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International Criminal Law

Dr. Roger O'Keefe

Codification Division of the United Nations Office of Legal Affairs

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INTERNATIONAL CRIMINAL LAW
DR. ROGER O'KEEFE

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1. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 3-34 182
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3. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, Dissenting Opinion of Judge Oda, I.C.J. Reports 2002*, pp. 46-53 208
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7. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, Separate Opinion of Judge Rezek, I.C.J. Reports 2002*, pp. 91-94 238
8. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, Dissenting Opinion of Judge Al-Khasawneh, I.C.J. Reports 2002*, pp. 95-99 242
9. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, Separate Opinion of Judge* ad hoc *Bula-Bula, I.C.J. Reports 2002*, pp. 100-136 246
10. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, Dissenting Opinion of Judge* ad hoc *Van den Wyngaert, I.C.J. Reports 2002*, pp. 137-187 266
11. *Prosecutor* v. *Duško Tadić, ICTY Appeals Chamber, 2 October 1995*
    For text, see *Study Materials Part I, Law of Treaties,* page 238

Recommended Readings (Documents not reproduced in electronic version)

1. Robert Cryer *et al., An Introduction to International Criminal Law and Procedure,* 2nd ed. (Cambridge, Cambridge University Press, 2010), pp. 43-63 and pp. 85-106, chapters 7-16 and 19
2. Vaughan Lowe, “Jurisdiction”, in Malcolm D. Evans (ed.) *International Law*, (Oxford, Oxford University Press, 2010), chapter 11

International Criminal Law
28- 29 July 2011
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Course Outline

I. 'Horizontal' international criminal law
(a) National jurisdiction to prescribe criminal laws
(b) National jurisdiction to enforce criminal laws

II. 'Vertical' international criminal law
1. *The substantive international law*
   (a) Crimes under customary international law: identification, definitions, modes of responsibility and defenses
   (b) Treaty crimes
2. *Enforcement*
   (a) International crimes in national criminal courts, especially the controversies over universal jurisdiction and immunities
   (b) International criminal tribunals (i): the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda
   (c) International criminal tribunals (ii): the International Criminal Court
   (d) International criminal tribunals (iii): the Special Court for Sierra Leone
   (e) International criminal tribunals (iv): the Special Tribunal for Lebanon
   (f) National criminal courts with international elements (Special Panels for Serious Crimes, Dili District Court, East Timor; "Regulation 64" panels in the courts of Kosovo; the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea; Supreme Iraqi Criminal Tribunal)

<u>Aims and Objectives</u>

I. 'Horizontal' international criminal law
- To understand the concept of national criminal jurisdiction, both to prescribe and to enforce
- To be familiar with the accepted and disputed bases of national jurisdiction to prescribe criminal laws
- To be familiar with various aspects of national jurisdiction to enforce criminal laws

II. 'Vertical' international criminal law
1. *The substantive international law*
- To be familiar with the general content of war crimes, crimes against humanity, genocide and aggression
- To be familiar with the various modes of individual criminal responsibility under international law
- To be familiar with the general defences to criminal responsibility recognised and rejected by international law
- To appreciate both common and specific features of treaty crimes

2. *Enforcement*

- To be familiar with and critically assess the controversies over universal jurisdiction and immunities in respect of international crimes in national courts
- To be familiar with and appreciate critically the various legal means by which international criminal tribunals have been established to date
- To be familiar with and appreciate critically the respective statutes and practice of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda
- To be familiar with and appreciate critically the Rome Statute of the International Criminal Court, the practice of the ICC to date and associated controversies
- To be familiar with the statute and practice of the Special Court for Sierra Leone
- To be aware of the Special Tribunal for Lebanon
- To be aware of the various national criminal courts with international elements

Readings

I. 'Horizontal' international criminal law

Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basic Concept", *Journal of International Criminal Justice*, vol. 2, No. 3 (2004), pp. 735-760

Recommended readings

- Robert Cryer *et al., An Introduction to International Criminal Law and Procedure,* 2nd ed. (Cambridge, Cambridge University Press, 2010), pp. 43-63 and pp. 85-106
- Vaughan Lowe, "Jurisdiction", in Malcolm D. Evans (ed.) *International Law*, (Oxford, Oxford University Press, 2010), chapter 11

II. 'Vertical' international criminal law

1. *The substantive international law*

- Rome Statute of the International Criminal Court, 1998, articles 5-8, 8 *bis*, 25(3), 25(3) *bis*, 28, 30-33
  For text, see *Core Legal Texts of the International Criminal Court*
- Amendments to article 8 of the Rome Statute (Resolution RC/Res.5, Assembly of States Parties to the Rome Statute of the International Criminal Court, Kampala, 10 June 2010, annex)
- The crime of aggression (Resolution RC/Res.6, Assembly of States Parties to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010, annex)
- Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B; *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010* (International Criminal Court publication, RC/11)
  For text, see *Core Legal Texts of the International Criminal Court*
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

Recommended readings:

Robert Cryer *et al., An Introduction to International Criminal Law and Procedure,* 2nd ed. (Cambridge, Cambridge University Press, 2010), chapters 10 to 16

2. *Enforcement*

- *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, pp. 3-34 (including separate and dissenting opinions and declarations)
- Charter of the United Nations, articles 1(1), 2(7), 24, 25, 39, 41, 103
- Security Council resolution 827 (1993) of 25 May 1993
- Statute of the International Criminal Tribunal for the former Yugoslavia (as amended), 1993
- Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (as amended), 2010
- *Prosecutor* v. *Duško Tadić, ICTY Appeals Chamber, 2 October 1995*, paras 9-64
  For text, see *Study Materials Part I, Law of Treaties,* page 238
- Security Council resolution 955 (1994) of 8 November 1994
- Statute of the International Criminal Tribunal for Rwanda (as amended), 1994
- Security Council resolution 1966 (2010) of 22 December 2010
- Rome Statute of the International Criminal Court (as amended)
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- Rules of Procedure and Evidence of the International Criminal Court, 2002
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- Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute), 2002
- Security Council resolution 1400 (2002) of 28 March 2002
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- Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, United Nations Transitional Administration in East Timor, (UNTAET/REG/2000/15)
- Special Panels for Serious Crimes, East Timor:
  http://socrates.berkeley.edu/~warcrime/ET.htm#SeriousCrimesUnit
- Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004, (NS/RKM/1004/006)
- Extraordinary Chambers in the Courts of Cambodia:
  http://www.eccc.gov.kh/en

Recommended readings:
Robert Cryer *et al.*, *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge, Cambridge University Press, 2010), chapters 7-9, 19

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984

CONVENTION[1] AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The States Parties to this Convention,

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

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

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

Having regard to artlcle 5 of the Universal Declaration of Human Rights[2] and article 7 of the International Covenant on Civil and Political Rights,[3] both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,

Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,[4]

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

Have agreed as follows:

PART I

Article 1. 1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person informa-

[1] Came into force on 26 June 1987, i.e., the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession, in accordance with article 27 (1), including the provisions of articles 21 and 22 concerning the competence of the Committee against Torture, more than five States* having declared that they recognize the competence of the Committee, in accordance with articles 21 and 22:

State	Date of deposit of the instrument of ratification or accession (a)
Afghanistan**	1 April 1987
Argentina*	24 September 1986
Belize	17 March 1986 *a*
Bulgaria**	16 December 1986
Byelorussian Soviet Socialist Republic**	13 March 1987
Cameroon	19 December 1986 *a*
Denmark*	27 May 1987
Egypt	25 June 1986 *a*
France* **	18 February 1986
Hungary**	15 April 1987
Mexico	23 January 1986
Norway*	9 July 1986
Philippines	18 June 1986 *a*
Senegal	21 August 1986
Sweden*	8 January 1986
Switzerland*	2 December 1986
Uganda	3 November 1986 *a*
Ukrainian Soviet Socialist Republic**	24 February 1987
Union of Soviet Socialist Republics**	3 March 1987
Uruguay	24 October 1986

* See p. 204 of this volume for the texts of the declarations recognizing the competence of the Committee against Torture, in accordance with articles 21 and 22.

** See p. 207 of this volume for the texts of the reservations made upon ratification.

[2] United Nations, *Official Records of the General Assembly, Third Session*, Part I, p. 71.

[3] United Nations, *Treaty Series*, vol. 999, p. 171; vol. 1057, p. 407 (rectification of Spanish authentic text); vol. 1059, p. 451 (corrigendum to vol. 999).

[4] United Nations, *Official Records of the General Assembly, Thirtieth Session, Supplement No. 34* (A/10034), p. 91.

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

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

Article 2. 1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

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

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

Article 3. 1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

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

Article 4. 1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

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

Article 5. 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

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

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

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

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

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

Article 6. 1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

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

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

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

Article 7. 1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

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

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

Article 8. 1. The offences referred to in article 4 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

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

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

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

Article 9. 1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 of this article in conformity with any treaties on mutual judicial assistance that may exist between them.

Article 10. 1. Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who

may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

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

Article 11. Each State Party shall keep under systematic review interrogation rules, instructions, methods and practices as well as arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.

Article 12. Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13. Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

Article 14. 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

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

Article 15. Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

Article 16. 1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

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

PART II

Article 17. 1. There shall be established a Committee against Torture (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The Committee shall consist of ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from

among its own nationals. States Parties shall bear in mind the usefulness of nominating persons who are also members of the Human Rights Committee established under the International Covenant on Civil and Political Rights and who are willing to serve on the Committee against Torture.

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

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

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

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

7. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 18. 1. The Committee shall elect its officers for a term of two years. They may be re-elected.

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

(*a*) Six members shall constitute a quorum;

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

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

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

5. The States Parties shall be responsible for expenses incurred in connection with the holding of meetings of the States Parties and of the Committee, including reimbursement to the United Nations for any expenses, such as the cost of staff and facilities, incurred by the United Nations pursuant to paragraph 3 of this article.

Article 19. 1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to

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

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

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

4. The Committee may, at its discretion, decide to include any comments made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 24. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

Article 20. 1. If the Committee receives reliable information which appears to it to contain well-founded indications that torture is being systematically practised in the territory of a State Party, the Committee shall invite that State Party to co-operate in the examination of the information and to this end to submit observations with regard to the information concerned.

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

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

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

5. All the proceedings of the Committee referred to in paragraphs 1 to 4 of this article shall be confidential, and at all stages of the proceedings the co-operation of the State Party shall be sought. After such proceedings have been completed with regard to an inquiry made in accordance with paragraph 2, the Committee may, after consultations with the State Party concerned, decide to include a summary account of the results of the proceedings in its annual report made in accordance with article 24.

Article 21. 1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under this Convention. Such communications may be received and considered according to the procedures laid down in this article only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be dealt with by the Committee under this article if it concerns a State Party which has not made such a declaration. Communications received under this article shall be dealt with in accordance with the following procedure:

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

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

(*c*) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;

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

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

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

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

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

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

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

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

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

been received by the Secretary-General, unless the State Party concerned has made a new declaration.

Article 22. 1. A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

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

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

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

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

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

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

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

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

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

Article 23. The members of the Committee and of the *ad hoc* conciliation commissions which may be appointed under article 21, paragraph 1 (*e*), shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.[1]

[1] United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1, p. 18).

Article 24. The Committee shall submit an annual report on its activities under this Convention to the States Parties and to the General Assembly of the United Nations.

PART III

Article 25. 1. This Convention is open for signature by all States.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 26. This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 27. 1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

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

Article 28. 1. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not recognize the competence of the Committee provided for in article 20.

2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

Article 29. 1. Any State Party to this Convention may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposal. In the event that within four months from the date of such communication at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted by the Secretary-General to all the States Parties for acceptance.

2. An amendment adopted in accordance with paragraph 1 of this article shall enter into force when two thirds of the States Parties to this Convention have notified the Secretary-General of the United Nations that they have accepted it in accordance with their respective constitutional processes.

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

Article 30. 1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State may, at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party having made such a reservation.

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

Article 31. 1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

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

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

Article 32. The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

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

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

(*c*) Denunciations under article 31.

Article 33. 1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

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

[*For the signature pages, see p. 155 of this volume.*]

Amendments to article 8 of the Rome Statute (Resolution RC/Res.5, Assembly of States Parties to the Rome Statute of the International Criminal Court, Kampala, 10 June 2010, annex)

Resolution RC/Res.5*

Adopted at the 12th plenary meeting, on 10 June 2010, by consensus

RC/Res.5
Amendments to article 8 of the Rome Statute

The Review Conference,

Noting article 123, paragraph 1, of the Rome Statute of the International Criminal Court which requests the Secretary-General of the United Nations to convene a Review Conference to consider any amendments to the Statute seven years after its entry into force,

Noting article 121, paragraph 5, of the Statute which states that any amendment to articles 5, 6, 7 and 8 of the Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance and that in respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding the crime covered by the amendment when committed by that State Party's nationals or on its territory, and *confirming* its understanding that in respect to this amendment the same principle that applies in respect of a State Party which has not accepted the amendment applies also in respect of States that are not parties to the Statute,

Confirming that, in light of the provision of article 40, paragraph 5, of the Vienna Convention on the Law of Treaties, States that subsequently become States Parties to the Statute will be allowed to decide whether to accept the amendment contained in this resolution at the time of ratification, acceptance or approval of, or accession to the Statute,

Noting article 9 of the Statute on the Elements of Crimes which states that such Elements shall assist the Court in the interpretation and application of the provisions of the crimes within its jurisdiction,

Taking due account of the fact that the crimes of employing poison or poisoned weapons; of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices; and of employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, already fall within the jurisdiction of the Court under article 8, paragraph 2 (b), as serious violations of the laws and customs applicable in international armed conflict,

Noting the relevant elements of the crimes within the Elements of Crimes already adopted by the Assembly of States Parties on 9 September 2000,

Considering that the abovementioned relevant elements of the crimes can also help in their interpretation and application in armed conflict not of an international character, in that *inter alia* they specify that the conduct took place in the context of and was associated with an armed conflict, which consequently confirm the exclusion from the Court's jurisdiction of law enforcement situations,

Considering that the crimes referred to in article 8, paragraph 2 (e) (xiii) (employing poison or poisoned weapons) and in article 8, paragraph 2 (e) (xiv) (asphyxiating, poisonous or other gases, and all analogous liquids, materials and devices) are serious violations of the laws and customs applicable in armed conflict not of an international character, as reflected in customary international law,

Considering that the crime referred to in article 8, paragraph 2 (e) (xv) (employing bullets which expand or flatten easily in the human body), is also a serious violation of the laws and customs applicable in armed conflict not of an international character, and *understanding* that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law,

* See Depositary Notification C.N.651.2010 Treaties-6, dated 29 November 2010, available at http://treaties.un.org.

1. *Decides* to adopt the amendment to article 8, paragraph 2 (e), of the Rome Statute of the International Criminal Court contained in annex I to the present resolution, which is subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5, of the Statute;

2. *Decides* to adopt the relevant elements to be added to the Elements of Crimes, as contained in annex II to the present resolution.

Annex I

Amendment to article 8

Add to article 8, paragraph 2 (e), the following:

"(xiii) Employing poison or poisoned weapons;

(xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions."

Annex II

Elements of Crimes

Add the following elements to the Elements of Crimes:

Article 8 (2) (e) (xiii)
War crime of employing poison or poisoned weapons

Elements

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.

2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xiv)
War crime of employing prohibited gases, liquids, materials or devices

Elements

1. The perpetrator employed a gas or other analogous substance or device.

2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.[1]

3. The conduct took place in the context of and was associated with an armed conflict not of an international character.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xv)
War crime of employing prohibited bullets

Elements

1. The perpetrator employed certain bullets.

2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.

3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.

4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[1] Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.

The crime of aggression
(Resolution RC/Res.6, Assembly of States Parties to the Rome Statute of the International Criminal Court, Kampala, 11 June 2010, annex)

Resolution RC/Res.6*

Adopted at the 13th plenary meeting, on 11 June 2010, by consensus

RC/Res.6
The crime of aggression

The Review Conference,

Recalling paragraph 1 of article 12 of the Rome Statute,

Recalling paragraph 2 of article 5 of the Rome Statute,

Recalling also paragraph 7 of resolution F, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998,

Recalling further resolution ICC-ASP/1/Res.1 on the continuity of work in respect of the crime of aggression, and *expressing its appreciation* to the Special Working Group on the Crime of Aggression for having elaborated proposals on a provision on the crime of aggression,

Taking note of resolution ICC-ASP/8/Res.6, by which the Assembly of States Parties forwarded proposals on a provision on the crime of aggression to the Review Conference for its consideration,

Resolved to activate the Court's jurisdiction over the crime of aggression as early as possible,

1. *Decides* to adopt, in accordance with article 5, paragraph 2, of the Rome Statute of the International Criminal Court (hereinafter: "the Statute") the amendments to the Statute contained in annex I of the present resolution, which are subject to ratification or acceptance and shall enter into force in accordance with article 121, paragraph 5; and *notes* that any State Party may lodge a declaration referred to in article 15 *bis* prior to ratification or acceptance;

2. *Also decides* to adopt the amendments to the Elements of Crimes contained in annex II of the present resolution;

3. *Also decides* to adopt the understandings regarding the interpretation of the above-mentioned amendments contained in annex III of the present resolution;

4. *Further decides* to review the amendments on the crime of aggression seven years after the beginning of the Court's exercise of jurisdiction;

5. *Calls upon* all States Parties to ratify or accept the amendments contained in annex I.

* See Depositary Notification C.N.651.2010 Treaties-8, dated 29 November 2010, available at http://treaties.un.org.

Annex I

Amendments to the Rome Statute of the International Criminal Court on the crime of aggression

1. *Article 5, paragraph 2, of the Statute is deleted.*

2. *The following text is inserted after article 8 of the Statute:*

Article 8 *bis*
Crime of aggression

1. For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

3. The following text is inserted after article 15 of the Statute:

Article 15 *bis*
Exercise of jurisdiction over the crime of aggression
(State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

5. In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.

6. Where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. The Prosecutor shall notify the Secretary-General of the United Nations of the situation before the Court, including any relevant information and documents.

7. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression.

8. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression in accordance with the procedure contained in article 15, and the Security Council has not decided otherwise in accordance with article 16.

9. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

10. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

4. The following text is inserted after article 15 bis of the Statute:

Article 15 *ter*
Exercise of jurisdiction over the crime of aggression
(Security Council referral)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraph (b), subject to the provisions of this article.

2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.

4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.

5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

5. The following text is inserted after article 25, paragraph 3, of the Statute:

3 *bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

6. The first sentence of article 9, paragraph 1, of the Statute is replaced by the following sentence:

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*.

7. The chapeau of article 20, paragraph 3, of the Statute is replaced by the following paragraph; the rest of the paragraph remains unchanged:

3. No person who has been tried by another court for conduct also proscribed under article 6, 7, 8 or 8 *bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

Annex II

Amendments to the Elements of Crimes

Article 8 *bis*
Crime of aggression

Introduction

1. It is understood that any of the acts referred to in article 8 *bis*, paragraph 2, qualify as an act of aggression.

2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.

3. The term "manifest" is an objective qualification.

4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the "manifest" nature of the violation of the Charter of the United Nations.

Elements

1. The perpetrator planned, prepared, initiated or executed an act of aggression.

2. The perpetrator was a person[1] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.

3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.

4. The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations.

5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.

6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.

[1] With respect to an act of aggression, more than one person may be in a position that meets these criteria.

Annex III

Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression

Referrals by the Security Council

1. It is understood that the Court may exercise jurisdiction on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute only with respect to crimes of aggression committed after a decision in accordance with article 15 *ter*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

2. It is understood that the Court shall exercise jurisdiction over the crime of aggression on the basis of a Security Council referral in accordance with article 13, paragraph (b), of the Statute irrespective of whether the State concerned has accepted the Court's jurisdiction in this regard.

Jurisdiction *ratione temporis*

3. It is understood that in case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction only with respect to crimes of aggression committed after a decision in accordance with article 15 *bis*, paragraph 3, is taken, and one year after the ratification or acceptance of the amendments by thirty States Parties, whichever is later.

Domestic jurisdiction over the crime of aggression

4. It is understood that the amendments that address the definition of the act of aggression and the crime of aggression do so for the purpose of this Statute only. The amendments shall, in accordance with article 10 of the Rome Statute, not be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

5. It is understood that the amendments shall not be interpreted as creating the right or obligation to exercise domestic jurisdiction with respect to an act of aggression committed by another State.

Other understandings

6. It is understood that aggression is the most serious and dangerous form of the illegal use of force; and that a determination whether an act of aggression has been committed requires consideration of all the circumstances of each particular case, including the gravity of the acts concerned and their consequences, in accordance with the Charter of the United Nations.

7. It is understood that in establishing whether an act of aggression constitutes a manifest violation of the Charter of the United Nations, the three components of character, gravity and scale must be sufficient to justify a "manifest" determination. No one component can be significant enough to satisfy the manifest standard by itself.

Security Council resolution 827 (1993) of 25 May 1993

UNITED NATIONS

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Security Council

Distr.
GENERAL

S/RES/827 (1993)
25 May 1993

RESOLUTION 827 (1993)

Adopted by the Security Council at its 3217th meeting, on 25 May 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September 1991 and all subsequent relevant resolutions,

Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Noting in this regard the recommendation by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia for the establishment of such a tribunal (S/25221),

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274),

Acting under Chapter VII of the Charter of the United Nations,

1. Approves the report of the Secretary-General;

2. Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report;

3. Requests the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;

4. Decides 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 of the Statute;

5. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

6. Decides that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;

7. Decides also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;

8. Requests the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective

functioning of the International Tribunal at the earliest time and to report periodically to the Council;

9. Decides to remain actively seized of the matter.

Statute of the International Criminal Tribunal for the former Yugoslavia (as amended), 1993

UNITED
NATIONS

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

Date: September 2009

Original: English & French

UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 BY RESOLUTION 827)
(AS AMENDED 13 MAY 1998 BY RESOLUTION 1166)
(AS AMENDED 30 NOVEMBER 2000 BY RESOLUTION 1329)
(AS AMENDED 17 MAY 2002 BY RESOLUTION 1411)
(AS AMENDED 14 AUGUST 2002 BY RESOLUTION 1431)
(AS AMENDED 19 MAY 2003 BY RESOLUTION 1481)
(AS AMENDED 20 APRIL 2005 BY RESOLUTION 1597)
(AS AMENDED 28 FEBRUARY 2006 BY RESOLUTION 1660)
(AS AMENDED 29 SEPTEMBER 2008 BY RESOLUTION 1837)
(AS AMENDED 7 JULY 2009 BY RESOLUTION 1877)

ICTY RELATED RESOLUTIONS:
Resolution 1503 of 28 August 2003
Resolution 1504 of 4 September 2003
Resolution 1534 of 26 March 2004
Resolution 1581 of 18 January 2005
Resolution 1613 of 26 July 2005
Resolution 1629 of 30 September 2005
Resolution 1668 of 10 April 2006
Resolution 1775 of 14 September 2007
Resolution 1786 of 28 November 2007
Resolution 1800 of 20 February 2008

(Not an official document. This compilation is based on original United Nations resolutions.)

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UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 3

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UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

(ADOPTED 25 MAY 1993 BY RESOLUTION 827)
(AS AMENDED 13 MAY 1998 BY RESOLUTION 1166)
(AS AMENDED 30 NOVEMBER 2000 BY RESOLUTION 1329)
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(AS AMENDED 28 FEBRUARY 2006 BY RESOLUTION 1660)
(AS AMENDED 29 SEPTEMBER 2008 BY RESOLUTION 1837)
(AS AMENDED 7 JULY 2009 BY RESOLUTION 1877)

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, 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 (hereinafter referred to as "the International Tribunal") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the International Tribunal

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

Article 4
Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. 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.

3. 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.

Article 5
Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;
(b) extermination;
(c) enslavement;
(d) deportation;
(e) imprisonment;
(f) torture;
(g) rape;
(h) persecutions on political, racial and religious grounds;
(i) other inhumane acts.

Article 6
Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

2. 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.

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8
Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.

Article 9
Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

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

Article 10
Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:

(a) the act for which he or she was tried was characterized as an ordinary crime; or
(b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11
Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

(a) the Chambers, comprising three Trial Chambers and an Appeals Chamber;
(b) the Prosecutor; and
(c) a Registry, servicing both the Chambers and the Prosecutor.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of a maximum of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of twelve *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

2. A maximum at any one time of three permanent judges and six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges, except in the circumstances specified in paragraph 5 below. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

5. The Secretary-General may, at the request of the President of the International Tribunal appoint, from among the *ad litem* judges elected in accordance with Article 13 *ter*, reserve judges to be present at each stage of a trial to which they have been appointed and to replace a judge if that judge is unable to continue sitting.

6. Without prejudice to paragraph 2 above, in the event that exceptional circumstances require for a permanent judge in a section of a Trial Chamber to be replaced resulting in a section solely comprised of *ad litem* judges, that section may continue to hear the case, notwithstanding that its composition no longer includes a permanent judge.

Article 13
Qualifications of judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 13 *bis*
Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") in accordance with article 12 *bis* of the Statute of that Tribunal;
(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;
(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 13 *ter*
Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.
(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.
(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.
(e) The *ad litem* judges shall be elected for a term of four years. They shall be eligible for re-election.

2. During any term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 13 *quater*
Status of *ad litem* judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:

(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
(b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;
(c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
(d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.

2. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:

(a) Be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
(b) Have power:

(i) To adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
(ii) To review an indictment pursuant to article 19 of the Statute;
(iii) To consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute.

3. Notwithstanding, paragraphs 1 and 2 above, an *ad litem* judge who is serving as a reserve judge shall, during such time as he or she so serves:

(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
(b) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
(c) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to and for that purpose to enjoy subject to paragraph 2 above, the same powers as permanent judges.

4. In the event that a reserve judge replaces a judge who is unable to continue sitting, he or she will, as of that time, benefit from the provisions of paragraph 1 above.

Article 14
Officers and members of the Chambers

1. The permanent judges of the International Tribunal shall elect a President from amongst their number.

2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.

3. After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in accordance with article 13 *bis* of the Statute to the Appeals Chamber and nine to the Trial Chambers. Notwithstanding the provisions of article 12, paragraph 1, and article 12, paragraph 3, the President may assign to the Appeals Chamber up to four additional permanent judges serving in the Trial Chambers, on the completion of the cases to which each judge is assigned. The term of office of each judge redeployed to the Appeals Chamber shall be the same as the term of office of the judges serving in the Appeals Chamber.

4. Two of the permanent judges of the International Tribunal for Rwanda elected or appointed in accordance with article 12 *bis* of the Statute of that Tribunal shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal. Notwithstanding the provisions of article 12, paragraph 1, and article 12, paragraph 3, up to four additional permanent judges serving in the Trial Chambers of the International Criminal Tribunal for Rwanda may be assigned to the Appeals Chamber by the President of that Tribunal, on the completion of the cases to which each judge is assigned. The term of office of each judge redeployed to the Appeals Chamber shall be the same as the term of office of the judges serving in the Appeals Chamber.

5. After consultation with the permanent judges of the International Tribunal, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.

6. A judge shall serve only in the Chamber to which he or she was assigned.

7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.

Article 15
Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17
The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 18
Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

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

3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.

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

Article 19
Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21
Rights of the accused

1. All persons shall be equal before the International Tribunal.

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

Article 22
Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23
Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24
Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice.

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

Article 26
Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27
Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Article 29
Co-operation and judicial assistance

1. States shall co-operate 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;
(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.

Article 30
The status, privileges and immunities of the International Tribunal

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

Article 31
Seat of the International Tribunal

The International Tribunal shall have its seat at The Hague.

Article 32
Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

Article 33
Working languages

The working languages of the International Tribunal shall be English and French.

Article 34
Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (as amended), 2010

UNITED NATIONS

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

IT/32/Rev. 45
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PART ONE
GENERAL PROVISIONS

Rule 1
Entry into Force
(Adopted 11 Feb 1994)

These Rules of Procedure and Evidence, adopted pursuant to Article 15 of the Statute of the Tribunal, shall come into force on 14 March 1994.

Rule 2
Definitions
(Adopted 11 Feb 1994)

(A) In the Rules, unless the context otherwise requires, the following terms shall mean:

Rules: The Rules of Procedure and Evidence in force;
(Amended 25 July 1997)

Statute: The Statute of the Tribunal adopted by Security Council resolution 827 of 25 May 1993;

Tribunal: 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, established by Security Council resolution 827 of 25 May 1993.

* * *

Accused: A person against whom one or more counts in an indictment have been confirmed in accordance with Rule 47; (Amended 25 July 1997)

Ad litem Judge: A Judge appointed pursuant to Article 13 *ter* of the Statute; (Amended 12 Apr 2001)

Arrest: The act of taking a suspect or an accused into custody pursuant to a warrant of arrest or under Rule 40; (Amended 25 July 1997)

Bureau: A body composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers;

Defence: The accused, and/or the accused's counsel; (Amended 17 Nov 1999)

Investigation: All activities undertaken by the Prosecutor under the Statute and the Rules for the collection of information and evidence, whether before or after an indictment is confirmed; (Amended 25 July 1997)

Parties: The Prosecutor and the Defence; (Amended 17 Nov 1999)

Permanent Judge: A Judge elected or appointed pursuant to Article 13 *bis* of the Statute; (Amended 12 Apr 2001)

President: The President of the Tribunal;

Prosecutor: The Prosecutor appointed pursuant to Article 16 of the Statute;

Regulations: The provisions framed by the Prosecutor pursuant to Rule 37 (A) for the purpose of directing the functions of the Office of the Prosecutor; (Amended 30 Jan 1995, amended 12 Nov 1997)

State: (i) A State Member or non-Member of the United Nations;

(ii) an entity recognised by the constitution of Bosnia and Herzegovina, namely, the Federation of Bosnia and Herzegovina and the Republic Srpska; or

(iii) a self-proclaimed entity de facto exercising governmental functions, whether recognised as a State or not;

(Amended 30 Jan 1995, amended 12 Dec 2002)

Suspect: 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; (Amended 30 Jan 1995, amended 12 Nov 1997)

Transaction: A number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy or plan;

Victim: A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed.

(B) In the Rules, the masculine shall include the feminine and the singular the plural, and vice-versa.

Rule 3
Languages
(Adopted 11 Feb 1994)

(A) The working languages of the Tribunal shall be English and French.

(B) An accused shall have the right to use his or her own language. (Amended 12 Nov 1997)

(C) Other persons appearing before the Tribunal, other than as counsel, who do not have sufficient knowledge of either of the two working languages, may use their own language. (Amended 30 Jan 1995, amended 12 Nov 1997)

(D) Counsel for an accused may apply to the Presiding Judge of a Chamber for leave to use a language other than the two working ones or the language of the accused. If such leave is granted, the expenses of interpretation and translation shall be borne by the Tribunal to the extent, if any, determined by the President, taking into account the rights of the defence and the interests of justice.

(E) The Registrar shall make any necessary arrangements for interpretation and translation into and from the working languages.

(F) If:

(i) a party is required to take any action within a specified time after the filing or service of a document by another party; and

(ii) pursuant to the Rules, that document is filed in a language other than one of the working languages of the Tribunal,

time shall not run until the party required to take action has received from the Registrar a translation of the document into one of the working languages of the Tribunal. (Amended 25 July 1997)

Rule 4
Meetings away from the Seat of the Tribunal
(Adopted 11 Feb 1994)

A Chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorised by the President in the interests of justice.

Rule 5
Non-compliance with Rules
(Adopted 11 Feb 1994, amended 30 Jan 1995)

(A) Where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber shall grant relief if it finds that the alleged non-compliance is proved and that it has caused material prejudice to that party. (Amended 12 Nov 1997)

(B) Where such an objection is raised otherwise than at the earliest opportunity, the Trial Chamber may in its discretion grant relief if it finds that the alleged non-compliance is proved and that it has caused material prejudice to the objecting party. (Amended 12 Nov 1997)

(C) The relief granted by a Trial Chamber under this Rule shall be such remedy as the Trial Chamber considers appropriate to ensure consistency with the fundamental principles of fairness. (Amended 12 Nov 1997)

Rule 6
Amendment of the Rules
(Adopted 11 Feb 1994)

(A) Proposals for amendment of the Rules may be made by a Judge, the Prosecutor or the Registrar and shall be adopted if agreed to by not less than ten permanent Judges at a plenary meeting of the Tribunal convened with notice of the proposal addressed to all Judges. (Amended 4 Dec 1998, amended 12 Apr 2001)

(B) An amendment to the Rules may be otherwise adopted, provided it is unanimously approved by the permanent Judges. (Amended 12 Apr 2001)

(C) Proposals for amendment of the Rules may otherwise be made in accordance with the Practice Direction issued by the President. (Amended 4 Dec 1998)

(D) An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case. (Amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000)

Rule 7
Authentic Texts
(Adopted 11 Feb 1994)

The English and French texts of the Rules shall be equally authentic. In case of discrepancy, the version which is more consonant with the spirit of the Statute and the Rules shall prevail.

PART TWO
PRIMACY OF THE TRIBUNAL

Rule 7 *bis*
Non-compliance with Obligations
(Adopted 25 July 1997)

(A) In addition to cases to which Rule 11, Rule 13, Rule 59 or Rule 61 applies, where a Trial Chamber or a permanent Judge is satisfied that a State has failed to comply with an obligation under Article 29 of the Statute which relates to any proceedings before that Chamber or Judge, the Chamber or Judge may advise the President, who shall report the matter to the Security Council. (Amended 12 Apr 2001)

(B) If the Prosecutor satisfies the President that a State has failed to comply with an obligation under Article 29 of the Statute in respect of a request by the Prosecutor under Rule 8, Rule 39 or Rule 40, the President shall notify the Security Council thereof.

Rule 8
Request for Information
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, the Prosecutor may request the State to forward all relevant information in that respect, and the State shall transmit such information to the Prosecutor forthwith in accordance with Article 29 of the Statute.

Rule 9
Prosecutor's Request for Deferral
(Adopted 11 Feb 1994)

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

(i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;

(ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or

(iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.
(Amended 30 Jan 1995)

Rule 10
Formal Request for Deferral
(Adopted 11 Feb 1994)

(A) If it appears to the Trial Chamber seised of a proposal for deferral that, on any of the grounds specified in Rule 9, deferral is appropriate, the Trial Chamber may issue a formal request to the State concerned that its court defer to the competence of the Tribunal. (Amended 30 Jan 1995)

(B) A request for deferral shall include a request that the results of the investigation and a copy of the court's records and the judgement, if already delivered, be forwarded to the Tribunal.

(C) Where deferral to the Tribunal has been requested by a Trial Chamber, any subsequent trial shall be held before another Trial Chamber. (Amended 3 May 1995, amended 17 Nov 1999)

Rule 11
Non-compliance with a Request for Deferral
(Adopted 11 Feb 1994, amended 25 July 1997)

If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the request, the Trial Chamber may request the President to report the matter to the Security Council.

Rule 11 *bis*
Referral of the Indictment to Another Court

(Adopted 12 Nov 1997, amended 30 Sept 2002)

(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or
(Amended 10 June 2004)

(iii) having jurisdiction and being willing and adequately prepared to accept such a case,
(Amended 10 June 2004)

so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (Amended 30 Sept 2002, amended 11 Feb 2005)

(B) The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. (Amended 30 Sept 2002, amended 10 June 2004, amended 11 Feb 2005)

(C) In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004)[1], consider the gravity of the crimes charged and the level of responsibility of the accused. (Amended 30 Sept 2002, amended 28 July 2004, amended 11 Feb 2005)

(D) Where an order is issued pursuant to this Rule:

(i) the accused, if in the custody of the Tribunal, shall be handed over to the authorities of the State concerned;

[1] U.N. Doc. S/RES/1534 (2004).

(ii) the Referral Bench may order that protective measures for certain witnesses or victims remain in force;
(Amended 11 Feb 2005)

(iii) the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment;

(iv) the Prosecutor may send observers to monitor the proceedings in the national courts on her behalf.

(Amended 30 Sept 2002)

(E) The Referral Bench may issue a warrant for the arrest of the accused, which shall specify the State to which he is to be transferred to trial. (Amended 30 Sept 2002, amended 11 Feb 2005)

(F) At any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10. (Amended 30 Sept 2002, amended 11 Feb 2005)

(G) Where an order issued pursuant to this Rule is revoked by the Referral Bench, it may make a formal request to the State concerned to transfer the accused to the seat of the Tribunal and the State shall accede to such a request without delay in keeping with Article 29 of the Statute. The Referral Bench or a Judge may also issue a warrant for the arrest of the accused. (Amended 30 Sept 2002, amended 11 Feb 2005)

(H) A Referral Bench shall have the powers of, and insofar as applicable shall follow the procedures laid down for, a Trial Chamber under the Rules. (Amended 11 Feb 2005)

(I) An appeal by the accused or the Prosecutor shall lie as of right from a decision of the Referral Bench whether or not to refer a case. Notice of appeal shall be filed within fifteen days of the decision unless the accused was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the accused is notified of the decision. (Amended 11 Feb 2005)

Rule 12
Determinations of Courts of any State
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 10 July 1998)

Subject to Article 10, paragraph 2, of the Statute, determinations of courts of any State are not binding on the Tribunal.

Rule 13
Non Bis in Idem
(Adopted 11 Feb 1994, amended 30 Jan 1995)

When the President receives reliable information to show that criminal proceedings have been instituted against a person before a court of any State for a crime for which that person has already been tried by the Tribunal, a Trial Chamber shall, following *mutatis mutandis* the procedure provided in Rule 10, issue a reasoned order requesting that court permanently to discontinue its proceedings. If that court fails to do so, the President may report the matter to the Security Council.

PART THREE
ORGANIZATION OF THE TRIBUNAL

Section 1: The Judges

Rule 14
Solemn Declaration
(Adopted 11 Feb 1994)

(A) Before taking up duties each Judge shall make the following solemn declaration:

"I solemnly declare that I will perform my duties and exercise my powers as a Judge 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 honourably, faithfully, impartially and conscientiously". (Amended 12 Nov 1997)

(B) The declaration shall be signed by the Judge and witnessed by, or by a representative of, the Secretary-General of the United Nations. The declaration shall be kept in the records of the Tribunal. (Amended 12 Nov 1997)

(C) A Judge whose service continues without interruption after expiry of a previous period of service shall not make a new declaration. (Amended 12 Nov 1997)

Rule 15
Disqualification of Judges
(Adopted 11 Feb 1994, amended 15 June 1995, amended 25 June 1996, amended 5 July 1996, amended 25 July 1997, amended 17 Nov 1999)

(A) A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

(B) (i) Any party may apply to the Presiding Judge of a Chamber for the disqualification and withdrawal of a Judge of that Chamber from a trial

or appeal upon the above grounds. The Presiding Judge shall confer with the Judge in question and report to the President. (Amended 30 Jan 1995)

(ii) Following the report of the Presiding Judge, the President shall, if necessary, appoint a panel of three Judges drawn from other Chambers to report to him its decision on the merits of the application. If the decision is to uphold the application, the President shall assign another Judge to sit in the place of the Judge in question.

(iii) The decision of the panel of three Judges shall not be subject to interlocutory appeal.

(iv) If the Judge in question is the President, the responsibility of the President in accordance with this paragraph shall be assumed by the Vice-President or, if he or she is not able to act in the application, by the permanent Judge most senior in precedence who is able to act.

(Amended 21 July 2005)

(C) The Judge of the Trial Chamber who reviews an indictment against an accused, pursuant to Article 19 of the Statute and Rules 47 or 61, shall not be disqualified for sitting as a member of the Trial Chamber for the trial of that accused. Such a Judge shall also not be disqualified for sitting as a member of the Appeals Chamber to hear any appeal in that case. (Amended 6 Oct 1995, amended 2 July 1999, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 12 Dec 2002, amended 21 July 2005)

(D) (i) No Judge shall sit on any appeal in a case in which that Judge sat as a member of the Trial Chamber. (Amended 10 July 1998, amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000, amended 12 Dec 2002, amended 21 July 2005)

(ii) No Judge shall sit on any State Request for Review pursuant to Rule 108 *bis* in a matter in which that Judge sat as a member of the Trial Chamber whose decision is to be reviewed. (Amended 10 July 1998)

Rule 15 *bis*
Absence of a Judge
(Adopted 17 Nov 1999)

(A) If

(i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and
(Amended 1 Dec 2000, amended 13 Dec 2000)

(ii) the remaining Judges of the Chamber are satisfied that it is in the interests of justice to do so,

those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than five working days. (Amended 12 Dec 2002)

(B) If

(i) a Judge is, for illness or urgent personal reasons, or for reasons of authorised Tribunal business, unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and
(Amended 1 Dec 2000, amended 13 Dec 2000)

(ii) the remaining Judges of the Chamber are not satisfied that it is in the interests of justice to order that the hearing of the case continue in the absence of that Judge, then

(a) those remaining Judges of the Chamber may nevertheless conduct those matters which they are satisfied it is in the interests of justice that they be disposed of notwithstanding the absence of that Judge, and
(b) the remaining Judges of the Chamber may adjourn the proceedings.

(Amended 29 Mar 2006)

(C) If a Judge is, for any reason, unable to continue sitting in a part-heard case for a period which is likely to be longer than of a short duration, the remaining Judges of the Chamber shall report to the President who may assign another Judge to the case and order either a rehearing or continuation of the proceedings from that point. However, after the opening statements provided

for in Rule 84, or the beginning of the presentation of evidence pursuant to Rule 85, the continuation of the proceedings can only be ordered with the consent of all the accused, except as provided for in paragraphs (D) and (G). (Amended 12 Dec 2002, amended 29 Mar 2006)

(D) If, in the circumstances mentioned in the last sentence of paragraph (C), an accused withholds his consent, the remaining Judges may nonetheless decide whether or not to continue the proceedings before a Trial Chamber with a substitute Judge if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice. This decision is subject to appeal directly to a full bench of the Appeals Chamber by either party. If no appeal is taken from the decision to continue proceedings with a substitute Judge or the Appeals Chamber affirms that decision, the President shall assign to the existing bench a Judge, who, however, can join the bench only after he or she has certified that he or she has familiarised himself or herself with the record of the proceedings. Only one substitution under this paragraph may be made. (Amended 12 Dec 2002, amended 29 Mar 2006)

(E) For the purposes of paragraphs (C) and (D), due consideration shall be given to paragraph 6 of Article 12 of the Statute. (Amended 29 Mar 2006)

(F) Appeals under paragraph (D) shall be filed within seven days of filing of the impugned decision. When such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from the filing of the written decision.
(Amended 29 Mar 2006)

(Amended 12 Dec 2002)

(G) If, in a trial where a reserve Judge has been assigned in accordance with Rule 15 *ter*, a Judge is unable to continue sitting and a substitute Judge is not assigned pursuant to paragraphs (C) or (D), the trial shall continue with the reserve Judge replacing the Judge who is unable to continue sitting.
(Amended 29 Mar 2006)

(H) In case of illness or an unfilled vacancy or in any other similar circumstances, the President may, if satisfied that it is in the interests of justice to do so, authorise a Chamber to conduct routine matters, such as the delivery of decisions, in the absence of one or more of its members.

Rule 15 *ter*
Reserve Judges
(Adopted 29 Mar 2006)

(A) The President may, in the interests of justice, assign a reserve Judge to sit with a Trial Chamber in a trial.

(B) A reserve Judge shall be present at each stage of a trial to which that Judge has been assigned.

(C) A reserve Judge may pose questions which are necessary to the reserve Judge's understanding of the trial. (Amended 8 Dec 2010)

(D) A reserve Judge shall be present, but shall not vote, during any deliberations in a trial.

Rule 16
Resignation
(Adopted 11 Feb 1994)

A Judge who decides to resign shall communicate the resignation in writing to the President who shall transmit it to the Secretary-General of the United Nations.

Rule 17
Precedence
(Adopted 11 Feb 1994)

(A) All Judges are equal in the exercise of their judicial functions, regardless of dates of election, appointment, age or period of service.

(B) The Presiding Judges of the Trial Chambers shall take precedence according to age after the President and the Vice-President.

(C) Permanent Judges elected or appointed on different dates shall take precedence according to the dates of their election or appointment; Judges elected or appointed on the same date shall take precedence according to age. (Amended 12 Apr 2001)

(D) In case of re-election, the total period of service as a Judge of the Tribunal shall be taken into account.

(E) *Ad litem* Judges shall take precedence after the permanent Judges according to the dates of their appointment. *Ad litem* Judges appointed on the same date shall take precedence according to age. (Amended 12 Apr 2001)

Section 2: The Presidency

Rule 18
Election of the President
(Adopted 11 Feb 1994)

(A) The President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his or her term of office as a Judge. The President may be re-elected once. (Amended 12 Nov 1997)

(B) If the President ceases to be a member of the Tribunal or resigns from office before the expiration of his or her term, the permanent Judges shall elect from among their number a successor for the remainder of the term. (Amended 12 Nov 1997, amended 12 Apr 2001)

(C) The President shall be elected by a majority of the votes of the permanent Judges composing the Tribunal. If no Judge obtains such a majority, the second ballot shall be limited to the two Judges who obtained the greatest number of votes on the first ballot. In the case of equality of votes on the second ballot, the Judge who takes precedence in accordance with Rule 17 shall be declared elected. (Amended 12 Apr 2001)

Rule 19
Functions of the President
(Adopted 11 Feb 1994)

(A) The President shall preside at all plenary meetings of the Tribunal. The President shall coordinate the work of the Chambers and supervise the activities of the Registry as well as exercise all the other functions conferred on the President by the Statute and the Rules. (Amended 12 Nov 1997)

(B) The President may from time to time, and in consultation with the Bureau, the Registrar and the Prosecutor, issue Practice Directions, consistent with the Statute and the Rules, addressing detailed aspects of the conduct of proceedings before the Tribunal. (Amended 25 July 1997)

Rule 20
The Vice-President
(Adopted 11 Feb 1994)

(A) The Vice-President shall be elected for a term of two years, or such shorter term as shall coincide with the duration of his or her term of office as a permanent Judge. The Vice President may be re-elected once. (Amended 12 Nov 1997, amended 12 Apr 2001)

(B) The Vice-President may sit as a member of a Trial Chamber or of the Appeals Chamber.

(C) Rules 18 (B) and (C) shall apply *mutatis mutandis* to the Vice-President. (Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 21
Functions of the Vice-President
(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000)

Subject to Rule 22 (B), the Vice-President shall exercise the functions of the President in case of the latter's absence or inability to act.

Rule 22
Replacements
(Adopted 11 Feb 1994)

(A) If neither the President nor the Vice-President remains in office or is able to carry out the functions of the President, these shall be assumed by the senior permanent Judge, determined in accordance with Rule 17 (C). (Amended 12 Apr 2001, amended 12 July 2001)

(B) If the President is unable to exercise the functions of Presiding Judge of the Appeals Chamber, that Chamber shall elect a Presiding Judge from among its number. (Amended 12 Nov 1997)

(C) The President and the Vice-President, if still permanent Judges, shall continue to discharge their functions after the expiration of their terms until the election of the President and the Vice-President has taken place. (Amended 12 July 2001)

Section 3: Internal Functioning of the Tribunal

Rule 23
The Bureau
(Adopted 11 Feb 1994)

(A) The Bureau shall be composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.

(B) The President shall consult the other members of the Bureau on all major questions relating to the functioning of the Tribunal.

(C) The President may consult with the *ad litem* Judges on matters to be discussed in the Bureau and may invite a representative of the *ad litem* Judges to attend Bureau meetings. (Amended 12 Apr 2001)

(D) A Judge may draw the attention of any member of the Bureau to issues that the Judge considers ought to be discussed by the Bureau or submitted to a plenary meeting of the Tribunal.

(E) If any member of the Bureau is unable to carry out any of the functions of the Bureau, these shall be assumed by the senior available Judge determined in accordance with Rule 17. (Amended 25 Feb 1999)

Rule 23 *bis*
The Coordination Council
(Adopted 1 Dec 2000, amended 13 Dec 2000)

(A) The Coordination Council shall be composed of the President, the Prosecutor and the Registrar.

(B) In order to achieve the mission of the Tribunal, as defined in the Statute, the Coordination Council ensures, having due regard for the responsibilities and the independence of any member, the coordination of the activities of the three organs of the Tribunal.

(C) The Coordination Council shall meet once a month at the initiative of the President. A member may at any time request that additional meetings be held. The President shall chair the meetings.

(D) The Vice-President, the Deputy Prosecutor and the Deputy Registrar may *ex officio* represent respectively, the President, the Prosecutor and the Registrar.

Rule 23 *ter*
[Deleted]
(Adopted 1 Dec 2000, amended 13 Dec 2000, deleted 8 Dec 2010)

Rule 24
Plenary Meetings of the Tribunal
(Adopted 11 Feb 1994)

Subject to the restrictions on the voting rights of *ad litem* Judges set out in Article 13 *quater* of the Statute, the Judges shall meet in plenary to:

(i) elect the President and Vice-President;

(ii) adopt and amend the Rules;

(iii) adopt the Annual Report provided for in Article 34 of the Statute;

(iv) decide upon matters relating to the internal functioning of the Chambers and the Tribunal;

(v) determine or supervise the conditions of detention;

(vi) exercise any other functions provided for in the Statute or in the Rules.

(Amended 12 Apr 2001)

Rule 25
Dates of Plenary Sessions
(Adopted 11 Feb 1994)

(A) The dates of the plenary sessions of the Tribunal shall normally be agreed upon in July of each year for the following calendar year.

(B) Other plenary meetings shall be convened by the President if so requested by at least nine permanent Judges, and may be convened whenever the exercise of the President's functions under the Statute or the Rules so requires. (Amended 12 Nov 1997, amended 4 Dec 1998, amended 12 Apr 2001)

Rule 26
Quorum and Vote
(Adopted 11 Feb 1994)

(A) The quorum for each plenary meeting of the Tribunal shall be ten permanent Judges. (Amended 4 Dec 1998, amended 12 Apr 2001)

(B) Subject to Rules 6 (A), (B) and 18 (C), the decisions of the plenary meetings of the Tribunal shall be taken by the majority of the Judges present. In the event of an equality of votes, the President or the Judge acting in the place of the President shall have a casting vote. (Amended 12 Apr 2001)

Section 4: The Chambers

Rule 27
Rotation
(Adopted 11 Feb 1994)

(A) Permanent Judges shall rotate on a regular basis between the Trial Chambers and the Appeals Chamber. Rotation shall take into account the efficient disposal of cases. (Amended 12 Apr 2001)

(B) The Judges shall take their places in their new Chamber as soon as the President thinks it convenient, having regard to the disposal of part-heard cases.

(C) The President may at any time temporarily assign a member of a Trial Chamber or of the Appeals Chamber to another Chamber.

Rule 28
Reviewing and Duty Judges
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 23 Apr 1996, amended 12 Nov 1997)

(A) On receipt of an indictment for review from the Prosecutor, the Registrar shall consult with the President. The President shall refer the matter to the Bureau which shall determine whether the indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. If the Bureau determines that the indictment meets this standard, the President shall designate one of the permanent Trial Chamber Judges for the review under Rule 47. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor (Amended 17 Nov 1999, amended 12 Apr 2001, amended 6 Apr 2004)

(B) The President, in consultation with the Judges, shall maintain a roster designating one Judge as duty Judge for the assigned period of seven days. The duty Judge shall be available at all times, including out of normal Registry hours, for dealing with applications pursuant to paragraphs (C) and (D) but may refuse to deal with any application out of normal Registry hours if not satisfied as to its urgency. The roster of duty Judges shall be published by the Registrar. (Amended 12 Nov 1997, amended 17 Nov 1999, amended 12 Apr 2001, amended 11 Mar 2005)

(C) All applications in a case not otherwise assigned to a Chamber, other than the review of indictments, shall be transmitted to the duty Judge. Where accused are jointly indicted, a submission relating only to an accused who is not in the custody of the Tribunal, other than an application to amend or withdraw part of the indictment pursuant to Rule 50 or Rule 51, shall be transmitted to the duty Judge, notwithstanding that the case has already been assigned to a Chamber in respect of some or all of the co-accused of that accused. The duty Judge shall act pursuant to Rule 54 in dealing with applications under this Rule. (Amended 17 Nov 1999, amended 21 Dec 2001)

(D) Where a case has already been assigned to a Trial Chamber:

(i) where the application is made out of normal Registry hours, the application shall be dealt with by the duty Judge if satisfied as to its urgency;

(ii) where the application is made within the normal Registry hours and the Trial Chamber is unavailable, it shall be dealt with by the duty Judge if satisfied as to its urgency or that it is otherwise appropriate to do so in the absence of the Trial Chamber.

In such case, the Registry shall serve a copy of all orders or decisions issued by the duty Judge in connection therewith on the Chamber to which the matter is assigned. (Amended 17 Nov 1999, amended 21 Dec 2001)

(E) During periods of court recess, regardless of the Chamber to which he or she is assigned, in addition to applications made pursuant to paragraph (D) above, the duty Judge may:

(i) take decisions on provisional detention pursuant to Rule 40 *bis*;

(ii) conduct the initial appearance of an accused pursuant to Rule 62.

The Registry shall serve a copy of all orders or decisions issued by the duty Judge in connection therewith on the Chamber to which the matter is assigned. (Amended 14 July 2000, amended 21 Dec 2001)

(F) The provisions of this Rule shall apply *mutatis mutandis* to applications before the Appeals Chamber. (Amended 21 Dec 2001)

Rule 29
Deliberations
(Adopted 11 Feb 1994)

The deliberations of the Chambers shall take place in private and remain secret.

Section 5: The Registry

Rule 30
Appointment of the Registrar
(Adopted 11 Feb 1994, amended 10 July 1998, amended 12 Apr 2001)

The President shall seek the opinion of the permanent Judges on the candidates for the post of Registrar, before consulting with the Secretary-General of the United Nations pursuant to Article 17, paragraph 3, of the Statute.

Rule 31
Appointment of the Deputy Registrar and Registry Staff
(Adopted 11 Feb 1994)

The Registrar, after consultation with the Bureau, shall make recommendations to the Secretary-General of the United Nations for the appointment of the Deputy Registrar and other Registry staff.

Rule 32
Solemn Declaration
(Adopted 11 Feb 1994)

(A) Before taking up duties, the Registrar shall make the following declaration before the President:

> "I solemnly declare that I will perform the duties incumbent upon me as Registrar 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 in all loyalty, discretion and good conscience and that I will faithfully observe all the provisions of the Statute and the Rules of Procedure and Evidence of the Tribunal".

(Amended 12 Nov 1997)

(B) Before taking up duties, the Deputy Registrar shall make a similar declaration before the President. (Amended 12 Nov 1997)

(C) Every staff member of the Registry shall make a similar declaration before the Registrar.

Rule 33
Functions of the Registrar
(Adopted 11 Feb 1994)

(A) The Registrar shall assist the Chambers, the plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, the Registrar shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication. (Amended 12 Nov 1997)

(B) The Registrar, in the execution of his or her functions, may make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions, including that of implementing judicial decisions, with notice to the parties where necessary. (Amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000)

(C) The Registrar shall report regularly on his or her activities to the Judges meeting in plenary and to the Prosecutor. (Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 33 *bis*
Functions of the Deputy Registrar
(Adopted 1 Dec 2000, amended 13 Dec 2000)

(A) The Deputy Registrar shall exercise the functions of the Registrar in the event of the latter's absence from duty or inability to act or upon the Registrar's delegation.

(B) The Deputy Registrar, in consultation with the President, shall in particular:

(i) direct and administer the Chambers Legal Support Section; in particular, in conjunction with the administrative services of the Registry, the Deputy Registrar shall oversee the assignment of appropriate resources to the Chambers with a view to enabling them to accomplish their mission;

(ii) take all appropriate measures so that the decisions rendered by the Chambers and Judges are executed, especially sentences and penalties;

(iii) make recommendations regarding the missions of the Registry which affect the judicial activity of the Tribunal.

Rule 34
Victims and Witnesses Section
(Adopted 11 Feb 1994)

(A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:

(i) recommend protective measures for victims and witnesses in accordance with Article 22 of the Statute; and

(ii) provide counselling and support for them, in particular in cases of rape and sexual assault.

(Amended 2 July 1999)

(B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.

Rule 35
Minutes
(Adopted 11 Feb 1994, amended 12 Nov 1997)

Except where a full record is made under Rule 81, the Registrar, or Registry staff designated by the Registrar, shall take minutes of the plenary meetings of the Tribunal and of the sittings of the Chambers, other than private deliberations.

Rule 36
Record Book
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

The Registrar shall keep a Record Book which shall list, subject to any Practice Direction under Rule 19 or any order of a Judge or Chamber providing for

the non-disclosure of any document or information, all the particulars of each case brought before the Tribunal. The Record Book shall be open to the public.

Section 6: The Prosecutor

Rule 37
Functions of the Prosecutor
(Adopted 11 Feb 1994)

(A) The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by the Prosecutor. Any alleged inconsistency in the Regulations shall be brought to the attention of the Bureau to whose opinion the Prosecutor shall defer. (Amended 30 Jan 1995, amended 12 Nov 1997)

(B) The Prosecutor's powers and duties under the Rules may be exercised by staff members of the Office of the Prosecutor authorised by the Prosecutor, or by any person acting under the Prosecutor's direction. (Amended 25 July 1997, amended 12 Nov 1997)

Rule 38
Deputy Prosecutor
(Adopted 11 Feb 1994)

(A) The Prosecutor shall make recommendations to the Secretary-General of the United Nations for the appointment of a Deputy Prosecutor. (Amended 12 Nov 1997)

(B) The Deputy Prosecutor shall exercise the functions of the Prosecutor in the event of the latter's absence from duty or inability to act or upon the Prosecutor's express instructions. (Amended 25 July 1997, amended 12 Nov 1997)

PART FOUR
INVESTIGATIONS AND RIGHTS OF SUSPECTS

Section 1: Investigations

Rule 39
Conduct of Investigations
(Adopted 11 Feb 1994)

In the conduct of an investigation, the Prosecutor may:

(i) summon and question suspects, victims and witnesses and record their statements, collect evidence and conduct on-site investigations;

(ii) undertake such other matters as may appear necessary for completing the investigation and the preparation and conduct of the prosecution at the trial, including the taking of special measures to provide for the safety of potential witnesses and informants;
(Amended 30 Jan 1995)

(iii) seek, to that end, the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL); and

(iv) request such orders as may be necessary from a Trial Chamber or a Judge.

Rule 40
Provisional Measures
(Adopted 11 Feb 1994)

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

(i) to arrest a suspect or an accused provisionally;
(Amended 4 Dec 1998)

(ii) to seise physical evidence;

(iii) to take all necessary measures to prevent the escape of a suspect or an accused, injury to or intimidation of a victim or witness, or the destruction of evidence.

The State concerned shall comply forthwith, in accordance with Article 29 of the Statute. (Amended 30 Jan 1995)

Rule 40 *bis*
Transfer and Provisional Detention of Suspects
(Adopted 23 Apr 1996)

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

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

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

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

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

(C) The order for the transfer and provisional detention of the suspect shall be signed by the Judge and bear the seal of the Tribunal. The order shall set forth the basis of the application made by the Prosecutor under paragraph (A), including the provisional charge, and shall state the Judge's grounds for

making the order, having regard to paragraph (B). The order shall also specify the initial time-limit for the provisional detention of the suspect, and be accompanied by a statement of the rights of a suspect, as specified in this Rule and in Rules 42 and 43. (Amended 12 Apr 2001)

(D) The provisional detention of a suspect shall be ordered for a period not exceeding thirty days from the date of the transfer of the suspect to the seat of the Tribunal. At the end of that period, at the Prosecutor's request, the Judge who made the order, or another permanent Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing of the Prosecutor and the suspect assisted by counsel, to extend the detention for a period not exceeding thirty days, if warranted by the needs of the investigation. At the end of that extension, at the Prosecutor's request, the Judge who made the order, or another permanent Judge of the same Trial Chamber, may decide, subsequent to an *inter partes* hearing of the Prosecutor and the suspect assisted by counsel, to extend the detention for a further period not exceeding thirty days, if warranted by special circumstances. The total period of detention shall in no case exceed ninety days, at the end of which, in the event the indictment has not been confirmed and an arrest warrant signed, the suspect shall be released or, if appropriate, be delivered to the authorities of the requested State. (Amended 25 July 1997, amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000, amended 12 Apr 2001)

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

(F) After being transferred to the seat of the Tribunal, the suspect, assisted by counsel, shall be brought, without delay, before the Judge who made the order, or another permanent Judge of the same Trial Chamber, who shall ensure that the rights of the suspect are respected. (Amended 12 Nov 1997, amended 12 Apr 2001)

(G) During detention, the Prosecutor and the suspect or the suspect's counsel may submit to the Trial Chamber of which the Judge who made the order is a member, all applications relative to the propriety of provisional detention or to the suspect's release. (Amended 12 Nov 1997)

(H) Without prejudice to paragraph (D), the Rules relating to the detention on remand of accused persons shall apply *mutatis mutandis* to the provisional detention of persons under this Rule. (Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 41
Retention of Information

(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000)

Subject to Rule 81, the Prosecutor shall be responsible for the retention, storage and security of information and physical material obtained in the course of the Prosecutor's investigations until formally tendered into evidence.

Rule 42
Rights of Suspects during Investigation

(Adopted 11 Feb 1994)

(A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which the Prosecutor shall inform the suspect prior to questioning, in a language the suspect understands:

(i) the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it; (Amended 30 Jan 1995)

(ii) the right to have the free assistance of an interpreter if the suspect cannot understand or speak the language to be used for questioning; and (Amended 30 Jan 1995)

(iii) the right to remain silent, and to be cautioned that any statement the suspect makes shall be recorded and may be used in evidence. (Amended 30 Jan 1995)

(Amended 12 Nov 1997, amended 21 July 2005)

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel. (Amended 12 Nov 1997)

Rule 43
Recording Questioning of Suspects
(Adopted 11 Feb 1994)

Whenever the Prosecutor questions a suspect, the questioning shall be audio-recorded or video-recorded, in accordance with the following procedure:

(i) the suspect shall be informed in a language the suspect understands that the questioning is being audio-recorded or video-recorded;
(Amended 6 Oct 1995, amended 12 Nov 1997, amended 21 July 2005)

(ii) in the event of a break in the course of the questioning, the fact and the time of the break shall be recorded before audio-recording or video-recording ends and the time of resumption of the questioning shall also be recorded;
(Amended 6 Oct 1995)

(iii) at the conclusion of the questioning the suspect shall be offered the opportunity to clarify anything the suspect has said, and to add anything the suspect may wish, and the time of conclusion shall be recorded;
(Amended 12 Nov 1997)

(iv) a copy of the recorded tape will be supplied to the suspect or, if multiple recording apparatus was used, one of the original recorded tapes;
(Amended 30 Jan 1995, amended 12 Dec 2002)

(v) after a copy has been made, if necessary, of the recorded tape, the original recorded tape or one of the original tapes shall be sealed in the presence of the suspect under the signature of the Prosecutor and the suspect; and
(Amended 12 Dec 2002)

(vi) the tape shall be transcribed if the suspect becomes an accused.
(Amended 12 Dec 2002)

(Amended 6 Oct 1995)

Section 2: Of Counsel

Rule 44
Appointment, Qualifications and Duties of Counsel
(Adopted 11 Feb 1994, amended 25 July 1997)

(A) Counsel engaged by a suspect or an accused shall file a power of attorney with the Registrar at the earliest opportunity. Subject to any determination by a Chamber pursuant to Rule 46 or 77, a counsel shall be considered qualified to represent a suspect or accused if the counsel satisfies the Registrar that he or she:

(i) is admitted to the practice of law in a State, or is a university professor of law;

(ii) has written and oral proficiency in one of the two working languages of the Tribunal, unless the Registrar deems it in the interests of justice to waive this requirement, as provided for in paragraph (B);

(iii) is a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar;

(iv) has not been found guilty or otherwise disciplined in relevant disciplinary proceedings against him in a national or international forum, including proceedings pursuant to the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal, unless the Registrar deems that, in the circumstances, it would be disproportionate to exclude such counsel;

(v) has not been found guilty in relevant criminal proceedings;

(vi) has not engaged in conduct whether in pursuit of his or her profession or otherwise which is dishonest or otherwise discreditable to a counsel, prejudicial to the administration of justice, or likely to diminish public confidence in the International Tribunal or the administration of justice, or otherwise bring the International Tribunal into disrepute; and

(vii) has not provided false or misleading information in relation to his or her qualifications and fitness to practice or failed to provide relevant information.

(Amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000, amended 14 July 2000, amended 13 Dec 2001, amended 12 July 2002, amended 28 July 2004)

(B) At the request of the suspect or accused and where the interests of justice so demand, the Registrar may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. The Registrar may impose such conditions as deemed appropriate, including the requirement that the counsel or accused undertake to meet all translations and interpretation costs not usually met by the Tribunal, and counsel undertakes not to request any extensions of time as a result of the fact that he does not speak one of the working languages. A suspect or accused may seek the President's review of the Registrar's decision. (Amended 14 July 2000, amended 28 July 2004)

(C) In the performance of their duties counsel shall be subject to the relevant provisions of the Statute, the Rules, the Rules of Detention and any other rules or regulations adopted by the Tribunal, the Host Country Agreement, the Code of Professional Conduct for Defence Counsel Appearing Before the International Tribunal and the codes of practice and ethics governing their profession and, if applicable, the Directive on the Assignment of Defence Counsel adopted by the Registrar and approved by the permanent Judges. (Amended 25 July 1997, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 28 July 2004)

(D) An Advisory Panel shall be established to assist the President and the Registrar in all matters relating to defence counsel. The Panel members shall be selected from representatives of professional associations and from counsel who have appeared before the Tribunal. They shall have recognised professional legal experience. The composition of the Advisory Panel shall be representative of the different legal systems. A Directive of the Registrar shall set out the structure and areas of responsibility of the Advisory Panel. (Amended 14 July 2000)

Rule 45
Assignment of Counsel

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

(A) Whenever the interests of justice so demand, counsel shall be assigned to suspects or accused who lack the means to remunerate such counsel. Such assignments shall be treated in accordance with the procedure established in a Directive set out by the Registrar and approved by the permanent Judges. (Amended 14 July 2000, amended 12 Apr 2001)

(B) For this purpose, the Registrar shall maintain a list of counsel who:

(i) fulfil all the requirements of Rule 44, although the language requirement of Rule 44 (A)(ii) may be waived by the Registrar as provided for in the Directive;

(ii) possess established competence in criminal law and/or international criminal law/international humanitarian law/international human rights law;

(iii) possess at least seven years of relevant experience, whether as a judge, prosecutor, attorney or in some other capacity, in criminal proceedings; and

(iv) have indicated their availability and willingness to be assigned by the Tribunal to any person detained under the authority of the Tribunal lacking the means to remunerate counsel, under the terms set out in the Directive.

(Amended 25 June 1996, amended 5 July 1996, amended 14 July 2000, amended 28 July 2004)

(C) The Registrar shall maintain a separate list of counsel who, in addition to fulfilling the qualification requirements set out in paragraph (B), are readily available as "duty counsel" for assignment to an accused for the purposes of the initial appearance, in accordance with Rule 62. (Amended 10 July 1998, amended 14 July 2000, amended 28 July 2004)

(D) The Registrar shall, in consultation with the permanent Judges, establish the criteria for the payment of fees to assigned counsel. (Amended 12 Apr 2001, amended 12 Dec 2002)

(E) Where a person is assigned counsel and is subsequently found not to be lacking the means to remunerate counsel, the Chamber may, on application by the Registrar, make an order of contribution to recover the cost of providing counsel. (Amended 30 Jan 1995, amended 14 July 2000, amended 28 July 2004)

(F) A suspect or an accused electing to conduct his or her own defence shall so notify the Registrar in writing at the first opportunity. (Amended 30 Jan 1995, amended 12 Nov 1997)

Rule 45 *bis*
Detained Persons
(Adopted 25 June 1996, amended 5 July 1996)

Rules 44 and 45 shall apply to any person detained under the authority of the Tribunal.

Rule 45 *ter*
Assignment of Counsel in the Interests of Justice
(Adopted 4 Nov 2008)

The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused.

Rule 46
Misconduct of Counsel
(Adopted 11 Feb 1994, amended 13 Dec 2001)

(A) If a Judge or a Chamber finds that the conduct of a counsel is offensive, abusive or otherwise obstructs the proper conduct of the proceedings, or that a counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Chamber may, after giving counsel due warning:

(i) refuse audience to that counsel; and/or

(ii) determine, after giving counsel an opportunity to be heard, that counsel is no longer eligible to represent a suspect or an accused before the Tribunal pursuant to Rule 44 and 45.

(Amended 12 Nov 1997, amended 13 Dec 2001, amended 28 July 2004)

(B) A Judge or a Chamber may also, with the approval of the President, communicate any misconduct of counsel to the professional body regulating the conduct of counsel in the counsel's State of admission or, if a university professor of law and not otherwise admitted to the profession, to the governing body of that counsel's University. (Amended 12 Nov 1997, amended 28 July 2004)

(C) Under the supervision of the President, the Registrar shall publish and oversee the implementation of a Code of Professional Conduct for defence counsel. (Amended 14 July 2000)

PART FIVE
PRE-TRIAL PROCEEDINGS

Section 1: Indictments

Rule 47
Submission of Indictment by the Prosecutor
(Adopted 11 Feb 1994, amended 25 July 1997)

(A) An indictment, submitted in accordance with the following procedure, shall be reviewed by a Judge designated in accordance with Rule 28 for this purpose. (Amended 25 July 1997)

(B) The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal, shall prepare and forward to the Registrar an indictment for confirmation by a Judge, together with supporting material. (Amended 12 Nov 1997)

(C) The indictment shall set forth the name and particulars of the suspect, and a concise statement of the facts of the case and of the crime with which the suspect is charged.

(D) The Registrar shall forward the indictment and accompanying material to the designated Judge, who will inform the Prosecutor of the date fixed for review of the indictment. (Amended 30 Jan 1995, amended 25 July 1997)

(E) The reviewing Judge shall examine each of the counts in the indictment, and any supporting materials the Prosecutor may provide, to determine, applying the standard set forth in Article 19, paragraph 1, of the Statute, whether a case exists against the suspect. (Amended 25 July 1997)

(F) The reviewing Judge may:

(i) request the Prosecutor to present additional material in support of any or all counts;
(Amended 10 July 1998, amended 2 July 1999)

(ii) confirm each count;

(iii) dismiss each count; or

(iv) adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.

(Amended 25 July 1997)

(G) The indictment as confirmed by the Judge shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. If the accused does not understand either of the official languages of the Tribunal and if the language understood is known to the Registrar, a translation of the indictment in that language shall also be prepared, and shall be included as part of each certified copy of the indictment. (Amended 12 Nov 1997)

(H) Upon confirmation of any or all counts in the indictment,

(i) the Judge may issue an arrest warrant, in accordance with Rule 55 (A), and any orders as provided in Article 19 of the Statute, and
(Amended 1 Dec 2000, amended 13 Dec 2000)

(ii) the suspect shall have the status of an accused.

(Amended 25 July 1997)

(I) The dismissal of a count in an indictment shall not preclude the Prosecutor from subsequently bringing an amended indictment based on the acts underlying that count if supported by additional evidence. (Amended 25 July 1997)

Rule 48
Joinder of Accused
(Adopted 11 Feb 1994)

Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried.

Rule 49
Joinder of Crimes
(Adopted 11 Feb 1994)

Two or more crimes may be joined in one indictment if the series of acts committed together form the same transaction, and the said crimes were committed by the same accused.

Rule 50
Amendment of Indictment
(Adopted 11 Feb 1994)

(A) (i) The Prosecutor may amend an indictment:

(a) at any time before its confirmation, without leave;
(Amended 17 Nov 1999, amended 14 July 2000)

(b) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
(Amended 10 July 1998, amended 17 Nov 1999, amended 14 July 2000)

(c) after the assignment of the case to a Trial Chamber, with the leave of that Trial Chamber or a Judge of that Chamber, after having heard the parties.
(Amended 17 Nov 1999, amended 14 July 2000)

(ii) Independently of any other factors relevant to the exercise of the discretion, leave to amend an indictment shall not be granted unless the Trial Chamber or Judge is satisfied there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment.
(Amended 10 July 1998, amended 17 Nov 1999, amended 14 July 2000, amended 28 July 2004)

(iii) Further confirmation is not required where an indictment is amended by leave.
(Amended 28 July 2004)

(iv) Rule 47 (G) and Rule 53 *bis* apply *mutatis mutandis* to the amended indictment.

(Amended 18 Jan 1996, amended 3 Dec 1996, amended 12 Nov 1997, amended 10 July 1998)

(B) If the amended indictment includes new charges and the accused has already appeared before a Trial Chamber in accordance with Rule 62, a further

appearance shall be held as soon as practicable to enable the accused to enter a plea on the new charges. (Amended 18 Jan 1996)

(C) The accused shall have a further period of thirty days in which to file preliminary motions pursuant to Rule 72 in respect of the new charges and, where necessary, the date for trial may be postponed to ensure adequate time for the preparation of the defence. (Amended 18 Jan 1996, amended 12 Nov 1997, amended 10 July 1998)

Rule 51
Withdrawal of Indictment
(Adopted 11 Feb 1994)

(A) The Prosecutor may withdraw an indictment:

(i) at any time before its confirmation, without leave;
(Amended 12 Dec 2002)

(ii) between its confirmation and the assignment of the case to a Trial Chamber, with the leave of the Judge who confirmed the indictment, or a Judge assigned by the President; and
(Amended 12 Dec 2002)

(iii) after the assignment of the case to a Trial Chamber, by motion before that Trial Chamber pursuant to Rule 73.
(Amended 12 Dec 2002)

(Amended 3 Dec 1996, amended 12 Nov 1997)

(B) The withdrawal of the indictment shall be promptly notified to the suspect or the accused and to the counsel of the suspect or accused. (Amended 12 Nov 1997)

Rule 52
Public Character of Indictment
(Adopted 11 Feb 1994)

Subject to Rule 53, upon confirmation by a Judge of a Trial Chamber, the indictment shall be made public.

Rule 53
Non-disclosure
(Adopted 11 Feb 1994)

(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order. (Amended 25 June 1996, amended 5 July 1996)

(B) When confirming an indictment the Judge may, in consultation with the Prosecutor, order that there be no public disclosure of the indictment until it is served on the accused, or, in the case of joint accused, on all the accused.

(C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice. (Amended 30 Jan 1995)

(D) Notwithstanding paragraphs (A), (B) and (C), the Prosecutor may disclose an indictment or part thereof to the authorities of a State or an appropriate authority or international body where the Prosecutor deems it necessary to prevent an opportunity for securing the possible arrest of an accused from being lost. (Amended 4 Dec 1998, amended 12 Apr 2001)

Rule 53 *bis*
Service of Indictment
(Adopted 12 Nov 1997)

(A) Service of the indictment shall be effected personally on the accused at the time the accused is taken into custody or as soon as reasonably practicable thereafter.

(B) Personal service of an indictment on the accused is effected by giving the accused a copy of the indictment certified in accordance with Rule 47 (G).

Rule 54
General Rule

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 6 Oct 1995)

At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Rule 54 *bis*
Orders Directed to States for the Production of Documents

(Adopted 17 Nov 1999)

(A) A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber and shall:

(i) identify as far as possible the documents or information to which the application relates;

(ii) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter; and

(iii) explain the steps that have been taken by the applicant to secure the State's assistance.

(B) The Judge or Trial Chamber may reject an application under paragraph (A) *in limine* if satisfied that:

(i) the documents or information are not relevant to any matter in issue in the proceedings before them or are not necessary for a fair determination of any such matter; or

(ii) no reasonable steps have been taken by the applicant to obtain the documents or information from the State.

(Amended 12 Apr 2001)

(C) (i) A decision by a Judge or a Trial Chamber under paragraph (B) or (E) shall be subject to:

(a) review under Rule 108 *bis*; or
(b) appeal.

(Amended 21 July 2005)

(ii) An appeal under paragraph (i) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(a) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(b) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

(Amended 21 July 2005)

(Amended 12 Apr 2001, amended 13 Dec 2001, amended 12 Dec 2002)

(D) (i) Except in cases where a decision has been taken pursuant to paragraph (B) or paragraph (E), the State concerned shall be given notice of the application, and not less than fifteen days' notice of the hearing of the application, at which the State shall have an opportunity to be heard. (Amended 12 Apr 2001)

(ii) Except in cases where the Judge or Trial Chamber determines otherwise, only the party making the application and the State concerned shall have the right to be heard. (Amended 13 Dec 2001)

(E) If, having regard to all circumstances, the Judge or Trial Chamber has good reasons for so doing, the Judge or Trial Chamber may make an order to which this Rule applies without giving the State concerned notice or the opportunity to be heard under paragraph (D), and the following provisions shall apply to such an order:

(i) the order shall be served on the State concerned;

(ii) subject to paragraph (iv), the order shall not have effect until fifteen days after such service;

(iii) a State may, within fifteen days of service of the order, apply by notice to the Judge or Trial Chamber to have the order set aside, on the grounds that disclosure would prejudice national security interests. Paragraph (F) shall apply to such a notice as it does to a notice of objection;
(Amended 12 Apr 2001)

(iv) where notice is given under paragraph (iii), the order shall thereupon be stayed until the decision on the application;

(v) paragraphs (F) and (G) shall apply to the determination of an application made pursuant to paragraph (iii) as they do to the determination of an application of which notice is given pursuant to paragraph (D);
(Amended 12 Apr 2001)

(vi) the State and the party who applied for the order shall, subject to any special measures made pursuant to a request under paragraphs (F) or (G), have an opportunity to be heard at the hearing of an application made pursuant to paragraph (E)(iii) of this Rule.
(Amended 12 Apr 2001)

(Amended 12 Apr 2001)

(F) The State, if it raises an objection pursuant to paragraph (D), on the grounds that disclosure would prejudice its national security interests, shall file a notice of objection not less than five days before the date fixed for the hearing, specifying the grounds of objection. In its notice of objection the State:

(i) shall identify, as far as possible, the basis upon which it claims that its national security interests will be prejudiced; and

(ii) may request the Judge or Trial Chamber to direct that appropriate protective measures be made for the hearing of the objection, including in particular:

(a) hearing the objection in camera and *ex parte*;
(b) allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction;
(c) ordering that no transcripts be made of the hearing and that documents not further required by the Tribunal be returned directly to the State without being filed with the Registry or otherwise retained.

(Amended 12 Apr 2001)

(G) With regard to the procedure under paragraph (F) above, the Judge or Trial Chamber may order the following protective measures for the hearing of the objection:

(i) the designation of a single Judge from a Chamber to examine the documents or hear submissions; and/or

(ii) that the State be allowed to provide its own interpreters for the hearing and its own translations of sensitive documents.

(Amended 12 Apr 2001)

(H) Rejection of an application made under this Rule shall not preclude a subsequent application by the requesting party in respect of the same documents or information if new circumstances arise.

(I) An order under this Rule may provide for the documents or information in question to be produced by the State under appropriate arrangements to protect its interests, which may include those arrangements specified in paragraphs (F)(ii) or (G). (Amended 12 Apr 2001)

Rule 55
Execution of Arrest Warrants
(Adopted 11 Feb 1994)

(A) A warrant of arrest shall be signed by a permanent Judge. It shall include an order for the prompt transfer of the accused to the Tribunal upon the arrest of the accused. (Amended 12 Nov 1997, amended 12 Apr 2001)

(B) The original warrant shall be retained by the Registrar, who shall prepare certified copies bearing the seal of the Tribunal. (Amended 12 Nov 1997)

(C) Each certified copy shall be accompanied by a copy of the indictment certified in accordance with Rule 47 (G) and a statement of the rights of the accused set forth in Article 21 of the Statute, and in Rules 42 and 43 *mutatis mutandis*. If the accused does not understand either of the official languages of the Tribunal and if the language understood by the accused is known to the

Registrar, each certified copy of the warrant of arrest shall also be accompanied by a translation of the statement of the rights of the accused in that language. (Amended 12 Nov 1997)

(D) Subject to any order of a Judge or Chamber, the Registrar may transmit a certified copy of a warrant of arrest to the person or authorities to which it is addressed, including the national authorities of a State in whose territory or under whose jurisdiction the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found. (Amended 30 Jan 1995, amended 18 Jan 1996, amended 25 July 1997, amended 12 Nov 1997)

(E) The Registrar shall instruct the person or authorities to which a warrant is transmitted that at the time of arrest the indictment and the statement of the rights of the accused be read to the accused in a language that he or she understands and that the accused be cautioned in that language that the accused has the right to remain silent, and that any statement he or she makes shall be recorded and may be used in evidence. (Amended 30 Jan 1995, amended 18 Jan 1996, amended 25 July 1997, amended 12 Nov 1997)

(F) Notwithstanding paragraph (E), if at the time of arrest the accused is served with, or with a translation of, the indictment and the statement of rights of the accused in a language that the accused understands and is able to read, these need not be read to the accused at the time of arrest. (Amended 12 Nov 1997, amended 12 Apr 2001)

(G) When an arrest warrant issued by the Tribunal is executed by the authorities of a State, or an appropriate authority or international body, a member of the Office of the Prosecutor may be present as from the time of the arrest. (Amended 12 Nov 1997)

Rule 56
Cooperation of States
(Adopted 11 Feb 1994, amended 18 Jan 1996)

The State to which a warrant of arrest or a transfer order for a witness is transmitted shall act promptly and with all due diligence to ensure proper and effective execution thereof, in accordance with Article 29 of the Statute.

Rule 57
Procedure after Arrest
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

Upon arrest, the accused shall be detained by the State concerned which shall promptly notify the Registrar. The transfer of the accused to the seat of the Tribunal shall be arranged between the State authorities concerned, the authorities of the host country and the Registrar.

Rule 58
National Extradition Provisions
(Adopted 11 Feb 1994, amended 6 Oct 1995)

The obligations laid down in Article 29 of the Statute shall prevail over any legal impediment to the surrender or transfer of the accused or of a witness to the Tribunal which may exist under the national law or extradition treaties of the State concerned.

Rule 59
Failure to Execute a Warrant or Transfer Order
(Adopted 11 Feb 1994, amended 18 Jan 1996)

(A) Where the State to which a warrant of arrest or transfer order has been transmitted has been unable to execute the warrant, it shall report forthwith its inability to the Registrar, and the reasons therefor.

(B) If, within a reasonable time after the warrant of arrest or transfer order has been transmitted to the State, no report is made on action taken, this shall be deemed a failure to execute the warrant of arrest or transfer order and the Tribunal, through the President, may notify the Security Council accordingly.

Rule 59 *bis*
Transmission of Arrest Warrants
(Adopted 18 Jan 1996)

(A) Notwithstanding Rules 55 to 59, on the order of a permanent Judge, the Registrar shall transmit to an appropriate authority or international body or the Prosecutor a copy of a warrant for the arrest of an accused, on such terms as the Judge may determine, together with an order for the prompt transfer of the accused to the Tribunal in the event that the accused be taken into custody

by that authority or international body or the Prosecutor. (Amended 25 June 1996, amended 5 July 1996, amended 12 Nov 1997, amended 12 Apr 2001)

(B) At the time of being taken into custody an accused shall be informed immediately, in a language the accused understands, of the charges against him or her and of the fact that he or she is being transferred to the Tribunal. Upon such transfer, the indictment and a statement of the rights of the accused shall be read to the accused and the accused shall be cautioned in such a language. (Amended 12 Nov 1997)

(C) Notwithstanding paragraph (B), the indictment and statement of rights of the accused need not be read to the accused if the accused is served with these, or with a translation of these, in a language the accused understands and is able to read. (Amended 12 Nov 1997, amended 12 Apr 2001)

Rule 60
Advertisement of Indictment

(Adopted 11 Feb 1994, amended 25 July 1997, amended 12 Nov 1997)

At the request of the Prosecutor, a form of advertisement shall be transmitted by the Registrar to the national authorities of any State or States, for publication in newspapers or for broadcast via radio and television, notifying publicly the existence of an indictment and calling upon the accused to surrender to the Tribunal and inviting any person with information as to the whereabouts of the accused to communicate that information to the Tribunal.

Rule 61
Procedure in Case of Failure to Execute a Warrant

(Adopted 11 Feb 1994)

(A) If, within a reasonable time, 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 shall invite the Prosecutor to report on the measures taken. When the Judge is satisfied that:

(i) the Registrar and the Prosecutor have taken all reasonable steps to secure the arrest of the accused, including recourse to the appropriate authorities of the State in whose territory or under whose jurisdiction and control the person to be served resides or was last known to them to be; and
(Amended 18 Jan 1996, amended 12 Nov 1997)

(ii) if the whereabouts of the accused are unknown, the Prosecutor and the Registrar have taken all reasonable steps to ascertain those whereabouts, including by seeking publication of advertisements pursuant to Rule 60,
(Amended 18 Jan 1996, amended 12 Nov 1997, amended 4 Dec 1998)

the Judge shall order that the indictment be submitted by the Prosecutor to the Trial Chamber of which the Judge is a member. (Amended 3 May 1995, amended 18 Jan 1996, amended 12 Nov 1997, amended 4 Dec 1998)

(B) Upon obtaining such an order the Prosecutor shall submit the indictment to the Trial Chamber in open court, together with all the evidence that was before the Judge who initially confirmed the indictment. The Prosecutor may also call before the Trial Chamber and examine any witness whose statement has been submitted to the confirming Judge. In addition, the Trial Chamber may request the Prosecutor to call any other witness whose statement has been submitted to the confirming Judge. (Amended 30 Jan 1995, amended 25 July 1997)

(C) If the Trial Chamber is satisfied on that evidence, together with such additional evidence as the Prosecutor may tender, that there are reasonable grounds for believing that the accused has committed all or any of the crimes charged in the indictment, it shall so determine. The Trial Chamber shall have the relevant parts of the indictment read out by the Prosecutor together with an account of the efforts to effect service referred to in paragraph (A) above. (Amended 12 Apr 2001)

(D) The Trial Chamber shall also issue an international arrest warrant in respect of the accused which shall be transmitted to all States. Upon request by the Prosecutor or *proprio motu*, after having heard the Prosecutor, the Trial Chamber may order a State or States to adopt provisional measures to freeze the assets of the accused, without prejudice to the rights of third parties. (Amended 23 Apr 1996)

(E) If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as the President thinks fit. (Amended 18 Jan 1996)

Rule 62
Initial Appearance of Accused

(Adopted 11 Feb 1994, amended 12 July 2007)

(A) Upon transfer of an accused to the seat of the Tribunal, the President shall forthwith assign the case to a Trial Chamber. The accused shall be brought before that Trial Chamber or a Judge thereof without delay, and shall be formally charged. The Trial Chamber or the Judge shall:

(i) satisfy itself, himself or herself that the right of the accused to counsel is respected;
(Amended 17 Nov 1999)

(ii) read or have the indictment read to the accused in a language the accused understands, and satisfy itself, himself or herself that the accused understands the indictment;
(Amended 12 Nov 1997, amended 17 Nov 1999, amended 24 June 2003)

(iii) inform the accused that, within thirty days of the initial appearance, he or she will be called upon to enter a plea of guilty or not guilty on each count but that, should the accused so request, he or she may immediately enter a plea of guilty or not guilty on one or more count;
(Amended 4 Dec 1998)

(iv) if the accused fails to enter a plea at the initial or any further appearance, enter a plea of not guilty on the accused's behalf;
(Amended 15 June 1995, amended 12 Nov 1997, amended 4 Dec 1998)

(v) in case of a plea of not guilty, instruct the Registrar to set a date for trial; (Amended 30 Jan 1995)

(vi) in case of a plea of guilty:

(a) if before the Trial Chamber, act in accordance with Rule 62 *bis*, or
(Amended 17 Nov 1999)

(b) if before a Judge, refer the plea to the Trial Chamber so that it may act in accordance with Rule 62 *bis*;
(Amended 17 Nov 1999)

(Amended 30 Jan 1995, amended 12 Nov 1997)

(vii) instruct the Registrar to set such other dates as appropriate.
(Amended 30 Jan 1995)

(Amended 12 Nov 1997, amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(B) Where the interests of justice so require, the Registrar may assign a duty counsel as within Rule 45 (C) to represent the accused at the initial appearance. Such assignments shall be treated in accordance with the relevant provisions of the Directive referred to in Rule 45 (A). (Amended 28 July 2004)

(C) Within 30 days of the initial appearance, if the accused has not retained permanent counsel or has not yet elected in writing to conduct his or her own defence in accordance with Rule 45 (F), permanent counsel shall be assigned by the Registrar. Should the Registrar be unable to appoint permanent counsel within the time-limit, he will seek an extension from the Trial Chamber. (Amended 12 July 2007)

Rule 62 *bis*
Guilty Pleas

(Adopted 12 Nov 1997)

If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

(i) the guilty plea has been made voluntarily;

(ii) the guilty plea is informed;
(Amended 17 Nov 1999)

(iii) the guilty plea is not equivocal; and

(iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,

the Trial Chamber may enter a finding of guilt and instruct the Registrar to set a date for the sentencing hearing. (Amended 10 July 1998, amended 4 Dec 1998)

Rule 62 *ter*
Plea Agreement Procedure
(Adopted 13 Dec 2001)

(A) The Prosecutor and the defence may agree that, upon the accused entering a plea of guilty to the indictment or to one or more counts of the indictment, the Prosecutor shall do one or more of the following before the Trial Chamber:

(i) apply to amend the indictment accordingly;

(ii) submit that a specific sentence or sentencing range is appropriate;

(iii) not oppose a request by the accused for a particular sentence or sentencing range.

(B) The Trial Chamber shall not be bound by any agreement specified in paragraph (A).

(C) If a plea agreement has been reached by the parties, the Trial Chamber shall require the disclosure of the agreement in open session or, on a showing of good cause, in closed session, at the time the accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty.

Rule 63
Questioning of Accused
(Adopted 11 Feb 1994, amended 3 Dec 1996)

(A) Questioning by the Prosecutor of an accused, including after the initial appearance, shall not proceed without the presence of counsel unless the accused has voluntarily and expressly agreed to proceed without counsel present. If the accused subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the accused's counsel is present.

(B) The questioning, including any waiver of the right to counsel, shall be audio-recorded or video-recorded in accordance with the procedure provided for in Rule 43. The Prosecutor shall at the beginning of the questioning caution the accused in accordance with Rule 42 (A)(iii).

Rule 64
Detention on Remand
(Adopted 11 Feb 1994, amended 25 July 1997, amended 12 Nov 1997)

Upon being transferred to the seat of the Tribunal, the accused shall be detained in facilities provided by the host country, or by another country. In exceptional circumstances, the accused may be held in facilities outside of the host country. The President may, on the application of a party, request modification of the conditions of detention of an accused.

Rule 65
Provisional Release
(Adopted 11 Feb 1994)

(A) Once detained, an accused may not be released except upon an order of a Chamber. (Amended 14 July 2000)

(B) Release may be ordered by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. (Amended 30 Jan 1995, amended 17 Nov 1999, amended 13 Dec 2001)

(C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others. (Amended 12 Nov 1997)

(D) Any decision rendered under this Rule by a Trial Chamber shall be subject to appeal. Subject to paragraph (F) below, an appeal shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, the appeal shall be filed within seven days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or
(Amended 10 July 1998)

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision. (Amended 10 July 1998)

(Amended 25 July 1997, amended 12 Nov 1997, amended 10 July 1998, amended 17 Nov 1999, amended 14 July 2000, amended 1 Dec 2000, amended 13 Dec 2000, amended 21 July 2005)

(E) The Prosecutor may apply for a stay of a decision by the Trial Chamber to release an accused on the basis that the Prosecutor intends to appeal the decision, and shall make such an application at the time of filing his or her response to the initial application for provisional release by the accused. (Amended 17 Nov 1999)

(F) Where the Trial Chamber grants a stay of its decision to release an accused, the Prosecutor shall file his or her appeal not later than one day from the rendering of that decision. (Amended 17 Nov 1999)

(G) Where the Trial Chamber orders a stay of its decision to release the accused pending an appeal by the Prosecutor, the accused shall not be released until either:

(i) the time-limit for the filing of an appeal by the Prosecutor has expired, and no such appeal is filed; (Amended 21 July 2005)

(ii) the Appeals Chamber dismisses the appeal; or

(iii) the Appeals Chamber otherwise orders. (Amended 21 July 2005)

(Amended 17 Nov 1999, amended 21 July 2005)

(H) If necessary, the Trial Chamber may issue a warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty. The provisions of Section 2 of Part Five shall apply *mutatis mutandis*. (Amended 25 July 1997)

(I) Without prejudice to the provisions of Rule 107, the Appeals Chamber may grant provisional release to convicted persons pending an appeal or for a fixed period if it is satisfied that:

(i) the appellant, if released, will either appear at the hearing of the appeal or will surrender into detention at the conclusion of the fixed period, as the case may be;

(ii) the appellant, if released, will not pose a danger to any victim, witness or other person, and

(iii) special circumstances exist warranting such release.

The provisions of paragraphs (C) and (H) shall apply *mutatis mutandis*.

(Amended 14 July 2000, amended 1 Dec 2000, amended 13 Dec 2000)

Rule 65 *bis*
Status Conferences
(Adopted 25 July 1997)

(A) A Trial Chamber or a Trial Chamber Judge shall convene a status conference within one hundred and twenty days of the initial appearance of the accused and thereafter within one hundred and twenty days after the last status conference:

(i) to organize exchanges between the parties so as to ensure expeditious preparation for trial;

(ii) to review the status of his or her case and to allow the accused the opportunity to raise issues in relation thereto, including the mental and physical condition of the accused.

(Amended 4 Dec 1998, amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(B) The Appeals Chamber or an Appeals Chamber Judge shall convene a status conference, within one hundred and twenty days of the filing of a notice of appeal and thereafter within one hundred and twenty days after the last status conference, to allow any person in custody pending appeal the opportunity to raise issues in relation thereto, including the mental and physical condition of that person. (Amended 17 Nov 1999)

(C) With the written consent of the accused, given after receiving advice from his counsel, a status conference under this Rule may be conducted

(i) in his presence, but with his counsel participating either via tele-conference or video-conference; or

(ii) in Chambers in his absence, but with his participation via tele-conference if he so wishes and/or participation of his counsel via tele-conference or video-conference.

(Amended 12 Dec 2002)

Rule 65 *ter*
Pre-Trial Judge
(Adopted 10 July 1998, amended 17 Nov 1999)

(A) The Presiding Judge of the Trial Chamber shall, no later than seven days after the initial appearance of the accused, designate from among its members a Judge responsible for the pre-trial proceedings (hereinafter "pre-trial Judge").
(Amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(B) The pre-trial Judge shall, under the authority and supervision of the Trial Chamber seised of the case, coordinate communication between the parties during the pre-trial phase. The pre-trial Judge shall ensure that the proceedings are not unduly delayed and shall take any measure necessary to prepare the case for a fair and expeditious trial.

(C) The pre-trial Judge shall be entrusted with all of the pre-trial functions set forth in Rule 66, Rule 67, Rule 73 *bis* and Rule 73 *ter*, and with all or part of the functions set forth in Rule 73. (Amended 17 Nov 1999, amended 12 Apr 2001, amended 12 Dec 2003)

(D) (i) The pre-trial Judge may be assisted in the performance of his or her duties by one of the Senior Legal Officers assigned to Chambers.

(ii) The pre-trial Judge shall establish a work plan indicating, in general terms, the obligations that the parties are required to meet pursuant to this Rule and the dates by which these obligations must be fulfilled.

(iii) Acting under the supervision of the pre-trial Judge, the Senior Legal Officer shall oversee the implementation of the work plan and shall keep the pre-trial Judge informed of the progress of the discussions between and with the parties and, in particular, of any potential difficulty. He or she shall present the pre-trial Judge with reports as appropriate and shall communicate to the parties, without delay, any observations and decisions made by the pre-trial Judge.

(iv) The pre-trial Judge shall order the parties to meet to discuss issues related to the preparation of the case, in particular, so that the Prosecutor can meet his or her obligations pursuant to paragraphs (E) (i) to (iii) of this Rule and for the defence to meet its obligations pursuant to paragraph (G) of this Rule and of Rule 73 *ter*.

(v) Such meetings are held *inter partes* or, at his or her request, with the Senior Legal Officer and one or more of the parties. The Senior Legal Officer ensures that the obligations set out in paragraphs (E) (i) to (iii) of this Rule and, at the appropriate time, that the obligations in paragraph (G) and Rule 73 *ter*, are satisfied in accordance with the work plan set by the pre-trial Judge.

(vi) The presence of the accused is not necessary for meetings convened by the Senior Legal Officer.

(vii) The Senior Legal Officer may be assisted by a representative of the Registry in the performance of his or her duties pursuant to this Rule and may require a transcript to be made.

(Amended 12 Apr 2001)

(E) Once any existing preliminary motions filed within the time-limit provided by Rule 72 are disposed of, the pre-trial Judge shall order the Prosecutor, upon the report of the Senior Legal Officer, and within a time-limit set by the pre-trial Judge and not less than six weeks before the Pre-Trial Conference required by Rule 73 *bis*, to file the following:

(i) the final version of the Prosecutor's pre-trial brief including, for each count, a summary of the evidence which the Prosecutor intends to bring regarding the commission of the alleged crime and the form of responsibility incurred by the accused; this brief shall include any admissions by the parties and a statement of matters which are not in dispute; as well as a statement of contested matters of fact and law;
(Amended 12 Apr 2001)

(ii) the list of witnesses the Prosecutor intends to call with :

(a) the name or pseudonym of each witness;
(b) a summary of the facts on which each witness will testify;
(c) the points in the indictment as to which each witness will testify, including specific references to counts and relevant paragraphs in the indictment;
(Amended 12 Apr 2001)
(d) the total number of witnesses and the number of witnesses who will testify against each accused and on each count;

(Amended 12 Apr 2001)

(e) an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* or Rule 92 *quater* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and

(Amended 12 Apr 2001, amended 13 Sept 2006)

(f) the estimated length of time required for each witness and the total time estimated for presentation of the Prosecutor's case.

(Amended 12 Apr 2001)

(iii) the list of exhibits the Prosecutor intends to offer stating where possible whether the defence has any objection as to authenticity. The Prosecutor shall serve on the defence copies of the exhibits so listed.

(Amended 12 Apr 2001, amended 13 Dec 2001)

(Amended 17 Nov 1999, amended 12 Apr 2001, amended 12 July 2001)

(F) After the submission by the Prosecutor of the items mentioned in paragraph (E), the pre-trial Judge shall order the defence, within a time-limit set by the pre-trial Judge, and not later than three weeks before the Pre-Trial Conference, to file a pre-trial brief addressing the factual and legal issues, and including a written statement setting out:

(i) in general terms, the nature of the accused's defence;

(ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and

(iii) in the case of each such matter, the reason why the accused takes issue with it.

(Amended 17 Nov 1999, amended 12 Apr 2001)

(G) After the close of the Prosecutor's case and before the commencement of the defence case, the pre-trial Judge shall order the defence to file the following:

(i) a list of witnesses the defence intends to call with:

(a) the name or pseudonym of each witness;

(b) a summary of the facts on which each witness will testify;

(c) the points in the indictment as to which each witness will testify;

(Amended 12 Apr 2001)

(d) the total number of witnesses and the number of witnesses who will testify for each accused and on each count;

(Amended 12 Apr 2001)

(e) an indication of whether the witness will testify in person or pursuant to Rule 92 *bis* or Rule 92 *quater* by way of written statement or use of a transcript of testimony from other proceedings before the Tribunal; and

(Amended 12 Apr 2001, amended 13 Sept 2006)

(f) the estimated length of time required for each witness and the total time estimated for presentation of the defence case; and

(Amended 12 Apr 2001)

(ii) a list of exhibits the defence intends to offer in its case, stating where possible whether the Prosecutor has any objection as to authenticity. The defence shall serve on the Prosecutor copies of the exhibits so listed.

(Amended 13 Dec 2001)

(Amended 17 Nov 1999)

(H) The pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact. In this connection, he or she may order the parties to file written submissions with either the pre-trial Judge or the Trial Chamber.

(Amended 17 Nov 1999)

(I) In order to perform his or her functions, the pre-trial Judge may *proprio motu*, where appropriate, hear the parties without the accused being present. The pre-trial Judge may hear the parties in his or her private room, in which case minutes of the meeting shall be taken by a representative of the Registry.

(Amended 17 Nov 1999, amended 12 Apr 2001)

(J) The pre-trial Judge shall keep the Trial Chamber regularly informed, particularly where issues are in dispute and may refer such disputes to the Trial Chamber.

(K) The pre-trial Judge may set a time for the making of pre-trial motions and, if required, any hearing thereon. A motion made before trial shall be determined before trial unless the Judge, for good cause, orders that it be deferred for determination at trial. Failure by a party to raise objections or to make requests which can be made prior to trial at the time set by the Judge shall constitute waiver thereof, but the Judge for cause may grant relief from the waiver. (Amended 12 Apr 2001)

(L) (i) After the filings by the Prosecutor pursuant to paragraph (E), the pre-trial Judge shall submit to the Trial Chamber a complete file consisting of all the filings of the parties, transcripts of status conferences and minutes of meetings held in the performance of his or her functions pursuant to this Rule.

(ii) The pre-trial Judge shall submit a second file to the Trial Chamber after the defence filings pursuant to paragraph (G). (Amended 17 Nov 1999, amended 12 Apr 2001)

(M) The Trial Chamber may *proprio motu* exercise any of the functions of the pre-trial Judge. (Amended 17 Nov 1999)

(N) Upon a report of the pre-trial Judge, the Trial Chamber shall decide, should the case arise, on sanctions to be imposed on a party which fails to perform its obligations pursuant to the present Rule. Such sanctions may include the exclusion of testimonial or documentary evidence. (Amended 12 Apr 2001)

Section 4: Production of Evidence

Rule 66
Disclosure by the Prosecutor

(Adopted 11 Feb 1994)

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and
(Amended 12 Nov 1997)

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.
(Amended 12 Nov 1997, amended 10 July 1998, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Sept 2006)

(Amended 30 Jan 1995, amended 3 Dec 1996, amended 12 Nov 1997, amended 10 July 1998)

(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused. (Amended 30 Jan 1995, amended 12 Nov 1997, amended 17 Nov 1999)

(C) Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting in camera to be relieved from an obligation under the Rules to disclose that information. When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential. (Amended 30 Jan 1995, amended 10 July 1998, amended 17 Nov 1999)

Rule 67
Additional Disclosure

(Adopted 11 Feb 1994, amended 12 Dec 2003, amended 28 Feb 2008)

(A) Within the time-limit prescribed by the Trial Chamber, at a time not prior to a ruling under Rule 98 *bis*, but not less than one week prior to the commencement of the Defence case, the Defence shall:

(i) permit the Prosecutor to inspect and copy any books, documents, photographs, and tangible objects in the Defence's custody or control, which are intended for use by the Defence as evidence at trial; and

(ii) provide to the Prosecutor copies of statements, if any, of all witnesses whom the Defence intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, or Rule 92 *quater*, which the Defence intends to present at trial. Copies of the statements, if any, of additional witnesses shall be made available to the Prosecutor prior to a decision being made to call those witnesses.

(Adopted 28 Feb 2008)

(B) Within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*:

(i) the defence shall notify the Prosecutor of its intent to offer:

(a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence; and

(ii) the Prosecutor shall notify the defence of the names of the witnesses that the Prosecutor intends to call in rebuttal of any defence plea of

which the Prosecutor has received notice in accordance with paragraph (i) above.

(Amended 12 Nov 1997, amended 12 Apr 2001, amended 12 Dec 2003)

(C) Failure of the Defence to provide notice under this Rule shall not limit the right of the accused to testify on the above defences.

(D) If either party discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules, that party shall immediately disclose that evidence or material to the other party and the Trial Chamber.

(Amended 13 Dec 2001)

Rule 68
Disclosure of Exculpatory and Other Relevant Material

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 July 2001, amended 12 Dec 2003, amended 28 July 2004)

Subject to the provisions of Rule 70,

(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence;

(ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically;

(iii) the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains material referred to in paragraph (i) above, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused;

(iv) the Prosecutor shall apply to the Chamber sitting *in camera* to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential;

(v) notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in paragraph (i) above.

Rule 68 *bis*
Failure to Comply with Disclosure Obligations

(Adopted 13 Dec 2001)

The pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.

Rule 69
Protection of Victims and Witnesses

(Adopted 11 Feb 1994)

(A) In exceptional circumstances, the Prosecutor may apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. (Amended 13 Dec 2001)

(B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section. (Amended 15 June 1995, amended 2 July 1999, amended 13 Dec 2001)

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Rule 70
Matters not Subject to Disclosure

(Adopted 11 Feb 1994)

(A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused. (Amended 4 Oct 1994, amended 30 Jan 1995, amended 12 Nov 1997)

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence. (Amended 6 Oct 1995, amended 25 July 1997)

(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality. (Amended 6 Oct 1995, amended 25 July 1997)

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D). (Amended 6 Oct 1995, amended 12 Apr 2001)

(F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused. (Amended 25 July 1997)

(G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. (Amended 6 Oct 1995, amended 12 Apr 2001)

Section 5: Depositions

Rule 71
Depositions
(Adopted 11 Feb 1994, amended 10 July 1998)

(A) Where it is in the interests of justice to do so, a Trial Chamber may order, *proprio motu* or at the request of a party, that a deposition be taken for use at trial, whether or not the person whose deposition is sought is able physically to appear before the Tribunal to give evidence. The Trial Chamber shall appoint a Presiding Officer for that purpose. (Amended 17 Nov 1999)

(B) The motion for the taking of a deposition shall indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined, and of the circumstances justifying the taking of the deposition. (Amended 17 Nov 1999)

(C) If the motion is granted, the party at whose request the deposition is to be taken shall give reasonable notice to the other party, who shall have the right to attend the taking of the deposition and cross-examine the person whose deposition is being taken.

(D) Deposition evidence may be taken either at or away from the seat of the Tribunal, and it may also be given by means of a video-conference. (Amended 17 Nov 1999)

(E) The Presiding Officer shall ensure that the deposition is taken in accordance with the Rules and that a record is made of the deposition, including cross-examination and objections raised by either party for decision by the Trial Chamber. The Presiding Officer shall transmit the record to the Trial Chamber.

Rule 71 *bis*
[Deleted]
(Adopted 17 Nov 1999, deleted 12 July 2007)

Section 6: Motions

Rule 72
Preliminary Motions
(Adopted 11 Feb 1994, amended 10 July 1998, amended 4 Dec 1998, amended 21 July 2005, amended 12 July 2007)

(A) Preliminary motions, being motions which

(i) challenge jurisdiction;

(ii) allege defects in the form of the indictment;

(iii) seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 82 (B); or

(iv) raise objections based on the refusal of a request for assignment of counsel made under Rule 45 (C)

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84. Subject to any order made by a Judge or the Trial Chamber, where permanent counsel has not yet been assigned to or retained by the accused, or where the accused has not yet elected in writing to conduct his or her defence in accordance with Rule 45 (F), the thirty-day time-limit under this Rule shall not run, notwithstanding the disclosure to the defence of the material and statements referred to in Rule 66 (A)(i), until permanent counsel has been assigned to the accused. (Amended 12 July 2007)

(B) Decisions on preliminary motions are without interlocutory appeal save

(i) in the case of motions challenging jurisdiction;
(Amended 25 June 1996, amended 5 July 1996, amended 23 Apr 2002)

(ii) in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the

opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
(Amended 25 June 1996, amended 5 July 1996, amended 25 July 1997, amended 12 Nov 1997, amended 23 Apr 2002)

(Amended 30 Jan 1995, amended 12 Nov 1997)

(C) Appeals under paragraph (B)(i) shall be filed within fifteen days and requests for certification under paragraph (B)(ii) shall be filed within seven days of filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case, the time-limit shall run from filing of the written decision.

If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify. (Amended 12 Nov 1997, amended 10 July 1998, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 23 Apr 2002)

(D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

(i) any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;

(ii) the territories indicated in Articles 1, 8 and 9 of the Statute;

(iii) the period indicated in Articles 1, 8 and 9 of the Statute;

(iv) any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

(Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 73
Other Motions

(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 12 Apr 2001, amended 13 Dec 2001, amended 23 Apr 2002)

(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber. (Amended 12 Nov 1997)

(B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. (Amended 12 Apr 2001, amended 23 Apr 2002)

(C) Requests for certification shall be filed within seven days of the filing of the impugned decision. Where such decision is rendered orally, this time-limit shall run from the date of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

If certification is given, a party shall appeal to the Appeals Chamber within seven days of the filing of the decision to certify. (Amended 12 Nov 1997, amended 10 July 1998, amended 12 Apr 2001, amended 23 Apr 2002)

(D) Irrespective of any sanctions which may be imposed under Rule 46 (A), when a Chamber finds that a motion is frivolous or is an abuse of process, the Registrar shall withhold payment of fees associated with the production of that motion and/ or costs thereof. (Amended 8 Dec 2004)

Section 7: Conferences

Rule 73 *bis*
Pre-Trial Conference

(Adopted 10 July 1998, amended 17 Nov 1999, amended 17 July 2003)

(A) Prior to the commencement of the trial, the Trial Chamber shall hold a Pre-Trial Conference.

(B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(i), the Trial Chamber may call upon the Prosecutor to shorten the estimated length of the examination-in-chief for some witnesses. (Amended 17 Nov 1999, amended 12 Apr 2001)

(C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(i), the Trial Chamber, after having heard the Prosecutor, shall determine

(i) the number of witnesses the Prosecutor may call; and

(ii) the time available to the Prosecutor for presenting evidence.

(Amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

(D) After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged. (Amended 17 July 2003, amended 30 May 2006)

(E) Upon or after the submission by the pre-trial Judge of the complete file of the Prosecution case pursuant to paragraph (L)(i) of Rule 65 *ter*, the Trial Chamber, having heard the parties and in the interest of a fair and expeditious trial, may direct the Prosecutor to select the counts in the indictment on which to proceed. Any decision taken under this paragraph may be appealed as of right by a party. (Amended 30 May 2006)

(F) After commencement of the trial, the Prosecutor may file a motion to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that are to be called or for additional time to present evidence and the Trial Chamber may grant the Prosecutor's request if satisfied that this is in the interests of justice. (Amended 17 Nov 1999, amended 12 Apr 2001, amended 17 July 2003)

Rule 73 *ter*
Pre-Defence Conference

(Adopted 10 July 1998, amended 17 Nov 1999)

(A) Prior to the commencement by the defence of its case the Trial Chamber may hold a Conference.

(B) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(ii), the Trial Chamber may call upon the defence to shorten the estimated length of the examination-in-chief for some witnesses. (Amended 17 Nov 1999, amended 12 Apr 2001)

(C) In the light of the file submitted to the Trial Chamber by the pre-trial Judge pursuant to Rule 65 *ter* (L)(ii), the Trial Chamber, after having heard the defence, shall set the number of witnesses the defence may call. (Amended 17 Nov 1999, amended 12 Apr 2001)

(D) After commencement of the defence case, the defence may, if it considers it to be in the interests of justice, file a motion to reinstate the list of witnesses or to vary the decision as to which witnesses are to be called. (Amended 12 Apr 2001)

(E) After having heard the defence, the Trial Chamber shall determine the time available to the defence for presenting evidence. (Amended 12 Apr 2001)

(F) During a trial, the Trial Chamber may grant a defence request for additional time to present evidence if this is in the interests of justice. (Amended 12 Apr 2001)

PART SIX
PROCEEDINGS BEFORE TRIAL CHAMBERS

Section 1: General Provisions

Rule 74
Amicus Curiae
(Adopted 11 Feb 1994)

A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber.

Rule 74 *bis*
Medical Examination of the Accused
(Adopted 10 July 1998, amended 12 Apr 2001)

A Trial Chamber may, *proprio motu* or at the request of a party, order a medical, psychiatric or psychological examination of the accused. In such a case, unless the Trial Chamber otherwise orders, the Registrar shall entrust this task to one or several experts whose names appear on a list previously drawn up by the Registry and approved by the Bureau.

Rule 75
Measures for the Protection of Victims and Witnesses
(Adopted 11 Feb 1994, amended 12 July 2007, amended 28 Feb 2008)

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. (Amended 15 June 1995, amended 2 July 1999)

(B) A Chamber may hold an in camera proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as: (Amended 12 Nov 1997)

(a) expunging names and identifying information from the Tribunal's public records; (Amended 1 Dec 2000, amended 13 Dec 2000)
(b) non-disclosure to the public of any records identifying the victim or witness; (Amended 28 Feb 2008)
(c) giving of testimony through image- or voice- altering devices or closed circuit television; and
(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television. (Amended 30 Jan 1995)

(C) The Victims and Witnesses Section shall ensure that the witness has been informed before giving evidence that his or her testimony and his or her identity may be disclosed at a later date in another case, pursuant to Rule 75 (F). (Amended 12 Dec 2002)

(D) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

(E) When making an order under paragraph (A) above, a Judge or Chamber shall wherever appropriate state in the order whether the transcript of those proceedings relating to the evidence of the witness to whom the measures relate shall be made available for use in other proceedings before the Tribunal or another jurisdiction. (Amended 12 July 2007)

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal ("second proceedings") or another jurisdiction

unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings. (Amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 12 July 2002, amended 12 July 2007)

(G) A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seised of the first proceedings; or

(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings. (Amended 12 July 2002)

(H) A Judge or Bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the Tribunal may seek to rescind, vary, or augment protective measures ordered in proceedings before the Tribunal by applying to the President of the Tribunal, who shall refer the application: (Amended 28 Feb 2008)

(i) to any Chamber, however constituted, remaining seised of the first proceedings;

(ii) if no Chamber remains seised of the first proceedings, to a Chamber seised of second proceedings; or,

(iii) if no Chamber remains seised, to a newly constituted Chamber. (Amended 12 July 2007)

(I) Before determining an application under paragraph (G)(ii), (H)(ii), or (H)(iii) above, the Chamber shall endeavour to obtain all relevant information from

the first proceedings, including from the parties to those proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal. (Amended 12 July 2002, amended 12 Dec 2002, amended 12 July 2007)

(J) The Chamber determining an application under paragraphs (G) and (H) above shall ensure through the Victims and Witnesses Section that the protected victim or witness has given consent to the rescission, variation, or augmentation of protective measures; however, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may, in exceptional circumstances, order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent. (Amended 12 July 2007, amended 28 Feb 2008)

(K) An application to a Chamber to rescind, vary, or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber". (Amended 12 July 2002)

Rule 75 *bis*
Requests for Assistance of the Tribunal in Obtaining Testimony

(Adopted 8 Dec 2010)

(A) A Judge or Bench in another jurisdiction or parties in another jurisdiction authorised by an appropriate judicial authority ("Requesting Authority") may request the assistance of the Tribunal in obtaining the testimony of a person under the authority of the Tribunal in ongoing proceedings in the jurisdiction of the Requesting Authority involving violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

(B) Requests pursuant to paragraph (A) shall be submitted to the President of the Tribunal, who shall refer the application to a specially appointed Chamber composed of three Judges of the Tribunal ("Specially Appointed Chamber").

(C) Requests under paragraph (A) shall not be granted if granting the request may prejudice ongoing investigations or proceedings before the Tribunal.

(D) The Specially Appointed Chamber, having heard the parties to the proceedings before the Tribunal, may grant a request pursuant to paragraph (A) after having verified that:

(i) granting the request will not prejudice the rights of the person under the authority of the Tribunal;

(ii) provisions and assurances are in place for observing any protective measures granted by the Tribunal to the person under its authority;

(iii) granting the request will not pose a danger or risk to any victim, witness, or other person; and

(iv) no overriding grounds oppose granting the request.

(E) The assistance will be rendered by way of video-conference link. If legal provisions in the jurisdiction of the Requesting Authority do not allow for the testimony to be received by way of video-conference link, the Specially Appointed Chamber may consider to render the assistance by way of granting the Requesting Authority access to the person to be heard on the premises of the Tribunal or the transfer of the person under Rule 75 *ter*.

(F) Upon order of the Specially Appointed Chamber, the Registrar shall co-ordinate the arrangements for the video-conference link and be present during the hearing.

(G) A Judge of the Specially Appointed Chamber shall be present during the hearing and shall ensure that Rule 75 *bis* (D)(i)–(iii) is respected.

(H) The questioning of the person to be heard shall be conducted directly by, or under the direction of, the Requesting Authority in accordance with its own laws.

(I) For purposes of this Rule, "person under the authority of the Tribunal" means an accused or convicted person detained on the premises of the detention unit of the Tribunal.

(J) No decision taken under this Rule or Rule 75 *ter* is subject to appeal.

(K) The President may in all cases request any document or additional information from the Requesting Authority.

Rule 75 *ter*
Transfer of Persons for the Purpose of Testimony in Proceedings Not Pending Before the Tribunal

(Adopted 8 Dec 2010)

(A) The Specially Appointed Chamber, considering the transfer of a person under Rule 75 *bis* (E), shall not grant such transfer unless:

(i) the person under the authority of the Tribunal has been duly summoned to testify;

(ii) the person under the authority of the Tribunal has provided his consent to the transfer;

(iii) the host country and the State to which the person under the authority of the Tribunal is to be transferred have been given the opportunity to be heard;

(iv) the State to where the person is to be transferred ("Requesting State") has provided written guarantees to the Tribunal as to the return of the transferred person within a stipulated period; the non-transfer of the person to a third State; the appropriate location of detention; and immunities from prosecution and service of process for acts, omissions, or convictions prior to the person's arrival in the territory of the Requesting State;

(v) the transfer of such person will not extend the period of the person's detention as foreseen by the Tribunal; and

(vi) there are no overriding grounds for not transferring the person to the territory of the Requesting State.

(B) The Specially Appointed Chamber may impose such conditions upon the transfer of the person under the authority of the Tribunal as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the person for trial thereafter and the protection of others.

(C) For purposes of this Rule, "person under the authority of the Tribunal" means an accused or convicted person detained on the premises of the detention unit of the Tribunal.

(D) If necessary, the Specially Appointed Chamber may issue a warrant of arrest to secure the presence of a person who has been transferred under this Rule. The provisions of Section 2 of Part Five shall apply mutatis mutandis.

(E) At any time after an order has been issued pursuant to this Rule, the Specially Appointed Chamber may revoke the order and make a formal request for the return of the transferred person.

Rule 76
Solemn Declaration by Interpreters and Translators

(Adopted 11 Feb 1994)

Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality.

Rule 77
Contempt of the Tribunal

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 25 July 1997, amended 12 Nov 1997, amended 13 Dec 2001)

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber; (Amended 4 Dec 1998)

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or
(Amended 4 Dec 1998, amended 13 Dec 2001)

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.
(Amended 4 Dec 1998, amended 13 Dec 2001)

(Amended 10 July 1998, amended 12 Nov 1997, amended 13 Dec 2001)

(B) Any incitement or attempt to commit any of the acts punishable under paragraph (A) is punishable as contempt of the Tribunal with the same penalties. (Amended 4 Dec 1998, amended 13 Dec 2001)

(C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or

(iii) initiate proceedings itself.

(Amended 12 Nov 1997, amended 10 July 1998, amended 4 Dec 1998, amended 13 Dec 2001)

(D) If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:

(i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or

(ii) in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

(Amended 13 Dec 2001)

(E) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule. The time limit for entering a plea

pursuant to Rule 62(A), disclosure pursuant to Rule 66(A)(i), or filing of preliminary motions pursuant to Rule 72(A) shall each not exceed ten days. (Amended 13 Dec 2001, amended 22 July 2009)

(F) Any person indicted for or charged with contempt shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45. (Amended 12 Nov 1997, amended 13 Dec 2001)

(G) The maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both. (Amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001)

(H) Payment of a fine shall be made to the Registrar to be held in a separate account.

(I) If a counsel is found guilty of contempt of the Tribunal pursuant to this Rule, the Chamber making such finding may also determine that counsel is no longer eligible to represent a suspect or accused before the Tribunal or that such conduct amounts to misconduct of counsel pursuant to Rule 46, or both. (Amended 13 Dec 2001)

(J) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

(Amended 12 Nov 1997, amended 10 July 1998, amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000)

(K) In the case of decisions under this Rule by the Appeals Chamber sitting as a Chamber of first instance, an appeal may be submitted in writing to the President within fifteen days of the filing of the impugned decision. Such appeal shall be decided by five different Judges as assigned by the President.

Where the impugned decision is rendered orally, the appeal shall be filed within fifteen days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Appeals Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

(Amended 12 July 2002)

Rule 77 *bis*
Payment of Fines
(Adopted 2 July 1999)

(A) In imposing a fine under Rule 77 or Rule 91, a Chamber shall specify the time for its payment. (Amended 13 Dec 2001)

(B) Where a fine imposed under Rule 77 or Rule 91 is not paid within the time specified, the Chamber imposing the fine may issue an order requiring the person on whom the fine is imposed to appear before, or to respond in writing to, the Tribunal to explain why the fine has not been paid. (Amended 13 Dec 2001)

(C) After affording the person on whom the fine is imposed an opportunity to be heard, the Chamber may make a decision that appropriate measures be taken, including:

(i) extending the time for payment of the fine;

(ii) requiring the payment of the fine to be made in instalments;

(iii) in consultation with the Registrar, requiring that the moneys owed be deducted from any outstanding fees owing to the person by the Tribunal where the person is a counsel retained by the Tribunal pursuant to the Directive on the Assignment of Defence Counsel;
(Amended 17 Nov 1999)

(iv) converting the whole or part of the fine to a term of imprisonment not exceeding twelve months.

(Amended 17 Nov 1999, amended 13 Dec 2001)

(D) In addition to a decision under paragraph (C), the Chamber may find the person in contempt of the Tribunal and impose a new penalty applying Rule 77 (G), if that person was able to pay the fine within the specified time and has wilfully failed to do so. This penalty for contempt of the Tribunal shall be additional to the original fine imposed. (Amended 12 Apr 2001, amended 13 Dec 2001)

(E) The Chamber may, if necessary, issue an arrest warrant to secure the person's presence where he or she fails to appear before or respond in writing pursuant to an order under paragraph (B). A State or authority to whom such a warrant is addressed, in accordance with Article 29 of the Statute, shall act promptly and with all due diligence to ensure proper and effective execution thereof. Where an arrest warrant is issued under this Sub-rule, the provisions of Rules 45, 57, 58, 59, 59 *bis*, and 60 shall apply *mutatis mutandis*. Following the transfer of the person concerned to the Tribunal, the provisions of Rules 64, 65 and 99 shall apply *mutatis mutandis*. (Amended 12 Apr 2001, amended 13 Dec 2001)

(F) Where under this Rule a penalty of imprisonment is imposed, or a fine is converted to a term of imprisonment, the provisions of Rules 102, 103 and 104 and Part Nine shall apply *mutatis mutandis*.

(G) Any finding of contempt or penalty imposed under this Rule shall be subject to appeal as allowed for in Rule 77 (J).

Rule 78
Open Sessions
(Adopted 11 Feb 1994)

All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided.

Rule 79
Closed Sessions
(Adopted 11 Feb 1994)

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

(iii) the protection of the interests of justice.

(B) The Trial Chamber shall make public the reasons for its order.

Rule 80
Control of Proceedings
(Adopted 11 Feb 1994)

(A) The Trial Chamber may exclude a person from the courtroom in order to protect the right of the accused to a fair and public trial, or to maintain the dignity and decorum of the proceedings.

(B) The Trial Chamber may order the removal of an accused from the courtroom and continue the proceedings in the absence of the accused if the accused has persisted in disruptive conduct following a warning that such conduct may warrant the removal of the accused from the courtroom.

Rule 81
Records of Proceedings and Evidence
(Adopted 11 Feb 1994)

(A) The Registrar shall cause to be made and preserve a full and accurate record of all proceedings, including audio recordings, transcripts and, when deemed necessary by the Trial Chamber, video recordings.

(B) The Trial Chamber, after giving due consideration to any matters relating to witness protection, may order the disclosure of all or part of the record of

closed proceedings when the reasons for ordering its non-disclosure no longer exist. (Amended 1 Dec 2000, amended 13 Dec 2000)

(C) The Registrar shall retain and preserve all physical evidence offered during the proceedings subject to any Practice Direction or any order which a Chamber may at any time make with respect to the control or disposition of physical evidence offered during proceedings before that Chamber. (Amended 25 July 1997)

(D) Photography, video-recording or audio-recording of the trial, otherwise than by the Registrar, may be authorised at the discretion of the Trial Chamber.

Rule 81 *bis*
Proceedings by Video-Conference Link
(Adopted 12 July 2007)

At the request of a party or *proprio motu,* a Judge or a Chamber may order, if consistent with the interests of justice, that proceedings be conducted by way of video-conference link.

Section 2: Case Presentation

Rule 82
Joint and Separate Trials
(Adopted 11 Feb 1994)

(A) In joint trials, each accused shall be accorded the same rights as if such accused were being tried separately. (Amended 12 Nov 1997)

(B) The Trial Chamber may order that persons accused jointly under Rule 48 be tried separately if it considers it necessary in order to avoid a conflict of interests that might cause serious prejudice to an accused, or to protect the interests of justice.

Rule 83
Instruments of Restraint
(Adopted 11 Feb 1994, amended 4 Dec 1998)

Instruments of restraint, such as handcuffs, shall be used only on the order of the Registrar as a precaution against escape during transfer or in order to prevent an accused from self-injury, injury to others or to prevent serious damage to property. Instruments of restraint shall be removed when the accused appears before a Chamber or a Judge.

Rule 84
Opening Statements
(Adopted 11 Feb 1994, amended 12 Nov 1997)

Before presentation of evidence by the Prosecutor, each party may make an opening statement. The defence may, however, elect to make its statement after the conclusion of the Prosecutor's presentation of evidence and before the presentation of evidence for the defence.

Rule 84 *bis*
Statement of the Accused
(Adopted 2 July 1999)

(A) After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement.

(B) The Trial Chamber shall decide on the probative value, if any, of the statement.

Rule 85
Presentation of Evidence
(Adopted 11 Feb 1994)

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber in the interests of justice, evidence at the trial shall be presented in the following sequence:

(i) evidence for the prosecution;

(ii) evidence for the defence;

(iii) prosecution evidence in rebuttal;

(iv) defence evidence in rejoinder;

(v) evidence ordered by the Trial Chamber pursuant to Rule 98; and
(Amended 10 July 1998)

(vi) any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment.
(Amended 10 July 1998)

(B) Examination-in-chief, cross-examination and re-examination shall be allowed in each case. It shall be for the party calling a witness to examine such witness in chief, but a Judge may at any stage put any question to the witness.

(C) If the accused so desires, the accused may appear as a witness in his or her own defence.

Rule 86
Closing Arguments
(Adopted 11 Feb 1994, amended 12 Nov 1997)

(A) After the presentation of all the evidence, the Prosecutor may present a closing argument; whether or not the Prosecutor does so, the defence may make a closing argument. The Prosecutor may present a rebuttal argument to which the defence may present a rejoinder. (Amended 10 July 1998)

(B) Not later than five days prior to presenting a closing argument, a party shall file a final trial brief. (Amended 10 July 1998, amended 1 Dec 2000, amended 13 Dec 2000)

(C) The parties shall also address matters of sentencing in closing arguments. (Amended 10 July 1998)

Rule 87
Deliberations
(Adopted 11 Feb 1994)

(A) When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt.

(B) The Trial Chamber shall vote separately on each charge contained in the indictment. If two or more accused are tried together under Rule 48, separate findings shall be made as to each accused.

(C) If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused. (Amended 10 July 1998, amended 1 Dec 2000, amended 13 Dec 2000)

Rule 88

[Deleted]

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997, deleted 10 July 1998)

Rule 88 *bis*

[Deleted]

(Adopted 12 Nov 1997, deleted 10 July 1998)

Section 3: Rules of Evidence

Rule 89

General Provisions

(Adopted 11 Feb 1994)

(A) A Chamber shall apply the rules of evidence set forth in this Section, and shall not be bound by national rules of evidence. (Amended 1 Dec 2000, amended 13 Dec 2000)

(B) In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

(E) A Chamber may request verification of the authenticity of evidence obtained out of court.

(F) A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form. (Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 90

Testimony of Witnesses

(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 25 July 1997, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000)

(A) Every witness shall, before giving evidence, make the following solemn declaration: "I solemnly declare that I will speak the truth, the whole truth and nothing but the truth".

(B) A child who, in the opinion of the Chamber, does not understand the nature of a solemn declaration, may be permitted to testify without that formality, if the Chamber is of the opinion that the child is sufficiently mature to be able to report the facts of which the child had knowledge and understands the duty

to tell the truth. A judgement, however, cannot be based on such testimony alone. (Amended 30 Jan 1995)

(C) A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given. However, a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying.

(D) Notwithstanding paragraph (C), upon order of the Chamber, an investigator in charge of a party's investigation shall not be precluded from being called as a witness on the ground that he or she has been present in the courtroom during the proceedings. (Amended 25 July 1997, amended 1 Dec 2000, amended 13 Dec 2000)

(E) A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than false testimony. (Amended 30 Jan 1995, amended 1 Dec 2000, amended 13 Dec 2000)

(F) The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to

(i) make the interrogation and presentation effective for the ascertainment of the truth; and

(ii) avoid needless consumption of time.

(Amended 10 July 1998)

(G) The Trial Chamber may refuse to hear a witness whose name does not appear on the list of witnesses compiled pursuant to Rules 73 *bis* (C) and 73 *ter* (C). (Amended 12 Apr 2001)

(H) (i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel

appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

(Amended 10 July 1998, amended 17 Nov 1999)

Rule 90 *bis*
Transfer of a Detained Witness
(Adopted 6 Oct 1995)

(A) Any detained person whose personal appearance as a witness has been requested by the Tribunal shall be transferred temporarily to the detention unit of the Tribunal, conditional on the person's return within the period decided by the Tribunal.

(B) The transfer order shall be issued by a permanent Judge or Trial Chamber only after prior verification that the following conditions have been met:

(i) the presence of the detained witness is not required for any criminal proceedings in progress in the territory of the requested State during the period the witness is required by the Tribunal;

(ii) transfer of the witness does not extend the period of detention as foreseen by the requested State.

(Amended 12 Apr 2001)

(C) The Registrar shall transmit the order of transfer to the national authorities of the State on whose territory, or under whose jurisdiction or control, the witness is detained. Transfer shall be arranged by the national authorities concerned in liaison with the host country and the Registrar. (Amended 12 Nov 1997)

(D) The Registrar shall ensure the proper conduct of the transfer, including the supervision of the witness in the detention unit of the Tribunal; the Registrar shall remain abreast of any changes which might occur regarding the conditions of detention provided for by the requested State and which may possibly affect the length of the detention of the witness in the detention unit and, as promptly as possible, shall inform the relevant Judge or Chamber. (Amended 12 Nov 1997)

(E) On expiration of the period decided by the Tribunal for the temporary transfer, the detained witness shall be remanded to the authorities of the requested State, unless the State, within that period, has transmitted an order of release of the witness, which shall take effect immediately.

(F) If, by the end of the period decided by the Tribunal, the presence of the detained witness continues to be necessary, a permanent Judge or Chamber may extend the period on the same conditions as stated in paragraph (B). (Amended 12 Apr 2001)

Rule 91
False Testimony under Solemn Declaration
(Adopted 11 Feb 1994)

(A) A Chamber, *proprio motu* or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so. (Amended 25 July 1997)

(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or (Amended 13 Dec 2001)

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony. (Amended 13 Dec 2001)

(C) If the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may:

(i) in circumstances described in paragraph (B)(i), direct the Prosecutor to prosecute the matter; or

(ii) in circumstances described in paragraph (B)(ii), issue an order in lieu of an indictment and direct *amicus curiae* to prosecute the matter.

(Amended 13 Dec 2001)

(D) The rules of procedure and evidence in Parts Four to Eight shall apply *mutatis mutandis* to proceedings under this Rule.

(E) Any person indicted for or charged with false testimony shall, if that person satisfies the criteria for determination of indigence established by the Registrar, be assigned counsel in accordance with Rule 45. (Amended 13 Dec 2001)

(F) No Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony.

(G) The maximum penalty for false testimony under solemn declaration shall be a fine of 100,000 Euros or a term of imprisonment of seven years, or both. The payment of any fine imposed shall be paid to the Registrar to be held in the account referred to in Rule 77 (H). (Amended 18 Jan 1996, amended 25 July 1997, amended 12 Nov 1997, amended 4 Dec 1998, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001)

(H) Paragraphs (B) to (G) apply *mutatis mutandis* to a person who knowingly and willingly makes a false statement in a written statement taken in accordance with Rule 92 *bis* or Rule 92 *quater* which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal. (Amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 13 Sept 2006)

(I) Any decision rendered by a Trial Chamber under this Rule shall be subject to appeal. Notice of appeal shall be filed within fifteen days of filing of the impugned decision. Where such decision is rendered orally, the notice shall be filed within fifteen days of the oral decision, unless

(i) the party challenging the decision was not present or represented when the decision was pronounced, in which case the time-limit shall run from the date on which the challenging party is notified of the oral decision; or

(ii) the Trial Chamber has indicated that a written decision will follow, in which case the time-limit shall run from filing of the written decision.

(Amended 1 Dec 2000, amended 13 Dec 2000)

Rule 92
Confessions
(Adopted 11 Feb 1994)

A confession by the accused given during questioning by the Prosecutor shall, provided the requirements of Rule 63 were strictly complied with, be presumed to have been free and voluntary unless the contrary is proved.

Rule 92 *bis*
Admission of Written Statements and Transcripts in Lieu of Oral Testimony
(Adopted 1 Dec 2000, amended 13 Dec 2000, amended 13 Sept 2006)

(A) A Trial Chamber may dispense with the attendance of a witness in person, and instead admit, in whole or in part, the evidence of a witness in the form of a written statement or a transcript of evidence, which was given by a witness in proceedings before the Tribunal, in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment.

(i) Factors in favour of admitting evidence in the form of a written statement or transcript include but are not limited to circumstances in which the evidence in question:

(a) is of a cumulative nature, in that other witnesses will give or have given oral testimony of similar facts;
(b) relates to relevant historical, political or military background;
(c) consists of a general or statistical analysis of the ethnic composition of the population in the places to which the indictment relates;
(d) concerns the impact of crimes upon victims;
(e) relates to issues of the character of the accused; or
(f) relates to factors to be taken into account in determining sentence.

(ii) Factors against admitting evidence in the form of a written statement or transcript include but are not limited to whether:

(a) there is an overriding public interest in the evidence in question being presented orally;

(b) a party objecting can demonstrate that its nature and source renders it unreliable, or that its prejudicial effect outweighs its probative value; or
(c) there are any other factors which make it appropriate for the witness to attend for cross-examination.

(B) If the Trial Chamber decides to dispense with the attendance of a witness, a written statement under this Rule shall be admissible if it attaches a declaration by the person making the written statement that the contents of the statement are true and correct to the best of that person's knowledge and belief and

(i) the declaration is witnessed by:

(a) a person authorised to witness such a declaration in accordance with the law and procedure of a State; or
(b) a Presiding Officer appointed by the Registrar of the Tribunal for that purpose; and

(ii) the person witnessing the declaration verifies in writing:

(a) that the person making the statement is the person identified in the said statement;
(b) that the person making the statement stated that the contents of the written statement are, to the best of that person's knowledge and belief, true and correct;
(c) that the person making the statement was informed that if the content of the written statement is not true then he or she may be subject to proceedings for giving false testimony; and
(d) the date and place of the declaration.

The declaration shall be attached to the written statement presented to the Trial Chamber.

(C) The Trial Chamber shall decide, after hearing the parties, whether to require the witness to appear for cross-examination; if it does so decide, the provisions of Rule 92 *ter* shall apply.

Rule 92 *ter*
Other Admission of Written Statements and Transcripts
(Adopted 13 Sept 2006)

(A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions:

(i) the witness is present in court;

(ii) the witness is available for cross-examination and any questioning by the Judges; and

(iii) the witness attests that the written statement or transcript accurately reflects that witness' declaration and what the witness would say if examined.

(B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

Rule 92 *quater*
Unavailable Persons
(Adopted 13 Sept 2006)

(A) The evidence of a person in the form of a written statement or transcript who has subsequently died, or who can no longer with reasonable diligence be traced, or who is by reason of bodily or mental condition unable to testify orally may be admitted, whether or not the written statement is in the form prescribed by Rule 92 *bis*, if the Trial Chamber:

(i) is satisfied of the person's unavailability as set out above; and

(ii) finds from the circumstances in which the statement was made and recorded that it is reliable.

(B) If the evidence goes to proof of acts and conduct of an accused as charged in the indictment, this may be a factor against the admission of such evidence, or that part of it.

Rule 92 *quinquies*
Admission of Statements and Transcripts of Persons Subjected to Interference
(Adopted 10 Dec 2009)

(A) A Trial Chamber may admit the evidence of a person in the form of a written statement or a transcript of evidence given by the person in proceedings before the Tribunal, where the Trial Chamber is satisfied that:

(i) the person has failed to attend as a witness or, having attended, has not given evidence at all or in a material respect;

(ii) the failure of the person to attend or to give evidence has been materially influenced by improper interference, including threats, intimidation, injury, bribery, or coercion;

(iii) where appropriate, reasonable efforts have been made pursuant to Rules 54 and 75 to secure the attendance of the person as a witness or, if in attendance, to secure from the witness all material facts known to the witness; and

(iv) the interests of justice are best served by doing so.

(B) For the purposes of paragraph (A):

(i) An improper interference may relate *inter alia* to the physical, economic, property, or other interests of the person or of another person;

(ii) the interests of justice include:

(a) the reliability of the statement or transcript, having regard to the circumstances in which it was made and recorded;

(b) the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference; and

(c) whether the statement or transcript goes to proof of the acts and conduct of the accused as charged in the indictment.

(iii) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment.

(C) The Trial Chamber may have regard to any relevant evidence, including written evidence, for the purpose of applying this Rule.

Rule 93
Evidence of Consistent Pattern of Conduct
(Adopted 11 Feb 1994)

(A) Evidence of a consistent pattern of conduct relevant to serious violations of international humanitarian law under the Statute may be admissible in the interests of justice. (Amended 18 Jan 1996)

(B) Acts tending to show such a pattern of conduct shall be disclosed by the Prosecutor to the defence pursuant to Rule 66. (Amended 30 Jan 1995)

Rule 94
Judicial Notice
(Adopted 11 Feb 1994)

(A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

(B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or of the authenticity of documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings. (Amended 10 July 1998, amended 8 Dec 2010)

Rule 94 *bis*
Testimony of Expert Witnesses
(Adopted 10 July 1998)

(A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge. (Amended 14 July 2000, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 13 Sept 2006)

(B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether:

(i) it accepts the expert witness statement and/or report; or
(Amended 13 Sept 2006)
(ii) it wishes to cross-examine the expert witness; and
(iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.
(Amended 12 Dec 2002, amended 13 Sept 2006)

(Amended 13 Dec 2001, amended 13 Sept 2006)

(C) If the opposing party accepts the statement and/or report of the expert witness, the statement and/or report may be admitted into evidence by the Trial Chamber without calling the witness to testify in person.
(Amended 13 Sept 2006)

Rule 94 *ter*
[Deleted]
(Adopted 4 Dec 1998, amended 17 Nov 1999, deleted 1 Dec 2000, deleted 13 Dec 2000)

Rule 95
Exclusion of Certain Evidence
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 12 Nov 1997)

No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Rule 96
Evidence in Cases of Sexual Assault
(Adopted 11 Feb 1994)

In cases of sexual assault:

(i) no corroboration of the victim's testimony shall be required;

(ii) consent shall not be allowed as a defence if the victim

(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;

(Amended 3 May 1995)

(iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;

(Amended 30 Jan 1995)

(iv) prior sexual conduct of the victim shall not be admitted in evidence.

Rule 97
Lawyer-Client Privilege

(Adopted 11 Feb 1994)

All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless:

(i) the client consents to such disclosure; or

(ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure.

Rule 98
Power of Chambers to Order Production of Additional Evidence

(Adopted 11 Feb 1994, amended 25 July 1997)

A Trial Chamber may order either party to produce additional evidence. It may *proprio motu* summon witnesses and order their attendance.

Section 4: Judgement

Rule 98 *bis*
Judgement of Acquittal

(Adopted 10 July 1998, amended 17 Nov 1999, amended 8 Dec 2004)

At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.

Rule 98 *ter*
Judgement

(Adopted 10 July 1998)

(A) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present, subject to the provisions of Rule 102 (B). (Amended 10 July 1998, amended 12 Apr 2001)

(B) If the Trial Chamber finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it, it shall make a specific finding to that effect in its judgement. The Trial Chamber may order restitution as provided in Rule 105.

(C) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

(D) A copy of the judgement and of the Judges' opinions in a language which the accused understands shall as soon as possible be served on the accused if in custody. Copies thereof in that language and in the language in which they were delivered shall also as soon as possible be provided to counsel for the accused.

Rule 99
Status of the Acquitted Person
(Adopted 11 Feb 1994, amended 12 Nov 1997)

(A) Subject to paragraph (B), in the case of an acquittal or the upholding of a challenge to jurisdiction, the accused shall be released immediately. (Amended 12 Apr 2001)

(B) If, at the time the judgement is pronounced, the Prosecutor advises the Trial Chamber in open court of the Prosecutor's intention to file notice of appeal pursuant to Rule 108, the Trial Chamber may, on application in that behalf by the Prosecutor and upon hearing the parties, in its discretion, issue an order for the continued detention of the accused, pending the determination of the appeal. (Amended 10 July 1998)

Section 5: Sentencing and Penalties

Rule 100
Sentencing Procedure on a Guilty Plea
(Adopted 11 Feb 1994, amended 10 July 1998)

(A) If the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence. (Amended 25 June 1996, amended 5 July 1996)

(B) The sentence shall be pronounced in a judgement in public and in the presence of the convicted person, subject to Rule 102 (B).

Rule 101
Penalties
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 10 July 1998, amended 1 Dec 2000, amended 13 Dec 2000)

(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life. (Amended 12 Nov 1997)

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:

(i) any aggravating circumstances;

(ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;

(iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;

(iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
(Amended 30 Jan 1995, amended 10 July 1998)

(Amended 10 July 1998)

(C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal. (Amended 30 Jan 1995)

Rule 102
Status of the Convicted Person
(Adopted 11 Feb 1994)

(A) The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgement shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 64. (Amended 10 July 1998)

(B) If, by a previous decision of the Trial Chamber, the convicted person has been released, or is for any other reason at liberty, and is not present when the judgement is pronounced, the Trial Chamber shall issue a warrant for the convicted person's arrest. On arrest, the convicted person shall be notified of the conviction and sentence, and the procedure provided in Rule 103 shall be followed. (Amended 12 Nov 1997)

Rule 103
Place of Imprisonment
(Adopted 11 Feb 1994)

(A) Imprisonment shall be served in a State designated by the President of the Tribunal from a list of States which have indicated their willingness to accept convicted persons. (Amended 10 July 1998)

(B) Transfer of the convicted person to that State shall be effected as soon as possible after the time-limit for appeal has elapsed.

(C) Pending the finalisation of arrangements for his or her transfer to the State where his or her sentence will be served, the convicted person shall remain in the custody of the Tribunal. (Amended 4 Dec 1998)

Rule 104
Supervision of Imprisonment
(Adopted 11 Feb 1994)

All sentences of imprisonment shall be supervised by the Tribunal or a body designated by it.

Rule 105
Restitution of Property
(Adopted 11 Feb 1994)

(A) After a judgement of conviction containing a specific finding as provided in Rule 98 *ter* (B), the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate. (Amended 25 July 1997, amended 10 July 1998, amended 12 Apr 2001)

(B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.

(C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.

(D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate. (Amended 30 Jan 1995)

(E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.

(F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate. (Amended 30 Jan 1995)

(G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to paragraphs (C), (D), (E) and (F). (Amended 30 Jan 1995, amended 12 Apr 2001)

Rule 106
Compensation to Victims
(Adopted 11 Feb 1994)

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation. (Amended 12 Nov 1997)

(C) For the purposes of a claim made under paragraph (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury. (Amended 12 Apr 2001)

PART SEVEN
APPELLATE PROCEEDINGS

Rule 107
General Provision
(Adopted 11 Feb 1994)

The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

Rule 108
Notice of Appeal
(Adopted 11 Feb 1994, amended 30 Jan 1995, amended 25 July 1997, amended 12 Nov 1997, amended 10 July 1998, amended 2 July 1999, amended 17 Nov 1999, amended 13 Dec 2001)

A party seeking to appeal a judgement shall, not more than thirty days from the date on which the judgement was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal.

Rule 108 *bis*
State Request for Review
(Adopted 25 July 1997)

(A) A State directly affected by an interlocutory decision of a Trial Chamber may, within fifteen days from the date of the decision, file a request for review of the decision by the Appeals Chamber if that decision concerns issues of general importance relating to the powers of the Tribunal. (Amended 2 July 1999)

(B) The party upon whose motion the Trial Chamber issued the impugned decision shall be heard by the Appeals Chamber. The other party may be heard if the Appeals Chamber considers that the interests of justice so require. (Amended 17 Nov 1999)

(C) The Appeals Chamber may at any stage suspend the execution of the impugned decision. (Amended 17 Nov 1999)

(D) Rule 116 *bis* shall apply *mutatis mutandis*.

Rule 109
Record on Appeal
(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 1 Dec 2000, amended 13 Dec 2000)

The record on appeal shall consist of the trial record, as certified by the Registrar.

Rule 110
Copies of Record
(Adopted 11 Feb 1994)

The Registrar shall make a sufficient number of copies of the record on appeal for the use of the Judges of the Appeals Chamber and of the parties.

Rule 111
Appellant's Brief
(Adopted 11 Feb 1994, amended 12 Nov 1997, amended 10 July 1998, amended 17 Nov 1999, amended 13 Dec 2001, amended 21 July 2005)

(A) An Appellant's brief setting out all the arguments and authorities shall be filed within seventy-five days of filing of the notice of appeal pursuant to Rule 108. Where limited to sentencing, an Appellant's brief shall be filed within thirty days of filing of the notice of appeal pursuant to Rule 108.

(B) Where the Prosecutor is the Appellant, the Prosecutor shall make a declaration in the Appellant's brief that disclosure has been completed with respect to the material available to the Prosecutor at the time of filing the brief.

Rule 112
Respondent's Brief
(Adopted 11 Feb 1994, amended 17 Nov 1999, amended 13 Dec 2001, 21 July 2005)

(A) A Respondent's brief of argument and authorities shall be field within forty days of filing of the Appellant's brief. Where limited to sentencing, a Respondent's brief shall be filed within thirty days of filing of the Appellant's brief.

(B) Where the Prosecutor is the Respondent, the Prosecutor shall make a declaration in the Respondent's brief that disclosure had been completed with respect to the material available to the Prosecutor at the time of filing the brief.

Rule 113
Brief in Reply
(Adopted 11 Feb 1994, amended 21 July 2005)

An Appellant may file a brief in reply within fifteen days of filing of the Respondent's brief. Where limited to sentencing, a brief in reply shall be filed within ten days of filing of the Respondent's brief.

Rule 114
Date of Hearing
(Adopted 11 Feb 1994)

After the expiry of the time-limits for filing the briefs provided for in Rules 111, 112 and 113, the Appeals Chamber shall set the date for the hearing and the Registrar shall notify the parties.

Rule 115
Additional Evidence
(Adopted 11 Feb 1994, amended 12 July 2002)

(A) A party may apply by motion to present additional evidence before the Appeals Chamber. Such motion shall clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed, and must be served on the other party and filed with the Registrar not later than thirty days from the date for filing of the brief in reply, unless good cause or, after the appeal hearing, cogent reasons are shown for a delay. Rebuttal material may be presented by any party affected by the motion. Parties are permitted to file supplemental briefs on the impact of the additional evidence within fifteen days of the expiry of the time limit set for the filing of rebuttal material, if no such material is filed, or if rebuttal material is filed, within fifteen days of the decision on the admissibility of that material.
(Amended 30 Sept 2002, amended 21 July 2005)

(B) If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider the additional evidence and any rebuttal material along with that already on the record to arrive at a final judgement in accordance with Rule 117.

(C) The Appeals Chamber may decide the motion prior to the appeal, or at the time of the hearing on appeal. It may decide the motion with or without an oral hearing.

(D) If several defendants are parties to the appeal, the additional evidence admitted on behalf of any one of them will be considered with respect to all of them, where relevant.

Rule 116
[Deleted]
(Adopted 11 Feb 1994, deleted 12 Nov 1997)

Rule 116 *bis*
Expedited Appeals Procedure
(Adopted 30 Jan 1995, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000)

(A) An appeal under Rule 72 or Rule 73 or appeal from a decision rendered under Rule 11 *bis,* Rule 54 *bis*, Rule 65, Rule 73 *bis* (E), Rule 77 or Rule 91 shall be heard expeditiously on the basis of the original record of the Trial Chamber. Appeals may be determined entirely on the basis of written briefs. (Amended 12 Nov 1997, amended 17 Nov 1999, amended 14 July 2000, amended 1 Dec 2000, amended 13 Dec 2000, amended 13 Dec 2001, amended 21 July 2005, amended 30 May 2006)

(B) Rules 109 to 114 shall not apply to such appeals.

(C) The Presiding Judge, after consulting the members of the Appeals Chamber, may decide not to apply Rule 117 (D). (Amended 25 July 1997, amended 17 Nov 1999, amended 1 Dec 2000, amended 13 Dec 2000)

Rule 117
Judgement on Appeal
(Adopted 11 Feb 1994)

(A) The Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been presented to it.

(B) The judgement shall be rendered by a majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended. (Amended 30 Jan 1995)

(C) In appropriate circumstances the Appeals Chamber may order that the accused be retried according to law. (Amended 30 Jan 1995)

(D) The judgement shall be pronounced in public, on a date of which notice shall have been given to the parties and counsel and at which they shall be entitled to be present. (Amended 30 Jan 1995)

Rule 118
Status of the Accused following Appeal
(Adopted 11 Feb 1994)

(A) A sentence pronounced by the Appeals Chamber shall be enforced immediately.

(B) Where the accused is not present when the judgement is due to be delivered, either as having been acquitted on all charges or as a result of an order issued pursuant to Rule 65, or for any other reason, the Appeals Chamber may deliver its judgement in the absence of the accused and shall, unless it pronounces an acquittal, order the arrest or surrender of the accused to the Tribunal. (Amended 12 Nov 1997)

PART EIGHT
REVIEW PROCEEDINGS

Rule 119
Request for Review
(Adopted 11 Feb 1994)

(A) Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place. (Amended 12 July 2001)

(B) Any brief in response to a request for review shall be filed within forty days of the filing of the request. (Amended 12 July 2002)

(C) Any brief in reply shall be filed within fifteen days after the filing of the response. (Amended 12 July 2002)

Rule 120
Preliminary Examination
(Adopted 11 Feb 1994, amended 12 July 2001)

If a majority of Judges of the Chamber constituted pursuant to Rule 119 agree that the new fact, if proved, could have been a decisive factor in reaching a decision, the Chamber shall review the judgement, and pronounce a further judgement after hearing the parties.

Rule 121
Appeals
(Adopted 11 Feb 1994)

The judgement of a Trial Chamber on review may be appealed in accordance with the provisions of Part Seven.

Rule 122
Return of Case to Trial Chamber
(Adopted 11 Feb 1994)

If the judgement to be reviewed is under appeal at the time the motion for review is filed, the Appeals Chamber may return the case to the Trial Chamber for disposition of the motion.

PART NINE
PARDON AND COMMUTATION OF SENTENCE

Rule 123
Notification by States
(Adopted 11 Feb 1994, amended 5 May 1994, amended 12 Nov 1997)

If, according to the law of the State of imprisonment, a convicted person is eligible for pardon or commutation of sentence, the State shall, in accordance with Article 28 of the Statute, notify the Tribunal of such eligibility.

Rule 124
Determination by the President
(Adopted 11 Feb 1994, amended 12 Apr 2001, amended 11 Feb 2005)

The President shall, upon such notice, determine, in consultation with the members of the Bureau and any permanent Judges of the sentencing Chamber who remain Judges of the Tribunal, whether pardon or commutation is appropriate.

Rule 125
General Standards for Granting Pardon or Commutation
(Adopted 11 Feb 1994)

In determining whether pardon or commutation is appropriate, the President shall take into account, inter alia, the gravity of the crime or crimes for which the prisoner was convicted, the treatment of similarly-situated prisoners, the prisoner's demonstration of rehabilitation, as well as any substantial cooperation of the prisoner with the Prosecutor.

PART TEN
TIME

Rule 126
General Provisions
(Adopted 12 Nov 1997, amended 13 Dec 2001)

(A) Where the time prescribed by or under these Rules for the doing of any act is to run as from the occurrence of an event, that time shall begin to run as from the date of the event.

(B) Should the last day of a time prescribed by a Rule or directed by a Chamber fall upon a day when the Registry of the Tribunal does not accept documents for filing it shall be considered as falling on the first day thereafter when the Registry does accept documents for filing. (Amended 12 July 2002)

Rule 126 *bis*
Time for Filing Responses to Motions
(Adopted 13 Dec 2001)

Unless otherwise ordered by a Chamber either generally or in the particular case, a response, if any, to a motion filed by a party shall be filed within fourteen days of the filing of the motion. A reply to the response, if any, shall be filed within seven days of the filing of the response, with the leave of the relevant Chamber.

Rule 127
Variation of Time-limits
(Adopted 12 Nov 1997)

(A) Save as provided by paragraph (C), a Trial Chamber or Pre-Trial Judge may, on good cause being shown by motion,

(i) enlarge or reduce any time prescribed by or under these Rules;

(ii) recognize as validly done any act done after the expiration of a time so prescribed on such terms, if any, as is thought just and whether or not that time has already expired.

(Amended 1 Dec 2000, amended 13 Dec 2000, amended 21 July 2005)

(B) In relation to any step falling to be taken in connection with an appeal, the Appeals Chamber or Pre-Appeal Judge may exercise the like power as is conferred by paragraph (A) and in like manner and subject to the same conditions as are therein set out. (Amended 1 Dec 2000, amended 13 Dec 2000, amended 21 July 2005)

(C) This Rule shall not apply to the times prescribed in Rules 40 *bis* and 90 *bis*.

* * *

Security Council resolution 955 (1994) of 8 November 1994

UNITED NATIONS

S

Security Council

Distr.
GENERAL

S/RES/955 (1994)*
8 November 1994

RESOLUTION 955 (1994)

Adopted by the Security Council at its 3453rd meeting, on 8 November 1994

The Security Council,

Reaffirming all its previous resolutions on the situation in Rwanda,

Having considered the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) of 1 July 1994 (S/1994/879 and S/1994/906), and having taken note of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of 1 October 1994 (S/1994/1125),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

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* Reissued for technical reasons.

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects,

Considering that the Commission of Experts established pursuant to resolution 935 (1994) should continue on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda and should submit its final report to the Secretary-General by 30 November 1994,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting 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 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2. Decides 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 28 of the Statute, and requests States to keep the Secretary-General informed of such measures;

3. Considers that the Government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the Statute;

4. Urges States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

5. Requests the Secretary-General to implement this resolution urgently and in particular to make practical arrangements for the effective functioning of the International Tribunal, including recommendations to the Council as to possible locations for the seat of the International Tribunal at the earliest time and to report periodically to the Council;

6. Decides that the seat of the International Tribunal shall be determined by the Council having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy, and subject to the conclusion of appropriate arrangements between

the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions; and decides that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements;

7. Decides to consider increasing the number of judges and Trial Chambers of the International Tribunal if it becomes necessary;

8. Decides to remain actively seized of the matter.

Annex

Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "the International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2

Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. 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.

3. 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.

Article 3

Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

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

(i) Other inhumane acts.

Article 4

Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 5

Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused 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.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8

Concurrent jurisdiction

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

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

Article 9

Non bis in idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10

Organization of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) A Registry.

Article 11

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers;

(b) Five judges shall serve in the Appeals Chamber.

Article 12

Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2. The members of the Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia") shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

3. The judges of the Trial Chambers of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges of the Trial Chambers from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within thirty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge on the Appeals Chamber;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twelve and not more than eighteen candidates, taking due account of adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the six judges of the Trial Chambers. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

4. In the event of a vacancy in the Trial Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

5. The judges of the Trial Chambers shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 13

Officers and members of the Chambers

1. The judges of the International Tribunal for Rwanda shall elect a President.

2. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign the judges to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

3. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

Article 14

Rules of procedure and evidence

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.

Article 15

The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such

staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16

The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17

Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

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

3. If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as to necessary translation into and from a language he or she speaks and understands.

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

Article 18

Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19

Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 20

Rights of the accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21

Protection of victims and witnesses

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22

Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23

Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24

Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision; or

(b) An error of fact which has occasioned a miscarriage of justice.

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

Article 25

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26

Enforcement of sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such

imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28

Cooperation and judicial assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(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 for Rwanda.

Article 29

The status, privileges and immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30

Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organization in accordance with Article 17 of the Charter of the United Nations.

Article 31

Working languages

The working languages of the International Tribunal shall be English and French.

Article 32

Annual report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

Statute of the International Criminal Tribunal for Rwanda (as amended), 1994

UNITED NATIONS NATIONS UNIES

STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

As adopted and amended, as applicable,* by the following Security Council resolutions:**

		p.
1. Resolution 955 (1994) 8 November 1994*	Establishing the International Criminal Tribunal for Rwanda (ICTR) and attaches its Statute.	1
2. Resolution 1165 (1998) 30 April 1998*	Establishing a third Trial Chamber and amends Articles 10, 11 and 12 of the ICTR Statute.	5
3. Resolution 1329 (2000) 30 November 2000	Deciding that two additional ICTR judges will be elected, who will sit in the Appeals Chamber.	9
4. Resolution 1411 (2002) 17 May 2002*	Amending Article 11 of the ICTR Statute on composition of the Chambers.	13
5. Resolution 1431 (2002) 14 August 2002*	Establishing a pool of 18 ICTR *ad litem* judges and amending Articles 11, 12 and 13 of the ICTR Statute.	15
6. Resolution 1503 (2003) 28 August 2003*	Urging the ICTR to formalize a completion strategy, amending Article 15 of the Statute on "The Prosecutor," and calling on the International Criminal Tribunal for the former Yugoslavia (ICTY) and the ICTR to complete investigations by the end of 2004, all trials at first instance by the end of 2008, and all work in 2010.	17
7. Resolution 1512 (2003) 27 October 2003*	Increasing the number of *ad litem* judges that may be appointed at any one time to serve in a trial chamber and amending Articles 11 and 12 *quarter* of the Statute.	23
8. Resolution 1534 (2004) 26 March 2004	Calling on the ICTY and ICTR Prosecutors to identify cases which should be transferred to national jurisdictions and requesting the Tribunals to provide assessments of the implementation of their respective completion strategies every 6 months.	29
9. Resolution 1684 (2006) 13 June 2006	Extending the term of office of the 11 permanent ICTR Judges through 31 December 2008.	35
10. Resolution 1717 (2006) 13 October 2006	Extending through 31 December 2008 the term of office of the ICTR *ad litem* Judges elected in June 2003.	39
11. Resolution 1824 (2008) 18 July 2008	Extending through 31 December 2009 the term of office of the ICTR Trial Judges (*ad litem* and permanent), and through 31 December 2010 the term of office of the two ICTR Appeals Judges, and amending Article 11 of the ICTR Statute.	43
12. Resolution 1855 (2008) 19 December 2008	Amending Article 11 of the ICTR Statute and therefore extending the number of *ad litem* Judges allowed at the Tribunal.	47
13. Resolution 1878 (2009) 7 July 2009	Amending Article 13 of the ICTR Statute and therefore increasing the composition of the Appeals Chamber.	49
14. Resolution 1901 (2009) 16 December 2009	Underlining its intention to extend, by 30 June 2010, the terms of office of all trial and appeals judges; temporarily increasing the number of *ad litem* judges allowed at the Tribunal at any one time; deciding that one ICTR trial judge complete his case, notwithstanding the expiry of his term of office.	55

** This list is not exhaustive. See, for instance, resolutions: 977 (1995), designating the town of Arusha as the seat of the ICTR; 978 (1995) on arrest of persons responsible for acts within the jurisdiction of the ICTR; 989 (1995) on the nomination of ICTR judges; 1047 (1996), appointing Mrs. Louise Arbour as Prosecutor of the ICTR and of the ICTY; 1200 (1998) regarding the nomination of ICTR judges; 1241 (1999) deciding that Judge Aspegren would finish the pending cases which he begun before expiry of his term of office; 1259 (1999), appointing Ms. Carla Del Ponte as Prosecutor of the ICTR and of the ICTY; 1347 (2001), regarding nomination of ICTR judges; 1449 (2002), establishing a list of judges-candidates; 1477 (2003), regarding nominations of *ad litem* Judges; 1482 (2003) allowing Judges Dolenc, Maqutu, Ostrovsky and Pillay to remain as Judges in order to finish ongoing cases begun before expiry of their respective terms of office; 1505 (2003), appointing Mr. Hassan Bubacar Jallow as ICTR Prosecutor; 1705 (2006), authorizing *ad litem* Judge Solomy Balungi Bossa to continue to serve in the *Butare* Case until its completion; 1774 (2007), reappointing Mr. Hassan Bubacar Jallow as ICTR Prosecutor for a (maximum) term of 4 years.

ICTR STATUTE
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STATUTE OF THE INTERNATIONAL TRIBUNAL FOR RWANDA

As amended by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "The International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1: Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. 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.

3. 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.

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape;

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

(i) Other inhumane acts.

Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;

(h) Threats to commit any of the foregoing acts.

Article 5: Personal Jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused 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.

3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7: Territorial and Temporal Jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8: Concurrent Jurisdiction

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

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

Article 9: *Non Bis in Idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

(a) The act for which he or she was tried was characterised as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10: Organisation of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

(a) The Chambers, comprising three Trial Chambers and an Appeals Chamber;

(b) The Prosecutor;

(c) A Registry.

Article 11: Composition of the Chambers

1. The Chambers shall be composed of a maximum of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 12 *ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.

2. Each Trial Chamber may be divided into sections of three judges each. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

4. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12: Qualification and Election of Judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 12 *bis*: Election of Permanent Judges

1. Eleven of the permanent judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for permanent judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 12 of the present Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge 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 (hereinafter referred to as 'the International Tribunal for the Former Yugoslavia') in accordance with article 13 *bis* of the Statute of that Tribunal;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven permanent judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 12 of the present Statute, for the remainder of the term of office concerned.

3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 12 *ter*: Election and Appointment of *Ad litem* Judges

1. The *ad litem* judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than thirty-six candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eighteen *ad litem* judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;

(e) The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.

2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal for Rwanda, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal for Rwanda shall bear in mind the criteria set out in article 12 of the present Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 12 *quater*: Status of *Ad litem* Judges

1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:

(a) Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal for Rwanda;

(b) Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;

(c) Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda;

(d) Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.

2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not:

(a) Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;

(b) Have power:

(i) To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;

(ii) To review an indictment pursuant to article 18 of the present Statute;

(iii) To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute.

Article 13: Officers and Members of the Chambers

1. The permanent judges of the International Tribunal for Rwanda shall elect a President from amongst their number.

2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.

3. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign two of the permanent judges elected or appointed in accordance with article 12 bis of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda. Notwithstanding the provisions of article 11, paragraph 1, and article 11, paragraph 3, the President may assign to the Appeals Chamber up to four additional permanent judges serving in the Trial Chambers, on the completion of the cases to which each judge is assigned. The term of office of each judge redeployed to the Appeals Chamber shall be the same as the term of office of the judges serving in the Appeals Chamber.

4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

5. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal for Rwanda to the Trial Chambers.

6. A judge shall serve only in the Chamber to which he or she was assigned.

7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of that Trial Chamber as a whole.

Article 14: Rules of Procedure and Evidence

The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

Article 15: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16: The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17: Investigation and Preparation of Indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

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

3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

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

Article 18: Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19: Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 20: Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.

3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 21: Protection of Victims and Witnesses

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22: Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24: Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision; or

(b) An error of fact which has occasioned a miscarriage of justice.

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

Article 25: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26: Enforcement of Sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:

(a) The identification and location of persons;

(b) The taking of testimony and the production of evidence;

(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 for Rwanda.

Article 29: The Status, Privileges and Immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.

4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30: Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31: Working Languages

The working languages of the International Tribunal for Rwanda shall be English and French.

Article 32: Annual Report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

Security Council resolution 1966 (2010) of 22 December 2010

United Nations S/RES/1966 (2010)

Security Council

Distr.: General
22 December 2010

Resolution 1966 (2010)

Adopted by the Security Council at its 6463rd meeting, on 22 December 2010

The Security Council,

Recalling Security Council resolution 827 (1993) of 25 May 1993, which established the International Tribunal for the former Yugoslavia ("ICTY"), and resolution 955 (1994) of 8 November 1994, which established the International Criminal Tribunal for Rwanda ("ICTR"), and all subsequent relevant resolutions,

Recalling in particular Security Council resolutions 1503 (2003) of 28 August 2003 and 1534 (2004) of 26 March 2004, which called on the Tribunals to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 ("completion strategy"), and *noting* that those envisaged dates have not been met,

Acknowledging the considerable contribution the Tribunals have made to international criminal justice and accountability for serious international crimes, and the re-establishment of the rule of law in the countries of the former Yugoslavia and in Rwanda,

Recalling that the Tribunals were established in the particular circumstances of the former Yugoslavia and Rwanda as *ad hoc* measures contributing to the restoration and maintenance of peace,

Reaffirming its determination to combat impunity for those responsible for serious violations of international humanitarian law and the necessity that all persons indicted by the ICTY and ICTR are brought to justice,

Recalling the statement of the President of the Security Council of 19 December 2008 (S/PRST/2008/47), and *reaffirming* the need to establish an *ad hoc* mechanism to carry out a number of essential functions of the Tribunals, including the trial of fugitives who are among the most senior leaders suspected of being most responsible for crimes, after the closure of the Tribunals,

Emphasizing that, in view of the substantially reduced nature of the residual functions, the international residual mechanism should be a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions,

Welcoming the Report of the Secretary-General (S/2009/258) on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the residual mechanism(s) for the Tribunals,

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* to establish the International Residual Mechanism for Criminal Tribunals ("the Mechanism") with two branches, which shall commence functioning on 1 July 2012 (branch for the ICTR) and 1 July 2013 (branch for the ICTY), respectively ("commencement dates"), and to this end *decides* to adopt the Statute of the Mechanism in Annex 1 to this resolution;

2. *Decides* that the provisions of this resolution and the Statutes of the Mechanism and of the ICTY and ICTR shall be subject to the transitional arrangements set out in Annex 2 to this resolution;

3. *Requests* the ICTY and the ICTR to take all possible measures to expeditiously complete all their remaining work as provided by this resolution no later than 31 December 2014, to prepare their closure and to ensure a smooth transition to the Mechanism, including through advance teams in each of the Tribunals;

4. *Decides* that, as of the commencement date of each branch referred to in paragraph 1, the Mechanism shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR, respectively, subject to the provisions of this resolution and the Statute of the Mechanism, and all contracts and international agreements concluded by the United Nations in relation to the ICTY and the ICTR, and still in force as of the relevant commencement date, shall continue in force *mutatis mutandis* in relation to the Mechanism;

5. *Requests* the Secretary-General to submit at the earliest possible date, but no later than 30 June 2011, draft Rules of Procedure and Evidence of the Mechanism, which shall be based on the Tribunals' Rules of Procedure and Evidence subject to the provisions of this resolution and the Statute of the Mechanism, for consideration and adoption by the judges of the Mechanism;

6. *Decides* that the Rules of Procedure and Evidence of the Mechanism and any amendments thereto shall take effect upon adoption by the judges of the Mechanism unless the Security Council decides otherwise;

7. *Decides* that the determination of the seats of the branches of the Mechanism is subject to the conclusion of appropriate arrangements between the United Nations and the host countries of the branches of the Mechanism acceptable to the Security Council;

8. *Recalls* the obligation of States to cooperate with the Tribunals, and in particular to comply without undue delay with requests for assistance in the location, arrest, detention, surrender and transfer of accused persons;

9. *Decides* that all States shall cooperate fully with the Mechanism in accordance with the present resolution and the Statute of the Mechanism 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 of the

Mechanism, including the obligation of States to comply with requests for assistance or orders issued by the Mechanism pursuant to its Statute;

10. *Urges* all States, especially States where fugitives are suspected to be at large, to further intensify cooperation with and render all necessary assistance to the Tribunals and the Mechanism, as appropriate, in particular to achieve the arrest and surrender of all remaining fugitives as soon as possible;

11. *Urges* the Tribunals and the Mechanism to actively undertake every effort to refer those cases which do not involve the most senior leaders suspected of being most responsible for crimes to competent national jurisdictions in accordance with their respective Statutes and Rules of Procedure and Evidence;

12. *Calls upon* all States to cooperate to the maximum extent possible in order to receive referred cases from the Tribunals and the Mechanism;

13. *Requests* the Secretary-General to implement the present resolution and to make practical arrangements for the effective functioning of the Mechanism from the first commencement date referred to in paragraph 1, in particular to initiate no later than 30 June 2011 the procedures for the selection of the roster of judges of the Mechanism, as provided in its Statute;

14. *Requests* the Secretary-General to prepare, in consultation with the Security Council, an information security and access regime for the archives of the Tribunals and the Mechanism prior to the first commencement date referred to in paragraph 1;

15. *Requests* the Tribunals and the Mechanism to cooperate with the countries of the former Yugoslavia and with Rwanda, as well as with interested entities to facilitate the establishment of information and documentation centres by providing access to copies of public records of the archives of the Tribunals and the Mechanism, including through their websites;

16. *Requests* the President of the Mechanism to submit an annual report to the Security Council and to the General Assembly, and the President and the Prosecutor of the Mechanism to submit six-monthly reports to the Security Council on the progress of the work of the Mechanism;

17. *Decides* that the Mechanism shall operate for an initial period of four years from the first commencement date referred to in paragraph 1, and to review the progress of the work of the Mechanism, including in completing its functions, before the end of this initial period and every two years thereafter, and further *decides* that the Mechanism shall continue to operate for subsequent periods of two years following each such review, unless the Security Council decides otherwise;

18. *Underlines* its intention to decide on the modalities for the exercise of any remaining residual functions of the Mechanism upon the completion of its operation;

19. *Decides* to remain seized of the matter.

Annex 1

Statute of the International Residual Mechanism for Criminal Tribunals

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STATUTE OF THE INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS (IRMCT)

Preamble

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations to carry out residual functions 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 (hereinafter "ICTY") and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter "ICTR"), the International Residual Mechanism for Criminal Tribunals (hereinafter "the Mechanism") shall function in accordance with the provisions of the present Statute,

Article 1: Competence of the Mechanism

1. The Mechanism shall continue the material, territorial, temporal and personal jurisdiction of the ICTY and the ICTR as set out in Articles 1 to 8 of the ICTY Statute and Articles 1 to 7 of the ICTR Statute,[1] as well as the rights and obligations, of the ICTY and the ICTR, subject to the provisions of the present Statute.

2. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are among the most senior leaders suspected of being most responsible for the crimes covered by paragraph 1 of this Article, considering the gravity of the crimes charged and the level of responsibility of the accused.

3. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTY or the ICTR who are not among the most senior leaders covered by paragraph 2 of this Article, provided that the Mechanism may only, in accordance with the provisions of the present Statute, proceed to try such persons itself after it has exhausted all reasonable efforts to refer the case as provided in Article 6 of the present Statute.

4. The Mechanism shall have the power to prosecute, in accordance with the provisions of the present Statute,

(a) any person who knowingly and wilfully interferes or has interfered with the administration of justice by the Mechanism or the Tribunals, and to hold such person in contempt; or

(b) a witness who knowingly and wilfully gives or has given false testimony before the Mechanism or the Tribunals.

[1] See Articles 1 to 8 ICTY Statute (S/RES/827 (1993) and Annex to S/25704 and Add.17658 (1993)) and Articles 1 to 7 ICTR Statute (Annex to S/RES/955 (1994)).

Before proceeding to try such persons, the Mechanism shall consider referring the case to the authorities of a State in accordance with Article 6 of the present Statute, taking into account the interests of justice and expediency.

5. The Mechanism shall not have the power to issue any new indictments against persons other than those covered by this Article.

Article 2: Functions of the Mechanism

The Mechanism shall continue the functions of the ICTY and of the ICTR, as set out in the present Statute ("residual functions"), during the period of its operation.

Article 3: Structure and Seats of the Mechanism

The Mechanism shall have two branches, one branch for the ICTY and one branch for the ICTR, respectively. The branch for the ICTY shall have its seat in The Hague. The branch for the ICTR shall have its seat in Arusha.

Article 4: Organization of the Mechanism

The Mechanism shall consist of the following organs:

(a) The Chambers, comprising a Trial Chamber for each branch of the Mechanism and an Appeals Chamber common to both branches of the Mechanism;

(b) The Prosecutor common to both branches of the Mechanism;

(c) The Registry, common to both branches of the Mechanism, to provide administrative services for the Mechanism, including the Chambers and the Prosecutor.

Article 5: Concurrent Jurisdiction

1. The Mechanism and national courts shall have concurrent jurisdiction to prosecute persons covered by Article 1 of this Statute.

2. The Mechanism shall have primacy over national courts in accordance with the present Statute. At any stage of the procedure involving a person covered by Article 1 paragraph 2 of this Statute, the Mechanism may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the Mechanism.

Article 6: Referral of Cases to National Jurisdictions

1. The Mechanism shall have the power, and shall undertake every effort, to refer cases involving persons covered by paragraph 3 of Article 1 of this Statute to the authorities of a State in accordance with paragraphs 2 and 3 of this Article. The Mechanism shall have the power also to refer cases involving persons covered by paragraph 4 of Article 1 of this Statute.

2. After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Mechanism, the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or

(ii) in which the accused was arrested; or

(iii) having jurisdiction and being willing and adequately prepared to accept such a case, so that those authorities should forthwith refer the case to the appropriate court for trial within that State.

3. In determining whether to refer a case involving a person covered by paragraph 3 of Article 1 of this Statute in accordance with paragraph 2 above, the Trial Chamber shall, consistent with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused.

4. The Trial Chamber may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out.

5. The Mechanism shall monitor cases referred to national courts by the ICTY, the ICTR, and those referred in accordance with this Article, with the assistance of international and regional organisations and bodies.

6. After an order referring a case has been issued by the ICTY, the ICTR or the Mechanism and before the accused is found guilty or acquitted by a national court, where it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice, the Trial Chamber may, at the request of the Prosecutor or *proprio motu* and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral.

Article 7: *Non bis in Idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the ICTY, the ICTR or the Mechanism.

2. A person covered by Article 1 of this Statute who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the Mechanism only if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Mechanism shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 8: Roster of Judges

1. The Mechanism shall have a roster of 25 independent judges ("judges of the Mechanism"), not more than two of whom may be nationals of the same State.

2. A person who for the purposes of membership of the roster could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

3. The judges of the Mechanism shall only be present at the seats of the branches of the Mechanism as necessary at the request of the President to exercise the functions requiring their presence. In so far as possible, and as decided by the President, the functions may be exercised remotely, away from the seats of the branches of the Mechanism.

4. The judges of the Mechanism shall not receive any remuneration or other benefits for being on the roster. The terms and conditions of service of the judges for each day on which they exercise their functions for the Mechanism shall be those of the judges *ad hoc* of the International Court of Justice. The terms and conditions of service of the President of the Mechanism shall be those of the judges of the International Court of Justice.

Article 9: Qualification of Judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. Particular account shall be taken of experience as judges of the ICTY or the ICTR.

2. In the composition of the Trial and Appeals Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 10: Election of Judges

1. The judges of the Mechanism shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a) The Secretary-General shall invite nominations for judges, preferably from among persons with experience as judges of the ICTY or the ICTR, from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b) Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in Article 9 paragraph 1 of the Statute;

(c) The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than 30 candidates, taking due account of the qualifications set out in Article 9 paragraph 1 and adequate representation of the principal legal systems of the world;

(d) The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect 25 judges of the Mechanism. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should more than two candidates of the same nationality

obtain the required majority vote, the two who received the highest number of votes shall be considered elected.

2. In the event of a vacancy in the roster, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of Article 9 paragraph 1 of the Statute, for the remainder of the term of office concerned.

3. The judges of the Mechanism shall be elected for a term of four years and shall be eligible for reappointment by the Secretary-General after consultation with the Presidents of the Security Council and of the General Assembly.

4. If there are no judges remaining on the roster or if no judge on the roster is available for appointment, and if it is not possible to assign a judge currently serving at the Mechanism, and all practical alternatives having been explored, the Secretary-General may, at the request of the President of the Mechanism and after consultation with the Presidents of the Security Council and of the General Assembly, appoint a person meeting the qualifications of Article 9 paragraph 1 of the Statute, to serve as a judge of the Mechanism.

Article 11: The President

1. After consultation with the President of the Security Council and the judges of the Mechanism, the Secretary-General shall appoint a full-time President from among the judges of the Mechanism.

2. The President shall be present at either seat of the branches of the Mechanism as necessary to exercise his or her functions.

Article 12: Assignment of Judges and Composition of the Chambers

1. In the event of a trial of a case pursuant to paragraphs 2 and 3 of Article 1 of this Statute, or to consider the referral of such a case to a national jurisdiction, the President shall appoint three judges from the roster to compose a Trial Chamber and the Presiding Judge from amongst their number to oversee the work of that Trial Chamber. In all other circumstances, including trials pursuant to paragraph 4 of Article 1 of this Statute, the President shall appoint a Single Judge from the roster to deal with the matter.

2. The President may designate a duty judge from the roster for each branch of the Mechanism, who will be available at short notice, to serve as a Single Judge and to whom indictments, warrants, and other matters not assigned to a Trial Chamber, may be transmitted for decision.

3. The President of the Mechanism shall be a member of the Appeals Chamber, appoint the other members and preside over its proceedings. In the event of an appeal against a decision by a Single Judge, the Appeals Chamber shall be composed of three judges. In the event of an appeal against a decision by a Trial Chamber, the Appeals Chamber shall be composed of five judges.

4. In the event of an application for review in accordance with Article 24 of this Statute of a judgment rendered by a single Judge or by a Trial Chamber, the President shall appoint three judges to compose a Trial Chamber on review. In the event of an application for review of a judgment rendered by the Appeals Chamber, the Appeals Chamber on review shall be composed of five judges.

5. The President may appoint, from among the judges of the Mechanism, a reserve judge to be present at each stage of a trial and to replace a judge if that judge is unable to continue sitting.

Article 13: Rules of Procedure and Evidence

1. The judges of the Mechanism shall adopt Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

2. Amendments of the Rules of Procedure and Evidence may be decided remotely by the judges of the Mechanism by written procedure.

3. The Rules of Procedure and Evidence and any amendments thereto shall take effect upon adoption by the judges of the Mechanism unless the Security Council decides otherwise.

4. The Rules of Procedure and Evidence and amendments thereto shall be consistent with this Statute.

Article 14: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons covered by Article 1 of this Statute.

2. The Prosecutor shall act independently as a separate organ of the Mechanism. He or she shall not seek or receive instructions from any government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor, an officer in charge at the seat of each branch of the Mechanism designated by the Prosecutor, and such other qualified staff as may be required, in accordance with paragraph 5 of this Article. The Prosecutor shall be present at either seat of the branches of the Mechanism as necessary to exercise his or her functions.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The Office of the Prosecutor shall retain a small number of staff commensurate with the reduced functions of the Mechanism, who shall serve at the seats of the branches of the Mechanism. The Office shall maintain a roster of qualified potential staff, preferably from among persons with experience at the ICTY or the ICTR, to enable it to recruit additional staff rapidly as may be required to perform its functions. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 15: The Registry

1. The Registry shall be responsible for the administration and servicing of the branches of the Mechanism.

2. The Registry shall consist of a Registrar, an officer in charge at the seat of each branch of the Mechanism designated by the Registrar, and such other qualified staff as may be required in accordance with paragraph 4 of this Article. The Registrar shall be present at either seat of the branches of the Mechanism as necessary to exercise his or her functions.

3. The Registrar shall be appointed by the Secretary-General for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4. The Registry shall retain a small number of staff commensurate with the reduced functions of the Mechanism, who shall serve at the seat of the respective branches of the Mechanism. The Registry shall maintain a roster of qualified potential staff, preferably from among persons with experience at the ICTY or the ICTR, to enable it to recruit additional staff rapidly as may be required to perform its functions. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 16: Investigation and Preparation of Indictment

1. The Prosecutor shall have the power to conduct investigations against persons covered by Article 1 of this Statute. The Prosecutor shall not have the power to prepare new indictments against persons other than those covered by Article 1 of this Statute.

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

3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to the duty judge or a Single Judge designated by the President.

Article 17: Review of the Indictment

1. The indictment shall be reviewed by the duty judge or a Single Judge designated by the President. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 18: Commencement and Conduct of Trial Proceedings

1. The Single Judge or Trial Chambers conducting a trial shall ensure that the trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the Mechanism, be taken into custody, immediately informed of the charges against him or her and transferred to the Mechanism.

3. The Single Judge or judge of the Trial Chamber designated by the President shall read the indictment, ensure that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Single Judge or Trial Chamber shall then set the date for trial.

4. The hearings shall be public unless the Single Judge or Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 19: Rights of the Accused

1. All persons shall be equal before the Mechanism.

2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 20 of the Statute.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) to be tried without undue delay;

(d) to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Mechanism;

(g) not to be compelled to testify against himself or herself or to confess guilt.

Article 20: Protection of Victims and Witnesses

The Mechanism shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses in relation to the ICTY, the ICTR, and the Mechanism. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 21: Judgements

1. The Single Judge or Trial Chamber shall pronounce judgements and impose sentences and penalties on persons covered by Article 1 of this Statute who are convicted by the Mechanism.

2. All judgements shall be delivered in public and shall be accompanied by a reasoned opinion in writing. Judgements by a Chamber shall be rendered by a majority of the judges, to which separate or dissenting opinions may be appended.

Article 22: Penalties

1. The penalty imposed on persons covered by paragraphs 2 and 3 of Article 1 of this Statute shall be limited to imprisonment. The penalty imposed on persons covered by paragraph 4 of Article 1 of this Statute shall be a term of imprisonment not exceeding seven years, or a fine of an amount to be determined in the Rules of Procedure and Evidence, or both.

2. In determining the terms of imprisonment, the Single Judge or Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia and in those of Rwanda, respectively.

3. In imposing the sentences, the Single Judge or Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

4. In addition to imprisonment, the Single Judge or Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 23: Appellate Proceedings

1. The Appeals Chamber shall hear appeals from convicted persons or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or

(b) an error of fact which has occasioned a miscarriage of justice.

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

Article 24: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Single Judge, Trial Chamber or the Appeals Chamber of the ICTY, the ICTR, or the Mechanism and which could have been a decisive factor in reaching the decision, the convicted person may submit to the Mechanism an application for review of the judgement. The Prosecutor may submit such an

application within one year from the day that the final judgement was pronounced. The Chamber shall only review the judgement if after a preliminary examination a majority of judges of the Chamber agree that the new fact, if proved, could have been a decisive factor in reaching a decision.

Article 25: Enforcement of Sentences

1. Imprisonment shall be served in a State designated by the Mechanism from a list of States with which the United Nations has agreements for this purpose. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the Mechanism.

2. The Mechanism shall have the power to supervise the enforcement of sentences pronounced by the ICTY, the ICTR or the Mechanism, including the implementation of sentence enforcement agreements entered into by the United Nations with Member States, and other agreements with international and regional organizations and other appropriate organisations and bodies.

Article 26: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the person convicted by the ICTY, the ICTR, or the Mechanism is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Mechanism accordingly. There shall only be pardon or commutation of sentence if the President of the Mechanism so decides on the basis of the interests of justice and the general principles of law.

Article 27: Management of the Archives

1. Without prejudice to any prior conditions stipulated by, or arrangements with, the providers of information and documents, the archives of the ICTY, the ICTR and the Mechanism shall remain the property of the United Nations. These archives shall be inviolable wherever located pursuant to Section 4 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.

2. The Mechanism shall be responsible for the management, including preservation and access, of these archives. The archives of the ICTY and the ICTR shall be co-located with the respective branches of the Mechanism.

3. In managing access to these archives, the Mechanism shall ensure the continued protection of confidential information, including information concerning protected witnesses, and information provided on a confidential basis. For this purpose, the Mechanism shall implement an information security and access regime, including for the classification and declassification as appropriate of the archives.

Article 28: Cooperation and Judicial Assistance

1. States shall cooperate with the Mechanism in the investigation and prosecution of persons covered by Article 1 of this Statute.

2. States shall comply without undue delay with any request for assistance or an order issued by a Single Judge or Trial Chamber in relation to cases involving persons covered by Article 1 of this Statute, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the Mechanism.

3. The Mechanism shall respond to requests for assistance from national authorities in relation to investigation, prosecution and trial of those responsible for serious violations of international humanitarian law in the countries of former Yugoslavia and Rwanda, including, where appropriate, providing assistance in tracking fugitives whose cases have been referred to national authorities by the ICTY, the ICTR, or the Mechanism.

Article 29: The Status, Privileges and Immunities of the Mechanism

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the Mechanism, the archives of the ICTY, the ICTR and the Mechanism, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The President, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law. The judges of the Mechanism shall enjoy the same privileges and immunities, exemptions and facilities when engaged on the business of the Mechanism.

3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this Article.

4. Defence counsel, when holding a certificate that he or she has been admitted as counsel by the Mechanism and when performing their official functions, and after prior notification by the Mechanism to the receiving State of their mission, arrival and final departure, shall enjoy the same privileges and immunities as are accorded to experts on mission for the United Nations under Article VI, Section 22, paragraphs (a) to (c), and Section 23, of the Convention referred to in paragraph 1 of this Article. Without prejudice to their privileges and immunities, it is the duty of defence counsel enjoying such privileges and immunities to respect the laws and regulations of the receiving State.

5. Other persons, including the accused, required at the seats of the Mechanism, shall be accorded such treatment as is necessary for the proper functioning of the Mechanism.

Article 30: Expenses of the Mechanism

The expenses of the Mechanism shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31: Working Languages

The working languages of the Mechanism shall be English and French.

Article 32: Reports

1. The President of the Mechanism shall submit an annual report of the Mechanism to the Security Council and to the General Assembly.

2. The President and Prosecutor shall submit six-monthly reports to the Security Council on the progress of the work of the Mechanism.

Annex 2

Transitional Arrangements

Article 1 — Trial Proceedings

1. The ICTY and ICTR shall have competence to complete all trial or referral proceedings which are pending with them as of the commencement date of the respective branch of the Mechanism.

2. If a fugitive indicted by the ICTY or ICTR is arrested more than 12 months, or if a retrial is ordered by the Appeals Chamber more than 6 months prior to the commencement date of the respective branch of the Mechanism, the ICTY or ICTR, respectively, shall have competence over such person in accordance with their respective Statutes and Rules of Procedure and Evidence to conduct, and complete, the trial of such person, or to refer the case to the authorities of a State, as appropriate.

3. If a fugitive indicted by the ICTY or ICTR is arrested 12 months or less, or if a retrial is ordered 6 months or less prior to the commencement date of the respective branch of the Mechanism, the ICTY or ICTR, respectively, shall only have competence over such person in accordance with their respective Statutes and Rules of Procedure and Evidence to prepare the trial of such person, or to refer the case to the authorities of a State, as appropriate. As of the commencement date of the respective branch of the Mechanism, the Mechanism shall have competence over such person in accordance with Article 1 of its Statute, including trial of such person or referral of the case, as appropriate.

4. If a fugitive indicted by the ICTY or ICTR is arrested or if a retrial is ordered on or after the commencement date of the respective branch of the Mechanism, the Mechanism shall have competence over such person in accordance with Article 1 of its Statute.

Article 2 — Appeals Proceedings

1. The ICTY and ICTR shall have competence to conduct, and complete, all appellate proceedings for which the notice of appeal against the judgment or sentence is filed prior to the commencement date of the respective branch of the Mechanism.

2. The Mechanism shall have competence to conduct, and complete, all appellate proceedings for which the notice of appeal against the judgment or sentence is filed on or after the commencement date of the respective branch of the Mechanism.

Article 3 — Review Proceedings

1. The ICTY and ICTR shall have competence to conduct, and complete, all review proceedings for which the application for review of the judgment is filed prior to the commencement date of the respective branch of the Mechanism.

2. The Mechanism shall have competence to conduct, and complete, all review proceedings for which the application for review of the judgment is filed on or after the commencement date of the respective branch of the Mechanism.

Article 4 — Contempt of Court and False Testimony

1. The ICTY and ICTR shall have competence to conduct, and complete, all proceedings for contempt of court and false testimony for which the indictment is

confirmed prior to the commencement date of the respective branch of the Mechanism.

2. The Mechanism shall have competence to conduct, and complete, all proceedings for contempt of court and false testimony for which the indictment is confirmed on or after the commencement date of the respective branch of the Mechanism.

Article 5 — Protection of Victims and Witnesses

1. The ICTY and ICTR shall provide for the protection of victims and witnesses, and carry out all related judicial or prosecutorial functions, in relation to all cases for which the ICTY or ICTR, respectively, has competence pursuant to Articles 1 to 4 of the present Annex.

2. The Mechanism shall provide for the protection of victims and witnesses, and carry out all related judicial or prosecutorial functions, in relation to all cases for which the Mechanism has competence pursuant to Articles 1 to 4 of the present Annex.

3. The Mechanism shall provide for the protection of victims and witnesses, and carry out all related judicial or prosecutorial functions, where a person is a victim or witness in relation to two or more cases for which the Mechanism and the ICTY or ICTR, respectively, have competence pursuant to Articles 1 to 4 of the present Annex.

4. The ICTY and ICTR, respectively, shall make the necessary arrangements to ensure as soon as possible a coordinated transition of the victims and witness protection function to the Mechanism in relation to all completed cases of the Tribunals. As of the commencement date of the respective branch of the Mechanism, the Mechanism shall carry out all related judicial or prosecutorial functions in relation to these cases.

Article 6 — Coordinated Transition of other Functions

The ICTY and ICTR, respectively, shall make the necessary arrangements to ensure, as soon as possible, a coordinated transition of the other functions of the Tribunals to the Mechanism, including the supervision of enforcement of sentences, assistance requests by national authorities, and the management of records and archives. As of the commencement date of the respective branch of the Mechanism, the Mechanism shall carry out all related judicial or prosecutorial functions.

Article 7 — Transitional Arrangements for the President, Judges, Prosecutor, Registrar and Staff

Notwithstanding the provisions of the Statutes of the Mechanism, the ICTY and ICTR,

(a) the President, Judges, Prosecutor and Registrar of the Mechanism may also hold the office of President, Judge, Prosecutor and Registrar, respectively, of the ICTY or ICTR;

(b) the staff members of the Mechanism may also be staff members of the ICTY or ICTR.

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute), 2002

[ENGLISH TEXT — TEXTE ANGLAIS]

AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF SIERRA LEONE ON THE ESTABLISHMENT OF A SPECIAL COURT FOR SIERRA LEONE

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court ");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1. Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2. Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of a Trial Chamber and an Appeals Chamber with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Court, the Secretary-General, the Prosecutor or the President of the Special Court so request. Up to two alternate judges shall similarly be appointed after six months if the President of the Special Court so determines.

2. The Chambers shall be composed of no fewer than eight independent judges and no more than eleven such judges who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber where one shall be appointed by the Government of Sierra Leone and two judges appointed by the Secretary-General, upon

nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (a) above;

(c) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a three-year term and shall be eligible for re-appointment.

5. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3. Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a three-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4. Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a three-year term and shall be eligible for re-appointment.

Article 5. Premises

The Government shall assist in the provision of premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6. Expenses of the Special Court

The expenses of the Court shall be borne by voluntary contributions from the international community. It is understood that the Secretary-General will commence the process of establishing the Court when he has sufficient contributions in hand to finance the establishment of the Court and 12 months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Court's operation. It is further understood that the Secretary-General will continue to seek contributions equal to the anticipated expenses of the Court beyond its first three years of operation. Should voluntary contributions be insufficient for the Court to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Court.

Article 7. Management Committee

It is the understanding of the Parties that interested States may wish to establish a management committee to assist the Special Court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters.

The management committee will include representatives of interested States that contribute voluntarily to the Special Court, as well as representatives of the Government of Sierra Leone and the Secretary-General.

Article 8. Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 9. Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 10. Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

Article 11. Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 12. Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities,

exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 13. Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 14. Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

a. Immunity from personal arrest or detention and from seizure of personal baggage;

b. Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

c. Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

d. Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Court and back.

Article 15. Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions. The provisions of article 13, paragraph 2(a) and (d), shall apply to them.

Article 16. Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 17. Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

a. Identification and location of persons;

b. Service of documents;

c. Arrest or detention of persons;

d. Transfer of an indictee to the Court.

Article 18. Working language

The official working language of the Special Court shall be English.

Article 19. Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions of those already in custody shall be initiated.

3. In the initial phase, judges of the Trial Chamber and the Appeals Chamber shall be convened on an ad hoc basis for dealing with organizational matters, and serving when required to perform their duties.

4. Judges of the Trial Chamber shall take permanent office shortly before the investigation process has been completed. Judges of the Appeals Chamber shall take permanent office when the first trial process has been completed.

Article 20. Settlement of Disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 21. Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal requirements for entry into force have been complied with.

Article 22. Amendment

This Agreement may be amended by written agreement between the Parties.

Article 23. Termination

This Agreement shall be terminated by agreement of the Parties upon completion of the judicial activities of the Special Court.

In witness whereof, the following duly authorized representatives of the United Nations and of the Government of Sierra Leone have signed this Agreement.

Done at Freetown, on 16 January 2002 in two originals in the English language.

For the United Nations:

HANS CORELL

For the Government of Sierra Leone:

Solomon E. Berewa

STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1. Competence of the Special Court

1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Article 2. Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

Article 3. Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4. Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 5. Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

(a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

(i). Setting fire to dwelling - houses, any person being therein, contrary to section 2;

(ii) Setting fire to public buildings, contrary to sections 5 and 6;

(iii) Setting fire to other buildings, contrary to section 6.

Article 6. Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7. Jurisdiction over persons of 15 years of age

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8. Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9. Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 to 4 of the present Statute may be subsequently tried by the Special Court if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted. 3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10. Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11. Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12. Composition of the Chambers

1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:

(a) Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General").

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 13. Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a three-year period and shall be eligible for reappointment.

Article 14. Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15. The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16. The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a three-year term and be eligible for re-appointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17. Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18. Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19. Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20. Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

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

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21. Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22. Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23. Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24. Working language

The working language of the Special Court shall be English.

Article 25. Annual Report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

Security Council resolution 1400 (2002) of 28 March 2002

United Nations S/RES/1400 (2002)

Security Council

Distr.: General
28 March 2002

Resolution 1400 (2002)

Adopted by the Security Council at its 4500th meeting, on 28 March 2002

The Security Council,

Recalling its previous resolutions and the statements of its President concerning the situation in Sierra Leone,

Affirming the commitment of all States to respect the sovereignty, political independence and territorial integrity of Sierra Leone,

Welcoming the meeting of the Mano River Union Presidents held in Rabat on 27 February 2002 at the invitation of His Majesty the King of Morocco,

Welcoming the further progress made in the peace process in Sierra Leone, including the lifting of the state of emergency, commending the positive role of the United Nations Mission in Sierra Leone (UNAMSIL) in advancing the peace process, and calling for its further consolidation,

Encouraging the Mano River Union Women's Peace Network and other civil society initiatives to continue their contribution towards regional peace,

Determining that the situation in Sierra Leone continues to constitute a threat to peace and security in this region,

Expressing its concern at the fragile situation in the Mano River region, the substantial increase in refugees and the humanitarian consequences for the civilian, refugee and internally displaced populations in the region,

Emphasizing the importance of free, fair, transparent and inclusive elections, and welcoming the progress made by the Government of Sierra Leone and the National Electoral Commission of Sierra Leone in preparing for elections, particularly with voter registration,

Reiterating the importance of the effective extension of State authority throughout the country, the reintegration of ex-combatants, voluntary and unhindered return of refugees and internally displaced persons, full respect for human rights and the rule of law, and effective action on impunity and accountability, paying special attention to the protection of women and children, and stressing continued United Nations support for the fulfilment of these objectives,

Welcoming the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, and the

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recommendations of the Planning Mission on the Establishment of the Special Court for Sierra Leone (S/2002/246) and the report of the Secretary-General of 14 March 2002 (S/2002/267) that UNAMSIL should provide administrative and related support to the Special Court,

Emphasizing the importance of the continuing support of UNAMSIL to the Government of Sierra Leone in the consolidation of peace and stability after the elections,

Having considered the report of the Secretary-General of 14 March 2002 (S/2002/267),

1. *Decides* that the mandate of UNAMSIL shall be extended for a period of six months from 30 March 2002;

2. *Expresses its appreciation* to those Member States providing troops and support elements to UNAMSIL and those who have made commitments to do so;

3. *Welcomes* the military concept of operations for UNAMSIL for 2002 outlined in paragraph 10 of the Secretary-General's report of 14 March 2002 (S/2002/267), and requests the Secretary-General to inform the Council at regular intervals on progress made by UNAMSIL in the implementation of its key aspects and in the planning of its subsequent phases;

4. *Encourages* the Government of Sierra Leone and the Revolutionary United Front (RUF) to strengthen their efforts towards full implementation of the Ceasefire Agreement signed in Abuja on 10 November 2000 (S/2000/1091) between the Government of Sierra Leone and the RUF and reaffirmed at the meeting of the Economic Community of West African States (ECOWAS), the United Nations, the Government of Sierra Leone and the RUF at Abuja on 2 May 2001;

5. *Encourages* the Government of Sierra Leone and the RUF to continue to take steps towards furthering of dialogue and national reconciliation, and, in this regard, stresses the importance of the reintegration of the RUF into Sierra Leone society and the transformation of the RUF into a political party, and demands the immediate and transparent dismantling of all non-government military structures;

6. *Welcomes* the formal completion of the disarmament process, expresses concern at the serious financial shortfall in the multi-donor Trust Fund for the disarmament, demobilization and reintegration programme, and urges the Government of Sierra Leone to seek actively the urgently needed additional resources for reintegration;

7. *Emphasizes* that the development of the administrative capacities of the Government of Sierra Leone is essential to sustainable peace and development, and to the holding of free and fair elections, and therefore urges the Government of Sierra Leone, with the assistance of UNAMSIL, in accordance with its mandate, to accelerate the restoration of civil authority and public services throughout the country, in particular in the diamond mining areas, including the deployment of key government personnel and police and the deployment of the Sierra Leone Army on border security tasks, and calls on States, international organizations and non-governmental organizations to assist in the wide range of recovery efforts;

8. *Welcomes* the establishment of the electoral component of UNAMSIL and the recruitment of 30 additional civilian police advisers to support the Government of Sierra Leone and the Sierra Leone police in preparing for elections;

9. *Welcomes* the signature on 16 January 2002 of the Agreement between the Government of Sierra Leone and the United Nations on the Establishment of a Special Court for Sierra Leone, as envisaged by resolution 1315 (2000) of 14 August 2000, urges donors urgently to disburse their pledges to the Trust Fund for the Special Court, looks forward to the Court expeditiously beginning its operations and endorses UNAMSIL's providing, without prejudice to its capabilities to perform its specified mandate, administrative and related support to the Special Court on a cost-reimbursable basis;

10. *Welcomes* progress made by the Government of Sierra Leone, together with the Secretary-General, the United Nations High Commissioner for Human Rights and other relevant international actors, in establishing the Truth and Reconciliation Commission, and urges donors urgently to commit funds to it;

11. *Welcomes* the summit meeting of the Mano River Union Presidents held in Rabat on 27 February 2002, urges the Presidents to continue dialogue and to implement their commitments to building regional peace and security, and encourages the ongoing efforts of ECOWAS towards a lasting and final settlement of the crisis in the Mano River Union region;

12. *Expresses its serious concern* at the violence, particularly sexual violence, suffered by women and children during the conflict in Sierra Leone, and emphasizes the importance of addressing these issues effectively;

13. *Expresses its serious concern* at the evidence UNAMSIL has found of human rights abuses and breaches of humanitarian law set out in paragraphs 38 to 40 of the Secretary-General's report of 14 March 2002 (S/2002/267), encourages UNAMSIL to continue its work and in this context requests the Secretary-General to provide a further assessment in his September report, particularly regarding the situation of women and children who have suffered during the conflict;

14. *Expresses its serious concern* at allegations that some United Nations personnel may have been involved in sexual abuse of women and children in camps for refugees and internally displaced people in the region, supports the Secretary-General's policy of zero tolerance for such abuse, looks forward to the Secretary-General's report on the outcome of the investigation into these allegations, and requests him to make recommendations on how to prevent any such crimes in future, while calling on States concerned to take the necessary measures to bring to justice their own nationals responsible for such crimes;

15. *Encourages* the continued support of UNAMSIL, within its capabilities and areas of deployment, for returning refugees and displaced persons, and urges all stakeholders to continue to cooperate to this end to fulfil their commitments under the Abuja Ceasefire Agreement;

16. *Welcomes* the Secretary-General's intention to keep the security, political, humanitarian and human rights situation in Sierra Leone under close review and to report to the Council, after due consultations with troop-contributing countries, with any additional recommendations, and requests in particular the Secretary-General to submit before 30 June 2002 an interim report assessing the post-electoral situation and the prospects for peace consolidation;

17. *Decides* to remain actively seized of the matter.

Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)

Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

LAW ON THE ESTABLISHMENT OF EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA FOR THE PROSECUTION OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

CHAPTER I
GENERAL PROVISIONS

Article 1:

The purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER II
COMPETENCE

Article 2 new
Extraordinary Chambers shall be established in the existing court structure, namely- the trial court and the supreme court to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian laws related to crimes, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.

Senior leaders of Democratic Kampuchea and those who were most responsible for the above acts are hereinafter designated as "Suspects".

Article 3 new
The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed any of these crimes set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979:

- Homicide (Article 501, 503, 504, 505, 506, 507 and 508)
- Torture (Article 500)
- Religious Persecution (Articles 209 and 210)

The statute of limitations set forth in the 1956 Penal Code shall be extended for an additional 30 years for the crimes enumerated above, which are within the jurisdiction of the Extraordinary Chambers.

The penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code shall be limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law.

Article 4
The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed the crimes of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, and which were committed during the period from 17 April 1975 to 6 January 1979.

The acts of genocide, which have no statute of limitations, mean any acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

- 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 from one group to another group.

The following acts shall be punishable under this Article:

- attempts to commit acts of genocide;
- conspiracy to commit acts of genocide;
- participation in acts of genocide.

Article 5
The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed crimes against humanity during the period 17 April 1975 to 6 January 1979.

Crimes against humanity, which have no statute of limitations, are any acts committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds, such as:

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;

- rape;
- persecutions on political, racial, and religious grounds;
- other inhumane acts.

Article 6
The Extraordinary Chambers shall have the power to bring to trial all Suspects who committed or ordered the commission of grave breaches of the Geneva Conventions of 12 August 1949, such as the following acts against persons or property protected under provisions of these Conventions, and which were committed during the period 17 April 1975 to 6 January 1979:

- wilful killing;
- torture or inhumane treatment;
- wilfully causing great suffering or serious injury to body or health;
- destruction and serious damage to property, not justified by military necessity and carried out unlawfully and wantonly;
- compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- wilfully depriving a prisoner of war or civilian the rights of fair and regular trial;
- unlawful deportation or transfer or unlawful confinement of a civilian;
- taking civilians as hostages.

Article 7
The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict, and which were committed during the period from 17 April 1975 to 6 January 1979.

Article 8
The Extraordinary Chambers shall have the power to bring to trial all Suspects most responsible for crimes against internationally protected persons pursuant to the Vienna Convention of 1961 on Diplomatic Relations, and which were committed during the period from 17 April 1975 to 6 January 1979.

CHAPTER III
COMPOSITION OF THE EXTRAORDINARY CHAMBERS

Article 9 new
The Trial Chamber shall be an Extraordinary Chamber composed of five professional judges, of whom three are Cambodian judges with one as president, and two foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

The Supreme Court Chamber, which shall serve as both appellate chamber and final instance, shall be an Extraordinary Chamber composed of seven judges, of whom four are Cambodian judges with one as president, and three foreign judges; and before which the Co-Prosecutors shall present their cases. The president shall appoint one or more clerks of the court to participate.

CHAPTER IV
APPOINTMENT OF JUDGES

Article 10 new
The judges of the Extraordinary Chambers shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience, particularly in criminal law or international law, including international humanitarian law and human rights law.

Judges shall be independent in the performance of their functions, and shall not accept or seek any instructions from any government or any other source.

Article 11 new
The Supreme Council of the Magistracy shall appoint at least seven Cambodian judges to act as judges of the Extraordinary Chambers, and shall appoint reserve judges as needed, and shall also appoint the President of each of the Extraordinary Chambers from the above Cambodian judges so appointed, in accordance with the existing procedures for appointment of judges.

The reserve Cambodian judges shall replace the appointed Cambodian judges in case of their absence. These reserve judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint at least five individuals of foreign nationality to act as foreign judges of the Extraordinary Chambers upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of not less than seven candidates for foreign judges to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint five sitting judges and at least two reserve judges. In addition to the foreign judges sitting in the Extraordinary Chambers and present at every stage of the proceedings, the President of each Chamber may, on a case-by-case basis, designate one or more reserve foreign judges already appointed by the Supreme Council of the Magistracy to be present at each stage of the trial, and to replace a foreign judge if that judge is unable to continue sitting.

Article 12
All judges under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each judge under this law shall be appointed for the period of these proceedings.

Article 13
Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants and law clerks, the Director of the Office of Administration shall interview if necessary and, with the approval of the Cambodian judges by majority vote, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all international staff. The number of assistants and law clerks shall be chosen in proportion to the Cambodian judges and foreign judges.

Cambodian staff shall be selected from Cambodian civil servants or other qualified nationals of Cambodia, if necessary.

CHAPTER V
DECISIONS OF THE EXTRAORDINARY CHAMBERS

Article 14 new
1. The judges shall attempt to achieve unanimity in their decisions. If this is not possible, the following shall apply:

a. a decision by the Extraordinary Chamber of the trial court shall require the affirmative vote of at least four judges;
b. a decision by the Extraordinary Chamber of the Supreme Court shall require the affirmative vote of at least five judges.

2. When there is no unanimity, the decision of the Extraordinary Chambers shall contain the opinions of the majority and the minority.

Article 15
The Presidents shall convene the appointed judges at the appropriate time to proceed with the work of the Extraordinary Chambers.

CHAPTER VI
CO-PROSECUTORS

Article 16
All indictments in the Extraordinary Chambers shall be the responsibility of two prosecutors, one Cambodian and another foreign, hereinafter referred to as Co-Prosecutors, who shall work together to prepare indictments against the Suspects in the Extraordinary Chambers.

Article 17 new
The Co-Prosecutors in the Trial Chamber shall have the right to appeal the verdict of the Extraordinary Chamber of the trial court.

Article 18 new
The Supreme Council of the Magistracy shall appoint Cambodian prosecutors and Cambodian reserve prosecutors as necessary from among the Cambodian professional judges.

The reserve prosecutors shall replace the appointed prosecutors in case of their absence. These reserve prosecutors may continue to perform their regular duties in their respective courts.

One foreign prosecutor with the competence to appear in both Extraordinary Chambers shall be appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Prosecutor to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one prosecutor and one reserve prosecutor.

Article 19
The Co-Prosecutors shall be appointed from among those individuals who are appointed in accordance with the existing procedures for selection of prosecutors who have high moral character and integrity and who are experienced in the conduct of investigations and prosecutions of criminal cases.

The Co-Prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 20 new
The Co-Prosecutors shall prosecute in accordance with existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Prosecutors may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Prosecutors the following shall apply:

The prosecution shall proceed unless the Co-Prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions;

The Co-Prosecutors shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three Cambodian judges appointed by the Supreme Council of the Magistracy, one of whom shall be President, and two foreign judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations. The appointment of the above judges shall follow the provisions of Article 10 of this Law.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Prosecutors. They shall immediately proceed in accordance with the decision of the Chamber. If there is no majority as required for a decision, the prosecution shall proceed.

In carrying out the prosecution, the Co-Prosecutors may seek the assistance of the Royal Government of Cambodia if such assistance would be useful to the prosecution, and such assistance shall be provided.

Article 21 new
The Co-Prosecutors under this law shall enjoy equal status and conditions of service according to each level of the Extraordinary Chambers.

Each Co-Prosecutor shall be appointed for the period of these proceedings.
In the event of the absence of the foreign Co-Prosecutor, he or she shall be replaced by the reserve foreign Co-Prosecutor.

Article 22 new
Each Co-Prosecutor shall have the right to choose one or more deputy prosecutors to assist him or her with prosecution before the chambers. Deputy foreign prosecutors shall be appointed by the foreign Co-Prosecutor from a list provided by the Secretary-General.

The Co-prosecutors shall be assisted by Cambodian and international staff as needed in their offices. In choosing staff to serve as assistants, the Director of the Office of Administration shall interview, if necessary, and with the approval of the Cambodian Co-Prosecutor, hire staff who shall be appointed by the Royal Government of Cambodia. The Deputy Director of the Office of Administration shall be responsible for the recruitment and administration of all foreign staff. The number of assistants shall be chosen in proportion to the Cambodian prosecutors and foreign prosecutors.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

CHAPTER VII
INVESTIGATIONS

Article 23 new
All investigations shall be the joint responsibility of two investigating judges, one Cambodian and another foreign, hereinafter referred to as Co-Investigating Judges, and shall follow existing procedures in force. If these existing procedures do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standards, the Co-Investigating Judges may seek guidance in procedural rules established at the international level.

In the event of disagreement between the Co-Investigating Judges the following shall apply:

The investigation shall proceed unless the Co-Investigating Judges or one of them requests within thirty days that the difference shall be settled in accordance with the following provisions.

The Co-Investigating Judges shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.
The difference shall be settled forthwith by the Pre-Trial Chamber referred to in Article 20.

Upon receipt of the statements referred to in the third paragraph, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

A decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. The decision shall be communicated to the Director of the Office of Administration, who shall publish it and communicate it to the Co-Investigating Judges. They shall immediately proceed in accordance with the decision of the Pre-Trial Chamber. If there is no majority as required for a decision, the investigation shall proceed.

The Co-Investigating Judges shall conduct investigations on the basis of information obtained from any institution, including the Government, United Nations organs, or non-governmental organizations.

The Co-Investigating Judges shall have the power to question suspects and victims, to hear witnesses, and to collect evidence, in accordance with existing procedures in force. In the event the Co-Investigating Judges consider it necessary to do so, they may issue an order requesting the Co-Prosecutors also to interrogate the witnesses.

In carrying out the investigations, the Co-Investigating Judges may seek the assistance of the Royal Government of Cambodia, if such assistance would be useful to the investigation, and such assistance shall be provided.

Article 24 new
During the investigation, Suspects shall be unconditionally entitled to assistance of counsel of their own choosing, and to have legal assistance assigned to them free of charge if they cannot afford it, as well as the right to interpretation, as necessary, into and from a language they speak and understand.

Article 25
The Co-Investigating Judges shall be appointed from among the currently practising judges or are additionally appointed in accordance with the existing procedures for appointment of judges; all of whom shall have high moral character, a spirit of impartiality and integrity, and experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source.

Article 26
The Cambodian Co-Investigating Judge and the reserve Investigating Judges shall be appointed by the Supreme Council of the Magistracy from among the Cambodian professional judges.

The reserve Investigating Judges shall replace the appointed Investigating Judges in case of their absence. These Investigating Judges may continue to perform their regular duties in their respective courts.

The Supreme Council of the Magistracy shall appoint the foreign Co-Investigating Judge for the period of the investigation, upon nomination by the Secretary-General of the United Nations.

The Secretary-General of the United Nations shall submit a list of at least two candidates for foreign Co-Investigating Judge to the Royal Government of Cambodia, from which the Supreme Council of the Magistracy shall appoint one Investigating Judge and one reserve Investigating Judge.

Article 27 new
All Investigating Judges under this law shall enjoy equal status and conditions of service.

Each Investigating Judge shall be appointed for the period of the investigation.

In the event of the absence of the foreign Co-Investigating Judge, he or she shall be replaced by the reserve foreign Co-Investigating Judge.

Article 28
The Co-Investigating Judges shall be assisted by Cambodian and international staff as needed in their offices.

In choosing staff to serve as assistants, the Co-Investigating Judges shall comply with the spirit of the provisions set forth in Article 13 of this law.

CHAPTER VIII
INDIVIDUAL RESPONSIBILITY

Article 29
Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in article 3 new, 4, 5, 6, 7 and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The fact that any of the acts referred to in Articles 3 new, 4, 5, 6, 7 and 8 of this law were committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility.

CHAPTER IX
OFFICE OF ADMINISTRATION

Article 30
The staff of the judges, the investigating judges and prosecutors of the Extraordinary Chambers shall be supervised by an Office of Administration.

This Office shall have a Cambodian Director, a foreign Deputy Director and such other staff as necessary.

Article 31 new
The Director of the Office of Administration shall be appointed by the Royal Government of Cambodia for a two-year term and shall be eligible for reappointment.

The Director of the Office of Administration shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

The Director of the Office of Administration shall be appointed from among those with significant experience in court administration and fluency in one of the foreign languages used in the Extraordinary Chambers, and shall be a person of high moral character and integrity.

The foreign Deputy Director shall be appointed by the Secretary-General of the United Nations and assigned by the Royal Government of Cambodia, and shall be responsible for the recruitment and administration of all international staff, as required by the foreign components of the Extraordinary Chambers, the Co-Investigating Judges, the Co-Prosecutors' Office, and the Office of Administration. The Deputy Director shall administer the resources provided through the United Nations Trust Fund.

The Office of Administration shall be assisted by Cambodian and international staff as necessary. All Cambodian staff of the Office of Administration shall be appointed by the Royal Government of Cambodia at the request of the Director. Foreign staff shall be appointed by the Deputy Director.

Cambodian staff shall be selected from Cambodian civil servants and, if necessary, other qualified nationals of Cambodia.

Article 32
All staff assigned to the judges, Co-Investigating Judges, Co-Prosecutors, and Office of Administration shall enjoy the same working conditions according to each level of the Extraordinary Chambers.

CHAPTER X
TRIAL PROCEEDINGS OF THE EXTRAORDINARY CHAMBERS

Article 33 new
The Extraordinary Chambers of the trial court shall ensure that trials are fair and expeditious and are conducted in accordance with existing procedures in force, with full respect for the rights of the accused and for the protection of victims and witnesses. If these existing procedure do not deal with a particular matter, or if there is uncertainty regarding their interpretation or application or if there is a question regarding their consistency with international standard, guidance may be sought in procedural rules established at the international level.

The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights.

Suspects who have been indicted and arrested shall be brought to the Trial Chamber according to existing procedures in force. The Royal Government of Cambodia shall guarantee the security of the Suspects who appear before the court, and is responsible for taking measures for the arrest of the Suspects prosecuted under this law. Justice police shall be assisted by other law enforcement elements of the Royal Government of Cambodia, including the armed forces, in order to ensure that accused persons are brought into custody immediately.

Conditions for the arrest and the custody of the accused shall conform to existing law in force.

The Court shall provide for the protection of victims and witnesses. Such protection measures shall include, but not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

Article 34 new
Trials shall be public and open to representatives of foreign States, of the Secretary-General of the United Nations, of the media and of national and international non-government organizations unless in exceptional circumstances the Extraordinary Chambers decide to close the proceedings for good cause in accordance with existing procedures in force where publicity would prejudice the interests of justice.

Article 35 new
The accused shall be presumed innocent as long as the court has not given its definitive judgment.

In determining charges against the accused, the accused shall be equally entitled to the following minimum guarantees, in accordance with Article 14 of the International Covenant on Civil and Political Rights.

a. to be informed promptly and in detail in a language that they understand of the nature and cause of the charge against them;
b. to have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing;
c. to be tried without delay;
d. to be tried in their own presence and to defend themselves in person or with the assistance of counsel of their own choosing, to be informed of this right and to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it ;
e. to examine evidence against them and obtain the presentation and examination of evidence on their behalf under the same conditions as evidence against them;
f. to have the free assistance of an interpreter if the accused cannot understand or does not speak the language used in the court;
g. not to be compelled to testify against themselves or to confess guilt.

Article 36 new
The Extraordinary Chamber of the Supreme Court shall decide appeals made by the accused, the victims, or the Co-Prosecutors against the decision of the Extraordinary Chamber of the trial court. In this case, the Supreme Court Chamber shall make final decisions on both issues of law and fact, and shall not return the case to the Extraordinary Chamber of the trial court.

Article 37 new
The provision of Article 33, 34 and 35 shall apply *mutatis mutandis* in respect of proceedings before the Extraordinary Chambers of the Supreme Court.

CHAPTER XI
PENALTIES

Article 38
All penalties shall be limited to imprisonment.

Article 39
Those who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment.

In addition to imprisonment, the Extraordinary Chamber of the trial court may order the confiscation of personal property, money, and real property acquired unlawfully or by criminal conduct.

The confiscated property shall be returned to the State.

CHAPTER XII
AMNESTY AND PARDONS

Article 40 new
The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers.

CHAPTER XIII
STATUS, RIGHTS, PRIVILEGES AND IMMUNITIES

Article 41
The foreign judges, the foreign Co-Investigating Judge, the foreign Co-Prosecutor and the Deputy Director of the Office of Administration, together with their families forming part of their household, shall enjoy all of the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961

Vienna Convention on Diplomatic Relations. Such officials shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

Article 42 new
1. Cambodian judges, the Co-Investigating Judge, the Co-Prosecutor, the Director of the Office of Administration and personnel shall be accorded immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

2. International personnel shall be accorded in addition:
   a. immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration;
   b. immunity from taxation on salaries, allowances and emoluments paid to them by the United Nations;
   c. immunity from immigration restriction;
   d. the right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Cambodia.

3. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subjected by the Government to any measure that may affect the free and independent exercise of his or her functions under the Law on the Establishment of the Extraordinary Chambers.

In particular, the counsel shall be accorded:
   a. immunity from personal arrest or detention and from seizure of personal baggage relating to his or her functions in the proceedings;
   b. inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;
   c. immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of their function as counsel of a suspect or accused.

4. The archives of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration and in general all

documents and materials made available to, belonging to, or used by them, wherever located in the Kingdom of Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.

CHAPTER XIV
LOCATION OF THE EXTRAORDINARY CHAMBERS

Article 43 new
The Extraordinary Chambers established in the trial court and the Supreme Court Chamber shall be located in Phnom Penh.

CHAPTER XV
EXPENSES

Article 44 new
The expenses and salaries of the Extraordinary Chambers shall be as follows:

1. The expenses and salaries of the Cambodian administrative officials and staff, the Cambodian judges and reserve judges, investigating judges and reserve investigating judges, and prosecutors and reserve prosecutors shall be borne by the Cambodian national budget;
2. The expenses of the foreign administrative officials and staff, the foreign judges, Co-investigating judge and Co-prosecutor sent by the Secretary-General of the United Nations shall be borne by the United Nations;
3. The defence counsel may receive fees for mounting the defence;
4. The Extraordinary Chambers may receive additional assistance for their expenses from other voluntary funds contributed by foreign governments, international institutions, non-governmental organizations, and other persons wishing to assist the proceedings.

CHAPTER XVI
WORKING LANGUAGES

Article 45 new
The official working languages of the Extraordinary Chambers shall be Khmer, English and French.

CHAPTER XVII
ABSENCE OF FOREIGN JUDGES, INVESTIGATING JUDGES OR PROSECUTORS

Article 46 new
In order to ensure timely and smooth implementation of this law, in the event any foreign judges or foreign investigating judges or foreign prosecutors fail or refuse to participate in the Extraordinary Chambers, the Supreme Council of the Magistracy shall appoint other judges or investigating judges or prosecutors to fill any vacancies from the lists of foreign candidates provided for in Article 11, Article 18, and Article 26. In the event those lists are exhausted, and the Secretary-General of the United Nations does not supplement the lists with new candidates, or in the event that the United Nations withdraws its support from the Extraordinary Chambers, any such vacancies shall be filled by the Supreme Council of the Magistracy from candidates recommended by the Governments of Member States of the United Nations or from among other foreign legal personalities.

If, following such procedures, there are still no foreign judges or foreign investigating judges or foreign prosecutors participating in the work of the Extraordinary Chambers and no foreign candidates have been identified to occupy the vacant positions, then the Supreme Council of the Magistracy may choose replacement Cambodian judges, investigating judges or prosecutors.

CHAPTER XVIII
EXISTENCE OF THE COURT

Article 47
The Extraordinary Chambers in the courts of Cambodia shall automatically dissolve following the definitive conclusion of these proceedings.

CHAPTER XIX
AGREEMENT BETWEEN THE UNITED NATIONS AND CAMBODIA

Article 47 bis new
Following its ratification in accordance with the relevant provisions of the law of Kingdom of Cambodia regarding competence to conclude treaties, the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crime Committed during the period of

Democratic Kampuchea, done at Phnom Penh on 6 June 2003, shall apply as law within the Kingdom of Cambodia.

FINAL PROVISION

Article 48
This law shall be proclaimed as urgent.

Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon (with Statute) (Security Council resolution 1757 (2007) of 30 May 2007, annex)

United Nations S/RES/1757 (2007)

Security Council

Distr.: General
30 May 2007

Resolution 1757 (2007)

Adopted by the Security Council at its 5685th meeting, on 30 May 2007

The Security Council,

Recalling all its previous relevant resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005, 1644 (2005) of 15 December 2005, 1664 (2006) of 29 March 2006 and 1748 (2007) of 27 March 2007,

Reaffirming its strongest condemnation of the 14 February 2005 terrorist bombings as well as other attacks in Lebanon since October 2004,

Reiterating its call for the strict respect of the sovereignty, territorial integrity, unity and political independence of Lebanon under the sole and exclusive authority of the Government of Lebanon,

Recalling the letter of the Prime Minister of Lebanon to the Secretary-General of 13 December 2005 (S/2005/783) requesting inter alia the establishment of a tribunal of an international character to try all those who are found responsible for this terrorist crime, and the request by this Council for the Secretary-General to negotiate an agreement with the Government of Lebanon aimed at establishing such a Tribunal based on the highest international standards of criminal justice,

Recalling further the report of the Secretary-General on the establishment of a special tribunal for Lebanon on 15 November 2006 (S/2006/893) reporting on the conclusion of negotiations and consultations that took place between January 2006 and September 2006 at United Nations Headquarters in New York, the Hague, and Beirut between the Legal Counsel of the United Nations and authorized representatives of the Government of Lebanon, and the letter of its President to the Secretary-General of 21 November 2006 (S/2006/911) reporting that the Members of the Security Council welcomed the conclusion of the negotiations and that they were satisfied with the Agreement annexed to the Report,

Recalling that, as set out in its letter of 21 November 2006, should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal,

Recalling also that the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon was signed by the Government of Lebanon and the United Nations respectively on 23 January and 6 February 2007,

Referring to the letter of the Prime Minister of Lebanon to the Secretary-General of the United Nations (S/2007/281), which recalled that the parliamentary majority has expressed its support for the Tribunal, and asked that his request that the Special Tribunal be put into effect be presented to the Council as a matter of urgency,

Mindful of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice,

Commending the Secretary-General for his continuing efforts to proceed, together with the Government of Lebanon, with the final steps for the conclusion of the Agreement as requested in the letter of its President dated 21 November 2006 and referring in this regard to the briefing by the Legal Counsel on 2 May 2007, in which he noted that the establishment of the Tribunal through the Constitutional process is facing serious obstacles, but noting also that all parties concerned reaffirmed their agreement in principle to the establishment of the Tribunal,

Commending also the recent efforts of parties in the region to overcome these obstacles,

Willing to continue to assist Lebanon in the search for the truth and in holding all those involved in the terrorist attack accountable and reaffirming its determination to support Lebanon in its efforts to bring to justice perpetrators, organizers and sponsors of this and other assassinations,

Reaffirming its determination that this terrorist act and its implications constitute a threat to international peace and security,

1. *Decides*, acting under Chapter VII of the Charter of the United Nations, that:

(a) The provisions of the annexed document, including its attachment, on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date;

(b) If the Secretary-General reports that the Headquarters Agreement has not been concluded as envisioned under Article 8 of the annexed document, the location of the seat of the Tribunal shall be determined in consultation with the Government of Lebanon and be subject to the conclusion of a Headquarters Agreement between the United Nations and the State that hosts the Tribunal;

(c) If the Secretary-General reports that contributions from the Government of Lebanon are not sufficient to bear the expenses described in Article 5 (b) of the annexed document, he may accept or use voluntary contributions from States to cover any shortfall;

2. *Notes* that, pursuant to Article 19 (2) of the annexed document, the Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government of Lebanon, taking into account the progress of the work of the International Independent Investigation Commission;

3. *Requests* the Secretary-General, in coordination, when appropriate, with the Government of Lebanon, to undertake the steps and measures necessary to establish the Special Tribunal in a timely manner and to report to the Council within 90 days and thereafter periodically on the implementation of this resolution;

4. *Decides* to remain actively seized of the matter.

Annex

Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon

Whereas the Security Council, in its resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, recalled all its previous resolutions, in particular resolutions 1595 (2005) of 7 April 2005, 1636 (2005) of 31 October 2005 and 1644 (2005) of 15 December 2005,

Whereas the Security Council has requested the Secretary-General of the United Nations (hereinafter "the Secretary-General") "to negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice", taking into account the recommendations of the Secretary-General's report of 21 March 2006 (S/2006/176) and the views that have been expressed by Council members,

Whereas the Secretary-General and the Government of the Lebanese Republic (hereinafter "the Government") have conducted negotiations for the establishment of a Special Tribunal for Lebanon (hereinafter "the Special Tribunal" or "the Tribunal"),

Now therefore the United Nations and the Lebanese Republic (hereinafter referred to jointly as the "Parties") have agreed as follows:

Article 1
Establishment of the Special Tribunal

1. There is hereby established a Special Tribunal for Lebanon to prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

2. The Special Tribunal shall function in accordance with the Statute of the Special Tribunal for Lebanon. The Statute is attached to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Tribunal and appointment of judges

1. The Special Tribunal shall consist of the following organs: the Chambers, the Prosecutor, the Registry and the Defence Office.

2. The Chambers shall be composed of a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber, with a second Trial Chamber to be created if, after the passage of at least six months from the commencement of the functioning of the Special Tribunal, the Secretary-General or the President of the Special Tribunal so requests.

3. The Chambers shall be composed of no fewer than eleven independent judges and no more than fourteen such judges, who shall serve as follows:

(a) A single international judge shall serve as a Pre-Trial Judge;

(b) Three judges shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;

(c) In the event of the creation of a second Trial Chamber, that Chamber shall be likewise composed in the manner contained in subparagraph (b) above;

(d) Five judges shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges; and

(e) Two alternate judges, of whom one shall be a Lebanese judge and one shall be an international judge.

4. The judges of the Tribunal shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

5. (a) Lebanese judges shall be appointed by the Secretary-General to serve in the Trial Chamber or the Appeals Chamber or as an alternate judge from a list of twelve persons presented by the Government upon the proposal of the Lebanese Supreme Council of the Judiciary;

(b) International judges shall be appointed by the Secretary-General to serve as Pre-Trial Judge, a Trial Chamber Judge, an Appeals Chamber Judge or an alternate judge, upon nominations forwarded by States at the invitation of the Secretary-General, as well as by competent persons;

(c) The Government and the Secretary-General shall consult on the appointment of judges;

(d) The Secretary-General shall appoint judges, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

6. At the request of the presiding judge of a Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

7. Judges shall be appointed for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

8. Lebanese judges appointed to serve in the Special Tribunal shall be given full credit for their period of service with the Tribunal on their return to the Lebanese national judiciaries from which they were released and shall be reintegrated at a level at least comparable to that of their former position.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government, shall appoint a Prosecutor for a three-year term. The Prosecutor may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

2. The Secretary-General shall appoint the Prosecutor, upon the recommendation of a selection panel he has established after indicating his intentions to the Security Council. The selection panel shall be composed of two judges, currently sitting on or retired from an international tribunal, and the representative of the Secretary-General.

3. The Government, in consultation with the Secretary-General and the Prosecutor, shall appoint a Lebanese Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

4. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

5. The Prosecutor shall be assisted by such Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Tribunal.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 5
Financing of the Special Tribunal

1. The expenses of the Special Tribunal shall be borne in the following manner:

(a) Fifty-one per cent of the expenses of the Tribunal shall be borne by voluntary contributions from States;

(b) Forty-nine per cent of the expenses of the Tribunal shall be borne by the Government of Lebanon.

2. It is understood that the Secretary-General will commence the process of establishing the Tribunal when he has sufficient contributions in hand to finance the establishment of the Tribunal and twelve months of its operations plus pledges equal to the anticipated expenses of the following 24 months of the Tribunal's operation. Should voluntary contributions be insufficient for the Tribunal to implement its mandate, the Secretary-General and the Security Council shall explore alternate means of financing the Tribunal.

Article 6
Management Committee

The parties shall consult concerning the establishment of a Management Committee.

Article 7
Juridical capacity

The Special Tribunal shall possess the juridical capacity necessary:

(a) To contract;

(b) To acquire and dispose of movable and immovable property;

(c) To institute legal proceedings;

(d) To enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Tribunal.

Article 8
Seat of the Special Tribunal

1. The Special Tribunal shall have its seat outside Lebanon. The location of the seat shall be determined having due regard to considerations of justice and fairness as well as security and administrative efficiency, including the rights of victims and access to witnesses, and subject to the conclusion of a headquarters agreement between the United Nations, the Government and the State that hosts the Tribunal.

2. The Special Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions.

3. An Office of the Special Tribunal for the conduct of investigations shall be established in Lebanon subject to the conclusion of appropriate arrangements with the Government.

Article 9
Inviolability of premises, archives and all other documents

1. The Office of the Special Tribunal in Lebanon shall be inviolable. The competent authorities shall take appropriate action that may be necessary to ensure

that the Tribunal shall not be dispossessed of all or any part of the premises of the Tribunal without its express consent.

2. The property, funds and assets of the Office of the Special Tribunal in Lebanon, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Office of the Special Tribunal in Lebanon, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 10
Funds, assets and other property

The Office of the Special Tribunal, its funds, assets and other property in Lebanon, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Tribunal has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

Article 11
Privileges and immunities of the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office

1. The judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office, while in Lebanon, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the Vienna Convention on Diplomatic Relations of 1961.

2. Privileges and immunities are accorded to the judges, the Prosecutor, the Deputy Prosecutor, the Registrar and the Head of the Defence Office in the interest of the Special Tribunal and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purposes for which it is accorded shall lie with the Secretary-General, in consultation with the President of the Tribunal.

Article 12
Privileges and immunities of international and Lebanese personnel

1. Lebanese and international personnel of the Office of the Special Tribunal, while in Lebanon, shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Office of the Special Tribunal;

(b) Exemption from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Lebanon.

3. The privileges and immunities are granted to the officials of the Office of the Special Tribunal in the interest of the Tribunal and not for their personal benefit. The right and the duty to waive the immunity in any case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Tribunal.

Article 13
Defence counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Tribunal shall not be subjected, while in Lebanon, to any measure that may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused;

(d) Immunity from any immigration restrictions during his or her stay as well as during his or her journey to the Tribunal and back.

Article 14
Security, safety and protection of persons referred to in this Agreement

The Government shall take effective and adequate measures to ensure the appropriate security, safety and protection of personnel of the Office of the Special Tribunal and other persons referred to in this Agreement, while in Lebanon. It shall take all appropriate steps, within its capabilities, to protect the equipment and premises of the Office of the Special Tribunal from attack or any action that prevents the Tribunal from discharging its mandate.

Article 15
Cooperation with the Special Tribunal

1. The Government shall cooperate with all organs of the Special Tribunal, in particular with the Prosecutor and defence counsel, at all stages of the proceedings. It shall facilitate access of the Prosecutor and defence counsel to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Tribunal or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Tribunal.

Article 16
Amnesty

The Government undertakes not to grant amnesty to any person for any crime falling within the jurisdiction of the Special Tribunal. An amnesty already granted in respect of any such persons and crimes shall not be a bar to prosecution.

Article 17
Practical arrangements

With a view to achieving efficiency and cost-effectiveness in the operation of the Special Tribunal:

(a) Appropriate arrangements shall be made to ensure that there is a coordinated transition from the activities of the International Independent Investigation Commission, established by the Security Council in its resolution 1595 (2005), to the activities of the Office of the Prosecutor;

(b) Judges of the Trial Chamber and the Appeals Chamber shall take office on a date to be determined by the Secretary-General in consultation with the President of the Special Tribunal. Pending such a determination, judges of both Chambers shall be convened on an ad hoc basis to deal with organizational matters and serving, when required, to perform their duties.

Article 18
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation or by any other mutually agreed upon mode of settlement.

Article 19
Entry into force and commencement of the functioning of the Special Tribunal

1. This Agreement shall enter into force on the day after the Government has notified the United Nations in writing that the legal requirements for entry into force have been complied with.

2. The Special Tribunal shall commence functioning on a date to be determined by the Secretary-General in consultation with the Government, taking into account the progress of the work of the International Independent Investigation Commission.

Article 20
Amendment

This Agreement may be amended by written agreement between the Parties.

Article 21
Duration of the Agreement

1. This Agreement shall remain in force for a period of three years from the date of the commencement of the functioning of the Special Tribunal.

2. Three years after the commencement of the functioning of the Special Tribunal the Parties shall, in consultation with the Security Council, review the progress of the work of the Special Tribunal. If at the end of this period of three years the activities of the Tribunal have not been completed, the Agreement shall be extended to allow the Tribunal to complete its work, for a further period(s) to be determined by the Secretary-General in consultation with the Government and the Security Council.

3. The provisions relating to the inviolability of the funds, assets, archives and documents of the Office of the Special Tribunal in Lebanon, the privileges and immunities of those referred to in this Agreement, as well as provisions relating to defence counsel and the protection of victims and witnesses, shall survive termination of this Agreement.

In witness whereof, the following duly authorized representatives of the United Nations and of the Lebanese Republic have signed this Agreement.

Done at _____ on _____ 2006, in three originals in the Arabic, French and English languages, all texts being equally authentic.

For the United Nations:

_____

For the Lebanese Republic:

_____

Attachment
Statute of the Special Tribunal for Lebanon

Having been established by an Agreement between the United Nations and the Lebanese Republic (hereinafter "the Agreement") pursuant to Security Council resolution 1664 (2006) of 29 March 2006, which responded to the request of the Government of Lebanon to establish a tribunal of an international character to try all those who are found responsible for the terrorist crime which killed the former Lebanese Prime Minister Rafiq Hariri and others, the Special Tribunal for Lebanon (hereinafter "the Special Tribunal") shall function in accordance with the provisions of this Statute.

Section I
Jurisdiction and applicable law

Article 1
Jurisdiction of the Special Tribunal

The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

Article 2
Applicable criminal law

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and

(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".

Article 3
Individual criminal responsibility

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:

(a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or

(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

3. The fact that the person acted pursuant to an order of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Tribunal determines that justice so requires.

Article 4
Concurrent jurisdiction

1. The Special Tribunal and the national courts of Lebanon shall have concurrent jurisdiction. Within its jurisdiction, the Tribunal shall have primacy over the national courts of Lebanon.

2. Upon the assumption of office of the Prosecutor, as determined by the Secretary-General, and no later than two months thereafter, the Special Tribunal shall request the national judicial authority seized with the case of the attack against Prime Minister Rafiq Hariri and others to defer to its competence. The Lebanese judicial authority shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any. Persons detained in connection with the investigation shall be transferred to the custody of the Tribunal.

3. (a) At the request of the Special Tribunal, the national judicial authority seized with any of the other crimes committed between 1 October 2004 and 12 December 2005, or a later date decided pursuant to article 1, shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, for review by the Prosecutor;

(b) At the further request of the Tribunal, the national authority in question shall defer to the competence of the Tribunal. It shall refer to the Tribunal the results of the investigation and a copy of the court's records, if any, and persons detained in connection with any such case shall be transferred to the custody of the Tribunal;

(c) The national judicial authorities shall regularly inform the Tribunal of the progress of their investigation. At any stage of the proceedings, the Tribunal may formally request a national judicial authority to defer to its competence.

Article 5
Non bis in idem

1. No person shall be tried before a national court of Lebanon for acts for which he or she has already been tried by the Special Tribunal.

2. A person who has been tried by a national court may be subsequently tried by the Special Tribunal if the national court proceedings were not impartial or independent, were designed to shield the accused from criminal responsibility for crimes within the jurisdiction of the Tribunal or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under this Statute, the Special Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 6
Amnesty

An amnesty granted to any person for any crime falling within the jurisdiction of the Special Tribunal shall not be a bar to prosecution.

Section II
Organization of the Special Tribunal

Article 7
Organs of the Special Tribunal

The Special Tribunal shall consist of the following organs:

(a) The Chambers, comprising a Pre-Trial Judge, a Trial Chamber and an Appeals Chamber;

(b) The Prosecutor;

(c) The Registry; and

(d) The Defence Office.

Article 8
Composition of the Chambers

1. The Chambers shall be composed as follows:

(a) One international Pre-Trial Judge;

(b) Three judges who shall serve in the Trial Chamber, of whom one shall be a Lebanese judge and two shall be international judges;

(c) Five judges who shall serve in the Appeals Chamber, of whom two shall be Lebanese judges and three shall be international judges;

(d) Two alternate judges, one of whom shall be a Lebanese judge and one shall be an international judge.

2. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Tribunal.

3. At the request of the presiding judge of the Trial Chamber, the President of the Special Tribunal may, in the interest of justice, assign the alternate judges to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 9
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity, with extensive judicial experience. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the established competence of the judges in criminal law and procedure and international law.

3. The judges shall be appointed by the Secretary-General, as set forth in article 2 of the Agreement, for a three-year period and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

Article 10
Powers of the President of the Special Tribunal

1. The President of the Special Tribunal, in addition to his or her judicial functions, shall represent the Tribunal and be responsible for its effective functioning and the good administration of justice.

2. The President of the Special Tribunal shall submit an annual report on the operation and activities of the Tribunal to the Secretary-General and to the Government of Lebanon.

Article 11
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for the crimes falling within the jurisdiction of the Special Tribunal. In the interest of proper administration of justice, he or she may decide to charge jointly persons accused of the same or different crimes committed in the course of the same transaction.

2. The Prosecutor shall act independently as a separate organ of the Special Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Prosecutor shall be appointed, as set forth in article 3 of the Agreement, by the Secretary-General for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.

4. The Prosecutor shall be assisted by a Lebanese Deputy Prosecutor and by such other Lebanese and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

5. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Lebanese authorities concerned.

Article 12
The Registry

1. Under the authority of the President of the Special Tribunal, the Registry shall be responsible for the administration and servicing of the Tribunal.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General and shall be a staff member of the United Nations. He or she shall serve for a three-year term and may be eligible for reappointment for a further period to be determined by the Secretary-General in consultation with the Government.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, and such other appropriate assistance for witnesses who appear before the Special Tribunal and others who are at risk on account of testimony given by such witnesses.

Article 13
The Defence Office

1. The Secretary-General, in consultation with the President of the Special Tribunal, shall appoint an independent Head of the Defence Office, who shall be responsible for the appointment of the Office staff and the drawing up of a list of defence counsel.

2. The Defence Office, which may also include one or more public defenders, shall protect the rights of the defence, provide support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of evidence and advice, and appearing before the Pre-Trial Judge or a Chamber in respect of specific issues.

Article 14
Official and working languages

The official languages of the Special Tribunal shall be Arabic, French and English. In any given case proceedings, the Pre-Trial Judge or a Chamber may decide that one or two of the languages may be used as working languages as appropriate.

Section III
Rights of defendants and victims

Article 15
Rights of suspects during investigation

A suspect who is to be questioned by the Prosecutor shall not be compelled to incriminate himself or herself or to confess guilt. He or she shall have the following rights of which he or she shall be informed by the Prosecutor prior to questioning, in a language he or she speaks and understands:

(a) The right to be informed that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Special Tribunal;

(b) The right to remain silent, without such silence being considered in the determination of guilt or innocence, and to be cautioned that any statement he or she makes shall be recorded and may be used in evidence;

(c) The right to have legal assistance of his or her own choosing, including the right to have legal assistance provided by the Defence Office where the interests of justice so require and where the suspect does not have sufficient means to pay for it;

(d) The right to have the free assistance of an interpreter if he or she cannot understand or speak the language used for questioning;

(e) The right to be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 16
Rights of the accused

1. All accused shall be equal before the Special Tribunal.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Tribunal for the protection of victims and witnesses.

3. (a) The accused shall be presumed innocent until proved guilty according to the provisions of this Statute;

(b) The onus is on the Prosecutor to prove the guilt of the accused;

(c) In order to convict the accused, the relevant Chamber must be convinced of the guilt of the accused beyond reasonable doubt.

4. In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate without hindrance with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) Subject to the provisions of article 22, to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To examine all evidence to be used against him or her during the trial in accordance with the Rules of Procedure and Evidence of the Special Tribunal;

(g) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Tribunal;

(h) Not to be compelled to testify against himself or herself or to confess guilt.

5. The accused may make statements in court at any stage of the proceedings, provided such statements are relevant to the case at issue. The Chambers shall decide on the probative value, if any, of such statements.

Article 17
Rights of victims

Where the personal interests of the victims are affected, the Special Tribunal shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Pre-Trial Judge or the Chamber and in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Pre-Trial Judge or the Chamber considers it appropriate.

Section IV
Conduct of proceedings

Article 18
Pre-Trial proceedings

1. The Pre-Trial Judge shall review the indictment. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If he or she is not so satisfied, the indictment shall be dismissed.

2. The Pre-Trial Judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest or transfer of persons, and any other orders as may be required for the conduct of the investigation and for the preparation of a fair and expeditious trial.

Article 19
Evidence collected prior to the establishment of the Special Tribunal

Evidence collected with regard to cases subject to the consideration of the Special Tribunal, prior to the establishment of the Tribunal, by the national authorities of Lebanon or by the International Independent Investigation Commission in accordance with its mandate as set out in Security Council resolution 1595 (2005) and subsequent resolutions, shall be received by the Tribunal. Its admissibility shall be decided by the Chambers pursuant to international standards on collection of evidence. The weight to be given to any such evidence shall be determined by the Chambers.

Article 20
Commencement and conduct of trial proceedings

1. The Trial Chamber shall read the indictment to the accused, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment and instruct the accused to enter a plea.

2. Unless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence.

3. Upon request or *proprio motu*, the Trial Chamber may at any stage of the trial decide to call additional witnesses and/or order the production of additional evidence.

4. The hearings shall be public unless the Trial Chamber decides to hold the proceedings in camera in accordance with the Rules of Procedure and Evidence.

Article 21
Powers of the Chambers

1. The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.

2. A Chamber may admit any relevant evidence that it deems to have probative value and exclude such evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

3. A Chamber may receive the evidence of a witness orally or, where the interests of justice allow, in written form.

4. In cases not otherwise provided for in the Rules of Procedure and Evidence, a Chamber shall apply rules of evidence that will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

Article 22
Trials in absentia

1. The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she:

(a) Has expressly and in writing waived his or her right to be present;

(b) Has not been handed over to the Tribunal by the State authorities concerned;

(c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.

2. When hearings are conducted in the absence of the accused, the Special Tribunal shall ensure that:

(a) The accused has been notified, or served with the indictment, or notice has otherwise been given of the indictment through publication in the media or communication to the State of residence or nationality;

(b) The accused has designated a defence counsel of his or her own choosing, to be remunerated either by the accused or, if the accused is proved to be indigent, by the Tribunal;

(c) Whenever the accused refuses or fails to appoint a defence counsel, such counsel has been assigned by the Defence Office of the Tribunal with a view to ensuring full representation of the interests and rights of the accused.

3. In case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.

Article 23
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which any separate or dissenting opinions shall be appended.

Article 24
Penalties

1. The Trial Chamber shall impose upon a convicted person imprisonment for life or for a specified number of years. In determining the terms of imprisonment for the crimes provided for in this Statute, the Trial Chamber shall, as appropriate, have recourse to international practice regarding prison sentences and to the practice of the national courts of Lebanon.

2. In imposing sentence, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

Article 25
Compensation to victims

1. The Special Tribunal may identify victims who have suffered harm as a result of the commission of crimes by an accused convicted by the Tribunal.

2. The Registrar shall transmit to the competent authorities of the State concerned the judgement finding the accused guilty of a crime that has caused harm to a victim.

3. Based on the decision of the Special Tribunal and pursuant to the relevant national legislation, a victim or persons claiming through the victim, whether or not such victim had been identified as such by the Tribunal under paragraph 1 of this article, may bring an action in a national court or other competent body to obtain compensation.

4. For the purposes of a claim made under paragraph 3 of this article, the judgement of the Special Tribunal shall be final and binding as to the criminal responsibility of the convicted person.

Article 26
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

(a) An error on a question of law invalidating the decision;

(b) An error of fact that has occasioned a miscarriage of justice.

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

Article 27
Review proceedings

1. Where a new fact has been discovered that was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and that could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 28
Rules of Procedure and Evidence

1. The judges of the Special Tribunal shall, as soon as practicable after taking office, adopt Rules of Procedure and Evidence for the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate.

2. In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial.

Article 29
Enforcement of sentences

1. Imprisonment shall be served in a State designated by the President of the Special Tribunal from a list of States that have indicated their willingness to accept persons convicted by the Tribunal.

2. Conditions of imprisonment shall be governed by the law of the State of enforcement subject to the supervision of the Special Tribunal. The State of enforcement shall be bound by the duration of the sentence, subject to article 30 of this Statute.

Article 30
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Tribunal accordingly. There shall only be pardon or commutation of sentence if the President of the Tribunal, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, United Nations Transitional Administration in East Timor (UNTAET/REG/2000/15)

UNITED NATIONS
United Nations Transitional Administration
in East Timor

UNTAET

NATIONS UNIES
Administration Transitoire des Nations Unies
au Timor Oriental

UNTAET/REG/2000/15
6 June 2000

REGULATION NO. 2000/15

ON THE ESTABLISHMENT OF PANELS WITH EXCLUSIVE JURISDICTION OVER SERIOUS CRIMINAL OFFENCES

The Special Representative of the Secretary-General (hereinafter: Transitional Administrator),

Pursuant to the authority given to him under United Nations Security Council resolution 1272 (1999) of 25 October 1999,

Taking into account United Nations Transitional Administration in East Timor (UNTAET) Regulation No.1999/1 of 27 November 1999 on the Authority of the Transitional Administration in East Timor (hereinafter: UNTAET Regulation No. 1999/1),

Taking into account UNTAET Regulation No. 2000/11 of 6 March 2000 on the Organisation of Courts in East Timor (hereinafter: UNTAET Regulation No. 2000/11) as amended by UNTAET Regulation No. 2000/14 of 10 May 2000 (hereinafter: UNTAET Regulation No. 2000/14),

Recalling the recommendations of the International Commission of Inquiry of East Timor in their report to the Secretary-General of January 2000,

After consultation in the National Consultative Council,

For the purpose of establishing panels with exclusive jurisdiction over serious criminal offences as referred to under Section 10.1 of UNTAET Regulation No. 2000/11,

Promulgates the following:

I. General

Section 1
Panels with Jurisdiction over Serious Criminal Offences

1.1 Pursuant to Section 10.3 of UNTAET Regulation No. 2000/11, there shall be established panels of judges (hereinafter: "panels") within the District Court in Dili with exclusive jurisdiction to deal with serious criminal offences.

1.2 Pursuant to Section 15.5 of UNTAET Regulation No. 2000/11 there shall be established panels within the Court of Appeal in Dili to hear and decide an appeal on a matter under Section 10 of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation.

1.3 The panels established pursuant to Sections 10.3 and 15.5 of UNTAET Regulation No. 2000/11 and as specified under Section 1 of the present regulation, shall exercise jurisdiction in accordance with Section 10 of UNTAET Regulation No. 2000/11 and with the provisions of the present regulation with respect to the following serious criminal offences:

(a) Genocide;
(b) War Crimes;
(c) Crimes against Humanity;
(d) Murder;
(e) Sexual Offences; and
(f) Torture.

1.4 At any stage of the proceedings, in relation to cases of serious criminal offences listed under Section 10 (a) to (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 9 of the present regulation, a panel may have deferred to itself a case which is pending before another panel or court in East Timor.

Section 2
Jurisdiction

2.1 With regard to the serious criminal offences listed under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11, as specified in Sections 4 to 7 of the present regulation, the panels shall have universal jurisdiction.

2.2 For the purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether:

(a) the serious criminal offence at issue was committed within the territory of East Timor;
(b) the serious criminal offence was committed by an East Timorese citizen; or
(c) the victim of the serious criminal offence was an East Timorese citizen.

2.3 With regard to the serious criminal offences listed under Section 10.1(d) to (e) of UNTAET Regulation No. 2000/11 as specified in Sections 8 to 9 of the present regulation, the panels established within the District Court in Dili shall have exclusive jurisdiction only insofar as the offence was committed in the period between 1 January 1999 and 25 October 1999.

2.4 The panels shall have jurisdiction in respect of crimes committed in East Timor prior to 25 October 1999 only insofar as the law on which the serious criminal offence is based is consistent with Section 3.1 of UNTAET Regulation No. 1999/1 or any other UNTAET Regulation.

2.5 In accordance with Section 7.3 of UNTAET Regulation No. 2000/11, the panels established by the present regulation shall have jurisdiction (*ratione loci*) throughout the entire territory of East Timor.

Section 3
Applicable Law

3.1 In exercising their jurisdiction, the panels shall apply:

(a) the law of East Timor as promulgated by Sections 2 and 3 of UNTAET Regulation No. 1999/1 and any subsequent UNTAET regulations and directives; and

(b) where appropriate, applicable treaties and recognised principles and norms of international law, including the established principles of the international law of armed conflict.

3.2 In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

II. Serious Criminal Offences

Section 4
Genocide

For the purposes of the present regulation, "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.

Section 5
Crimes Against Humanity

5.1 For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in Section 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

5.2 For the purposes of Section 5.1 of the present regulation:

(a) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(b) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(c) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(d) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(e) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(f) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(g) "The crime of apartheid" means inhumane acts of a character similar to those referred to in Section 5.1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(h) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

5.3 For the purpose of the present regulation, the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Section 6
War crimes

6.1 For the purposes of the present regulation, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Section 5.2 (e) of the present regulation, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Section 6.1 (c) of the present regulation applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in Section 5.2 (e) of the present regulation, enforced sterilization, and any other form of sexual violence also constituting a serious violation of Article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest,

and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Section 6.1 (e) of the present regulation applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

6.2 Nothing in Section 6.1 (c) and (e) of the present regulation shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Section 7
Torture

7.1 For the purposes of the present regulation, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him/her or a third person information or a confession, punishing him/her for an act he/she or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing him/her or a third person, or for any reason based on discrimination of any kind. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

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

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

Section 8
Murder

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 9
Sexual Offences

For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply.

Section 10
Penalties

10.1 A panel may impose one of the following penalties on a person convicted of a crime specified under Sections 4 to 7 of the present regulation:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in Sections 4 to 7 of the present regulation, the panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals; for the crimes referred to in Sections 8 and 9 of the present regulation, the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor, shall apply.

(b) A fine up to a maximum of US$ 500,000.

(c) A forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties.

10.2 In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

10.3 In imposing a sentence of imprisonment, the panel shall deduct the time, if any, previously spent in detention due to an order of the panel or any other court in East Timor (for the same criminal conduct). The panel may deduct any time otherwise spent in detention in connection with the conduct (underlying the crime).

III. General Principles of Criminal Law

Section 11
Ne bis in idem

11.1 No person shall be tried before a panel established by the present regulation with respect to conduct (which formed the basis of crimes) for which the person has been convicted or acquitted by a panel.

11.2 No person shall be tried by another court (in East Timor) for a crime referred to in Sections 4 to 9 of the present regulation for which that person has already been convicted or acquitted by a panel.

11.3 No person who has been tried by another court for conduct also proscribed under Sections 4 to 9 of the present regulation shall be tried by a panel with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the panel; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Section 12
Nullum crimen sine lege

12.1 A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.

12.2 The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

12.3 The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.

Section 13
Nulla poena sine lege

A person convicted by a panel may be punished only in accordance with the present regulation.

Section 14
Individual criminal responsibility

14.1 The panels shall have jurisdiction over natural persons pursuant to the present regulation.

14.2 A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation.

14.3 In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

(a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the panels; or

(ii) be made in the knowledge of the intention of the group to commit the crime;

(e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Section 15
Irrelevance of official capacity

15.1 The present regulation 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 the present regulation, nor shall it, in and of itself, constitute a ground for reduction of sentence.

15.2 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 panels from exercising its jurisdiction over such a person.

Section 16
Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation, the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Section 17
Statute of limitations

17.1 The serious criminal offences under Section 10.1 (a), (b), (c) and (f) of UNTAET Regulation No. 2000/11 and under Sections 4 to 7 of the present regulation shall not be subject to any statute of limitations.

17.2 The serious criminal offences under Section 10.1 (d) to (e) of UNTAET Regulation No. 2000/11 and under Sections 8 to 9 of the present regulation shall be subject to applicable law.

Section 18
Mental element

18.1 A person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels only if the material elements are committed with intent and knowledge.

18.2 For the purposes of the present Section, a person has "intent" where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

18.3 For the purposes of the present Section, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Section 19
Grounds for excluding criminal responsibility

19.1 A person shall not be criminally responsible if, at the time of that person's conduct:

(a) the person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) the person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the panels;

(c) the person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) the conduct which is alleged to constitute a crime within the jurisdiction of the panels has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) made by other persons; or

(ii) constituted by other circumstances beyond that person's control.

19.2 The panel shall determine the applicability of the grounds for excluding criminal responsibility provided for in the present regulation to the case before it.

19.3 At trial, the panel may consider a ground for excluding criminal responsibility other than those referred to in Section 19.1 of the present regulation where such a ground is derived from applicable law. The procedures relating to the consideration of such a ground shall be provided for in an UNTAET directive.

Section 20
Mistake of fact or mistake of law

20.1 A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

20.2 A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the panels shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in Section 21 of the present regulation.

Section 21
Superior orders and prescription of law

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires.

IV. Composition of the Panels and Procedure

Section 22
Composition of the Panels

22.1 In accordance with Sections 9 and 10.3 of UNTAET Regulation No. 2000/11 the panels in the District Court of Dili shall be composed of two international judges and one East Timorese judge.

22.2 In accordance with Section 15 of UNTAET Regulation No. 2000/11 the panels in the Court of Appeal in Dili shall be composed of two international judges and one East Timorese judge. In cases of special importance or gravity a panel of five judges composed of three international and two East Timorese judges may be established.

Section 23
Qualifications of Judges

23.1 The judges of the panels established within the District Court in Dili and the Court of Appeal in Dili shall be selected and appointed in accordance with UNTAET Regulation No. 1999/3, Section 10.3 of UNTAET Regulation No. 2000/11 and Sections 22 and 23 of the present regulation.

23.2 The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to judicial offices. In the overall composition of the panels due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

V. Other Matters

Section 24
Witness Protection

24.1 The panels shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the panels shall have regard to all relevant factors, including age, gender, health and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.

24.2 Procedures regarding the protection of witnesses shall be elaborated in an UNTAET directive.

Section 25
Trust Fund

25.1 A Trust Fund may be established by decision of the Transitional Administrator in consultation with the National Consultative Council for the benefit of victims of crimes within the jurisdiction of the panels, and of the families of such victims.

25.2 The panels may order money and other property collected through fines, forfeiture, foreign donors or other means to be transferred to the Trust Fund.

25.3 The Trust Fund shall be managed according to criteria to be determined by an UNTAET directive.

Section 26
Entry into force

The present regulation shall enter into force on 6 June 2000.

Sergio Vieira de Mello
Transitional Administrator

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo *v.* Belgium), Judgment, I.C.J. Reports 2002

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 question 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 Gillès 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.

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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

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, Judgment, 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.

* *

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 co-extensive 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".

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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. Yerodia'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.

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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 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).

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 Democratic 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.

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo v. Belgium),
Judgment, Separate Opinion of President Guillaume,
I.C.J. Reports 2002

SEPARATE OPINION OF PRESIDENT GUILLAUME

[English Original Text]

Criminal jurisdiction of national courts — Place of commission of the offence — Other criteria of connection — Universal jurisdiction — Absence of.

1. I fully subscribe to the Judgment rendered by the Court. I believe it useful however to set out my position on one question which the Judgment has not addressed: whether the Belgian judge had jurisdiction to issue an international arrest warrant against Mr. Yerodia Ndombasi on 11 April 2000.

This question was raised in the Democratic Republic of the Congo's Application instituting proceedings. The Congo maintained that the arrest warrant violated not only Mr. Yerodia's immunity as Minister for Foreign Affairs but also "the principle that a State may not exercise its authority on the territory of another State". It accordingly concluded that the universal jurisdiction which the Belgian State had conferred upon itself pursuant to Article 7 of the Law of 16 June 1993, as amended on 10 February 1999, was in breach of international law and that the same was therefore true of the disputed arrest warrant.

The Congo did not elaborate on this line of argument during the oral proceedings and did not include it in its final submissions. Thus, the Court could not rule on this point in the operative part of its Judgment. It could, however, have addressed certain aspects of the question of universal jurisdiction in the reasoning for its decision (see Judgment, para. 43).

That would have been a logical approach; a court's jurisdiction is a question which it must decide before considering the immunity of those before it. In other words, there can only be immunity from jurisdiction where there is jurisdiction. Moreover, this is an important and controversial issue, clarification of which would have been in the interest of all States, including Belgium in particular. I believe it worthwhile to provide such clarification here.

2. The Belgian Law of 16 June 1993, as amended by the Law of 10 February 1999, aims at punishing serious violations of international humanitarian law. It covers certain violations of the Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 additional to those Conventions. It also extends to crimes against humanity, which it defines in the terms used in the Rome Convention of 17 July 1998. Article 7 of the Law adds that "[t]he Belgian courts shall have jurisdiction in respect of the offences provided for in the present Law, wheresoever they may have been committed".

3. The disputed arrest warrant accuses Mr. Yerodia of grave breaches of the Geneva Conventions and of crimes against humanity. It states that under Article 7 of the Law of 16 June 1993, as amended, perpetrators of those offences "fall under the jurisdiction of the Belgian courts, regardless of their nationality or that of the victims". It adds that "the Belgian courts have jurisdiction even if the accused (Belgian or foreign) is not found in Belgium". It states that "[i]n the matter of humanitarian law, the lawmaker's intention was thus to derogate from the principle of the territorial character of criminal law, in keeping with the provisions of the four Geneva Conventions and of Protocol I". It notes that

> "the Convention of 10 December 1984 against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [is] to be viewed in the same way, recognizing the legitimacy of extra-territorial jurisdiction in the area and enshrining the principle of *aut dedere aut judicare*".

It concludes on these bases that the Belgian courts have jurisdiction.

4. In order to assess the validity of this reasoning, the fundamental principles of international law governing States' exercise of their criminal jurisdiction should first be reviewed.

The primary aim of the criminal law is to enable punishment in each country of offences committed in the national territory. That territory is where evidence of the offence can most often be gathered. That is where the offence generally produces its effects. Finally, that is where the punishment imposed can most naturally serve as an example. Thus, the Permanent Court of International Justice observed as far back as 1927 that "in all systems of law the principle of the territorial character of criminal law is fundamental"[1].

The question has, however, always remained open whether States other than the territorial State have concurrent jurisdiction to prosecute offenders. A wide debate on this subject began as early as the foundation in Europe of the major modern States. Some writers, like Covarruvias and Grotius, pointed out that the presence on the territory of a State of a foreign criminal peacefully enjoying the fruits of his crimes was intolerable. They therefore maintained that it should be possible to prosecute perpetrators of certain particularly serious crimes not only in the State on whose territory the crime was committed but also in the country where they sought refuge. In their view, that country was under an obligation to arrest, followed by extradition or prosecution, in accordance with the maxim *aut dedere aut judicare*[2].

Beginning in the eighteenth century however, this school of thought

[1] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 20.

[2] Covarruvias, *Practicarum quaestionum*, Chap. II, No. 7; Grotius, *De jure belli ac pacis*, Book II, Chap. XXI, para. 4; see also Book I, Chap. V.

favouring universal punishment was challenged by another body of opinion, one opposed to such punishment and exemplified notably by Montesquieu, Voltaire and Jean-Jacques Rousseau[3]. Their views found expression in terms of criminal law in the works of Beccaria, who stated in 1764 that "judges are not the avengers of humankind in general . . . A crime is punishable only in the country where it was committed."[4]

Enlightenment philosophy inspired the lawmakers of the Revolution and nineteenth-century law. Some went so far as to push the underlying logic to its conclusion, and in 1831 Martens could assert that "the lawmaker's power [extends] over all persons and property present in the State" and that "the law does not extend over other States and their subjects"[5]. A century later, Max Huber echoed that assertion when he stated in 1928, in the Award in the *Island of Palmas* case, that a State has "exclusive competence in regard to its own territory"[6].

In practice, the principle of territorial sovereignty did not permit of any exception in respect of coercive action, but that was not the case in regard to legislative and judicial jurisdiction. In particular, classic international law does not exclude a State's power in some cases to exercise its judicial jurisdiction over offences committed abroad. But as the Permanent Court stated, once again in the *"Lotus"* case, the exercise of that jurisdiction is not without its limits[7]. Under the law as classically formulated, a State normally has jurisdiction over an offence committed abroad only if the offender, or at the very least the victim, has the nationality of that State or if the crime threatens its internal or external security. Ordinarily, States are without jurisdiction over crimes committed abroad as between foreigners.

5. Traditionally, customary international law did, however, recognize one case of universal jurisdiction, that of piracy. In more recent times, Article 19 of the Geneva Convention on the High Seas of 29 April 1958 and Article 105 of the Montego Bay Convention of 10 December 1982 have provided:

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft . . . and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed."

[3] Montesquieu, *L'esprit des lois*, Book 26, Chaps. 16 and 21; Voltaire, *Dictionnaire philosophique*, heading "Crimes et délits de temps et de lieu"; Rousseau, *Du contrat social*, Book II, Chap. 12, and Book III, Chap. 18.

[4] Beccaria, *Traité des délits et des peines*, para. 21.

[5] G. F. de Martens, *Précis du droit des gens modernes de l'Europe fondé sur les traités et l'usage*, 1831, Vol. I, paras. 85 and 86 (see also para. 100)

[6] United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. II, Award of 4 April 1928, p. 838.

[7] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 19.

Thus, under these conventions, universal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory. However, even on the high seas, classic international law is highly restrictive, for it recognizes universal jurisdiction only in cases of piracy and not of other comparable crimes which might also be committed outside the jurisdiction of coastal States, such as trafficking in slaves[8] or in narcotic drugs or psychotropic substances[9].

6. The drawbacks of this approach became clear at the beginning of the twentieth century in respect of currency counterfeiting, and the Convention of 20 April 1929, prepared within the League of Nations, marked a certain development in this regard. That Convention enabled States to extend their criminal legislation to counterfeiting crimes involving foreign currency. It added that "[f]oreigners who have committed abroad" any offence referred to in the Convention "and who are in the territory of a country whose internal legislation recognises as a general rule the principle of the prosecution of offences committed abroad, should be punishable in the same way as if the offence had been committed in the territory of that country". But it made that obligation subject to various conditions[10].

A similar approach was taken by the Single Convention on Narcotic Drugs of 30 March 1961[11] and by the United Nations Convention on Psychotropic Substances of 21 February 1971[12], both of which make certain provisions subject to "the constitutional limitations of a Party, its legal system and domestic law". There is no provision governing the jurisdiction of national courts in any of these conventions, or for that matter in the Geneva Conventions of 1949.

7. A further step was taken in this direction beginning in 1970 in connection with the fight against international terrorism. To that end, States established a novel mechanism: compulsory, albeit subsidiary, universal jurisdiction.

This fundamental innovation was effected by the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970[13]. The Convention places an obligation on the State in whose territory the perpetrator of the crime takes refuge to extradite or

[8] See the Geneva Slavery Convention of 25 September 1926 and the United Nations Supplementary Convention of 7 September 1956 (French texts in de Martens, *Nouveau recueil général des traités*, 3rd Series, Vol. XIX, p. 303, and Colliard and Manin, *Droit international et histoire diplomatique*, Vol. 1, p. 220).

[9] Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed at Vienna on 20 December 1988, deals with illicit traffic on the seas. It reserves the jurisdiction of the flag State (French text in *Revue générale de droit international public*, 1989/3, p. 720).

[10] League of Nations, *Treaty Series (LNTS)*, Vol. 112, p. 371.

[11] United Nations, *Treaty Series (UNTS)*, Vol. 520, p. 151.

[12] *UNTS*, Vol. 1019, p. 175.

[13] *UNTS*, Vol. 860, p. 105.

prosecute him. But this would have been insufficient if the Convention had not at the same time placed the States parties under an obligation to establish their jurisdiction for that purpose. Thus, Article 4, paragraph 2, of the Convention provides:

> "Each Contracting State shall . . . take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to [the Convention]."

This provision marked a turning point, of which the Hague Conference was moreover conscious[14]. From then on, the obligation to prosecute was no longer conditional on the existence of jurisdiction, but rather jurisdiction itself had to be established in order to make prosecution possible.

8. The system as thus adopted was repeated with some minor variations in a large number of conventions: the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; the New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 14 December 1973; the New York Convention against the Taking of Hostages of 17 December 1979; the Vienna Convention on the Physical Protection of Nuclear Materials of 3 March 1980; the New York Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; the Montreal Protocol of 24 February 1988 concerning acts of violence at airports; the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 10 March 1988; the Protocol of the same date concerning the safety of platforms located on the continental shelf; the Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988; the New York Convention for the Suppression of Terrorist Bombings of 15 December 1997; and finally the New York Convention for the Suppression of the Financing of Terrorism of 9 December 1999.

9. Thus, a system corresponding to the doctrines espoused long ago by Grotius was set up by treaty. Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. It must have first conferred jurisdiction on its courts to try him if he is not extradited. Thus, universal punishment of the offences in question is assured, as the perpetrators are denied refuge in all States.

By contrast, none of these texts has contemplated establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.

[14] The Diplomatic Conference at The Hague supplemented the ICAO Legal Committee draft on this point by providing for a new jurisdiction. That solution was adopted on Spain's proposal by a vote of 34 to 17, with 12 abstentions (see *Annuaire français de droit international*, 1970, p. 49).

10. Thus, in the absence of conventional provisions, Belgium, both in its written Memorial and in oral argument, relies essentially on this point on international customary law.

11. In this connection, Belgium cites the development of international criminal courts. But this development was precisely in order to provide a remedy for the deficiencies of national courts, and the rules governing the jurisdiction of international courts as laid down by treaty or by the Security Council of course have no effect upon the jurisdiction of national courts.

12. Hence, Belgium essentially seeks to justify its position by relying on the practice of States and their *opinio juris*. However, the national legislation and jurisprudence cited in the case file do not support the Belgian argument, and I will give some topical examples of this.

In France, Article 689-1 of the Code of Criminal Procedure provides:

> "Pursuant to the international conventions referred to in the following articles[15], any person, if present in France, may be prosecuted and tried by the French courts if that person has committed outside the territory of the Republic one of the offences specified in those articles."

Two Laws, of 2 January 1995 and 22 May 1996, concerning certain crimes committed in the former Yugoslavia and in Rwanda extended the jurisdiction of the French courts to such crimes where, again, the presumed author of the offence is found in French territory[16]. Moreover, the French Court of Cassation has interpreted Article 689-1 restrictively, holding that, "in the absence of any direct effect of the four Geneva Conventions in regard to search and prosecution of the perpetrators of grave breaches, Article 689 of the Code of Criminal Procedure cannot be applied" in relation to the perpetrators of grave breaches of those Conventions found on French territory[17].

In Germany, the Criminal Code (Strafgesetzbuch) contains in Section 6, paragraphs 1 and 9, and in Section 7, paragraph 2, provisions permitting the prosecution in certain circumstances of crimes committed abroad. And indeed in a case of genocide (*Tadić*) the German Federal Supreme Court (Bundesgerichtshof) recalled that: "German criminal law is applicable pursuant to section 6, paragraph 1, to an act of genocide committed abroad independently of the law of the territorial State (principle of so-called

[15] Namely the international conventions mentioned in paragraphs 7 and 8 of the present opinion to which France is party.

[16] For the application of this latter Law, see Court of Cassation, Criminal Chamber, 6 January 1998, *Munyeshyaka*.

[17] Court of Cassation, Criminal Chamber, 26 March 1996, No. 132, *Javor*.

universal jurisdiction)". The Court added, however, that "a condition precedent is that international law does not prohibit such action"; it is only, moreover, where there exists in the case in question a "link" legitimizing prosecution in Germany "that it is possible to apply German criminal law to the conduct of a foreigner abroad. In the absence of such a link with the forum State, prosecution would violate the principle of non-interference, under which every State is required to respect the sovereignty of other States."[18] In that case, the Federal Court held that there was such a link by reason of the fact that the accused had been voluntarily residing for some months in Germany, that he had established his centre of interests there and that he had been arrested on German territory.

The Netherlands Supreme Court (Hoge Raad) was faced with comparable problems in the *Bouterse* case. It noted that the Dutch legislation adopted to implement the Hague and Montreal Conventions of 1970 and 1971 only gave the Dutch courts jurisdiction in respect of offences committed abroad if "the accused was found in the Netherlands". It concluded from this that the same applied in the case of the 1984 Convention against Torture, even though no such specific provision had been included in the legislation implementing that Convention. It accordingly held that prosecution in the Netherlands for acts of torture committed abroad was possible only

> "if one of the conditions of connection provided for in that Convention for the establishment of jurisdiction was satisfied, for example if the accused or the victim was Dutch or fell to be regarded as such, or if the accused was on Dutch territory at the time of his arrest"[19].

[18] Bundesgerichtshof, 13 February 1994, 1 BGs 100.94, in *Neue Zeitschrift für Strafrecht*, 1994, pp. 232-233. The original German text reads as follows:

> "4 *a)* Nach § 6 Nr. 1 StGB gilt deutsches Strafrecht für ein im Ausland begangenes Verbrechen des Völkermordes (§ 220a StGB), und zwar unabhängig vom Recht des Tatorts (sog. Weltrechtsprinzip). Vorraussetzung ist allerdings — über den Wortlaut der Vorschrift hinaus —, daß ein völkerrechtliches Verbot nicht entgegensteht und außerdem ein legitimierender Anknüpfungspunkt im Einzelfall einen unmittelbaren Bezug der Strafverfolgung zum Inland herstellt; nur dann ist die Anwendung innerstaatlicher (deutscher) Strafgewalt auf die Auslandstat eines Ausländers gerechtfertigt. Fehlt ein derartiger Inlandsbezug, so verstößt die Strafverfolgung gegen das sog. Nichteinmischungsprinzip, das die Achtung der Souveränität fremder Staaten gebietet (BGHSt 27, 30 und 34, 334; Oehler JR 1977, 424; Holzhausen NStZ 1992, 268)."

Similarly, Düsseldorf Oberlandesgericht, 26 September 1997, Bundesgerichtshof, 30 April 1999, *Jorgić*; Düsseldorf Oberlandesgericht, 29 November 1999, Bundesgerichtshof, 21 February 2001, *Sokolvić*.

[19] Hoge Raad, 18 September 2001, *Bouterse*, para. 8.5. The original Dutch text reads as follows:

> "indien daartoe een in dat Verdrag genoemd aankopingspunt voor de vestiging van rechtsmacht aanwezig is, bijvoorbeeld omdat de vermoedelijke dader dan wel het slachtoffer Nederlander is of daarmee gelijkgesteld moet worden, of omdat de vermoedelijke dader zich ten tijde van zijn aanhouding in Nederland bevindt".

Numbers of other examples could be given, and the only country whose legislation and jurisprudence appear clearly to go the other way is the State of Israel, which in this field obviously constitutes a very special case.

To conclude, I cannot do better than quote what Lord Slynn of Hadley had to say on this point in the first *Pinochet* case:

> "It does not seem . . . that it has been shown that there is any State practice or general consensus let alone a widely supported convention that all crimes against international law should be justiciable in National Courts on the basis of the universality of jurisdiction . . . That international law crimes should be tried before international tribunals or in the perpetrator's own state is one thing; that they should be impleaded without regard to a long established customary international law rule in the Courts of other states is another . . . The fact even that an act is recognised as a crime under international law does not mean that the Courts of all States have jurisdiction to try it . . . There is no universality of jurisdiction for crimes against international law . . ."[20]

In other words, international law knows only one true case of universal jurisdiction: piracy. Further, a number of international conventions provide for the establishment of subsidiary universal jurisdiction for purposes of the trial of certain offenders arrested on national territory and not extradited to a foreign country. Universal jurisdiction *in absentia* as applied in the present case is unknown to international law.

13. Having found that neither treaty law nor international customary law provide a State with the possibility of conferring universal jurisdiction on its courts where the author of the offence is not present on its territory, Belgium contends lastly that, even in the absence of any treaty or custom to this effect, it enjoyed total freedom of action. To this end it cites from the Judgment of the Permanent Court of International Justice in the *"Lotus"* case:

> "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . ."[21]

[20] House of Lords, 25 November 1998, *R.* v. *Bartle*; ex parte *Pinochet*.

[21] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 19.

Hence, so Belgium claimed, in the absence of any prohibitive rule it was entitled to confer upon itself a universal jurisdiction *in absentia*.

14. This argument is hardly persuasive. Indeed the Permanent Court itself, having laid down the general principle cited by Belgium, then asked itself "whether the foregoing considerations really apply as regards criminal jurisdiction"[22]. It held that either this might be the case, or alternatively, that: "the exclusively territorial character of law relating to this domain constitutes a principle which, except as otherwise expressly provided, would, *ipso facto*, prevent States from extending the criminal jurisdiction of their courts beyond their frontiers"[23]. In the particular case before it, the Permanent Court took the view that it was unnecessary to decide the point. Given that the case involved the collision of a French vessel with a Turkish vessel, the Court confined itself to noting that the effects of the offence in question had made themselves felt on Turkish territory, and that consequently a criminal prosecution might "be justified from the point of view of this so-called territorial principle"[24].

15. The absence of a decision by the Permanent Court on the point was understandable in 1927, given the sparse treaty law at that time. The situation is different today, it seems to me — totally different. The adoption of the United Nations Charter proclaiming the sovereign equality of States, and the appearance on the international scene of new States, born of decolonization, have strengthened the territorial principle. International criminal law has itself undergone considerable development and constitutes today an impressive legal *corpus*. It recognizes in many situations the possibility, or indeed the obligation, for a State other than that on whose territory the offence was committed to confer jurisdiction on its courts to prosecute the authors of certain crimes where they are present on its territory. International criminal courts have been created. But at no time has it been envisaged that jurisdiction should be conferred upon the courts of every State in the world to prosecute such crimes, whoever their authors and victims and irrespective of the place where the offender is to be found. To do this would, moreover, risk creating total judicial chaos. It would also be to encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined "international community". Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward.

16. States primarily exercise their criminal jurisdiction on their own territory. In classic international law, they normally have jurisdiction in respect of an offence committed abroad only if the offender, or at least

[22] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 20.
[23] *Ibid.*
[24] *Ibid.*, p. 23.

the victim, is of their nationality, or if the crime threatens their internal or external security. Additionally, they may exercise jurisdiction in cases of piracy and in the situations of subsidiary universal jurisdiction provided for by various conventions if the offender is present on their territory. But apart from these cases, international law does not accept universal jurisdiction; still less does it accept universal jurisdiction *in absentia*.

17. Passing now to the specific case before us, I would observe that Mr. Yerodia Ndombasi is accused of two types of offence, namely serious war crimes, punishable under the Geneva Conventions, and crimes against humanity.

As regards the first count, I note that, under Article 49 of the First Geneva Convention, Article 50 of the Second Convention, Article 129 of the Third Convention and Article 146 of the Fourth Convention:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, [certain] grave breaches [of the Convention], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned . . ."

This provision requires each contracting party to search out alleged offenders and bring them before its courts (unless it prefers to hand them over to another party). However, the Geneva Conventions do not contain any provision on jurisdiction comparable, for example, to Article 4 of the Hague Convention already cited. What is more, they do not create any obligation of search, arrest or prosecution in cases where the offenders are not present on the territory of the State concerned. They accordingly cannot in any event found a universal jurisdiction *in absentia*. Thus Belgium could not confer such jurisdiction on its courts on the basis of these Conventions, and the proceedings instituted in this case against Mr. Yerodia Ndombasi on account of war crimes were brought by a judge who was not competent to do so in the eyes of international law.

The same applies as regards the proceedings for crimes against humanity. No international convention, apart from the Rome Convention of 17 July 1998, which is not in force, deals with the prosecution of such crimes. Thus the Belgian judge, no doubt aware of this problem, felt himself entitled in his warrant to cite the Convention against Torture of 10 December 1984. But it is not permissible in criminal proceedings to reason by analogy, as the Permanent Court of International Justice indeed pointed out in its Advisory Opinion of 4 December 1935 concerning the *Consistency of Certain Danzig Legislative Decrees with the Con-*

stitution of the Free City[25]. There too, proceedings were instituted by a judge not competent in the eyes of international law.

If the Court had addressed these questions, it seems to me that it ought therefore to have found that the Belgian judge was wrong in holding himself competent to prosecute Mr. Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law.

(Signed) Gilbert GUILLAUME.

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[25] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935, P.C.I.J., Series A/B, No. 65*, pp. 41 *et seq.*

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DISSENTING OPINION OF JUDGE ODA

Lack of jurisdiction of the Court — Absence of a legal dispute within the purview of Article 36, paragraph 2, of the Statute — Mere belief of the Congo that the Belgian Law violated international law not evidence or proof that a dispute existed between it and Belgium — Failure of the Application instituting proceedings to specify the legal grounds upon which the jurisdiction of the Court is said to be based or to indicate the subject of the dispute — Failure of the Congo to cite any damage or injury which the Congo or Mr. Yerodia has suffered or will suffer except for some moral injury — Changing of the subject-matter of the proceedings by the Congo — Principle that a State cannot exercise its jurisdiction outside its territory — National case law, treaty-made law and legal writing in respect of the issue of universal jurisdiction — Inability of a State to arrest an individual outside its territory — Arrest warrant not directly binding without more on foreign authorities — Issuance and international circulation of arrest warrant having no legal impact unless arrest request validated by the receiving State — Question of the immunity of a Minister for Foreign Affairs and of whether it can be claimed in connection with serious breaches of international humanitarian law — Concluding remarks.

INTRODUCTION

1. I voted against all provisions of the operative part of the Judgment. My objections are not directed individually at the various provisions since I am unable to support any aspect of the position the Court has taken in dealing with the presentation of this case by the Congo.

It is my firm belief that the Court should have declared *ex officio* that it lacked jurisdiction to entertain the Congo's Application of 17 October 2000 for the reason that there was, at that date, no *legal dispute* between the Congo and Belgium falling within the purview of Article 36, paragraph 2, of the Statute, a belief already expressed in my declaration appended to the Court's Order of 8 December 2000 concerning the request for the indication of provisional measures. I reiterate my view that the Court should have dismissed the Application submitted by the Congo on 17 October 2000 for lack of jurisdiction.

My opinion was that the case should have been removed from the General List at the provisional measures stage. In the Order of 8 December 2000, however, I voted in favour of the holding that the case should *not* be removed from the General List but did so reluctantly "*only* from a sense of judicial solidarity" (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 205, para. 6, declaration of Judge Oda). I now regret that vote.

2. It strikes me as unfortunate that the Court, after finding that "it has jurisdiction to entertain the Application" and that "the Application . . . is admissible" (Judgment, para. 78 (1) (B) and (D)), quickly comes to certain conclusions concerning "the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of [the Congo] enjoyed under international law" in connection with "the issue against [Mr. Yerodia] of the arrest warrant of 11 April 2000" and "its international circulation" (Judgment, para. 78 (2)).

I. NO LEGAL DISPUTE IN TERMS OF ARTICLE 36, PARAGRAPH 2, OF THE STATUTE

3. To begin with, the Congo's Application provides no basis on which to infer that the Congo ever thought that a *dispute* existed between it and Belgium regarding the arrest warrant issued by a Belgian investigating judge on 11 April 2000 against Mr. Yerodia, the Minister for Foreign Affairs of the Congo. The word "dispute" appears in the Application only at its very end, under the heading "V. Admissibility of the Present Application", in which the Congo stated that:

> "As to the existence of a *dispute* on that question [namely, the question that the Court is called upon to decide], this is established *ab initio* by the very fact that it is the non-conformity with international law of the Law of the Belgian State on which the investigating judge founds his warrant which is the subject of the legal grounds which [the Congo] has submitted to the Court." (Emphasis added.)

Without giving any further explanation as to the alleged *dispute*, the Congo simply asserted that Belgium's 1993 Law, as amended in 1999, concerning the Punishment of Serious Violations of International Humanitarian Law contravened international law.

4. The Congo's mere belief that the Belgian law violated international law is not evidence, let alone proof, that a *dispute* existed between it and Belgium. It shows at most that the Congo held a different legal view, one opposed to the action taken by Belgium. It is clear that the Congo did not think that it was referring a *dispute* to the Court. The Congo, furthermore, never thought of this as a *legal dispute*, the existence of which is a requirement for unilateral applications to the Court under Article 36, paragraph 2, of the Court's Statute. The Congo's mere opposition to the Belgian Law and certain acts taken by Belgium pursuant to it cannot be regarded as a *dispute* or a *legal dispute* between the Congo and Belgium. In fact, there existed no such *legal dispute* in this case.

I find it strange that the Court does not take up this point in the Judgment; instead the Court simply states in the first paragraph of its decision that "the Congo . . . filed in the Registry of the Court an Application

instituting proceedings against . . . Belgium . . . in respect of a *dispute* concerning an 'international arrest warrant . . .'" (Judgment, para. 1, emphasis added) and speaks of "a *legal dispute* between [the Congo and Belgium] concerning the international lawfulness of the arrest warrant of 11 April 2000 and the consequences to be drawn if the arrest warrant was unlawful" (Judgment, para. 27, emphasis added). To repeat, the Congo did refer in its Application to a *dispute* but only in reference to the admissibility of the case, *not* "[i]n order to found the Court's jurisdiction", as the Court mistakenly asserts in paragraph 1 of the Judgment.

5. While Article 40 of the Court's Statute does not require from an applicant State a statement of "the legal grounds upon which the jurisdiction of the Court is said to be based", Article 38, paragraph 2, of the Rules of Court does and the Congo failed to specify those grounds in its Application. Furthermore, the Congo did not indicate "the subject of the dispute", which is required under Article 40 of the Statute.

In its Application the Congo refers only to "Legal Grounds" (Section I) and "Statement of the Grounds on which the Claim is Based" (Section IV). In those sections of the Application, the Congo, without referring to the basis of jurisdiction or the subject of dispute, simply mentions "[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" and "[v]iolation of the diplomatic immunity of the Minister for Foreign Affairs of a sovereign State".

6. The Congo's claim is, first, that the 1993 Belgian Law, as amended in 1999, is in breach of those two aforementioned principles and, secondly, that Belgium's prosecution of Mr. Yerodia, Foreign Minister of the Congo, violates the diplomatic immunity granted under international law to Ministers for Foreign Affairs. The Congo did *not* cite any damage or injury which the Congo or Mr. Yerodia himself has suffered or will suffer except for some moral injury; that is, at most, Mr. Yerodia might have thought it wise to forgo travel to foreign countries for fear of being arrested by those States pursuant to the arrest warrant issued by the Belgian investigating judge (that fear being ungrounded). Thus, as already noted, the Congo did not ask the Court to settle a *legal dispute* with Belgium but rather to render a *legal opinion* on the lawfulness of the 1993 Belgian Law as amended in 1999 and actions taken under it.

7. I fear that the Court's conclusions finding that this case involves a *legal dispute* between the Congo and Belgium within the meaning of Article 36, paragraph 2, of the Statute (such questions being the only ones which can be submitted to the Court) and upholding its jurisdiction in the present case will eventually lead to an excessive number of cases of this nature being referred to the Court even when no real injury has occurred, simply because one State believes that another State has acted contrary to international law. I am also afraid that many States will then

withdraw their recognition of the Court's compulsory jurisdiction in order to avoid falling victim to this distortion of the rules governing the submission of cases. (See *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, Order of 8 December 2000, I.C.J. Reports 2000*, p. 204, declaration of Judge Oda.)

This "loose" interpretation of the compulsory jurisdiction of the Court will frustrate the expectations of a number of law-abiding nations. I would emphasize that the Court's jurisdiction is, in principle, based on the consent of the sovereign States seeking judicial settlement by the Court.

II. The Congo's Changing of the Subject-Matter

8. In reaffirming my conviction that the Congo's Application unilaterally submitted to the Court was not a proper subject of contentious proceedings before the Court, I would like to take up a few other points which I find to be crucial to understanding the essence of this inappropriate, unjustified and, if I may say so, wrongly decided case. It is to be noted, firstly, that between filing its Application of 17 October 2000 and submitting its Memorial on 15 May 2001, the Congo restated the issues, changing the underlying subject-matter in the process.

The Congo contended in the Application: (i) that the 1993 Belgian Law, as amended in 1999, violated the "principle that a State may not exercise [its authority] on the territory of another State" and the "principle of sovereign equality" and (ii) that Belgium's exercise of criminal jurisdiction over Mr. Yerodia, then Minister for Foreign Affairs of the Congo, violated the "diplomatic immunity of the Minister for Foreign Affairs of a sovereign State". The alleged violations of those first two principles concern the question of "universal jurisdiction", which remains a matter of controversy within the international legal community, while the last claim relates only to a question of the "diplomatic immunity" enjoyed by the incumbent Minister for Foreign Affairs.

9. The Congo changed its claim in its Memorial, submitted seven months later, stating that

> "by issuing and internationally circulating the arrest warrant of 11 April 2000 against [Mr. Yerodia], 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" (Memorial of the Democratic Republic of the Congo of 15 May 2001, p. 64). *[Translation by the Registry.]*

Charging and arresting a suspect are clearly acts falling within the exercise of a State's criminal jurisdiction. The questions originally raised —

namely, whether a State has *extraterritorial jurisdiction* over crimes constituting serious violations of humanitarian law wherever committed and by whomever (in other words, the question of universal jurisdiction) and whether a Foreign Minister is exempt from such jurisdiction (in other words, the question of diplomatic immunity) — were transmuted into questions of the "issue and international circulation" of an arrest warrant against a Foreign Minister and the immunities of incumbent Foreign Ministers.

This is clearly a change in subject-matter, one not encompassed in "the right to argue further the grounds of its Application", which the Congo reserved in its Application of 17 October 2000.

10. It remains a mystery to me why Belgium did not raise preliminary objections concerning the Court's jurisdiction at the outset of this case. Instead, it admitted in its Counter-Memorial that there had been a dispute between the two States, one susceptible to judicial settlement by the Court, at the time the proceedings were instituted and that the Court was then seised of the case, as the Court itself finds (Judgment, paras. 27-28). Did Belgium view this as a case involving a unilateral application and the Respondent's subsequent recognition of the Court's jurisdiction, instances of which are to be found in the Court's past?

Belgium seems to have taken the position that once Mr. Yerodia had ceased to be Foreign Minister, a dispute existed concerning him in his capacity as a *former* Foreign Minister and contended that the Court lacked jurisdiction under those circumstances. Thus, Belgium also appears to have replaced the issues as they existed on the date of the Congo's Application with those arising at a later date. It would appear that Belgium did not challenge the Court's jurisdiction in the original case but rather was concerned only with the admissibility of the Application or the mootness of the case once Mr. Yerodia had been relieved of his duties as Foreign Minister (see Belgium's four preliminary objections raised in its Counter-Memorial, referred to in the Judgment, paras. 23, 29, 33 and 37).

In this respect, I share the view of the Court (reserving, of course, my position that a *dispute* did not exist) that the alleged *dispute* was the one existing in October 2000 (Judgment, para. 38) and, although I voted against paragraph 78 (1) (A) of the Judgment for the reasons set out in paragraph 1 of my opinion, I concur with the Court in rejecting Belgium's objections relating to "jurisdiction, mootness and admissibility" in regard to the alleged *dispute* which Belgium believed existed after Mr. Yerodia left office.

Certainly, the question whether a *former* Foreign Minister is entitled to the same privileges and immunities as an *incumbent* Foreign Minister may well be a legal issue but it is not a proper subject of the present case brought by the Congo in October 2000.

III. Does the Present Case Involve Any Legal Issues on Which the Congo and Belgium Held Conflicting Views?

11. Putting aside for now my view that that there was no *legal dispute* between the Congo and Belgium susceptible to judicial settlement by the Court under its Statute and that the Congo seems simply to have asked the Court to render an opinion, I shall note my incomprehension of the Congo's intention and purpose in bringing this request to the Court in October 2000 when Mr. Yerodia held the office of Foreign Minister.

In its Application of October 2000, the Congo raised the question whether the 1993 Belgian Law, as amended in 1999, providing for the punishment of serious violations of humanitarian law was itself contrary to the principle of sovereign equality under international law (see Application of the Democratic Republic of the Congo of 17 October 2000, Part III: Statement of the Facts, A). Yet it appears that the Congo abandoned this point in its Memorial of May 2001, as the Court admits (Judgment, para. 45), and never took it up during the oral proceedings.

12. It is one of the fundamental principles of international law that a State cannot exercise its jurisdiction outside its territory. However, the past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law. From the base established by the Permanent Court's decision in 1927 in the *"Lotus"* case, the scope of extraterritorial criminal jurisdiction has been expanded over the past few decades to cover the crimes of piracy, hijacking, etc. Universal jurisdiction is increasingly recognized in cases of terrorism and genocide. Belgium is known for taking the lead in this field and its 1993 Law (which would make Mr. Yerodia liable to punishment for any crimes against humanitarian law he committed outside of Belgium) may well be at the forefront of a trend. There is some national case law and some treaty-made law evidencing such a trend.

Legal scholars the world over have written prolifically on this issue. Some of the opinions appended to this Judgment also give guidance in this respect. I believe, however, that the Court has shown wisdom in refraining from taking a definitive stance in this respect as the law is not sufficiently developed and, in fact, the Court is not requested in the present case to take a decision on this point.

13. It is clear that a State cannot arrest an individual outside its territory and forcibly bring him before its courts for trial. In this connection, it is necessary to examine the effect of an arrest warrant issued by a State authority against an individual who is subject to that State's jurisdiction to prescribe law.

The arrest warrant is an official document issued by the State's judiciary empowering the police authorities to take forcible action to place

the individual under arrest. Without more, however, the warrant is not directly binding on foreign authorities, who are not part of the law enforcement mechanism of the issuing State. The individual may be arrested abroad (that is, outside the issuing State) only by the authorities of the State where he or she is present, since jurisdiction over that territory lies exclusively with that State. Those authorities will arrest the individual being sought by the issuing State only if the requested State is committed to do so pursuant to international arrangements with the issuing State. Interpol is merely an organization which transmits the arrest request from one State to another; it has no enforcement powers of its own.

It bears stressing that the issuance of an arrest warrant by one State and the international circulation of the warrant through Interpol have no legal impact unless the arrest request is validated by the receiving State. The Congo appears to have failed to grasp that the mere issuance and international circulation of an arrest warrant have little significance. There is even some doubt whether the Court itself properly understood this, particularly as regards a warrant's legal effect. The crucial point in this regard is *not* the issuance or international circulation of an arrest warrant but the response of the State receiving it.

14. Diplomatic immunity is the immunity which an individual holding diplomatic status enjoys from the exercise of jurisdiction by States other than his own. The issue whether Mr. Yerodia, as Foreign Minister of the Congo, should have been immune in 2000 from Belgium's exercise of criminal jurisdiction *pursuant to the 1993 Law as amended in 1999* is twofold. The first question is whether in principle a Foreign Minister, the post which Mr. Yerodia held in 2000, is entitled to the same immunity as diplomatic agents. Neither the 1961 Vienna Convention on Diplomatic Relations nor any other convention spells out the privileges of Foreign Ministers and the answer may not be clear under customary international law. The Judgment addresses this question merely by giving a hornbook-like explanation in paragraphs 51 to 55. I have no further comment on this.

The more important aspect is the second one: can diplomatic immunity also be claimed in respect of serious breaches of humanitarian law — over which many advocate the existence of universal jurisdiction and which are the subject-matter of Belgium's 1993 Law as amended in 1999 — and, furthermore, is a Foreign Minister entitled to greater immunity in this respect than ordinary diplomatic agents? These issues are too new to admit of any definite answer.

The Court, after quoting several recent incidents in European countries, seems to conclude that Ministers for Foreign Affairs enjoy absolute immunity (Judgment, paras. 56-61). It may reasonably be asked whether

it was necessary, or advisable, for the Court to commit itself on this issue, which remains a highly hypothetical question as Belgium has not exercised its criminal jurisdiction over Mr. Yerodia pursuant to the 1993 Belgian Law, as amended in 1999, and no third State has yet acted in pursuance of Belgium's assertion of universal jurisdiction.

IV. Concluding Remarks

15. I find little sense in the Court's finding in paragraph (3) of the operative part of the Judgment, which in the Court's logic appears to be the consequence of the finding set out in paragraph (2) (Judgment, para. 78). Given that the Court concludes that the violation of international law occurred in *2000* and the Court would appear to believe that there is nothing in *2002* to prevent Belgium from issuing a new arrest warrant against Mr. Yerodia, this time as a *former* Foreign Minister and not the *incumbent* Foreign Minister, there is no practical significance in ordering Belgium to cancel the arrest warrant of April 2000. If the Court believes that this is an issue of the sovereign dignity of the Congo and that that dignity was violated in 2000, thereby causing injury at that time to the Congo, the harm done cannot be remedied by the cancellation of the arrest warrant; the only remedy would be an apology by Belgium. But I do not believe that Belgium caused any injury to the Congo because no action was ever taken against Mr. Yerodia pursuant to the warrant. Furthermore, Belgium was under no obligation to provide the Congo with any assurances that the incumbent Foreign Minister's immunity from criminal jurisdiction would be respected under the 1993 Law, as amended in 1999, but that is not the issue here.

16. In conclusion, I find the present case to be not only unripe for adjudication at this time but also fundamentally inappropriate for the Court's consideration. There is not even agreement between the Congo and Belgium concerning the issues in dispute in the present case. The potentially significant questions (the validity of universal jurisdiction, the general scope of diplomatic immunity) were transmuted into a simple question of the issuance and international circulation of an arrest warrant as they relate to diplomatic immunity. It is indeed unfortunate that the Court chose to treat this matter as a contentious case suitable for judicial resolution.

(Signed) Shigeru Oda.

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo *v.* Belgium),
Judgment, Declaration of Judge Ranjeva,
I.C.J. Reports 2002

DECLARATION OF JUDGE RANJEVA

[Translation]

Effect of withdrawal of the Congo's original first submission — Exclusion of universal jurisdiction in absentia *from the subject-matter of the claims — Universal jurisdiction of national courts: Belgian legislation — Development of the régime of universal jurisdiction under international law — Maritime piracy and universal jurisdiction under customary law — Obligation to punish and jurisdiction of national courts —* Aut judicare aut dedere *— Seriousness of offences not a basis for universal jurisdiction — Interpretation of the* "Lotus" *case — No recognition yet under international law of universal jurisdiction* in absentia *in the absence of a connecting factor.*

1. I fully subscribe to the Judgment's conclusion that the issue and international circulation of the arrest warrant of 11 April 2000 constituted violations of an international obligation owed by Belgium to the Congo in that they failed to respect the immunity from criminal jurisdiction of the Congo's Minister for Foreign Affairs. I also approve of the Court's position in refraining, in the light of the Congo's submissions as finally stated, from raising and dealing with the issue whether the legality of the warrant was subject to challenge on account of universal jurisdiction as it was exercised by Belgium.

2. Logical considerations should have led the Court to address the question of universal jurisdiction, a topical issue on which a decision in the present case would have necessarily set a precedent. The Congo's withdrawal of its original first submission (see paragraphs 17 and 21 of the Judgment) was not sufficient *per se* to justify the Court's position. The first claim as originally formulated could reasonably have been deemed a false submission and construed as a ground advanced to serve as the basis for the main relief sought: a declaration that the arrest warrant was unlawful as constituting a violation of immunities from criminal jurisdiction. As a result of the amendment of the Congo's claim, the question of universal jurisdiction was transformed from a ground of claim into a defence for Belgium. Procedurally, however, the Court must rule on the submissions and the grounds of the claims, and do so regardless of the intrinsic interest presented by questions raised in the course of the proceedings. Given the submissions concerning the unlawfulness of the warrant, it became unnecessary, to my great regret, to address the second aspect of unlawfulness. One thing is certain: there is no basis for concluding from the text of the Judgment that the Court was indifferent to the question of universal jurisdiction. That remains an open legal issue.

3. The silence maintained by the Judgment on the question of universal jurisdiction places me in an awkward position. Expressing an opinion

on the subject would be an unusual exercise, because it would involve reasoning in the realm of hypothesis, whereas the problem is a real one, not only in the present case but also in the light of developments in international criminal law aimed at preventing and punishing heinous crimes violating human rights and dignity under international law. This declaration will accordingly address Belgium's interpretation of universal jurisdiction.

4. Acting pursuant to the Belgian Law of 16 June 1993, as amended on 10 February 1999, concerning the punishment of serious violations of international humanitarian law, an investigating judge of the Brussels Tribunal de première instance issued an international arrest warrant against Mr. Yerodia Ndombasi, the then Minister for Foreign Affairs of the Congo. Mr. Yerodia was accused of serious violations of humanitarian law and of crimes against humanity. Under Article 7 of that Law, perpetrators of such offences are "subject to the jurisdiction of the Belgian courts, irrespective of their nationality or that of the victims" (arrest warrant, para. 3.4). The interest presented by this decision lies in the fact that the case is truly one of first impression.

5. The Belgian legislation establishing universal jurisdiction *in absentia* for serious violations of international humanitarian law adopted the broadest possible interpretation of such jurisdiction. The ordinary courts of Belgium have been given jurisdiction over war crimes, crimes against humanity and genocide committed by non-Belgians outside Belgium, and the warrant issued against Mr. Yerodia is the first instance in which this radical approach has been applied. There would appear to be no other legislation which permits the exercise of criminal jurisdiction in the absence of a territorial or personal connecting factor, active or passive. The innovative nature of the Belgian statute lies in the possibility it affords for exercising universal jurisdiction in the absence of any connection between Belgium and the subject-matter of the offence, the alleged offender or the relevant territory. In the wake of the tragic events in Yugoslavia and Rwanda, several States have invoked universal jurisdiction to prosecute persons suspected of crimes under humanitarian law; unlike Mr. Yerodia, however, the individuals in question had first been the subject of some form of proceedings or had been arrested; in other words, there was already a territorial connection.

6. Under international law, the same requirement of a connection *ratione loci* again applies to the exercise of universal jurisdiction. Maritime piracy affords the sole traditional example where universal jurisdiction exists under customary law. Article 19 of the Geneva Convention of 29 April 1958 and Article 105 of the Montego Bay Convention of 10 December 1982[1] provide:

[1] United Nations Convention on the Law of the Sea.

> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed . . ."

Universal jurisdiction under those circumstances may be explained by the lack of any predetermined sovereignty over the high seas and by the régime of their freedom; thus, normally, the jurisdiction of the flag State serves as the mechanism which ensures respect for the law. But since piracy by definition involves the pirate's denial and evasion of the jurisdiction of any State system, the exercise of universal jurisdiction enables the legal order to be re-established. Thus, in this particular situation the conferring of universal jurisdiction on national courts to try pirates and acts of piracy is explained by the harm done to the international system of State jurisdiction. The inherent seriousness of the offence itself has, however, not been deemed sufficient *per se* to establish universal jurisdiction. Universal jurisdiction has not been established over any other offence committed on the high seas (see, for example: the Conventions of 18 May 1904 and 4 May 1910 (for the suppression of the white slave traffic); the Convention of 30 September 1921 (for the suppression of the traffic in women and children); the Conventions of 28 June 1930 (concerning forced labour) and of 25 June 1957 (abolishing forced labour)).

7. There has been a movement in treaty-based criminal law over the last few decades towards recognition of the obligation to punish and towards a new system of State jurisdiction in criminal matters. While the 1949 Geneva humanitarian law conventions do give rise to international legal obligations, they contain no provision concerning the jurisdiction of national courts to enforce those obligations by judicial means. The same is true of the 1948 Genocide Convention. It was not until an international régime was established to combat terrorist attacks on aircraft that provisions were adopted implying the exercise of universal jurisdiction: the Hague Convention of 16 December 1970 enshrined the principle *aut judicare aut dedere* in Article 4, paragraph 2, as follows: "Each Contracting State shall . . . take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him . . ."[2] It is to be noted that application of the principle *aut judicare aut dedere* is conditional on the alleged offender having first been arrested. This provision dating from 1970 served as a model for the extension in various subsequent conventions of the criminal jurisdiction of national courts through the exercise of universal

[2] Convention for the Suppression of Unlawful Seizure of Aircraft.

jurisdiction. These legal developments did not result in the recognition of jurisdiction *in absentia*.

8. In support of its argument, Belgium invokes not only an international legal obligation to punish serious violations of humanitarian law but also a generally recognized discretion to enact legislation in this area. It is not worth commenting further on the lack of merit in the first limb of this argument, which mistakenly confuses the obligation to punish with the manner in which it is fulfilled: namely a claim that national criminal courts have jurisdiction *in absentia* notwithstanding the lack of any provision conferring such jurisdiction. Thus Belgium's assertion that "[a]s has already been addressed, pursuant to Belgian law, Belgium has the right to investigate grave breaches of international humanitarian law even when the presumptive perpetrator is not found on Belgian territory" (Counter-Memorial of Belgium, p. 89, para. 3.3.28) begs the question. The examples cited in support of this proposition are not persuasive: of the 125 States having national legislation concerning punishment of war crimes and crimes against humanity, only five provide that the presence of the accused in their territory is not required for initiating prosecution (see Counter-Memorial of Belgium, pp. 98-99, para. 3.3.57).

9. Belgium relies on the decision in the *"Lotus"* case to justify the scope of national legislative powers:

> "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law . . . Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." (*P.C.I.J., Series A, No. 10*, p. 19.)

That same Judgment states further on:

> "[A]ll that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; . . . The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty." (*Ibid.*, pp. 19-20.)

Doubtless, evolving opinion and political conditions in the contemporary world can be seen as favouring the retreat from the territory-based conception of jurisdiction and the emergence of a more functional approach in the service of higher common ends. Acknowledging such a trend cannot however justify the sacrifice of cardinal principles of law in the name of a particular kind of modernity. Territoriality as the basis of entitle-

ment to jurisdiction remains a given, the core of contemporary positive international law. Scholarly acceptance of the principle laid down in the *"Lotus"* case in the context of combating international crimes has not yet found expression in a consequential development of the positive law relating to criminal jurisdiction.

10. Finally, Belgium places particular reliance on the following passage from the *"Lotus"* Judgment in support of its interpretation of universal jurisdiction *in absentia*:

> "Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State." (*P.C.I.J., Series A, No. 10*, p. 20).

It cannot reasonably be inferred that this proposition establishes universal jurisdiction *in absentia*. To the contrary, the Permanent Court manifested great caution; it limited its realm of investigation to the case before it and sought close similarities with analogous situations. Any attempt to read into this the bases of universal jurisdiction *in absentia* is mere conjecture: the facts of the case were confined to the issue of the Turkish criminal courts' jurisdiction as a result of the arrest in Turkish territorial waters of Lieutenant Demons, the second-in-command of a vessel flying the French flag.

11. In sum, the issue of universal jurisdiction *in absentia* arises from the problem created by the possibility of extraterritorial criminal jurisdiction in the absence of any connection between the State claiming such jurisdiction and the territory in which the alleged offences took place — of any effective authority of that State over the suspected offenders. This problem stems from the nature of an instrument of criminal process: it is not a mere abstraction; it is enforceable, and, as such, requires a minimum material basis under international law. It follows that an explicit prohibition on the exercise, as construed by Belgium, of universal jurisdiction does not represent a sufficient basis.

12. In conclusion, notwithstanding the deep-seated sense of obligation to give effect to the requirement to prevent and punish crimes under international humanitarian law in order to promote peace and international security, and without there being any overriding consequential need to condemn the Belgian Law of 16 June 1993, as amended on 10 February 1999, it would have been difficult under contemporary positive law not to uphold the Democratic Republic of the Congo's original first submission.

(Signed) Raymond RANJEVA.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium), Judgment, Separate Opinion of Judge Koroma, I.C.J. Reports 2002

SEPARATE OPINION OF JUDGE KOROMA

Legal approach taken by Court justified in view of position of Parties, the origin and sources of the dispute and consistent with jurisprudence of the Court — Actual question before Court not a choice between universal jurisdiction or immunity — Though two concepts are linked, but not identical — Judgment not to be seen as rejection or endorsement of universal jurisdiction — Court not neutral on issues of grave breaches — But legal concepts should be consistent with legal tenets — Cancellation of warrant appropriate response for unlawful act.

1. The Court in paragraph 46 of the Judgment acknowledged that, as a matter of legal logic, the question of the alleged violation of the immunities of the Minister for Foreign Affairs of the Democratic Republic of the Congo should be addressed only once there has been a determination in respect of the legality of the purported exercise of universal jurisdiction by Belgium. However, in the context of the present case and given the main legal issues in contention, the Court chose another technique, another method, of exercising its discretion in arranging the order in which it will respond when more than one issue has been submitted for determination. This technique is not only consistent with the jurisprudence of the Court, but the Court is also entitled to such an approach, given the position taken by the Parties.

2. The Congo, in its final submissions, invoked only the grounds relating to the alleged violation of the immunity of its Foreign Minister, while it had earlier stated that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at its request but, rather, by virtue of the defence strategy adopted by Belgium. Belgium, for its part, had, at the outset, maintained that the exercise of universal jurisdiction is a valid counterweight to the observance of immunities, and that it is not that universal jurisdiction is an exception to immunity but rather that immunity is excluded when there is a grave breach of international criminal law. Belgium, nevertheless, asked the Court to limit its jurisdiction to those issues that are the subject of the Congo's final submissions, in particular not to pronounce on the scope and content of the law relating to universal jurisdiction.

3. Thus, since both Parties are in agreement that the subject-matter of the dispute is whether the arrest warrant issued against the Minister for Foreign Affairs of the Congo violates international law, and the Court is asked to pronounce on the question of universal jurisdiction only in so far as it relates to the question of the immunity of a Foreign Minister in office, both Parties had therefore relinquished the issue of universal juris-

diction; this entitled the Court to apply its well-established principle that it has a "duty . . . 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). In other words, according to the jurisprudence of the Court, it rules on the *petitum*, or the subject-matter of the dispute as defined by the claims of the Parties in their submissions; the Court is not bound by the grounds and arguments advanced by the Parties in support of their claims, nor is it obliged to address all such claims, as long as it provides a complete answer to the submissions. And that position is also in accordance with the submissions of the Parties.

4. This approach is all the more justified in the present case, which has generated much public interest and where two important legal principles would appear to be in competition, when in fact no such competition exists. The Court came to the conclusion, and rightly in my view, that the issue in contention is not one pitting the principle of universal jurisdiction against the immunity of a Foreign Minister. Rather, the dispute before it is whether the issue and international circulation of the arrest warrant by Belgium against the incumbent Minister for Foreign Affairs of the Congo violated the immunity of the Foreign Minister, and hence the obligation owed by Belgium to the Congo. The Court is asked to pronounce on the issue of universal jurisdiction only in so far as it relates to the question of the immunity of the Foreign Minister. This, in spite of appearances to the contrary, is the real issue which the Court is called upon to determine and not which of those legal principles is pre-eminent, or should be regarded as such.

5. Although immunity is predicated upon jurisdiction — whether national or international — it must be emphasized that the concepts are not the same. Jurisdiction relates to the power of a State to affect the rights of a person or persons by legislative, executive or judicial means, whereas immunity represents the independence and the exemption from the jurisdiction or competence of the courts and tribunals of a foreign State and is an essential characteristic of a State. Accordingly, jurisdiction and immunity must be in conformity with international law. It is not, however, that immunity represents freedom from legal liability as such, but rather that it represents exemption from legal process. The Court was therefore justified that in this case, in its legal enquiry, it took as its point of departure one of the issues directly relevant to the case for determination, namely whether international law permits an exemption from immunity of an incumbent Foreign Minister and whether the arrest warrant issued against the Foreign Minister violates international law, and came to the conclusion that international law does not permit such exemption from immunity.

6. In making its determination, as it pointed out in the Judgment, the Court took into due consideration the pertinent conventions, judicial decisions of both national and international tribunals, resolutions of international organizations and academic institutes before reaching the conclusion that the issue and circulation of the warrant is contrary to international customary law and violated the immunity of the Minister for Foreign Affairs. The paramount legal justification for this, in my opinion, is that immunity of the Foreign Minister is not only of functional necessity but increasingly these days the Foreign Minister represents the State, even though his or her position is not assimilable to that of Head of State. While it would have been interesting if the Court had done so, the Court did not consider it necessary to undertake a disquisition of the law in order to reach its decision. In acknowledging that the Court refrained from carrying out such an undertaking, in reaching its conclusion, perhaps not wanting to tie its hands when not compelled to do so, the Judgment cannot be said to be juridically constraining or not to have responded to the submissions. The Court's Judgment by its nature may not be as expressive or exhaustive of all the underlying legal principles pertaining to a case, so long as it provides a reasoned and complete answer to the submissions.

7. In the present case, the approach taken by the Court can also be viewed as justified and apposite on practical and other grounds. The Minister for Foreign Affairs of the Congo was sued in Belgium, on the basis of Belgian law. According to that law, immunity does not represent a bar to prosecution, even for a Minister for Foreign Affairs in office, when certain grave breaches of international humanitarian law are alleged to have been committed. The immunity claimed by the Foreign Minister is from Belgian national jurisdiction based on Belgian law. The Judgment implies that while Belgium can initiate criminal proceedings in its jurisdiction against anyone, an incumbent Minister for Foreign Affairs of a foreign State is immune from Belgian jurisdiction. International law imposes a limit on Belgium's jurisdiction where the Foreign Minister in office of a foreign State is concerned.

8. On the other hand, in my view, the issue and circulation of the arrest warrant show how seriously Belgium views its international obligation to combat international crimes. Belgium is entitled to invoke its criminal jurisdiction against anyone, save a Foreign Minister in office. It is unfortunate that the wrong case would appear to have been chosen in attempting to carry out what Belgium considers its international obligation.

9. Against this background, the Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which has continued to evolve, or as an invalidation of that principle. In my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against

humanity, including the slave trade and genocide. The Court did not rule on universal jurisdiction, because it was not indispensable to do so to reach its conclusion, nor was such submission before it. This, to some extent, provides the explanation for the position taken by the Court.

10. With regard to the Court's findings on remedies, the Court's ruling that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform the authorities to whom that warrant was circulated is a legal and an appropriate response in the context of the present case. For, in the first place, it was the issue and circulation of the arrest warrant that triggered and constituted the violation not only of the Foreign Minister's immunity but also of the obligation owed by the Kingdom to the Republic. The instruction to Belgium to cancel the warrant should cure both violations, while at the same time repairing the moral injury suffered by the Congo and restoring the situation to the *status quo ante* before the warrant was issued and circulated (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47).

11. In the light of the foregoing, any attempt to qualify the Judgment as formalistic, or to assert that the Court avoided the real issue of the commission of heinous crimes is without foundation. The Court cannot take, and in the present case has not taken, a neutral position on the issue of heinous crimes. Rather, the Court's ruling should be seen as responding to the question asked of it. The ruling ensures that legal concepts are consistent with international law and legal tenets, and accord with legal truth.

(Signed) Abdul G. KOROMA.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium), Judgment, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, I.C.J. Reports 2002

JOINT SEPARATE OPINION OF JUDGES HIGGINS, KOOIJMANS AND BUERGENTHAL

Necessity of a finding on jurisdiction — Reasoning on jurisdiction not precluded by ultra petita *rule.*

Status of universal jurisdiction to be tested by reference to the sources of international law — Few examples of universal jurisdiction within national legislation or case law of national courts — Examination of jurisdictional basis of multilateral treaties on grave offences do not evidence established practice of either obligatory or voluntary universal criminal jurisdiction — Aut dedere aut prosequi *— Contemporary trends suggesting universal jurisdiction* in absentia *not precluded — The* "Lotus" *case — Evidence that national courts and international tribunals intended to have parallel roles in acting against impunity — Universal jurisdiction not predicated upon presence of accused in territory, nor limited to piracy — Necessary safeguards in exercising such a jurisdiction — Rejection of Belgium's argument that it had in fact exercised no extraterritorial criminal jurisdiction.*

The immunities of an incumbent Minister for Foreign Affairs and their role in society — Rejection of assimilation with Head of State immunities — Trend to preclude immunity when charged with international crimes — Immunity not precluded in the particular circumstances of this case — Role of international law to balance values it seeks to protect — Narrow interpretation to be given to "official acts" when immunities of an ex-Minister for Foreign Affairs under review.

No basis in international law for Court's order to withdraw warrant.

1. We generally agree with what the Court has to say on the issues of jurisdiction and admissibility and also with the conclusions it reaches. There are, however, reservations that we find it necessary to make, both on what the Court has said and what it has chosen not to say when it deals with the merits. Moreover, we consider that the Court erred in ordering Belgium to cancel the outstanding arrest warrant.

* * *

2. In its Judgment the Court says nothing on the question of whether — quite apart from the status of Mr. Yerodia at the relevant time — the Belgian magistracy was entitled under international law to issue an arrest warrant for someone not at that time within its territory and pass it to Interpol. It has, in effect, acceded to the common wish of the Parties that

the Court should not pronounce upon the key issue of jurisdiction that divided them, but should rather pass immediately to the question of immunity as it applied to the facts of this case.

3. In our opinion it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction. The reasons are various. "Immunity" is the common shorthand phrase for "immunity from jurisdiction". If there is no jurisdiction *en principe*, then the question of an immunity from a jurisdiction which would otherwise exist simply does not arise. The Court, in passing over the question of jurisdiction, has given the impression that "immunity" is a free-standing topic of international law. It is not. "Immunity" and "jurisdiction" are inextricably linked. Whether there is "immunity" in any given instance will depend not only upon the status of Mr. Yerodia but also upon what type of jurisdiction, and on what basis, the Belgian authorities were seeking to assert it.

4. While the notion of "immunity" depends, conceptually, upon a pre-existing jurisdiction, there is a distinct corpus of law that applies to each. What can be cited to support an argument about the one is not always relevant to an understanding of the other. In by-passing the issue of jurisdiction the Court has encouraged a regrettable current tendency (which the oral and written pleadings in this case have not wholly avoided) to conflate the two issues.

5. Only if it is fully appreciated that there are two distinct norms of international law in play (albeit that the one — immunity — can arise only if the other — jurisdiction — exists) can the larger picture be seen. One of the challenges of present-day international law is to provide for stability of international relations and effective international intercourse while at the same time guaranteeing respect for human rights. The difficult task that international law today faces is to provide that stability in international relations by a means other than the impunity of those responsible for major human rights violations. This challenge is reflected in the present dispute and the Court should surely be engaged in this task, even as it fulfils its function of resolving a dispute that has arisen before it. But through choosing to look at half the story — immunity — it is not in a position to do so.

6. As Mr. Yerodia was a non-national of Belgium and the alleged offences described in the arrest warrant occurred outside of the territory over which Belgium has jurisdiction, the victims being non-Belgians, the arrest warrant was necessarily predicated on a universal jurisdiction. Indeed, both it and the enabling legislation of 1993 and 1999 expressly say so. Moreover, Mr. Yerodia himself was outside of Belgium at the time the warrant was issued.

7. In its Application instituting proceedings (p. 7), the Democratic Republic of the Congo complained that Article 7 of the Belgian Law:

> *"establishes the universal applicability of the Law and the universal jurisdiction of the Belgian courts in respect of 'serious violations of international humanitarian law', without even making such applicability and jurisdiction conditional on the presence of the accused on Belgian territory.*
>
> *It is clearly this unlimited jurisdiction which the Belgian State confers upon itself which explains the issue of the arrest warrant against Mr. Yerodia Ndombasi, against whom it is patently evident that no basis of territorial or* in personam *jurisdiction, nor any jurisdiction based on the protection of the security or dignity of the Kingdom of Belgium, could have been invoked."*

In its Memorial, the Congo denied that

> "international law recognized such an enlarged criminal jurisdiction as that which Belgium purported to exercise, namely in respect of incidents of international humanitarian law when the accused was not within the prosecuting State's territory" (Memorial of Congo, para. 87). *[Translation by the Registry.]*

In its oral submissions the Congo once again stated that it was not opposed to the principle of universal jurisdiction *per se*. But the assertion of a universal jurisdiction over perpetrators of crimes was not an obligation under international law, only an option. The exercise of universal jurisdiction required, in the Congo's view, that the sovereignty of the other State be not infringed and an absence of any breach of an obligation founded in international law (CR 2001/6, p. 33). Further, according to the Congo, States who are not under any obligation to prosecute if the perpetrator is not present on their territory, nonetheless are free to do so in so far as this exercise of jurisdiction does not infringe the sovereignty of another State and is not in breach of international law *(ibid.)*. The Congo stated that it had no intention of discussing the existence of the principle of universal jurisdiction, nor of placing obstacles in the way of any emerging custom regarding universal jurisdiction (*ibid.*, p. 30). As the oral proceedings drew to a close, the Congo acknowledged that the Court might have to pronounce on certain aspects of universal jurisdiction, but it did not request the Court to do so, as the question did not interest it directly (CR 2001/10, p. 11). It was interested to have a ruling from the Court on Belgium's obligations to the Congo in the light of Mr. Yerodia's immunity at the relevant time. The final submissions as contained in the Application were amended so as to remove any request for the Court to make a determination on the issue of universal jurisdiction.

8. Belgium in its Counter-Memorial insisted that there was a general obligation on States under customary international law to prosecute perpetrators of crimes. It conceded, however, that where such persons were non-nationals, outside of its territory, there was no obligation but rather an available option (Counter-Memorial of Belgium, para. 3.3.25). No

territorial presence was required for the exercise of jurisdiction where the offence violated the fundamental interests of the international community (Counter-Memorial of Belgium, paras. 3.3.44-3.3.52). In Belgium's view an investigation or prosecution mounted against a person outside its territory did not violate any rule of international law, and was accepted both in international practice and in the internal practice of States, being a necessary means of fighting impunity (Counter-Memorial of Belgium, paras. 3.3.28-3.3.74).

9. These submissions were reprised in oral argument, while noting that the Congo "no longer contest[ed] the exercise of universal jurisdiction by default" (CR 2001/9, pp. 8-13). Belgium, too, was eventually content that the Court should pronounce simply on the immunity issue.

10. That the Congo should have gradually come to the view that its interests were best served by reliance on its arguments on immunity, was understandable. So was Belgium's satisfaction that the Court was being asked to pronounce on immunity and not on whether the issue and circulations of an international arrest warrant required the presence of the accused on its territory. Whether the Court should accommodate this consensus is another matter.

11. Certainly it is not required to do so by virtue of the *ultra petita* rule. In the Counter-Memorial Belgium quotes the *locus classicus* for the *non ultra petita* rule, the *Asylum (Interpretation)* case:

> "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" (*Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402; Counter-Memorial of Belgium, para. 2.75; emphasis added).

It also quotes Rosenne who said: "It does not confer jurisdiction on the Court or detract jurisdiction from it. It limits the extent to which the Court may go in its decision." (Counter-Memorial of Belgium, para. 2.77.)

12. Close reading of these quotations shows that Belgium is wrong it if wishes to convey to the Court that the *non ultra petita* rule would bar it from *addressing* matters not included in the submissions. It only precludes the Court from deciding upon such matters in the operative part of the Judgment since that is the place where the submissions are dealt with. But it certainly does not prevent the Court from considering in its reasoning issues which it deems relevant for its conclusions. As Sir Gerald Fitzmaurice said:

> "unless certain distinctions are drawn, there is a danger that [the *non ultra petita* rule] might hamper the tribunal in coming to a correct decision, and might even cause it to arrive at a legally incorrect one, by compelling it to neglect juridically relevant factors" (*The Law and Procedure of the International Court of Justice*, 1986, Vol. II, pp. 529-530).

13. Thus the *ultra petita* rule can operate to preclude a finding of the Court, in the *dispositif*, on a question not asked in the final submissions by a party. But the Court should not, because one or more of the parties finds it more comfortable for its position, forfeit necessary steps on the way to the finding it *does* make in the *dispositif*. The Court has acknowledged this in paragraph 43 of the present Judgment. But having reserved the right to deal with aspects of universal jurisdiction in its reasoning, "should it deem this necessary or desirable", the Court says nothing more on the matter.

14. This may be contrasted with the approach of the Court in the Advisory Opinion request put to it in *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter)* (*I.C.J. Reports 1962*, pp. 156-157). (The Court was constrained by the request put to it, rather than by the final submissions of the Applicant, but the point of principle remains the same.) The Court was asked by the General Assembly whether the expenditures incurred in connection with UNEF and ONUC constituted "expenses of the organization" for purposes of Article 17, paragraph 2, of the Charter.

15. France had in fact proposed an amendment to this request, whereby the Court would have been asked to consider whether the expenditures in question were made in conformity with the provisions of the Charter, before proceeding to the question asked. This proposal was rejected. The Court stated

> "The rejection of the French amendment does not constitute a directive to the Court to exclude from its consideration the question whether certain expenditures were 'decided on in conformity with the Charter', if the Court finds such consideration appropriate. It is not to be assumed that the General Assembly would thus seek to fetter or hamper the Court in the discharge of its judicial functions; the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion." (*Ibid.*, p. 157.)

The Court further stated that it

> "has been asked to answer a specific question related to certain identified expenditures which have actually been made, but the Court would not adequately discharge the obligation incumbent on it unless it examined in some detail various problems raised by the question which the General Assembly has asked" (*ibid.*, p. 158).

16. For all the reasons expounded above, the Court should have "found it appropriate" to deal with the question of whether the issue and international circulation of a warrant based on universal jurisdiction in the absence of Mr. Yerodia's presence on Belgian territory was unlawful. This should have been done before making a finding on immunity from jurisdiction, and the Court should indeed have "examined in some detail various problems raised" by the request as formulated by the Congo in its final submissions.

17. In agreeing to pronounce upon the question of immunity without addressing the question of a jurisdiction from which there could be immunity, the Court has allowed itself to be manœuvred into answering a hypothetical question. During the course of the oral pleadings Belgium drew attention to the fact that Mr. Yerodia had ceased to hold any ministerial office in the Government of the Democratic Republic of the Congo. In Belgium's view, this meant that the Court should declare the request to pronounce upon immunity to be inadmissible. In Belgium's view the case had become one "about legal principle and the speculative consequences for the immunities of Foreign Ministers from the possible action of a Belgian judge" (CR 2001/8, p. 26, para. 43). The dispute was "a difference of opinion of an abstract nature" (CR 2001/8, p. 36, para. 71). The Court should not "enter into a debate which it may well come to see as essentially an academic exercise" (CR 2001/9, p. 7, para. 4 *[translation by the Registry]*).

18. In its Judgment the Court rightly rejects those contentions (see Judgment, paras. 30-32). But nothing is more academic, or abstract, or speculative, than pronouncing on an immunity from a jurisdiction that may, or may not, exist. It is regrettable that the Court has not followed the logic of its own findings in the *Certain Expenses* case, and in this Judgment addressed in the necessary depth the question of whether the Belgian authorities could legitimately have invoked universal jurisdiction in issuing and circulating the arrest warrant for the charges contained therein, and for a person outside the territorial jurisdiction at the moment of the issue of the warrant. Only if the answer to these is in the affirmative does the question arise: "Nevertheless, was Mr. Yerodia immune from such exercise of jurisdiction, and by reference to what moment of time is that question to be answered?"

* * *

19. We therefore turn to the question whether States are entitled to exercise jurisdiction over persons having no connection with the forum State when the accused is not present in the State's territory. The necessary point of departure must be the sources of international law identified in Article 38, paragraph 1 *(c)*, of the Statute of the Court, together with obligations imposed upon all United Nations Members by Security Council resolutions, or by such General Assembly resolutions as meet the

criteria enunciated by the Court in the case concerning *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* (*I.C.J. Reports 1996*, p. 226, para. 70).

20. Our analysis may begin with national legislation, to see if it evidences a State practice. Save for the Belgian legislation of 10 February 1999, national legislation, whether in fulfilment of international treaty obligations to make certain international crimes offences also in national law, or otherwise, does not suggest a universal jurisdiction over these offences. Various examples typify the more qualified practice. The Australian War Crimes Act of 1945, as amended in 1988, provides for the prosecution in Australia of crimes committed between 1 September 1939 and 8 May 1945 by persons who were Australian citizens or residents at the times of being charged with the offences (Arts. 9 and 11). The United Kingdom War Crimes Act of 1991 enables proceedings to be brought for murder, manslaughter or culpable homicide, committed between 1 September 1935 and 5 June 1945, in a place that was part of Germany or under German occupation, and in circumstances where the accused was at the time, or has become, a British citizen or resident of the United Kingdom. The statutory jurisdiction provided for by France, Germany and (in even broader terms) the Netherlands, refer for their jurisdictional basis to the jurisdictional provisions in those international treaties to which the legislation was intended to give effect. It should be noted, however, that the German Government on 16 January 2002 has submitted a legislative proposal to the German Parliament, section 1 of which provides:

> "This Code governs all the punishable acts listed herein violating public international law, [and] in the case of felonies listed herein [this Code governs] even if the act was committed abroad and does not show any link to [Germany]."

The Criminal Code of Canada 1985 allows the execution of jurisdiction when at the time of the act or omission the accused was a Canadian citizen or "employed by Canada in a civilian or military capacity"; or the "victim is a Canadian citizen or a citizen of a State that is allied with Canada in an armed conflict", or when "at the time of the act or omission Canada could, in conformity with international law, exercise jurisdiction over the person on the basis of the person's presence in Canada" (Art. 7).

21. All of these illustrate the trend to provide for the trial and punishment under international law of certain crimes that have been committed extraterritorially. But none of them, nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum State.

22. The case law under these provisions has largely been cautious so

far as reliance on universal jurisdiction is concerned. In the *Pinochet* case in the English courts, the jurisdictional basis was clearly treaty based, with the double criminality rule required for extradition being met by English legislation in September 1988, after which date torture committed abroad was a crime in the United Kingdom as it already was in Spain. In Australia the Federal Court referred to a group of crimes over which international law granted universal jurisdiction, even though national enabling legislation would also be needed (*Nulyarimma*, 1999: genocide). The High Court confirmed the authority of the legislature to confer jurisdiction on the courts to exercise a universal jurisdiction over war crimes (*Polyukhovich*, 1991). In Austria (whose Penal Code emphasizes the double-criminality requirement), the Supreme Court found that it had jurisdiction over persons charged with genocide, given that there was not a functioning legal system in the State where the crimes had been committed nor a functioning international criminal tribunal at that point in time (*Cvjetkovic*, 1994). In France it has been held by a juge d'instruction that the Genocide Convention does not provide for universal jurisdiction (*in re Javor*, reversed in the Cour d'Appel on other grounds. The Cour de Cassation ruling equally does not suggest universal jurisdiction). The *Munyeshyaka* finding by the Cour d'Appel (1998) relies for a finding — at first sight inconsistent — upon cross-reference into the Statute of the International Tribunal for Rwanda as the jurisdictional basis. In the *Qaddafi* case the Cour d'Appel relied on passive personality and not on universal jurisdiction (in the Cour de Cassation it was immunity that assumed central importance).

23. In the *Bouterse* case the Amsterdam Court of Appeal concluded that torture was a crime against humanity, and as such an "extraterritorial jurisdiction" could be exercised over a non-national. However, in the Hoge Raad, the Dutch Supreme Court attached conditions to this exercise of extraterritorial jurisdiction (nationality, or presence within the Netherlands at the moment of arrest) on the basis of national legislation.

24. By contrast, a universal jurisdiction has been asserted by the Bavarian Higher Regional Court in respect of a prosecution for genocide (the accused in this case being arrested in Germany). And the case law of the United States has been somewhat more ready to invoke "universal jurisdiction", though considerations of passive personality have also been of key importance (*Yunis*, 1988; *Bin Laden*, 2000).

25. An even more ambiguous answer is to be derived from a study of the provisions of certain important treaties of the last 30 years, and the obligations imposed by the parties themselves.

26. In some of the literature on the subject it is asserted that the great international treaties on crimes and offences evidence universality as a ground for the exercise of jurisdiction recognized in international law. (See the interesting recent article of Luis Benavides, "The Universal Juris-

diction Principle: Nature and Scope", *Anuario Mexicano de Derecho Internacional*, Vol. 1, p. 58 (2001).) This is doubtful.

27. Article VI of the Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, provides:

> "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."

This is an obligation to assert territorial jurisdiction, though the *travaux préparatoires* do reveal an understanding that this obligation was not intended to affect the right of a State to exercise criminal jurisdiction on its own nationals for acts committed outside the State (A/C.6/SR.134, p. 5). Article VI also provides a potential grant of non-territorial competence to a possible future international tribunal — even this not being automatic under the Genocide Convention but being restricted to those Contracting Parties which would accept its jurisdiction. In recent years it has been suggested in the literature that Article VI does not prevent a State from exercising universal jurisdiction in a genocide case. (And see, more generally, *Restatement (Third) of the Foreign Relations Law of the United States* (1987), §404.)

28. Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention, all of 12 August 1949, provide:

> "Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case."

29. Article 85, paragraph 1, of the First Additional Protocol to the 1949 Geneva Convention incorporates this provision by reference.

30. The stated purpose of the provision was that the offences would not be left unpunished (the extradition provisions playing their role in this objective). It may immediately be noted that this is an early form of the *aut dedere aut prosequi* to be seen in later conventions. But the obligation to prosecute is primary, making it even stronger.

31. No territorial or nationality linkage is envisaged, suggesting a true

universality principle (see also Henzelin, *Le principe de l'universalité en droit pénal international: droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, 2000, pp. 354-356). But a different interpretation is given in the authoritative Pictet Commentary: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, which contends that this obligation was understood as being an obligation upon States parties to search for offenders who may be on their territory. Is it a true example of universality, if the obligation to search is restricted to the own territory? Does the obligation to search imply a permission to prosecute *in absentia*, if the search had no result?

32. As no case has touched upon this point, the jurisdictional matter remains to be judicially tested. In fact, there has been a remarkably modest corpus of national case law emanating from the jurisdictional possibilities provided in the Geneva Conventions or in Additional Protocol I.

33. The Single Convention on Narcotics and Drugs, 1961, provides in Article 36, paragraph 2, that:

> "*(a)* (iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgment given."

34. Diverse views were expressed as to whether the State where the offence was committed should have first right to prosecute the offender (E/CN.7/AC.3/9, 11 September 1958, p. 17, fn. 43; cf. E/CN.7/AC.3/9 and Add.1, E/CONF.34/1/Add.1, 6 January 1961, p. 32). Nevertheless, the principle of "primary universal repression" found its way into the text, notwithstanding the strong objections of States such as the United States, New Zealand and India that their national laws only envisaged the prosecution of persons for offences occurring within their national borders. (The development of the concept of "impact jurisdiction" or "effects jurisdiction" has in more recent years allowed continued reliance on territoriality while stretching far the jurisdictional arm.) The compromise reached was to make the provisions of Article 36, paragraph 2 (iv), "subject to the constitutional limitations of a Party, its legal system and domestic law". But the possibility of a universal jurisdiction was not denounced as contrary to international law.

35. The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, making preambular reference to the "urgent need" to make such acts "punishable as an offence and to provide for appropriate measures with respect to prosecution and extradition of

offenders", provided in Article 4 (1) for an obligation to take such measures as may be necessary to establish jurisdiction over these offences and other acts of violence against passengers or crew:

> "*(a)* when the offence is committed on board an aircraft registered in that State;
> *(b)* when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
> *(c)* when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State".

Article 4 (2) provided for a comparable obligation to establish jurisdiction where the alleged offender was present in the territory and if he was not extradited pursuant to Article 8 by the territory. Thus here too was a treaty provision for *aut dedere aut prosequi*, of which the limb was in turn based on the principle of "primary universal repression". The jurisdictional bases provided for in Article 4 (1) *(b)* and 4 (2), requiring no territorial connection beyond the landing of the aircraft or the presence of the accused, were adopted only after prolonged discussion. The *travaux préparatoires* show States for whom mere presence was an insufficient ground for jurisdiction beginning reluctantly to support this particular type of formula *because of the gravity of the offence*. Thus the representative of the United Kingdom stated that his country "would see great difficulty in assuming jurisdiction merely on the ground that an aircraft carrying a hijacker had landed in United Kingdom territory". Further,

> "normally his country did not accept the principle that the mere presence of an alleged offender within the jurisdiction of a State entitled that State to try him. In view, however, of the gravity of the offence . . . he was prepared to support . . . [the proposal on mandatory jurisdiction on the part of the State where a hijacker is found]." (Hague Conference, p. 75, para. 18.)

36. It is also to be noted that Article 4, paragraphs 1 and 2, provides for the mandatory exercise of jurisdiction in the absence of extradition; but does not preclude criminal jurisdiction exercised on alternative grounds of jurisdiction in accordance with national law (though those possibilities are not made compulsory under the Convention).

37. Comparable jurisdictional provisions are to be found in Articles 5 and 8 of the International Convention against the Taking of Hostages of 17 December 1979. The obligation enunciated in Article 8 whereby a State party shall "without exception whatsoever and whether or not the offence was committed in its territory" submit the case for prosecution if

it does not extradite the alleged offender, was again regarded as necessary by the majority, given the nature of the crimes (Summary Record, *Ad Hoc* Committee on the Drafting of an International Convention against the Taking of Hostages (A/AC.188/SR.5, 7, 8, 11, 14, 15, 16, 17, 23, 24 and 35)). The United Kingdom cautioned against moving to universal criminal jurisdiction (*ibid.*, A/AC.188/SR.24, para. 27) while others (Poland, A/AC.188/SR.23, para. 18; Mexico, A/AC.188/SR.16, para. 11) felt the introduction of the principle of universal jurisdiction to be essential. The USSR observed that no State could exercise jurisdiction over crimes committed in another State by nationals of that State without contravening Article 2, paragraph 7, of the Charter. The Convention provisions were in its view to apply only to hostage taking that was a manifestation of international terrorism — another example of initial and understandable positions on jurisdiction being modified in the face of the exceptional gravity of the offence.

38. The Convention against Torture, of 10 December 1984, establishes in Article 5 an obligation to establish jurisdiction

> "*(a)* When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
> *(b)* When the alleged offender is a national of that State;
> *(c)* When the victim is a national of that State if that State considers it appropriate."

If the person alleged to have committed the offence is found in the territory of a State party and is not extradited, submission of the case to the prosecuting authorities shall follow (Art. 7). Other grounds of criminal jurisdiction exercised in accordance with the relevant national law are not excluded (Art. 5, para. 3), making clear that Article 5, paragraphs 1 and 2, must not be interpreted *a contrario*. (See J. H. Burgers and H. Danelius, *The United Nations Convention against Torture*, 1988, p. 133.)

39. The passage of time changes perceptions. The jurisdictional ground that in 1961 had been referred to as the principle of "primary universal repression" came now to be widely referred to by delegates as "universal jurisdiction" — moreover, a universal jurisdiction thought appropriate, since torture, like piracy, could be considered an "offence against the law of nations" (United States: E/CN.4/1367, 1980). Australia, France, the Netherlands and the United Kingdom eventually dropped their objection that "universal jurisdiction" over torture would create problems under their domestic legal systems. (See E/CN.4/1984/72.)

40. This short historical survey may be summarized as follows.

41. The parties to these treaties agreed both to grounds of jurisdiction

and as to the obligation to take the measures necessary to establish such jurisdiction. The specified grounds relied on links of nationality of the offender, or the ship or aircraft concerned, or of the victim. See, for example, Article 4 (1), Hague Convention; Article 3 (1), Tokyo Convention; Article 5, Hostages Convention; Article 5, Torture Convention. These may properly be described as treaty-based broad extraterritorial jurisdiction. But in addition to these were the parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offences is found shall prosecute him or extradite him. By the loose use of language the latter has come to be referred to as "universal jurisdiction", though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.

* * *

42. Whether this obligation (whether described as the duty to establish universal jurisdiction, or, more accurately, the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events) is an obligation only of treaty law, *inter partes*, or whether it is now, *at least as regards the offences articulated in the treaties*, an obligation of customary international law was pleaded by the Parties in this case but not addressed in any great detail.

43. Nor was the question of whether any such general obligation applies to crimes against humanity, given that those too are regarded everywhere as comparably heinous crimes. Accordingly, we offer no view on these aspects.

44. However, we note that the inaccurately termed "universal jurisdiction principle" in these treaties is a principle of *obligation*, while the question in this case is whether Belgium had the right to issue and circulate the arrest warrant if it so chose.

If a dispassionate analysis of State practice and Court decisions suggests that no such jurisdiction is presently being exercised, the writings of eminent jurists are much more mixed. The large literature contains vigorous exchanges of views (which have been duly studied by the Court) suggesting profound differences of opinion. But these writings, important and stimulating as they may be, cannot of themselves and without reference to the other sources of international law, evidence the existence of a jurisdictional norm. The assertion that certain treaties and court decisions rely on universal jurisdiction, which in fact they do not, does not evidence an international practice recognized as custom. And the policy arguments advanced in some of the writings can certainly suggest why a practice or a court decision should be regarded as desirable, or indeed

lawful; but contrary arguments are advanced, too, and in any event these also cannot serve to substantiate an international practice where virtually none exists.

45. That there is no established practice in which States exercise universal jurisdiction, properly so called, is undeniable. As we have seen, virtually all national legislation envisages links of some sort to the forum State; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction. This does not necessarily indicate, however, that such an exercise would be unlawful. In the first place, national legislation reflects the circumstances in which a State provides in its own law the ability to exercise jurisdiction. But a State is not required to legislate up to the full scope of the jurisdiction allowed by international law. The war crimes legislation of Australia and the United Kingdom afford examples of countries making more confined choices for the exercise of jurisdiction. Further, many countries have no national legislation for the exercise of well recognized forms of extraterritorial jurisdiction, sometimes notwithstanding treaty obligations to enable themselves so to act. National legislation may be illuminating as to the issue of universal jurisdiction, but not conclusive as to its legality. Moreover, while none of the national case law to which we have referred happens to be based on the exercise of a universal jurisdiction properly so called, there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law — that is, State practice — is neutral as to exercise of universal jurisdiction.

46. There are, moreover, certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the *aut dedere aut prosequi* provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law. (See, for example, Cherif Bassiouni, *International Criminal Law*, Vol. III: *Enforcement*, 2nd ed., 1999, p. 228; Theodor Meron, "International Criminalization of Internal Atrocities", 89 *AJIL* (1995), p. 576.)

47. The contemporary trends, reflecting international relations as they stand at the beginning of the new century, are striking. The movement is towards bases of jurisdiction other than territoriality. "Effects" or "impact" jurisdiction is embraced both by the United States and, with certain qualifications, by the European Union. Passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in

the legislation of various countries (the United States, Ch. 113A, 1986 Omnibus Diplomatic and Antiterrorism Act; France, Art. 689, Code of Criminal Procedure, 1975), and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

48. In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally.

49. Belgium — and also many writers on this subject — find support for the exercise of a universal criminal jurisdiction *in absentia* in the *"Lotus"* case. Although the case was clearly decided on the basis of jurisdiction over damage to a vessel of the Turkish navy and to Turkish nationals, it is the famous dictum of the Permanent Court which has attracted particular attention. The Court stated that:

> "[T]he first and foremost restriction imposed by international law upon a State is that — failing the existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention.
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only

> limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable." (*P.C.I.J., Series A, No. 10*, pp. 18-19.)

The Permanent Court acknowledged that consideration had to be given as to whether these principles would apply equally in the field of criminal jurisdiction, or whether closer connections might there be required. The Court noted the importance of the territorial character of criminal law but also the fact that all or nearly all systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. After examining the issue the Court finally concluded that for an exercise of extraterritorial criminal jurisdiction (other than within the territory of another State) it was equally necessary to "prove the existence of a principle of international law restricting the discretion of States as regards criminal legislation".

50. The application of this celebrated dictum would have clear attendant dangers in some fields of international law. (See, on this point, Judge Shahabuddeen's dissenting opinion in the case concerning *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 394-396.) Nevertheless, it represents a continuing potential in the context of jurisdiction over international crimes.

51. That being said, the dictum represents the high water mark of laissez-faire in international relations, and an era that has been significantly overtaken by other tendencies. The underlying idea of universal jurisdiction properly so-called (as in the case of piracy, and possibly in the Geneva Conventions of 1949), as well as the *aut dedere aut prosequi* variation, is a common endeavour in the face of atrocities. The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking, torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted. And those States and academic writers who claim the right to act unilaterally to assert a universal criminal jurisdiction over persons committing such acts, invoke the concept of acting as "agents for the international community". This vertical notion of the authority of action is significantly different from the horizontal system of international law envisaged in the *"Lotus"* case.

At the same time, the international consensus that the perpetrators of international crimes should not go unpunished is being advanced by a flexible strategy, in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play. We reject the suggestion that the battle against impunity is "made over" to international treaties and tribunals, with national courts having no com-

petence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis. (See Article 4 (3), Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Article 5 (3), International Convention against Taking of Hostages, 1979; Article 5 (3), Convention against Torture; Article 9, Statute of the International Criminal Tribunal for the former Yugoslavia; and Article 19, Rome Statute of the International Criminal Court.)

52. We may thus agree with the authors of *Oppenheim's International Law* (9th ed., p. 998), that:

> "While no general rule of positive international law can as yet be asserted which gives to states the right to punish foreign nationals for crimes against humanity in the same way as they are, for instance, entitled to punish acts of piracy, there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect."

* * *

53. This brings us once more to the particular point that divides the Parties in this case: is it a precondition of the assertion of universal jurisdiction that the accused be within the territory?

54. Considerable confusion surrounds this topic, not helped by the fact that legislators, courts and writers alike frequently fail to specify the precise temporal moment at which any such requirement is said to be in play. Is the presence of the accused within the jurisdiction said to be required at the time the offence was committed? At the time the arrest warrant is issued? Or at the time of the trial itself? An examination of national legislation, cases and writings reveals a wide variety of temporal linkages to the assertion of jurisdiction. This incoherent practice cannot be said to evidence a precondition to any exercise of universal criminal jurisdiction. The fact that in the past the only clear example of an agreed exercise of universal jurisdiction was in respect of piracy, *outside of any territorial jurisdiction*, is not determinative. The only prohibitive rule (repeated by the Permanent Court in the *"Lotus"* case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State. The Belgian arrest warrant envisaged the arrest of Mr. Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.

55. In criminal law, in particular, it is said that evidence-gathering requires territorial presence. But this point goes to *any* extraterritoriality, including those that are well established and not just to universal jurisdiction.

56. Some jurisdictions provide for trial *in absentia*; others do not. If it

is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law.

57. On what basis is it claimed, alternatively, that an arrest warrant may not be issued for non-nationals in respect of offences occurring outside the jurisdiction? The textual provisions themselves of the 1949 Geneva Convention and the First Additional Protocol give no support to this view. The great treaties on aerial offences, hijacking, narcotics and torture are built around the concept of *aut dedere aut prosequi. Definitionally, this envisages presence on the territory.* There cannot be an obligation to extradite someone you choose not to try unless that person is within your reach. National legislation, enacted to give effect to these treaties, quite naturally also may make mention of the necessity of the presence of the accused. These sensible realities are critical for the obligatory exercise of *aut dedere aut prosequi* jurisdiction, but cannot be interpreted *a contrario so as to exclude a* voluntary exercise of a universal jurisdiction.

58. If the underlying purpose of designating certain acts as international crimes is to authorize a wide jurisdiction to be asserted over persons committing them, there is no rule of international law (and certainly not the *aut dedere* principle) which makes illegal co-operative overt acts designed to secure their presence within a State wishing to exercise jurisdiction.

* * *

59. If, as we believe to be the case, a State may choose to exercise a universal criminal jurisdiction *in absentia*, it must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States.

No exercise of criminal jurisdiction may occur which fails to respect the inviolability or infringes the immunities of the person concerned. We return below to certain aspects of this facet, but will say at this juncture that commencing an investigation on the basis of which an arrest warrant may later be issued does not of itself violate those principles. The function served by the international law of immunities does not require that States fail to keep themselves informed.

A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned. The Court makes reference to these elements in the context of this case at paragraph 16 of its Judgment.

Further, such charges may only be laid by a prosecutor or juge d'instruction who acts in full independence, without links to or control

by the government of that State. Moreover, the desired equilibrium between the battle against impunity and the promotion of good inter-State relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction and if this has been brought to the attention of the prosecutor or juge d'instruction. For example, persons related to the victims of the case will have requested the commencement of legal proceedings.

* * *

60. It is equally necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community.

61. Piracy is the classical example. This jurisdiction was, of course, exercised on the high seas and not as an enforcement jurisdiction within the territory of a non-agreeing State. But this historical fact does not mean that universal jurisdiction only exists with regard to crimes committed on the high seas or in other places outside national territorial jurisdiction. Of decisive importance is that this jurisdiction was regarded as lawful because the international community regarded piracy as damaging to the interests of all. War crimes and crimes against humanity are no less harmful to the interests of all because they do not usually occur on the high seas. War crimes (already since 1949 perhaps a treaty-based provision for universal jurisdiction) may be added to the list. The specification of their content is largely based upon the 1949 Conventions and those parts of the 1977 Additional Protocols that reflect general international law. Recent years have also seen the phenomenon of an alignment of national jurisdictional legislation on war crimes, specifying those crimes under the statutes of the ICTY, ICTR and the intended ICC.

62. The substantive content of the concept of crimes against humanity, and its status as crimes warranting the exercise of universal jurisdiction, is undergoing change. Article 6 *(c)* of the Charter of the International Military Tribunal of 8 August 1945 envisaged them as a category linked with those crimes over which the Tribunal had jurisdiction (war crimes, crimes against the peace). In 1950 the International Law Commission defined them as murder, extermination, enslavement, deportation or other inhuman acts perpetrated on the citizen population, or persecutions on political, racial or religious grounds if in exercise of, or connection with, any crime against peace or a war crime (*Yearbook of the International Law Commission*, 1950, Principle VI *(c)*, pp. 374-377). Later definitions of crimes against humanity both widened the subject-matter, to include such offences as torture and rape, and de-coupled the link to other earlier established crimes. Crimes against humanity are now regarded as a distinct category. Thus the 1996 Draft Code of Crimes

against the Peace and Security of Mankind, adopted by the International Law Commission at its 48th session, provides that crimes against humanity

> "means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group:
>
> *(a)* Murder;
> *(b)* Extermination;
> *(c)* Torture;
> *(d)* Enslavement;
> *(e)* Persecution on political, racial, religious or ethnic grounds;
>
> *(f)* Institutionalized discrimination on racial, ethnic or religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population;
> *(g)* Arbitrary deportation or forcible transfer of population;
>
> *(h)* Arbitrary imprisonment;
> *(i)* Forced disappearance of persons;
> *(j)* Rape, enforced prostitution and other forms of sexual abuse;
>
> *(k)* Other inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm".

63. The Belgian legislation of 1999 asserts a universal jurisdiction over acts broadly defined as "grave breaches of international humanitarian law", and the list is a compendium of war crimes and the Draft Codes of Offences listing of crimes against humanity, with genocide being added. Genocide is also included as a listed "crime against humanity" in the 1968 Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes against Humanity, as well as being included in the ICTY, ICTR and ICC Statutes.

64. The arrest warrant issued against Mr. Yerodia accuses him both of war crimes and of crimes against humanity. As regards the latter, charges of incitement to racial hatred, which are said to have led to murders and lynchings, were specified. Fitting of this charge within the generally understood substantive context of crimes against humanity is not without its problems. "Racial hatred" would need to be assimilated to "persecution on racial grounds", or, on the particular facts, to mass murder and extermination. Incitement to perform any of these acts is not in terms listed in the usual definitions of crimes against humanity, nor is it explicitly mentioned in the Statutes of the ICTY or the ICTR, nor in the Rome

Statute for the ICC. However, Article 7 (1) of the ICTY and Article 6 (1) of the ICTR do stipulate that

> "any person who planned, instigated, ordered, committed or otherwise aided or abetted in the planning, preparation or execution of a crime referred to [in the relevant articles: crimes against humanity being among them] shall be individually responsible for the crime".

In the *Akayesu* Judgment (96-4-T) a Chamber of the ICTR has held that liability for a crime against humanity includes liability through incitement to commit the crime concerned (paras. 481-482). The matter is dealt with in a comparable way in Article 25 (3) of the Rome Statute.

65. It would seem (without in any way pronouncing upon whether Mr. Yerodia did or did not perform the acts with which he is charged in the warrant) that the acts alleged do fall within the concept of "crimes against humanity" and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law.

* * *

66. A related point can usefully be dealt with at this juncture. Belgium contended that, regardless of how international law stood on the matter of universal jurisdiction, it had in fact exercised no such jurisdiction. Thus, according to Belgium, there was neither a violation of any immunities that Mr. Yerodia might have, nor any infringement of the sovereignty of the Congo. To this end, Belgium, in its Counter-Memorial, observed that immunity from enforcement of the warrant was carefully provided for "representatives of foreign States who visit Belgium on the basis of any official invitation. In such circumstances, the warrant makes clear that the person concerned would be immune from enforcement in Belgium" (Counter-Memorial of Belgium, para. 1.12). Belgium further observed that the arrest warrant

> "has no legal effect at all either in or as regards the DRC. Although the warrant was circulated internationally for information by Interpol in June 2000, it was not the subject of a Red Notice. Even had it been, the legal effect of Red Notices is such that, for the DRC, it would not have amounted to a request for provisional arrest, let alone a formal request for extradition." (Counter-Memorial of Belgium, para. 3.1.12.) *[Translation by the Registry.]*

67. It was explained to the Court that a primary purpose in issuing an international warrant was to learn the whereabouts of a person. Mr. Yerodia's whereabouts were known at all times.

68. We have not found persuasive the answers offered by Belgium to a question put to it by Judge Koroma, as to what the *purpose* of the warrant was, if it was indeed so carefully formulated as to render it unenforceable.

69. We do not feel it can be said that, given these explanations by Belgium, there was no exercise of jurisdiction as such that could attract immunity or infringe the Congo's sovereignty. If a State issues an arrest warrant against the national of another State, that other State is entitled to treat it as such — certainly unless the issuing State draws to the attention of the national State the clauses and provisions said to vacate the warrant of all efficacy. Belgium has conceded that the purpose of the international circulation of the warrant was "to establish a legal basis for the arrest of Mr. Yerodia . . . abroad and his subsequent extradition to Belgium". An international arrest warrant, even though a Red Notice has not yet been linked, is analogous to the locking-on of radar to an aircraft: it is already a statement of willingness and ability to act and as such may be perceived as a threat so to do at a moment of Belgium's choosing. Even if the action of a third State is required, the ground has been prepared.

* * *

70. We now turn to the findings of the Court on the impact of the issue of circulation of the warrant on the inviolability and immunity of Mr. Yerodia.

71. As to the matter of immunity, although we agree in general with what has been said in the Court's Judgment with regard to the specific issue put before it, we nevertheless feel that the approach chosen by the Court has to a certain extent transformed the character of the case before it. By focusing exclusively on the immunity issue, while at the same time bypassing the question of jurisdiction, the impression is created that immunity has value *per se*, whereas in reality it is an exception to a normative rule which would otherwise apply. It reflects, therefore, an interest which in certain circumstances prevails over an otherwise predominant interest, it is an exception to a jurisdiction which normally can be exercised and it can only be invoked when the latter exists. It represents an interest of its own that must always be balanced, however, against the interest of that norm to which it is an exception.

72. An example is the evolution the concept of State immunity in civil law matters has undergone over time. The original concept of absolute immunity, based on status *(par in parem non habet imperium)* has been replaced by that of restrictive immunity; within the latter a distinction was made between *acta jure imperii* and *acta jure gestionis* but immunity is granted only for the former. The meaning of these two notions is not carved in stone, however; it is subject to a continuously changing inter-

pretation which varies with time reflecting the changing priorities of society.

73. A comparable development can be observed in the field of international criminal law. As we said in paragraph 49, a gradual movement towards bases of jurisdiction other than territoriality can be discerned. This slow but steady shifting to a more extensive application of extra-territorial jurisdiction by States reflects the emergence of values which enjoy an ever-increasing recognition in international society. One such value is the importance of the punishment of the perpetrators of international crimes. In this respect it is necessary to point out once again that this development not only has led to the establishment of new international tribunals and treaty systems in which new competences are attributed to national courts but also to the recognition of other, non-territorially based grounds of national jurisdiction (see paragraph 51 above).

74. The increasing recognition of the importance of ensuring that the 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. Now it is generally recognized that in the case of such crimes, which are often committed by high officials who make use of the power invested in the State, immunity is never substantive and thus cannot exculpate the offender from personal criminal responsibility. It has also 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.

75. These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since 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.

76. Such is the backdrop of the case submitted to the Court. Belgium claims that under international law it is permitted to initiate criminal proceedings against a State official who is under suspicion of having committed crimes which are generally condemned by the international community; and it contends that because of the nature of these crimes the individual in question is no longer shielded by personal immunity. The Congo does not deny that a Foreign Minister is responsible in international law for all of his acts. It asserts instead that he has absolute personal immunity from criminal jurisdiction as long as he is in office and that his status must be assimilated in this respect to that of a Head of State (Memorial of Congo, p. 30).

77. Each of the Parties, therefore, gives particular emphasis in its argument to one set of interests referred to above: Belgium to that of the prevention of impunity, the Congo to that of the prevention of unwarranted outside interference as the result of an excessive curtailment of immunities and an excessive extension of jurisdiction.

78. In the Judgment, the Court diminishes somewhat the significance of Belgium's arguments. After having emphasized — and we could not agree more — 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 (para. 60), the Court goes on to say that these immunities do not represent a bar to criminal prosecution in certain circumstances (para. 61). We feel less than sanguine about examples given by the Court of such circumstances. The chance that a Minister for Foreign Affairs will be tried in his own country in accordance with the relevant rules of domestic law or that his immunity will be waived by his own State is not high as long as there has been no change of power, whereas the existence of a competent international criminal court to initiate criminal proceedings is rare; moreover, it is quite risky to expect too much of a future international criminal court in this respect. The only credible alternative therefore seems to be the possibility of starting proceedings in a foreign court after the suspected person ceases to hold the office of Foreign Minister. This alternative, however, can also be easily forestalled by an unco-operative government that keeps the Minister in office for an as yet indeterminate period.

79. We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value and to which we referred in paragraph 77 above. International law

seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials. In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions. It is, therefore, necessary to analyse carefully the immunities which under customary international law are due to high State officials and, in particular, to Ministers for Foreign Affairs.

80. Under traditional customary law the Head of State was seen as personifying the sovereign State. The immunity to which he was entitled was therefore predicated on status, just like the State he or she symbolized. Whereas State practice in this regard is extremely scarce, the immunities to which other high State officials (like Heads of Government and Ministers for Foreign Affairs) are entitled have generally been considered in the literature as merely functional. (Cf. Arthur Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 247, pp. 102-103.)

81. We have found no basis for the argument that Ministers for Foreign Affairs are entitled to the same immunities as Heads of State. In this respect, it should be pointed out that paragraph 3.2 of the International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property of 1991, which contained a saving clause for the privileges and immunities of Heads of State, failed to include a similar provision for those of Ministers for Foreign Affairs (or Heads of Government). In its commentary, the ILC stated that mentioning the privileges and immunities of Ministers for Foreign Affairs would raise the issues of the basis and the extent of their jurisdictional immunity. In the opinion of the ILC these immunities were clearly not identical to those of Heads of State.

82. The Institut de droit international took a similar position in 2001 with regard to Foreign Ministers. Its resolution on the Immunity of Heads of State, based on a thorough report on all relevant State practice, states expressly that these "shall enjoy, in criminal matters, immunity from jurisdiction before the courts of a foreign State for any crime he or she may have committed, regardless of its gravity". But the Institut, which in this resolution did assimilate the position of Head of Government to that of Head of State, carefully avoided doing the same with regard to the Foreign Minister.

83. We agree, therefore, with the Court that the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective States (Judgment, para. 53). During their term of office, they must therefore be able to travel freely whenever the need to do so arises. There is broad agreement in the literature that a Minister for Foreign Affairs is entitled to full immunity during official visits in the exercise of his function. This was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000. The Foreign Minister must also be immune whenever and wherever engaged in the functions required by his office and when in transit therefor.

84. Whether he is also entitled to immunities during private travels and what is the scope of any such immunities, is far less clear. Certainly, he or she may not be subjected to measures which would prevent effective performance of the functions of a Foreign Minister. Detention or arrest would constitute such a measure and must therefore be considered an infringement of the inviolability and immunity from criminal process to which a Foreign Minister is entitled. The arrest warrant of 11 April 2000 was directly enforceable in Belgium and would have obliged the police authorities to arrest Mr. Yerodia had he visited that country for non-official reasons. The very issuance of the warrant therefore must be considered to constitute an infringement on the inviolability to which Mr. Yerodia was entitled as long as he held the office of Minister for Foreign Affairs of the Congo.

85. Nonetheless, that immunity prevails only as long as the Minister is in office and continues to shield him or her after that time only for "official" acts. It is now increasingly claimed in the literature (see for example, Andrea Bianchi, "Denying State Immunity to Violators of Human Rights", 46 *Austrian Journal of Public and International Law* (1994), pp. 227-228) 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 (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of *1° Congreso del Partido* (1978) QB 500 at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the *Eichmann* case; Supreme Court, 29 May 1962, 36 *International Law Reports*, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in *R.* v. *Bartle and the Commissioner of Police for the Metropolis and Others*, ex parte *Pinochet ("Pinochet III")*; and of Lords Steyn and Nicholls of Birkenhead in *"Pinochet I"*, as well as the

judgment of the Court of Appeal of Amsterdam in the *Bouterse* case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2.)

* * *

86. We have voted against paragraph (3) of the *dispositif* for several reasons.

87. In paragraph (3) of the *dispositif*, the Court "[f]inds 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 making this finding, the Court relies on the proposition enunciated in the *Factory at Chorzów* case pursuant to which "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would . . . have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47). Having previously found that the issuance and circulation of the warrant by Belgium was illegal under international law, the Court concludes that it must be withdrawn because "the warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs".

88. We have been puzzled by the Court's reliance on the *Factory at Chorzów* case to support its finding in paragraph (3) of the *dispositif*. It would seem that the Court regards its order for the cancellation of the warrant as a form of *restitutio in integrum*. Even in the very different circumstances which faced the Permanent Court in the *Factory at Chorzów* case, *restitutio* in the event proved impossible. Nor do we believe that restoration of the *status quo ante* is possible here, given that Mr. Yerodia is no longer Minister for Foreign Affairs.

89. Moreover — and this is more important — the Judgment suggests that what is at issue here is a continuing illegality, considering that a call for the withdrawal of an instrument is generally perceived as relating to the cessation of a continuing international wrong (International Law Commission, Commentary on Article 30 of the Articles of State Responsibility, A/56/10 (2001), p. 216). However, the Court's finding in the instant case that the issuance and circulation of the warrant was illegal, a conclusion which we share, was based on the fact that these acts took place at a time when Mr. Yerodia was Minister for Foreign Affairs. As soon as he ceased to be Minister for Foreign Affairs, the illegal consequences attaching to the warrant also ceased. The mere fact that the warrant continues to identify Mr. Yerodia as Minister for Foreign Affairs changes nothing in this regard as a matter of international law, although it may well be that a misnamed arrest warrant, which is all it now is, may be deemed to be defective as a matter of Belgian domestic law; but that

is not and cannot be of concern to this Court. Accordingly, we consider that the Court erred in its finding on this point.

(Signed) Rosalyn HIGGINS.
(Signed) Pieter KOOIJMANS.
(Signed) Thomas BUERGENTHAL.

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo *v.* Belgium),
Judgment, Separate Opinion of Judge Rezek,
I.C.J. Reports 2002

SEPARATE OPINION OF JUDGE REZEK

[Translation]

Logical priority of jurisdictional issues over issues of immunities — Effect of the exclusion of jurisdictional issues from the Congo's final submissions — Territoriality and the defence of certain legally protected interests as fundamental rules of jurisdiction — Active and passive nationality as supplementary bases of jurisdiction — Exercise of criminal jurisdiction in the absence of any factor of connection with the forum State not yet permitted under international law — International system of co-operation in the punishment of crime.

1. I am convinced that I am in the process of writing a *dissenting opinion*, even though it must be classified as a *separate opinion* because I voted in favour of the entire operative part of the Judgment. Like the majority of Members of the Court, I fully concur with the operative part, because I find the treatment of the question of immunity to be in conformity with the law as it now stands. I do, however, regret that no majority could be found to address the crucial aspect of the problem before the Court.

2. No immunity is absolute, in any legal order. An immunity must necessarily exist within a particular context, and no subject of law can enjoy immunity in the abstract. Thus, an immunity might be available before one national court but not before another. Similarly, an immunity might be effective in respect of domestic courts but not of an international one. Within a given legal order, an immunity might be relied upon in relation to criminal proceedings but not to civil proceedings, or vis-à-vis an ordinary court but not a special tribunal.

3. The question of jurisdiction thus inevitably precedes that of immunity. Moreover, the two issues were debated at length by the Parties both in their written pleadings and in oral argument. The fact that the Congo confined itself in its final submissions to asking the Court to render a decision based on its former Minister's immunity vis-à-vis the Belgian domestic court does not justify the Court's disregard of an inescapable premise underlying consideration of the issue of immunity. Here, the point is not to *follow the order* in which the issues were submitted to the Court for consideration but rather to respect the order which a strictly logical approach requires. Otherwise, we are impelled towards a situation where the Court is deciding whether or not there would be immunity in the event that *the Belgian courts were to have jurisdiction* . . .

4. By ruling first on the jurisdictional issue, the Court would have had the opportunity to point out that domestic criminal jurisdiction based

solely on the principle of universal justice is necessarily subsidiary in nature and that there are good reasons for that. First, it is accepted that no forum is as qualified as that of the *locus delicti* to see a criminal trial through to its conclusion in the proper manner, if for no other reasons than that the evidence lies closer to hand and that that forum has greater knowledge of the accused and the victims, as well as a clearer appreciation of the full circumstances surrounding the offence. It is for political rather than practical reasons that a number of domestic systems rank, immediately after the principle of *territoriality*, a basis of criminal jurisdiction of a different kind, one which applies irrespective of the *locus delicti*: the principle of the *defence of certain legal interests* to which the State attaches particular value: the life and physical integrity of the sovereign, the national heritage, good governance.

5. With the exception of these two basic principles, complementarity is becoming the rule: in most countries, criminal proceedings are possible on the basis of the principles of *active* or *passive nationality* where crimes have been committed abroad by or against nationals of the forum State, but on condition that those crimes have not been tried elsewhere, in a State where criminal jurisdiction would more naturally lie, and provided that the accused is present on the territory of the forum State, of which either he himself or his victims are nationals.

6. In no way does international law as it now stands allow for activist intervention, whereby a State seeks out on another State's territory, by means of an extradition request or an international arrest warrant, an individual accused of crimes under public international law but having *no factual connection with the forum State*. It required considerable presumption to suggest that Belgium was "obliged" to initiate criminal proceedings in the present case. Something which is not permitted cannot, *a fortiori*, be required. Even disregarding the question of the accused's immunity, the Respondent has been unable to point to a single other State which has in similar circumstances gone ahead with a public prosecution. No "nascent customary law" derives from the isolated action of one State; there is no embryonic customary rule in the making, notwithstanding that the Court, in addressing the issue of jurisdiction, acceded to the Respondent's request not to impose any restraint on the formative process of the law.

7. Article 146 of the Fourth Geneva Convention of 1949, on the protection of civilian persons in time of war, an article which also appears in the other three 1949 Conventions, is, of all the norms of current treaty law, the one which could best support the Respondent's position founding the exercise of criminal jurisdiction solely on the basis of the principle of universal jurisdiction. That provision obliges States to search for and either hand over or try individuals accused of the crimes defined by the relevant Convention. However, quite apart from the fact that the present case does not come within the scope, as strictly defined, of the 1949 Con-

ventions, we must also bear in mind, as Ms Chemillier-Gendreau recalled in order to clarify the provision's meaning, the point made by one of the most distinguished specialists in international criminal law (and in the criminal aspects of international law), Professor Claude Lombois:

> "Wherever that condition is not put into words, it must be taken to be implied: how could a State search for a criminal in a territory other than its own? How could it hand him over if he were not present in its territory? Both searching and handing over presuppose coercive acts, linked to the prerogatives of sovereign authority, the spatial limits of which are defined by the territory."[1]

8. It is essential that all States ask themselves, before attempting to steer public international law in a direction conflicting with certain principles which still govern contemporary international relations, what the consequences would be should other States, and possibly a large number of other States, adopt such a practice. Thus it was apt for the Parties to discuss before the Court what the reaction of some European countries would be if a judge in the Congo had accused their leaders of crimes purportedly committed in Africa by them or on their orders[2].

9. An even more pertinent scenario could serve as counterpoint to the present case. There are many judges in the southern hemisphere, no less qualified than Mr. Vandermeersch, and, like him, imbued with good faith and a deep attachment to human rights and peoples' rights, who would not hesitate for one instant to launch criminal proceedings against various leaders in the northern hemisphere in relation to recent military episodes, all of which have occurred north of the equator. Their knowledge of the facts is no less complete, or less impartial, than the knowledge which the court in Brussels thinks it possesses about events in Kinshasa. Why do these judges show restraint? Because they are aware that international law does not permit the assertion of criminal jurisdiction in such circumstances. Because they know that their national Governments, in light of this legal reality, would never support such action at international level. If the application of the principle of universal jurisdiction does not presuppose that the accused be present on the territory of the forum State, co-ordination becomes totally impossible, leading to the collapse of the international system of co-operation for the prosecution of crime[3]. It is important that the domestic treatment of issues of this kind, and hence the conduct of the authorities of each State, should accord with the notion of a decentralized international community, founded on the principle of the equality of its members and necessarily requiring the

[1] CR 2001/6, p. 31.
[2] CR 2001/6, p. 28 (Ms Chemillier-Gendreau); CR 2001/9, pp. 12-13 (Mr. Eric David).
[3] As regards the current status of the principle of universal jurisdiction, note that the States which negotiated the Rome Treaty avoided extending this principle to the jurisdiction of the future International Criminal Court.

co-ordination of their efforts. Any policy adopted in the name of human rights but not in keeping with that discipline threatens to harm rather than serve that cause.

10. In my view, if the Court had first considered the question of jurisdiction, it would have been relieved of any need to rule on the question of immunity. I do in any event adhere to the conclusions of the majority of my colleagues on this point. I find that under the facts and circumstances of the present case the Belgian domestic court lacks jurisdiction to conduct criminal proceedings, in the absence of any basis of jurisdiction other than the principle of universal jurisdiction and failing, in support of that principle, the presence on Belgian territory of the accused, whom it would be unlawful to force to appear. But I believe that, even on the assumption that the Belgian judicial authorities did have jurisdiction, the immunity enjoyed by the Congo's Minister for Foreign Affairs would have barred both the initiation of criminal proceedings and the circulation of the international arrest warrant by the judge, with support from the Belgian Government.

(*Signed*) Francisco REZEK.

Arrest Warrant of 11 April 2000
(Democratic Republic of the Congo *v.* Belgium),
Judgment, Dissenting Opinion of
Judge Al-Khasawneh, I.C.J. Reports 2002

DISSENTING OPINION OF JUDGE AL-KHASAWNEH

Immunity of a Foreign Minister functional — Its extent is not clear — Different from diplomatic representatives — Also different from Heads of State — Ministers entitled to immunity from enforcement when on official missions — But not on private visits — Belgian warrant did not violate Mr. Yerodia's immunity — Express language on non-enforceability when on official mission — Circulation of warrant not accompanied by Red Notice — More fundamental question is whether there are exceptions in the case of grave crimes — Immunity and impunity — Distinction between procedural and substantive aspects of immunity artificial — Cases postulated by the Court do not address questions of impunity adequately — Effective combating of grave international crimes has assumed a jus cogens *character — Should prevail over rules on immunity — Development in the field of jurisdictional immunities relevant — Two faulty premises — Absolute immunity — No exception — Dissent.*

1. As a general proposition it may be said without too much fear of contradiction that the effective conduct of diplomacy — the importance of which for the maintenance of peaceful relations among States needs hardly to be demonstrated — requires that those engaged in such conduct be given appropriate immunities from — *inter alia* — criminal proceedings before the courts of other States. The nature and extent of such immunities has been clarified in the case of diplomatic representatives in the 1961 Vienna Convention, as well as in extensive jurisprudence since the adoption of that Convention. By contrast, and this is not without irony, the nature and extent of immunities enjoyed by Foreign Ministers is far from clear, so much so that the ILC Special Rapporteur on Jurisdictional Immunities of States and Their Property expressed the opinion that the immunities of Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law. To be sure the Convention on Special Missions — the status of which as a reflection of customary law is however not without controversy — covers the immunities of Foreign Ministers who are on official mission, but reserves the extent of those immunities under the unhelpful formula:

> "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." (Art. 21, para. 2.)

Nor is the situation made any clearer by the total absence of precedents with regard to the immunities of Foreign Ministers from criminal process. What is sure however is that the position of Foreign Ministers cannot be assimilated to diplomatic representatives for in the case of the latter the host State has a discretion regarding their accreditation and can also declare a representative *persona non grata*, which in itself constitutes some sanction for wrongful conduct and more importantly opens the way — assuming good faith of course — for subsequent prosecution in his/her home State. A Minister for Foreign Affairs accused of criminal conduct — and for that matter criminal conduct that infringes the interests of the community of States as a whole in terms of the gravity of the crimes he is alleged to have committed, and the importance of the interests that the community seeks to protect and who is furthermore not prosecuted in his home State — is hardly under the same conditions as a diplomatic representative granted immunity from criminal process.

2. If the immunities of a Minister for Foreign Affairs cannot be assimilated to a diplomatic representative, can those immunities be established by assimilating him to a Head of a State? Whilst a Foreign Minister is undoubtedly an important personage of the State and represents it in the conduct of its foreign relations, he does not, in any sense, personify the State. As Sir Arthur Watts correctly puts it:

> "heads of governments and foreign ministers, although senior and important figures, do not symbolize or personify their States in the way that Heads of States do. Accordingly, they do not enjoy in international law any entitlement to special treatment by virtue of qualities of sovereignty or majesty attaching to them personally." (A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 247, pp. 102-103).

3. Moreover, it should not be forgotten that immunity is by definition an exception from the general rule that man is responsible legally and morally for his actions. As an exception, it has to be narrowly defined.

4. A Minister for Foreign Affairs is entitled to immunity from enforcement when on official mission for the unhindered conduct of diplomacy would suffer if the case was otherwise, but the opening of criminal investigations against him can hardly be said by any objective criteria to constitute interference with the conduct of diplomacy. A faint-hearted or ultra-sensitive Minister may restrict his private travels or feel discomfort but this is a subjective element that must be discarded. The warrant

issued against Mr. Yerodia goes further than a mere opening of investigation and may arguably be seen as an enforcement measure but it contained express language to the effect that it was not to be enforced if Mr. Yerodia was on Belgian territory on an official mission. In fact press reports — not cited in the Memorials or the oral pleadings — suggest that he had paid a visit to Belgium after the issuance of the warrant and no steps were taken to enforce it. Significantly also the circulation of the international arrest warrant was not accompanied by a Red Notice requiring third States to take steps to enforce it (which only took place after Mr. Yerodia had left office) and had those States acted they would be doing so at their own risk. A breach of an obligation presupposes the existence of an obligation and in the absence of any evidence to suggest a Foreign Minister is entitled to absolute immunity, I cannot see why the Kingdom of Belgium, when we have regard to the terms of the warrant and the lack of an Interpol Red Notice was in breach of its obligations owed to the Democratic Republic of Congo.

5. A more fundamental question is whether high State officials are entitled to benefit from immunity even when they are accused of having committed exceptionally grave crimes recognized as such by the international community. In other words, should immunity become *de facto* impunity for criminal conduct as long as it was in pursuance of State policy? The Judgment sought to circumvent this morally embarrassing issue by recourse to an existing but artificially drawn distinction between immunity as a substantive defence on the one hand and immunity as a procedural defence on the other. The artificiality of this distinction can be gleaned from the ILC commentary to Article 7 of the Draft Code of Crimes against the Peace and Security of Mankind, which states: "The absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings" — and it should not be forgotten that the draft was intended to apply to national or international courts — "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."

6. Having drawn this distinction, the Judgment then went on to postulate four cases where, in an attempt at proving that immunity and impunity are not synonymous, a Minister, and by analogy a high-ranking official, would be held personally accountable:

(a) for prosecution in his/her home State;
(b) for prosecution in other States if his/her immunity had been waived;

(c) after he/she leaves office except for official acts committed while in office;
(d) for prosecution before an international court.

This paragraph (Judgment, para. 61) is more notable for the things it does not say than for the things it does: as far as prosecution at home and waiver are concerned, clearly the problem arises when they do not take place. With regard to former high-ranking officials the question of impunity remains with regard to official acts, the fact that most grave crimes are definitionally State acts makes this more than a theoretical lacuna. Lastly with regard to existing international courts their jurisdiction *ratione materiae* is limited to the two cases of the former Yugoslavia and Rwanda and the future international court's jurisdiction is limited *ratione temporis* by non-retroactivity as well as by the fact that primary responsibility for prosecution remains with States. The Judgment cannot dispose of the problem of impunity by referral to a prospective international criminal court or existing ones.

7. The effective combating of grave crimes has arguably assumed a *jus cogens* character reflecting recognition by the international community of the vital community interests and values it seeks to protect and enhance. Therefore when this hierarchically higher norm comes into conflict with the rules on immunity, it should prevail. Even if we are to speak in terms of reconciliation of the two sets of rules, this would suggest to me a much more restrictive interpretation of the immunities of high-ranking officials than the Judgment portrays. Incidentally, such a restrictive approach would be much more in consonance with the now firmly established move towards a restrictive concept of State immunity, a move that has removed the bar regarding the submission of States to jurisdiction of other States often expressed in the maxim *par in parem non habet imperium*. It is difficult to see why States would accept that their conduct with regard to important areas of their development be open to foreign judicial proceedings but not the criminal conduct of their officials.

8. In conclusion, this Judgment is predicated on two faulty premises:

(a) that a Foreign Minister enjoys absolute immunity from both jurisdiction and enforcement of foreign States as opposed to only functional immunity from enforcement when on official mission, a proposition which is neither supported by precedent, *opinio juris*, legal logic or the writings of publicists;

(b) that as international law stands today, there are no exceptions to the immunity of high-ranking State officials even when they are accused of grave crimes. While, admittedly, the readiness of States and municipal courts to admit of exceptions is still at a very nebulous stage of development, the situation is much more fluid than the

Judgment suggests. I believe that the move towards greater personal accountability represents a higher norm than the rules on immunity and should prevail over the latter. In consequence, I am unable to join the majority view.

(Signed) Awn AL-KHASAWNEH.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium), Judgment, Separate Opinion of Judge *ad hoc* Bula-Bula, I.C.J. Reports 2002

SEPARATE OPINION OF JUDGE BULA-BULA

[Translation]

Establishment of the facts, mediate and immediate — Decolonization — Right of peoples to self-determination — Sovereign equality of States — Interference in domestic affairs — Armed aggression — International humanitarian law — Immunities of a Minister for Foreign Affairs — Immunity and impunity — Subject-matter and persistence of the dispute — Admissibility of an application — Claim to universal jurisdiction — Non ultra petita *rule — International customary law — Exception —* Opinio juris *and international practice — Internationally wrongful act — African conception — A people's dignity — International responsibility — Moral injury — Reparation — Good faith — Development of international law — The international community — Lessons of international law.*

1. Given that the landmark Judgment of 14 February 2002 declares the law and settles the dispute between the Democratic Republic of the Congo (hereinafter "the Congo") and the Kingdom of Belgium (hereinafter "Belgium"); that this judicial decision is without precedent in the field and codifies and develops contemporary international law; and that the Court has thus imposed the force of law upon the law of force within the "international community" which it has been at pains to establish over the years: I fully and unreservedly support the entire operative part of the Judgment.

2. I would nonetheless like to emphasize here other grounds of fact and law which seem to me to supplement and strengthen this collective decision. My opinion is also justified by the particular duty incumbent upon me in my capacity as judge *ad hoc*. An "opinion" does not necessarily obey rigid rules. Doubtless it must not address questions which bear no relation to any part of the Judgment. Subject to this, the traditional practice would seem to be characterized by its freedom. Not only does the length of opinions sometimes exceed that of the Judgment itself[1], but also

[1] Compare the Judgment of 5 February 1970 in the case concerning the *Barcelona Traction, Light and Power Company, Limited* (49 pages) with the opinions of Judges Ammoun (48 pages), Tanaka (47 pages), Fitzmaurice (50 pages) and Jessup (61 pages); the Advisory Opinion of 21 June 1971 in the *South West Africa* case (43 pages) with the opinion of Judge Fitzmaurice (103 pages); the Judgment of 27 June 1986 in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (137 pages), with the opinion of Judge Schwebel (269 pages); the Judgment of 16 June 1992 in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)* (30 pages) with the opinion of Judge Shahabuddeen (31 pages); the Judgment of 3 June 1993 in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)* (41 pages) with the opinion of Judge Shahabuddeen (81 pages); the Judgment of 24 February 1982 in the case concerning the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (77 pages) with the opinion of Judge Oda (21 pages); the Judgment of 12 December 1996 in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)* (19 pages) with the opinion of Judge Shahabuddeen (20 pages).

they can be written with a variety of aims in view[2]. Thus it is open to me, without carrying matters to excess, to develop my argument to a reasonable extent. On the one hand, it seems to me that the summary version of the facts presented by the opposing Parties reveals only the visible face of the iceberg. It permits a superficial reading of a case forming part of a far wider dispute. On the other, it was in part the immediate circumstances as thus presented to it which led the Court not to examine in depth the fundamental issue of the independence of the Congo, Belgium's former and sole colony, vis-à-vis the latter. The reference to sovereign equality, successively belaboured both at the provisional measures phase and then at the merits stage by two of Congo's counsel, both members of the Government, is a call to examine the matter in depth. It is repeated in the final submissions. And it surely underlies the choice of judges *ad hoc*, first by the Respondent, then by the Applicant!

3. In doctrine, judges *ad hoc* have the particular duty of contributing to an objective and impartial establishment of the facts and of presenting the conception of the law held by each party to the dispute[3]. In Judge Lauterpacht's view, an *ad hoc* judge has an obligation to

> "endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected — though not necessarily accepted — in any separate or dissenting opinion that he may write"[4].

4. Fulfilment of such an obligation does not in any sense assimilate a judge *ad hoc* to a representative of a State[5]. Further, his is in no sense a national representation but a "national presence"[6], which is, moreover, a permanent one for the permanent members of the Security Council. J. G. Merrills takes the view that the institution of judge *ad hoc* "provides an important link between the parties and the Court". In these circumstances, "the institution of the *ad hoc* judge reflecting, as it does, 'the incidence of metajuridical considerations in the functioning of international adjudication' is perhaps still too useful to be dispensed with"[7].

5. Naturally I am in agreement, in my capacity as judge *ad hoc*, with

[2] See on this point, Charles Rousseau, *Droit international public*, Vol. V, "Les rapports conflictuels", 1983, p. 463.

[3] Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, *Droit international public*, 1999, p. 855, para. 541; E. McWhinney, *Les Nations Unies et la formation du droit*, 1986, p. 150.

[4] Judge Lauterpacht, separate opinion appended to the Order of 17 December 1997 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Yugoslavia)*, *I.C.J. Reports 1997*, p. 278.

[5] See the communication of E. Lauterpacht, "The Role of *ad hoc* Judges", in *Increasing the Effectiveness of the International Court of Justice*, 1997, p. 374.

[6] See the commentary of Krzystof Skubiszewski, *ibid.*, p. 378.

[7] J. G. Merrills, *International Dispute Settlement*, 3rd ed., 1998, p. 139.

"at least the basic stance of the appointing State (jurisdiction, admissibility, fundamentals of the merits)"[8]. Otherwise, how could I have accepted the proposed appointment? My consent of course means that "there is a certain understanding . . . for the case that has been put in front of him"[9]. Moreover, it seemed to me helpful, as judge *ad hoc*, to give an opinion in both of the phases undergone by this case[10], thus, in my view, making the reasoning more readily understandable.

6. Covering a great deal of ground, and out of regard for the Court and its working methods, I will confine myself to recalling very concisely, from Belgian, Congolese, transnational and international sources, certain factual data, of both indirect and direct relevance, which make up the background to the case concerning the *Arrest Warrant of 11 April 2000*. Through these brief references, I seek both to exorcize the past and to foster between the Applicant and the Respondent, States intimately linked by history, effective implementation of the principle of *sovereign equality between States*.

7. Addressing the Congolese people at Kinshasa on 30 June 1991, forty-first anniversary of the country's independence, the Belgian Prime Minister declared:

> "You are an important part of our past. Special, particularly strong links unite our two countries. Links based on a relationship marked by pain, by promise, by prudence . . What unites us — you know it, we know it — is reflected in the external mirror constituted by our good or our bad conscience, the boundary between good and evil, between good intentions and blunders . . . I wish to say to the Congolese people, wheresoever they may be on this vast territory, that we are aware of their pain and of the suffering they have endured."

Rarely have such views been publicly expressed by the head of the government of a former colonial power four decades after decolonization. Wrongly or rightly, it is perhaps in the circumstances of a very particular act of decolonization, whose consequences are still with us today, including in the present case, that the justification for these views is to be sought.

8. Rereading the account of the decolonization of the Congo[11]

[8] See the commentary of Krzystof Skubiszewski, *Increasing the Effectiveness of the International Court of Justice*, *loc. cit.*, p. 378.

[9] See the contribution of Hugh W. A. Thirlway, *ibid.*, p. 393.

[10] According to A. Pellet, *ibid.*, "judges *ad hoc* are very appreciated if they express their opinions during the various phases of the case", p. 395.

[11] The tragic events which marked the decolonization of the Congo led the United Nations to involve the Court. See S. Rosenne, "La Cour internationale de Justice en 1961", *Revue générale de droit international public*, 3rd series, Vol. XXXIII, October-December 1962, No. 4, p. 703.

prepared by one of the 40 or so political reconciliation conferences[12], we learn the following:

> "Following his victory in the legislative elections, Patrice Emery Lumumba, after consulting the main parties and political personalities at that time, formed a Government.
>
> On 23 June 1960, he obtained the confidence of Parliament, even before the latter's election of Kasavubu as Head of State, thanks to the Lumumba Party's majority.
>
> Less than a week on from 30 June 1960, on 4 July, the army and police mutinied. Following the provocative statement by General Janssens to the military — 'after independence equals before independence' — the disturbances worsened. Katanga proclaimed its secession on 11 July 1960 and South Kasai its autonomy on 8 August 1960. Territorial and military administration collapsed and financial resourced dried up. The people's sovereignty was under threat.
>
> Despite the co-operation agreements signed between the Kingdom of Belgium and the young Republic on 29 June 1960, the crisis was aggravated by the untimely intervention of Belgian troops. Faced with this situation, on 15 July the Head of State Kasavubu, guarantor of territorial integrity, and the Prime Minister and Minister of Defence, Lumumba, jointly signed a telegram appealing for troops from the United Nations in New York . . . as a result of Belgian diplomatic manœuvres, the United Nations hesitated to intervene . . ."[13]

9. Rightly or wrongly, the report also cites Belgium for its responsibility in the removal from office of Prime Minister Lumumba:

> "After our country had achieved independence . . . President Kasavubu and Prime Minister Lumumba worked harmoniously together. They had even toured Elisabethville together. I believe that the Belgians were against this harmony. So they provoked this divisive tension . . . I telephoned Lumumba to tell him about it. He then contacted President Kasavubu. I thought they had taken precautions against those manœuvres. I was surprised to hear on the radio around 5 September 1960 of the dismissal of Lumumba and on the same day of that of Kasavubu by Lumumba."[14]

10. According to the report: "The Belgian ambassador in Leopoldville

[12] Known as the "Sovereign National Conference", the forum was held from November 1991 to December 1992. It was organized by the then Government, under pressure from its principal partners, including Belgium, and financed by them.

[13] Sovereign National Conference, Report of the Commission on Murders and Violations of Human Rights, pp. 18-19.

[14] *Ibid.*, statement of Mr. Cléophas Kamitatu, then Provincial President of Leopoldville (Kinshasa).

was behind the creation of the autonomous State of South Kasai. By 8 August 1960, it was a fait accompli."[15] In regard to the murder of Prime Minister Lumumba and his companions, the report *inter alia* states: "On 16 January 1961 there was a meeting at Ndjili airport. Those present included Messrs. Nendaka, Damien Kandolo, Ferdinand Kazadi, Lahaye and the Sabena representatives." A witness, Mr. Gabriel Kitenge, stated the following:

> "When the aircraft arrived, he recognized only one of the three packages, Mr. Lumumba, who was covered in bruises and trying to cling to a wall. All three were unloaded alive at Elisabethville. Soon afterwards they were taken to the villa Brouwez a few kilometres from the airport, where they had a talk with Messrs. Godefroid Munongo and Jean-Baptiste Kibwe, who were together with some white soldiers . . .
>
> They were executed in the bush a kilometre from the villa. Under the command of a white officer, the black soldiers shot Okito first and finished off with Lumumba.
>
> Those present were: Messrs. Munongo, Kitenge, Sapwe, Muke, four Belgians . . . On the orders of a senior Belgian police officer, the three prisoners were shot one after the other and thrown into a common grave which had already been dug."[16]

11. The conference report concluded with a proposal for "the opening of proceedings". It stated:

> "The murders of Lumumba, Mpolo and Okito, although not falling within the categories currently defined by the United Nations, should be assimilated to *crimes against humanity*, for these were acts of persecution and murder for political reasons."

This proposal may thus stimulate reflection on the part of writers who note uncertainties in the notion of crime against humanity[17]. The conference established responsibility on the part of a number of persons both natural and legal, domestic and foreign. Of whom, for purposes of this case it suffices to note the following:

> "*The Government of the Kingdom of Belgium* as protecting power for having failed to ensure bilateral security for an independence deliberately rushed through by it in a perfunctory manner. The ambiguous nature of the Basic Law is self-evident. Despite the agreement of 29 June 1960, Belgium did not provide the lawful authorities

[15] *Op cit.* footnote 13 *supra*, p. 26.
[16] *Ibid.*, p. 40.
[17] See G. Abi Saab, "International Criminal Tribunals and the Development of International Humanitarian and Human Rights Law", *Liber Amicorum Judge Mohammed Bedjaoui*, 1999, p. 651. See also E. Roucounas, "Time Limitations for Claims and Actions under International Law", *ibid.*, pp. 223-240.

> established by it in the Congo with the military and technical assistance which would have enabled the worst to be avoided.
>
> . . . . . .
>
> *The support of the Belgian Government* for the secession of Katanga through its official recognition as an independent State, with the opening of a Consulate-General, represents an offence against the rights of the Congolese people. Following the intervention of the Belgian Minister for African Affairs, Mr. Harold Aspremont, President Tshombe, on 16 January 1961, accepted transfer of the packages."[18]

Reacting, as it were, in advance to the respondent State, the conference decided to:

> "Alert international opinion so that the very persons who teach us respect for human rights and the rights of the citizen contained in the United Nations Declaration may not in future repeat the same mistakes, which do not sit well with world opinion."[19]

12. Six years earlier, the transnational group known as "The Permanent Court of the Peoples [tribunal permanent des peuples]", called upon to deliver a ruling on the case of Zaire (Congo) stated:

> "When the right of a people freely to pursue its economic, social and cultural development is treated with contempt by a State represented by collaborationist oligarchies, hostages or agents of foreign powers, installed or maintained in place by its will, that State cannot constitute a cover for the extinction of a people's right to self-determination."[20]

Thus that "court" held:

> "In such a case, we are faced with a phenomenon essentially similar to the colonial situation opposing an enslaved people to a foreign power, with the government authorities playing the role of overseer, seemingly differing little in their functions from the former colonial agents (viceroys, governors, *préfets*, etc.) or local satraps in the service of the metropole."[21]

The jury further stated:

> "The violation of the right of the Zairian people perpetrated by an alienated State raises the problem of the responsibility of other

[18] Sovereign National Conference, Report of the Commission on Murders and Violations of Human Rights, pp. 55-56.
[19] *Ibid.*
[20] See *Judgment of Permanent Court of the Peoples*, Rotterdam, 20 September 1982, p. 29.
[21] *Ibid.*

governments, and in particular of those who defend the interests for whose benefit the Zairian people are deprived of their sovereignty."[22]

The jury thus established, *inter alia*, "the responsibility . . . of Belgium"[23]. The operative part of the judgment finds that a number of the charges "constitute crimes against the Zairian people"[24]. Examining *inter alia* the legal force of the decisions of this "court of public opinion", some writers have concluded that "such a condemnation is a first step towards reparation"[25].

13. More recently, the United Nations Commission responsible for investigating the illegal exploitation of the natural resources of the Congo cited, among others, Belgian companies in occupied territories. Could it not be that the purported "neutrality" of the local Belgian authorities in the face of the armed aggression[26] suffered by the Congo since 2 August 1998 is being undermined by the participation of private groups or Belgian parastatal entities in the looting of the natural resources of the Congo, as established by a United Nations investigation[27]? All the more so in that the investigation has established a link between that illegal exploitation and the continuation of the war[28].

14. The immediate circumstances which gave rise to the issue of the warrant were amply debated by the Parties. It would be pointless to go over them again. Nonetheless, there are pertinent questions raised by this case. Why is it that virtually all of those charged before the Belgian courts, including Mr. Abdulaye Yerodia Ndombasi, belong essentially to a political tendency that was ousted in 1960 and, thanks to a variety of circumstances, regained power in 1997? 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?

15. These are some of the facts emerging from a rapid survey covering more than four decades whereby the respective conducts of the Parties to the dispute before us may be judged. They should be compared with Bel-

[22] *Op. cit.* footnote 20 *supra*, p. 30.
[23] *Ibid.*, p. 32.
[24] *Ibid.*, p. 34
[25] B. H. Weston, R. A. Falk and A. d'Amato, *International Law and World Order*, 2nd ed., p. 1286.
[26] Within the meaning of Article 51 of the United Nations Charter, as further defined by Article 3 of resolution 3314 of 14 December 1974 and confirmed as a rule of customary law by the Judgment of the Court of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, para. 195.
[27] See *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*. Those cited include the following Belgian companies: Cogem, Muka-Enterprise and Transintra for cassiterite; Chimie Pharmacie, Cogea, Tradement, Finiming Ltd., Cicle International, Specialty Metal, for coltan; Soger, Sogem, Cogecom, Tradement, MDW, for cassiterite and coltan. Source: http://www.un.org/News/dh/latest/drcongo.htm.
[28] See *ibid.*, paras. 109 *et seq.* "Links between the exploitation of natural resources and the continuation of the conflict."

gium's closing speech. Even as the respondent State brings its peroration to a glowing close with an invocation of the democracy and human rights which purportedly guided its conduct[29], at the same time it reopens one of the most shameful pages in the history of decolonization. In the 1960s, it appeared to grant the Congo its independence while, with the right hand, it was at the same time virtually ensuring the destabilization of that sovereignty and of the new-born Congolese democracy. The author Joseph Ki-Zerbo was able to write that, in the Congo, "independence was thrown like a bone to the natives in order the better to exploit their divisions, . . . the model for poisoned grants of independence"[30].

16. One of the points hotly debated by the Parties is Mr. Ndombasi's current loss of any governmental post. The Respondent relied on this fact in order to secure dismissal of the case by the Court, while the Applicant contended that it has no effect on the proceedings.

17. In my view, the argument deriving from the loss (and not the absence) of any current governmental function on Mr. Ndombasi's part is morally indecent. But the Court does not decide disputes on the basis of international morality, so dear to Nicolas Politis[31]. Legally, however, this argument should rebound against the Respondent, who has raised a mere corner of the veil over the cause of this situation, while exploiting its effects — and only those effects — to the full. It is juridically improper to seek to ground one's principal argument on a serious violation of international law (exercise of a right of censorship over the composition of the Congolese Government amounts to interference in the internal affairs of another State), which aggravates the original infringement of the criminal immunities and inviolability of the person of the Minister for Foreign Affairs. The Applicant's written pleadings and oral arguments (during both the "provisional" and the merits phase) denounced this fact and were not effectively rebutted by the Respondent. The Court was witness to this dismissal of a representative of the Congolese State, which occurred not only after the matter had been referred to the Court (17 October 2000), but, what is more, the demotion took place the day the hearings opened in the provisional phase (20 November 2000), and Mr. Ndombasi left the Government altogether not long afterwards (14 April 2001). Since that time his reappointment, although constantly announced in the press, has been resisted, apparently because of unlawful pressure exerted by the Respondent.

18. It is the duty of the Court, as guarantor of the integrity of international law[32], to sanction this doubly unlawful conduct on the part of the Respondent, denounced by the Applicant in its final submissions.

[29] See Belgium's oral argument, CR 2001/11, pp. 17-18, paras. 8, 9 and 11.
[30] Joseph Ki-Zerbo, Preface to Ahamadou A. Dicko's *Journal d'une défaite. Autour du référendum du 28 Septembre 1958 en Afrique noire*, 1992, p. XIV.
[31] Nicolas Politis, *La morale internationale*, 1943, p. 179.
[32] *Corfu Channel, I.C.J. Reports 1949*, p. 35.

19. There are two possible ways in which the notion of "organ responsible for the integrity of international law" is generally understood. For some, it involves a "duty to preserve the integrity of law as a discipline — distinct from considerations of politics, morality, expediency and so on"[33]. In my view, it ought also to mean that the Court is under an obligation to ensure respect for international law in its totality. As regards the specific nature of the task of a judicial organ by comparison with that of a political organ, such as the Security Council, there is already plentiful case law on this point.

20. I also share Manfred Lachs's view that "the Court is the guardian of legality for the international community as a whole"[34].

21. It is difficult to see how the Court can focus its gaze so particularly on Mr. Ndombasi's current loss of government office while closing its eyes to the obvious reasons for that situation in the light of events which have been sufficiently argued before it right from the start of the provisional measures phase up to the closing of the merits phase. This is particularly so in that the violation of the immunities in question is simply evidence of a general disregard for the principle of sovereign equality of a State decolonized by Belgium. On this point the Court made no mistake. More than once in its reasoning, in the politest of terms, it criticized the Respondent's unlawful conduct.

22. Quite aside from the attention devoted by the Court to the argument concerning the loss of official duties, made so much of by the author of fundamentally unlawful conduct, there is the matter of the non-existent legal effect which the Respondent seeks to infer from Mr. Ndombasi's new situation. From the moment the immunities of the Minister for Foreign Affairs were breached, the violation of international law was complete. And the Congo began to insist — and continued to do so until the close of argument — that the Court should find that its rights have been violated, and that it be granted reparation accordingly. The Congo has never believed, and has never asserted, that one of its citizens has been the victim of a Belgian wrongful act. The Applicant has always been convinced, and has always declared, that Belgium was acting against it as a sovereign entity wishing to organize itself freely, including in the conduct of its foreign relations by a Minister of its choosing. But it has suffered, and continues to suffer, *de facto* interference resulting from the issue, maintenance and circulation of the warrant, and from Belgium's attempts to give greater effect to that warrant.

[33] See H. Mendelson, "Formation of International Law and the Observational Standpoint", in connection with "The Formation of Rules of Customary (General) International Law", *International Law Association, Report of the Sixty-Third Conference, Warsaw, August 21st to August 27th 1988*, p. 944.

[34] See M. Lachs, separate opinion appended to the Order of 14 April 1992 in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, *I.C.J. Reports 1992*, p. 26.

23. The relevance of Mr. Ndombasi's loss of governmental responsibilities lies in the glaring light it throws on Belgium's flagrant meddling in the Congo's internal affairs. Further evidence of this can be found in the identity of certain Congolese complainants, members of a Congolese opposition political party[35], whose names the Respondent obstinately refused to reveal to the Court for so-called "security" reasons. Whichever way you look at it, this case clearly demonstrates the Respondent's interference in the Applicant's internal affairs. And, ultimately, the serious disregard for the sovereign equality of States underlying the violation of the immunities of the Minister for Foreign Affairs. The loss of government office is of no relevance in relation to Mr. Ndombasi's personal odyssey; he, strangely, unlike other accused Congolese high officials, and other foreign authorities, had this unprecedented warrant issued against him as Minister for Foreign Affairs, charged with maintaining permanent contact with the Congo's principal foreign partner.

24. So long as there shall exist the authentic, independent State of the Congo, born of decolonization — not to be confused with the fictional State entity calling itself "The Congo Free State", borne to the baptismal font by the powers at Berlin[36] — that debt will continue to exist. This is not a debt due to one specific incumbent Government — a Government bound, moreover, to pass on one day like every Government. What is at stake here is a debt owed to the Congolese people, freely organized in a sovereign State calling for its dignity to be respected.

25. But dignity has no price. It is one of those intangible assets, on which it is impossible to put a price in money terms. When a person, whether legal or natural, gives up his dignity, he loses the essence of his natural or legal personality. The dignity of the Congolese people, victim of the neocolonial chaos imposed upon it on the morrow of decolonization, of which the current tragic events largely represent the continued expression, is a dignity of this kind.

26. The loss of office by one of its authorities could not put an end to the unlawfulness of the Belgian warrant, any more than it could transform it into a lawful act. To appreciate that the unlawfulness cannot be extinguished as a result of Mr. A. Yerodia Ndombasi's loss of government office, I give two examples. When a representative of a foreign State

[35] According to the Applicant, these are representatives of an opposition party operating in Brussels! (See verbatim record of the public hearing of 22 November 2000, CR 2000/34, p. 20.) The Respondent, on the other hand, cites "security reasons" to the Court (despite the fact that the Court can sit in closed session) in order not to disclose the identity of the complainants of Congolese nationality (see verbatim record of the public hearing of 21 November 2000, CR 2000/33, p. 23).

[36] The 14 colonial powers meeting at Berlin (14 November 1884-26 February 1885) accorded their endorsement to the colonial project of King Leopold II called "Congo Free State".

is killed by the police in a particular country[37], that diplomat ceases by the very fact of his death to hold office. Can it be claimed that the unlawfulness of the act was extinguished by the death of the representative of the foreign State? It seems to me that the unlawfulness persists. Let us take another case. Suppose the diplomat was merely seriously wounded. After being evacuated to his sending country, he is declared unfit for diplomatic service. Can it be said that the unlawful act has disappeared, since the victim of the assault no longer represents his country abroad? I think not.

27. The question of the lack of object of the Congolese claim could have arisen if Belgium had adopted a diametrically opposite attitude, by showing respect for the Congo's independence. It should have admitted its violation of international law and then cancelled the warrant and hastened to request the foreign countries to which it had circulated the instrument to discharge it. It would then have informed the Congo of these various measures, which would have been tantamount to an expression of regret and an apology. Nothing of the sort occurred. The Congo's claim thus retained its object in full.

28. The Congo admits that "these requests differ to some extent from those formulated in its Application instituting proceedings", given Mr. Ndombasi's new situation. But it adds that, "since they are based on the same facts as those referred to in the Application, this cannot pose any problem"[38]. The Court has correctly confirmed its established practice of according the Parties the freedom to refine their claim between the date of filing of the Application instituting proceedings and the presentation of the final submissions at the close of oral argument. Thus there is no basis for criticism here, since these subsequent changes are based on the same facts as those already cited in the initial claim.

29. Moreover, in accordance with the Court's settled jurisprudence, the admissibility of the Congo's Application is to be assessed on "the only relevant date", which is the date of its filing in the Registry of the Court[39]. It is irrelevant whether the Respondent might subsequently have acted so as to empty the Application of its substance. The claim was already filed as such on 17 October 2000. Furthermore, as its substance is based on the violation of the Congo's sovereignty by the issue of the warrant, which requires reparation, that substance remains intact.

30. The Respondent's attempt to transform the international judicial

[37] This happened in Lomé (Togo) in October/November 1995, where a German diplomat was killed by policemen at a roadblock in the early evening. The incident caused a serious deterioration in relations between Germany and Togo.

[38] Memorial of the Democratic Republic of the Congo, p. 6, para. 8.

[39] See the case concerning *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), I.C.J. Reports 1998*, p. 130, para. 43.

proceedings instituted and pursued by the Congo in its own right, following the violation of the criminal immunities and inviolability of one of its highest representatives, into the mere exercise of diplomatic protection of one of its nationals deserves a polite dismissal calling for no further comment on my part.

31. Did the Congo's final submissions preclude the Court from ruling on the question of so-called universal jurisdiction?

32. It is true that the Congo's "final submissions" make no mention whatever of this question. They seek to have the Court enforce the "rule of international customary law concerning the absolute inviolability and immunity from criminal process of *incumbent foreign ministers*; in so doing [the Respondent] violated the principle of sovereign equality among States"[40].

33. The issue here is one of judicial procedure. Did the Applicant's spectacular change of position on this point require the Court not to rule on so-called universal jurisdiction in the operative part of its Judgment? Most definitely. It would have been criticized for ruling *ultra petita*. That is not the same as taking no collective position on the point. In any event, in so far as the Judgment's reasoning failed to address this question, the opinions would do so.

34. Moreover, of the 64 pages of the Congo's Memorial, 15 are devoted to this question[41]. At the oral proceedings, the Congo stated, through its counsel, Professor Rigaux, that "that [was] an area of no interest to [it]", even though it had raised it in its original Application[42]. But, battle-weary, or for reasons of litigation strategy, it allowed that the Court might examine the

> "*issues of international law raised by universal jurisdiction*, but it will not do so at the request of the Applicant: it will, in a sense, *have the issue forced upon it* as a result of the defence strategy adopted by the Respondent, since the Respondent appears to contend not only that it is lawful to exercise such jurisdiction but that it is moreover obligatory to do so, and therefore that the *exercise of such jurisdiction can represent a valid counterweight to the observance of immunities*".

And counsel concludes:

> "I accordingly believe that the Court will in any event be obliged to *adjudicate on certain aspects* of universal jurisdiction, but I would stress that this is not at the request of the Applicant, which is not *directly* interested in the issue."[43]

[40] See CR 2001/10, p. 26; emphasis added.

[41] Memorial of the Democratic Republic of the Congo, pp. 47-61.

[42] See CR 2001/10, p. 11.

[43] *Ibid.*; emphasis added.

And Counsel then refers to its forthcoming submissions. For her part, Professor Chemillier-Gendreau, another of the Congo's counsel, stated that:

> "the extension of such jurisdiction to a case *where the person concerned is not within the territory has at present no confirmed legal basis, which is very different from saying, as Professor David would have us say, that we no longer challenge universal jurisdiction* in absentia".

Congo's counsel continued:

> "In the light of this case, Belgium would like the Court, by finding in favour of *a universal jurisdiction which possesses those broader bounds*, to intervene in the lawmaking process and thereby endorse the validity of its policy."

She concluded:

> "For our part, we contend that the point to which the Court should *confine its ruling in regard to universal jurisdiction is*, as Professor Rigaux has just said, *its use where it infringes an immunity from jurisdiction of an incumbent Minister for Foreign Affairs. And we then request the Court to declare that its use in these circumstances, as embodied in Belgium's action, is contrary to international law*."[44]

35. For its part, Belgium basically founded its defence strategy on so-called universal jurisdiction, upon which its controversial statute and disputed warrant are purportedly based. But, since the Congo ignored the issue of such purported jurisdiction in its final submissions, Belgium accordingly argued that the Court's jurisdiction was thus limited, pursuant to the *non ultra petita* rule, solely to those points in dispute appearing in the final submissions. The Respondent cited the Court's jurisprudence[45]: "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.*"[46]

36. In its oral argument, the Respondent also stated that it was

> "reluctant, not because it has doubts as to the legality of its position or the soundness of its arguments, but rather it would have preferred the accusations against Mr. Yerodia Ndombasi to be dealt with by

[44] See CR 2001/10, p. 17; emphasis added.

[45] Case concerning *Corfu Channel, Assessment of Amount of Compensation, Judgment, I.C.J. Reports 1949*, p. 249; case concerning *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402.

[46] *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, Judgment, I.C.J. Reports 1950*, p. 402; Counter-Memorial of Belgium, paras. 0.25, 2.74, 2.79, 2.81, 10.2.

> the competent authorities in the Democratic Republic of the Congo"[47].

It also asserted that "the principles of universal jurisdiction and the absence of immunity in the case of allegations of serious breaches of international humanitarian law are well-founded in the law . . ."[48].

37. In my view, this is a major point of dispute between the Parties which the Court could decide were it not for the *non ultra petita* rule. On pain of acting *ultra vires*, the Court could not rule *ultra petita*. It has been correctly said that "while the Court is judge of its jurisdiction, it is not its master"[49]. The examination of points not included in the Congo's submissions would have exposed the Court to criticism on this score. In its final submissions, which were silent on the point, the Congo did not, however, show itself hostile to the Court's taking a stance on the point in its reasoning.

38. For its part, Belgium did not wish the Court to rule on the substance of its claims as above, which it did, however, consider established in law:

> "In the realm of law as process, the question is, if it ultimately turns on the discretion of the Court, *whether it would be desirable for the Court to proceed to a judgment on the merits of this case.* Belgium, with the very greatest of respect for the role of the Court in developing international law, contends that *it would not.* In Belgium's contention, in the absence of a compelling reason to do so — and a compelling reason to do so would be a subsisting concrete dispute between two States which requires resolution — for the Court to proceed to a judgment on the merits of these issues would risk rigidity in the law just at the point at which States, principally responsible for the development of the law, are *groping towards solutions* of their own. In Belgium's contention, this is not the point at which rigidity in the law, whether expansive or restrictive, is desirable."[50]

39. It goes without saying that it is not for a litigant to tell the Court how to do its job. The Respondent's concern regarding the rigidifying effects of an international judicial decision are unfounded. Particularly in international customary law, it is established that international jurisprudence does not have the effect of freezing the law for all time. To a certain extent, the same is true of treaty law, which is itself developed by States. Finally, to say that States have the prime responsibility for developing the law is to recognize implicitly the responsibility of other organs

[47] CR 2001/8, p. 8.

[48] CR 2001/8, p. 31, para. 54.

[49] Charles Rousseau, "Les rapports conflictuels", *Droit international public*, Vol. V, 1983, p. 326.

[50] CR 2001/8, p. 31, para. 54; emphasis added.

or entities, including the Court, for performing other tasks. Legal scholars are virtually unanimous in acknowledging this.

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40. In short, how should so-called universal jurisdiction have been treated, given the discretion shown in the Congo's final submissions on this subject and the lack of urgency demonstrated by Belgium for a ruling by the Court on the matter? The Congo's extreme caution was not justified, since it was seeking to have the dispute completely resolved. The resistance on Belgium's part was unfounded too. The Respondent, which was claiming to act under international law, had the opportunity to secure a positive sanction for a practice which it considered lawful. In my view, the Court's *primary responsibility was to decide* whether or not, as the Applicant claimed, the customary rules concerning the personal immunities and inviolability from criminal process of the Minister for Foreign Affairs of the Congo, Mr. Yerodia Ndombasi, had been violated by the Respondent. And since it was in the name of a so-called universal jurisdiction, in my opinion ill-conceived and misapplied, that this infringement took place, the operative part of the Judgment nonetheless implicitly condemns Belgium's claim. But ought not the Court, as guarantor of the integrity of international law, to have *ruled* in its reasoning equally clearly on the validity *ratione loci* and *ratione personae* of such manifestly unlawful claims on Belgium's part? Should the reasoning of the Judgment not have contained a relevant passage on one of the currently most controversial questions in international law? Would the Court have been criticized for stating the law on this point? The fact remains, however, that the Court, in accord with the Parties, made its choice of "essential reasons"[51] in order to settle the dispute. It has taken the opportunity to codify and develop the law of immunities. The vexed question of so-called universal jurisdiction, as presented in this case, has also been settled.

41. There is not the slightest doubt that in customary international law Ministers for Foreign Affairs enjoy immunities and inviolability of their person in respect of criminal process before national courts. These are restrictions imposed by international law on the operation of domestic law. To be more specific, all national law ceases to prevail in the presence of a higher organ of a foreign State. No sovereign entity can legally exercise authority over any other equally sovereign government as so represented. That is the current state of positive international law, which a worldwide survey would certainly confirm.

42. The Respondent has done its utmost to create confusion in the mind of the layman. It has been unable to do so in the minds of jurists.

[51] See Tanaka, separate opinion appended to the Judgment of 24 July 1964 in the case concerning *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, I.C.J. Reports 1964*, p. 65.

Belgium went to great lengths in seeking to equate immunity with *impunity*. No lawyer would be so misled as to believe that any proof was required of proposition that the personal criminal responsibility of the perpetrator of an alleged offence remains intact, notwithstanding the immunities protecting him. Nor should we lose sight of the basics of criminal law, to the point of forgetting the principle of the presumption of the accused's innocence! It might even have been thought that the issue of a Minister's immunities was a legal commonplace, had "certain recent developments"[52] not been cited. Wrongly. Those who defend before this Court States' rights to make law are seeking to transform the proponents of a certain school of doctrine into legislators, having refused that status to the Court.

43. There is no doubt that the immunities and their corollary, the inviolability of the person of the Minister in question, have a functional character. They are based on the importance of a high representative of another State being able freely to discharge his duties, without let or hindrance and under conditions of equality. It is for this reason that the prerogatives of the host State in regard, *inter alia*, to the maintenance of law and order, defence and justice must be exercised in such a way as to make it easier for the Minister for Foreign Affairs of another State to do his job. As certain writers have stated: "the immunity representatives of foreign States enjoy is a function of the nature of their office"[53].

44. American doctrine recalls that:

> "According to the Restatement, immunity extended to :
>
> *(a)* the State itself;
> *(b)* its head of State;
> *(c)* its government or any governmental agency;
> *(d)* its head of government;
> *(e)* its foreign minister;
> *(f)* any other public minister, official, or agent of the State with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the State."[54]

45. Although the Congo was not able to demonstrate sufficiently, either in its written pleadings or in oral argument, the extent of the hindrance caused by Belgium to the free exercise of his duties by the Congo's Minister for Foreign Affairs, I can now give some examples. Following the issue of the warrant, the Congolese Minister for Foreign Affairs was unable to attend ministerial meetings of the ACP States with the European Union in Brussels, since his criminal immunities and inviolability

[52] Counter-Memorial of Belgium, p. 109, para. 3.4.1.
[53] Louis Henkin, Richard Crawford Pugh, Oscar Schachter and Hans Smit, *International Law*, 1993, p. 1188.
[54] *Ibid.*, p. 1191.

were not guaranteed. Nor was he able to participate in a meeting held in Paris to evaluate the Francophone Summit. In October 2000, Mr. Ndombasi was unable to undertake an official visit to Tokyo (Japan), as the Japanese authorities stated that they were unable to give an assurance that his criminal immunities and inviolability would be guaranteed.

46. In addition to the official visits that he was unable to make, the Minister was obliged, depending on the itinerary, to travel separately from his Head of State arriving late at their common destination. This resulted in increased travel costs, lost baggage, and late arrivals at international meetings, such as the Maputo Summit following a visit to China. It is self-evident that, as a result of the official visits that he missed or carried out under such difficult circumstances, the Minister for Foreign Affairs was unable to perform his duties normally, whether alongside the Head of State or otherwise. Finally, a combination of various factors, particularly his undesirable character in the eyes of certain Belgian authorities, led to his dismissal on 20 November 2000, the date of the opening of the hearings in the provisional measures phase of this case.

47. The Respondent contends that there is an exception to the rule of the immunity and criminal inviolability of the person of the Minister for Foreign Affairs in the case of "crimes under international law". It has not proved that contention. This is no more than an element of its defence strategy. At times, it sought to circumvent the official status enjoyed at the relevant time by Mr. Ndombasi by arguing that it was concerned with him solely in his capacity as a private individual; at others, it apparently attempted to invent an exception which simply does not exist in customary international law.

48. The existence of a firmly established rule, obligatorily followed by the majority of some 190 States from Africa, Asia, America, Europe and Oceania, whereby an incumbent Minister for Foreign Affairs enjoys absolute immunity and inviolability from criminal process is not open to question. The doctrine confirms this[55].

49. Nonetheless, some dissenting voices, apparently moved by certain moral concerns, claim that these appointed State representatives should be stripped of such absolute legal protection where they have committed certain international offences. In many regions of the world, such provisions can only be welcome in countries traditionally victims of crimes against humanity. From its inception, the Permanent Court of International Justice, our predecessor, recognized that,

[55] See *inter alia* Jean Salmon, *Manuel de droit diplomatique*, 1994, p. 539: the Minister for Foreign Affairs enjoys "privileges and immunities analogous to those of the Head of Government"; Joe Verhoeven, *Droit international public*, 2000, p. 123: "there is a tendency, at least in the doctrine, to grant the Head of Government, and indeed the Minister for Foreign Affairs, the protection accorded to the Head of State".

> "in the fulfilment of its task of *itself ascertaining what the international law is*, [the Court] has not confined itself to a consideration of the arguments put forward, but has included in its researches all *precedents* . . . and *facts* to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated in the special agreement"[56].

50. It is in the area of *customary law* that the Belgian claims and their counterparts, the Congolese denials, lie. The Belgian Government possibly anticipated that, as with the Truman Proclamation of 1945 on the continental shelf, its new claim, formulated at a time when humanitarian ideas are undergoing a revival of interest, would be followed (massively) by other States. It gives the impression of having overestimated its importance on the world chessboard. No matter. The main charge which can be levied against the Respondent is of abusing the humanitarian argument for the purposes of political domination. As in the nineteenth century[57]! To the point of devising an exception to the rules of international law governing immunities which simply does not exist in international law.

51. In short, the Belgian claim was bound, from its inception, to represent violation of existing law. Despite the publicity enjoyed by the warrant of 11 April 2000, no other State has followed Belgium's example. No member of the international community has offered Belgium assistance in executing the warrant. In fact, on the contrary, several States, particularly African States, have ignored it. The unfortunate Belgian precedent has thus remained an isolated one. While Belgium is entitled to contribute to the formation of general international law, it cannot, on its own, create that law. Thus it does not have international practice behind it. By contrast, the State which is the victim of this action, the Congo, has resolutely opposed the application of the Belgian measure. On the ground that it is unlawful.

52. Moreover, the Belgian Government has shown, by its conduct, that it is unsure of the lawfulness of its disputed act. Its correspondence with the Applicant while the proceedings were in progress demonstrates this[58]. The Respondent claims that it is contemplating an amendment to its controversial statute so as to respect the immunities of high representatives of foreign States. From all the many inconsistencies and equivocations fundamentally characterizing a practice both unilateral and solitary — if we exclude the Yugoslav initiative of 21 September 2000, which has strangely gone unremarked by Belgium — no customary norm has

[56] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 31.

[57] The Preamble to the General Act of Berlin of 26 February 1885 provides reassurance as to the object and purpose of the Treaty: "the moral and material well-being of the indigenous populations".

[58] See the Belgian communication of 14 February 2001, to which the Congo replied on 22 June 2001.

emerged. Just as the Respondent's own *opinio juris* is apparently far from established.

53. In reality, the Respondent has sought to rely on a small number of opinions of publicists in order to claim that a new derogative customary norm has come into being. It has provided no evidence of its existence. We know that doctrine represents a means for determining the rules of law. It must be founded on a general practice corresponding to the *opinio juris sive necessitas*. Nothing of the kind exists today. In my view, the Court could readily find that the Respondent's claims were unfounded. Is it possible that the implementation of international humanitarian law might be subject to a co-efficient of *relative normativity* — to paraphrase P. Weil? If not, how can there be any legal justification for suspending proceedings against an organ of a Middle Eastern State whilst obstinately persisting with proceedings against the former Congolese Minister for Foreign Affairs?

54. Referring to the relationship between crimes and immunities, or the extent to which the nature of the former impedes the exercise of the latter, Pierre-Marie Dupuy writes, in light of the House of Lords ruling in the *Pinochet* case:

> "We should exercise caution in confirming the emergence of a new customary rule as embodied in the House of Lords ruling, which is based on considerations that are not entirely consistent and cannot, *of itself*, result in the consolidation of such custom."[59]

Dupuy then recalled that

> "custom emerges from the legal opinion of States as demonstrated by their practice, which is, however, far from unified, and in any event shows that States are still reluctant to accept any reductions in the immunities of their high officials"[60].

There is no conduct "generally" adopted "by the practice of States". As this Court has held,

> "[the] presence [of customary norms] in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, *and not by deduction from preconceived ideas*"[61].

These are few decisions — or at least any significant number — of courts

[59] Pierre-Marie Dupuy, "Crimes et immunités, ou dans quelle mesure la nature des premiers empêche l'exercice des secondes", *Revue générale de droit international public*, Vol. 103, No. 2, 1999, p. 293; emphasis added.

[60] *Ibid.*

[61] *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 299; emphasis added.

and tribunals worldwide which have taken the Belgian view. Quite the contrary. Just recently, the Court delivered an Opinion in the case concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, stating: "the Malaysian courts had the obligation to deal with the question of immunity from legal process as a *preliminary issue* to be expeditiously decided"[62].

55. Previously, it had noted that

> "The High Court of Kuala Lumpur did not pass upon . . . immunity *in limine litis*, but held that it had jurisdiction to hear the case before it on the merits, including making a determination of whether Mr. Cumaraswamy was entitled to any immunity."[63]

A similar obligation applies also, and above all, to States in their mutual relations. Thus, by way of analogy, and *a fortiori* — since we are dealing here with primary subjects of international law and with their highest ranking representatives, namely Ministers for Foreign Affairs — this rule as restated by the Court must be applied in the present case.

56. The successive changes in Mr. Ndombasi's status have no serious implications for the case, except to underline further the violation of the Congo's sovereignty by Belgium on account of its continued interference (see above).

57. Moreover, as the focus of this case is the violation of the immunities of the Minister for Foreign Affairs at the time of the issue and notification of the warrant, the previous and subsequent status of Mr. Ndombasi in no way affect the Congolese complaint. Given that the unlawful proceedings were instituted at a time when he had the status of a specialized organ responsible for the foreign relations of a State and, in consequence, was protected by absolute immunity and personal inviolability from criminal process, the violation of international law to the detriment of the Congo continues to exist; in transgressing the rule of customary international law governing inter-State relations, Belgium has incurred a debt not to an individual but a State, the Congo, whose organ responsible for international relations has been subjected to a rash, vexatious and unlawful measure, which calls for reparation. Yet, in response to these well-founded claims of the Applicant, the Respondent claims not to have violated the sovereign rights of its victim. On the contrary, Belgium claims to be exercising a right conferred on it by international law or fulfilling an obligation imposed on it by international law. That is why it

[62] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, p. 90, para. 67 (2) *(b)*; emphasis added.

[63] *Ibid.*, p. 72, para. 17.

refuses to cancel the warrant and thus make reparation for the injury suffered. Mr. Ndombasi's personal odyssey in no sense marks the end of the inter-State dispute.

58. It is significant that the Respondent implicitly acknowledges the weakness of its defence in the following terms:

> "Even were the Court to uphold, contrary to Belgium's submissions, the immunity of Mr. Yerodia Ndombasi *qua* Minister for Foreign Affairs of the DRC in the circumstances in issue, it would not follow that he would have been immune, even when in office, as regards conduct of a private nature . . ."[64]

59. Unless one were to contend that Belgium's offence became time-barred after two years. There is in principle no such rule in international law, even less so in the *African conception* of the law. In Africa, a dispute does not disappear. It is transmitted, like a debt, from generation to generation. The same applies to the subject-matter of the dispute, which cannot be effaced as long as there is no acknowledgment of the offence committed or reparation for the injury suffered by the victim. The Respondent's unfounded denials prompt me to present a hypothetical case.

60. Let us take the example of an individual carrying out the duties of an Adviser on African Affairs to the President or Prime Minister of a certain State. In that capacity, the individual orders the suppression of a popular uprising or a student demonstration in a "friendly country"[65], resulting in deaths. Subsequently, that Adviser is appointed Minister for Foreign Affairs or Secretary of State of the country in question.

61. A third State then issues a warrant against the Minister or Secretary of State on the grounds that he had given orders as Adviser which, when implemented, led to wide-scale and systematic violations of human rights. The question is whether such a warrant does or does not affect the criminal immunities and personal inviolability of the Minister or Secretary of State. In my opinion, the reply has to be in the affirmative. It is the organ of the State, responsible for representing that State internationally, which is the victim of that measure at that point in time.

62. Following a change in administration or government, the Minister for Foreign Affairs or Secretary of State loses his post (which is different

[64] Counter-Memorial, p. 116, para. 3.4.15.

[65] Jean-Pierre Cot, *A l'épreuve du pouvoir. Le tiers-mondisme. Pour quoi faire?*, 1984, p. 85. The author notes that, when he was Minister for Co-operation, he issued orders that French military advisers should not be involved in the suppression of the student demonstration of June 1981 in Kinshasa.

from the case of Mr. Ndombasi, where external pressures were exerted). The State which issued the warrant continues proceedings. Does this measure continue to affect the Adviser on African Affairs, the Minister for Foreign Affairs or the Secretary of State, or does it affect the individual now freed of all governmental responsibility? I consider that it is the date of the issue of the warrant which establishes the precise moment of the internationally wrongful act and the status at that time of the person against whom the warrant is issued, naming him and violating his moral integrity. It is the Minister for Foreign Affairs or the Secretary of State on the day and at the time of the issue of the warrant who was impugned. This is not an investigative measure directed against a private individual, which the former Secretary of State or Minister for Foreign Affairs has become, nor is it a measure directed at the time against the Adviser on African Affairs. Nothing can change the facts, which, like the sphinx, remain unaffected.

63. The principle of jurisdiction which some call "universal" cannot be seriously contested in terms of the relevant provisions of the Geneva Conventions. However, I do have certain reservations about the somewhat unfortunate terminology used in international law. For, in my opinion, the correct *summa divisio* should consist of (1) territorial jurisdiction, (2) personal jurisdiction and (3) jurisdiction in the public interest.

64. I would not describe the authority exercised by a State as "universal jurisdiction", whether exercised with respect to its nationals abroad, which comes under the head of its personal jurisdiction, or with respect to foreign nationals on the high seas having committed acts of maritime piracy, which falls under the head of jurisdiction in the public interest, or with respect to any person in its territory having offended against its *ordre public*, which thus falls within the scope of its territorial jurisdiction. The same applies to the jurisdiction which States accord to themselves regarding the punishment of certain violations of treaty provisions. It is readily conceivable that a worldwide entity, not yet in existence, or the United Nations itself and its principal judicial organ, being of a quasi-universal nature, might lay claim to universal legal jurisdiction. As we know, under the specific treaties to which they are parties, the members of the quasi-universal community have the power to punish certain offences committed outside their territory in well-defined circumstances. Yet, in material terms, such legal power is not universal. Perhaps under the unfortunate influence of the views of criminal law specialists[66], certain internationalists refer to it as the exercise of universal jurisdiction. This expression does not seem appropriate in the present international

[66] References to "universal jurisdiction" are relatively rare in the works of criminal jurists themselves. See, for example, André Huet and René Koering-Joulin, *Droit pénal international*, 1994.

order[67]. At a time when a large number of States are seeking to promote an international criminal forum with worldwide jurisdiction, would the promotion of "universal" jurisdiction not be a backward step in legal terms?

65. As thus understood, the principle of "universal jurisdiction" is laid down, in particular, in Article 49 of the First Geneva Convention of 12 August 1949[68]. But its conception, and especially its application by the Respondent in the present case, do not accord with the law as it currently stands.

66. According to the authorized interpretation of the above Article, the system is based on three essential obligations incumbent on each high contracting party, namely: "to promulgate *special legislation*; *to search for* any individual accused of violating the Convention; *to try* such individual or, if the contracting party prefers, *to hand over* the individual for trial to another interested State"[69].

67. The Respondent is to be thanked for having, in principle, satisfied the first obligation, subject to reservations as to the scope of its special legislation. Its apparent concern to search for any individual accused of having violated the relevant conventional provisions is also praiseworthy.

68. The *congratulations* due to the Respondent as regards the principles nevertheless leave room for *legitimate complaints* on grounds of the scope of its legislation and its implementing measures. The warrant would appear to come under the latter category.

[67] It is from international criminal law, an embryonic discipline with sparse, fragmentary rules, that what is inappropriately termed universal jurisdiction derives. But it cannot escape the marks of its original mould. Hence the somewhat nebulous character of an ancient legal power, limited to a handful of historical curiosities such as the repression of the slave trade, timidly extended in the mid-twentieth century to include the punishment of violations of international humanitarian law. It is from the latter that the specialized doctrine and jurisprudence (International Criminal Tribunal for the former Yugoslavia) are seeking to make it autonomous. For the "universal jurisdiction" claimed by Belgium concerns coercive implementation of the humanitarian rules of Geneva. It is beyond dispute that positive international law authorizes States to penalize offences committed outside their territory when certain conditions relating to the appurtenance to their territorial sovereignty have been met. Nor is there any doubt that this penal jurisdiction should be strictly interpreted, in conformity with the requirements of criminal law.

[68] Article 49 states:

> "Each high contracting party shall be obliged to search for persons presumed to have committed or ordered to have committed one or other of these offences, and must bring them before their own courts, irrespective of their nationality."

[69] Jean Pictet (ed.), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, p. 407; emphasis added.

1. Special Legislation

69. Neither of the two States (Switzerland and Yugoslavia) cited in the above-mentioned Commentary have adopted legislation with such universal geographical reach as the Belgian warrant. The passages in the Commentary merely reflect a concern to punish offences. The Commentary even warns that "no reference is made to the responsibility which could be incurred by individuals who have not *intervened to prevent an offence or to halt it*". Given "the Convention's silence, it must be accepted that it is for national legislation to settle the matter"[70].

2. Searching for and Prosecuting the Perpetrators

70. Not only does the Commentary emphasize the punishment of the accused irrespective of their nationality, it also endorses the territorial link, which, under classical international law as thus codified at Geneva, is in fact the norm:

> "As soon as one of the contracting parties is aware of the fact that an individual *present on its territory* has committed such an offence, its duty is to ensure that the individual is arrested and prosecuted quickly."[71]

Thus, it is not only at the request of a State that the necessary police investigations can be undertaken, but they may also be carried out unprompted. Beyond the confines of national territory, where in principle the exercise of State authority, whether legislative, executive or judicial, must end, the Commentary — quite naturally in my view — refers to the *mechanism of judicial co-operation*, that is to say extradition, where "adequate charges are brought against the accused"[72]. Not only is there no extradition treaty between the Parties concerned regarding this matter, but the Congo also subscribes to the legal principle that it cannot extradite its own nationals. It adds — an argument decisive of the matter — that it is unable to prosecute Mr. Ndombasi for lack of any charges against him, there being nothing it accuses him of.

71. The exercise of "universal" jurisdiction thus presupposes the existence of "adequate charges", under the terms of the humanitarian conventions[73]. Are there any in this case? The Applicant has rejected

[70] Jean Pictet (ed.), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, p. 409; emphasis added.

[71] *Ibid.*, p. 411; emphasis added.

[72] *Ibid.*

[73] See, for example, Article 129 (2) of the Third Geneva Convention of 12 August 1949.

them[74]. Presidents of the Congolese Bar asserted before local media, the day after notification of the warrant on 12 July 2000, that "the case-file was empty". In its warrant, the Respondent failed to specify adequate charges, apart from an unproven assertion that the accused "actively and directly" participated in committing serious offences under international humanitarian law.

72. What, moreover is the objective criterion which would authorize a State to exercise universal jurisdiction by default in various situations where no jurisdiction has normally been exercised? Is it that these are *core crimes*? There are said to be a number of them. Hence the legitimacy of the territorial criterion, which allocates jurisdiction as between the States concerned. Otherwise the political criterion of expediency would hold sway. It is accordingly understandable that the consequences of the tragic events in the Congo in August 1998 provided a pretext for the warrant of 11 April 2000, whereas the *extermination* of over two and a half million Congolese since that date by Rwandan, Ugandan and Burundian aggressors has so far gone unpunished.

73. The Respondent has done everything it can, in accordance with its egregious approach, to criminalize the Applicant's conduct. To the bitter end it has done its utmost to try and prick the conscience of the judges. Not only has it chosen the wrong forum — this Court not being one dealing with matters of substance relating to possible individual criminal responsibility — it has failed, moreover, to provide proof of such responsibility. It should be remembered that *actori incumbit probatio*, but also that *allegans probat*.

74. Should the former model colony of the Belgian Congo, without any *proof*, prosecute one of the Congolese leaders, who, like his fellow countrymen, rose up against the foreign invaders and their Congolese henchmen? The idea that a State could have the legal power to try offences committed abroad, by foreigners against foreigners, while the suspect himself is on foreign territory, runs counter to the very notion of international law.

75. Article 129, paragraph 2, of the Third Geneva Convention, setting out the principle *aut dedere aut judicare* with respect to criminal penalties, lays down the requirement of "adequate charges". In no wise has it contemplated a so-called jurisdiction by default *(in absentia)*. Thus the

[74] Memorial of the Democratic Republic of the Congo, p. 38, para. 57,

> "the Belgian authorities failed to place his [Mr. Yerodia's] statements, notably those made on 28 August 1998, in any historical or cultural context. They improperly interpreted them . . . but the causal connection between those words and certain unspeakable acts of violence . . . is far from having been clearly established."

For its part the Counter-Memorial of the Kingdom of Belgium reiterates (p. 11, para. 1.10) the facts as stated in the warrant of 11 April 2000, after announcing: "it is not necessary to go into these facts at this point, although relevant aspects will be addressed briefly in Part III below".

Commentary on this provision expressly contemplates a situation where the accused "is present on the territory" (of the State party).

76. In vain would one look, in recent practice, for a legislative text or domestic jurisprudence as far-going as this. In its War Crimes Act 1945, as amended in 1988, *Australia* states that "only an Australian citizen or *resident* can be charged under the 1988 Act" (Section 11 of the above Act). In *Polyukhovich* v. *Commonwealth of Australia*, the Australian High Court had recognized that the Australian courts had the power to exercise "a jurisdiction recognized by international law *as universal jurisdiction*" vis-à-vis war crimes[75].

77. A territorial connection is also required by the Austrian Criminal Code in relation to the prosecution of international crimes such as genocide (see its application in the *Dusko Cvjetkovic* case of 13 July 1994). A personal or territorial connection is also required by Article 7 of the Canadian Criminal Code, as revised in 1985. It was applied in *R* v. *Finta*. France, too, requires this connection: "where [the individual] *is present in France*"[76]. It would be tiresome to list all the many examples.

78. If I may resort to *reasoning by analogy*, it is noteworthy that, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits*, the Court held, specifically with respect to human rights, that:

> "where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves"[77].

At the time of their adoption, the Geneva Conventions clearly circumscribed the rights and obligations of States on this point. The authors of those instruments certainly in no way contemplated the excessively wide interpretation adopted by Belgium. Moreover, there has been scant evidence in the subsequent practice of any customary development of treaty law in this direction. It could have been codified in the Rome Convention of 17 July 1998, but was not. Thus, one year after the adoption of that Convention, Belgium has introduced a radical innovation of its own. Such concern for humanity!

79. In providing, in Article 7 of the Law of 16 June 1993, as amended on 10 February 1999, that "Belgian courts have jurisdiction to try the offences provided for in the present Law, irrespective of *where such offences have been committed*", Belgium adopted legislation that was totally unprecedented. It set itself up, if not as the prosecutor for the

[75] *Polyukhovich* v. *Commonwealth of Australia* (1991) 172 CLR 501, p. 562; emphasis added.

[76] Article 689-1 of the Code of Criminal Procedure.

[77] *I.C.J. Reports 1986*, p. 134, para. 267.

human race in the trans-temporal and trans-spatial sense attributed to this term by R.-J. Dupuy, then at least as arbiter of transnational justice, in accordance with the doctrine of "law without frontiers". This approach could even be said to transcend international law itself, since the latter deals essentially with relations between structures with defined borders, namely States. Yet even a cursory assessment shows that the Respondent is violating international law. It is not entitled, as the law currently stands, disdainfully to transcend it. Thus, Heads of States in office Laurent Gbagbo (Côte d'Ivoire) on 26 June 2001, Saddam Hussein on 29 June 2001, Fidel Castro (Cuba) on 4 October 2001, Denis Sassou Nguesso (Congo-Brazzaville) on 4 October 2001, Yasser Arafat on 27 November 2001, a Prime Minister, Ariel Sharon (Israel) on 1 July 2001, an incumbent Minister for Foreign Affairs, Abdulaye Yerodia Ndombasi on 11 April 2000, are the subject of complaints or prosecutions before the Belgian courts for various "international crimes". The list is still far from exhaustive, the name of President Paul Biya (Cameroon) having been added in December 2001. Joe Verhoeven[78] rightly feared that the result would be chaos, by definition the opposite of an order already precarious in the international arena. The Court must necessarily be called upon to intervene.

80. It should be strongly emphasized that Mr. A. Yerodia Ndombasi would appear to be the only person to have been served with an "international arrest warrant". Most singular. It should also be emphasized that the proceedings against Mr. Ariel Sharon, closely watched all over the world, have apparently been quietly put on hold while Belgium seeks an honourable way out for him through a form of a legal technicality; that since then the highest political authorities in the land have been queuing up at the universities (ULB) to give lectures abruptly denouncing the absurdities of this law, and that, since the close of the oral argument in November 2001, one of Belgium's counsel has altered his teaching in favour of a *sine qua non* territorial connection. Such is the showing of the Belgian Law when put to the test of international Realpolitik. The chances are that the proceedings instituted following a complaint by "unrepentant subjects of law" against Mr. A. Sharon will be a dead letter.

81. Belgium has neither any obligation — as discussed above — nor any entitlement under international law to pose as prosecutor for all

[78] Joe Verhoeven, "M. Pinochet, la coutume internationale et la compétence universelle", *Journal des tribunaux*, 1999, p. 315, and, by the same author, "Vers un ordre répressif universel? Quelques observations", *Annuaire français de droit international*, 1999, p. 55. Also, "what would happen if a plaintiff prosecuted Mr. Chirac in the French courts for having served in the Algerian War, when massacres were carried out by the French army?" a senior Israeli official is said to have asked following the complaint filed by Mr. Sharon, the Israeli Prime Minister. (*The Washington Post*, 30 April 2001, Washington Post Foreign Service, Karl Vick, p. 101: "Death Toll in Congo War May Approach 3 Million".)

mankind, in other words, to claim the right to redeem human suffering across national borders and over generations. The State practice referred to above also applies to my comments here. In no sense, however, is this to argue the case for impunity, whether geographical or temporal, including in wars of colonial conquest and neo-colonial reconquest in Africa, America, Asia, Europe and Oceania.

82. As victims of the violence[79] of the aggressors and the series of grave breaches of international humanitarian law, such as the occupation of the Inga Dam and the severing of power and water supplies, particularly in Kinshasa, a city of over 5 million people, resulting in numerous deaths, the Congolese people have consistently called for the withdrawal of the regular occupying forces from Uganda, Rwanda and Burundi. They have also called for the setting up of an international criminal tribunal on the Congo. This tribunal would try all persons, whether perpetrators, co-perpetrators or accomplices, whether African or non-African, having committed war crimes and crimes against humanity, such as the extermination of over two-and-a-half million Congolese[80] in the regions under foreign occupation since 2 August 1998. It would seem that those victims are (as yet) of no concern to Belgium, sadly notorious — rightly or wrongly — for its colonial[81] and neo-colonial[82] past in the field of human rights in the Congo, where a situation of grave, systematic and massive human rights violations persists which requires a response from international opinion. To echo the very fitting words of the French Ambassador to Kinshasa: "on such an issue, there must be no beating about the bush. Endless semantics are not an option when an entire people is dying." For "it is war . . . the occupying armies are on Congolese soil despite the injunctions of the international community"[83].

[79] See S. Oda, declaration appended to the Order of 9 April 1998 in the case concerning the *Vienna Convention on Consular Relations, Provisional Measures, I.C.J. Reports 1998*, p. 260, para. 2, and the Order of 3 March 1999 in *LaGrand (Germany* v. *United States of America), Provisional Measures, I.C.J. Reports 1999 (I)*, p. 18, para. 2, on the need to take account of the rights of the victims of violent attacks (an aspect often neglected).

[80] Source: International Rescue Committee (USA), <http://intranet.theirc.org/docs/mortll_report_small.pdf.>

[81] Adam Horschild, *Le fantôme du Roi Léopold. Un holocauste oublié*, 1998, pp. 264-274; Daniel Vangroenweghe, *Du sang sur les lianes. Léopold II et son Congo*, 1986, pp. 18-123; Barbara Emerson, *Léopold II. Le Royaume et l'Empire*, 1980, pp. 248-251.

[82] See CR 2000/34, p. 16, on the scathing argument of the Congo and Noam Chomsky, *Autopsie des terrorismes*, 2001, pp. 12-13.

> "The European Powers conquered a large part of the world with extreme brutality. With very few exceptions, these Powers were not attacked by their victims in return . . ., nor was Belgium attacked by the Congo . . ."

[83] See the speech by Mr. Gildas Le Lidec, French Ambassador in Kinshasa, on 14 July 2001, on the occasion of the French national holiday, *Le Palmarès*, No. 2181, of 16 July 2001, p. 8.

83. The views of a few legal writers will suffice to indicate the scale of the dispute on this issue. According to P.-M. Dupuy, "still seldom recognized in customary law, universal jurisdiction can thus only be *optional*"[84]. The author cites in his support the fact that the French Court of Cassation "has confirmed the refusal by the Appeal Court to see the 1949 Geneva Conventions as providing any legal basis for invoking such jurisdiction"[85]. He concludes that "the Rome Convention does not . . . institute true universal jurisdiction, based as it is on the jurisdiction of the State of nationality of the perpetrator and/or that of the State where the offence was committed"[86]. As for François Rigaux, he prefers not to commit himself "on a controversial, topical theme"[87]. Mario Bettati, on the other hand, considers that "universal jurisdiction . . . provides grounds for any State to prosecute crimes which are all the more serious because they sometimes involve both crimes against the laws of war and crimes against humanity"[88]. No proof is provided for this assertion. By contrast, Nguyen Quoc Dinh, Patrick Dailler and Alain Pellet refer to it as "a disputed principle"[89]. Olivier T. Covey only accepts it if the author of the offence "is later found on national territory"[90]. The advocates of universal jurisdiction recognize it provided the accused "is present on its territory"[91]. Jean Combacau and Serge Sur, however, point out that "States remain faithful to territorial and personal criteria and refrain from any recourse to universal or *in rem* jurisdiction"[92]. And Philippe Weckel, while observing the reference to universal jurisdiction in the Preamble to the Treaty of Rome of 28 July 1998, nevertheless notes the ubiquitous presence of the "judicial sovereignty of States"; for, as Belgian practice has already shown, "universal jurisdiction . . . would ultimately seem to be exercised unilaterally"[93].

84. The warrant of 11 April 2000 produced legal effects both internally in Belgium and internationally.

[84] Pierre-Marie Dupuy, *loc. cit.*, p. 293; emphasis added.
[85] *Ibid.*, p. 294.
[86] *Ibid.*
[87] François Rigaux, "Le concept de territorialité: un fantasme en quête de réalité", in *Liber Amicorum Judge Mohammed Bedjaoui*, 1999, p. 211.
[88] Mario Bettati, *Le droit d'ingérence. Mutation de l'ordre international*, 1996, p. 269.
[89] Nguyen Quoc Dinh, Patrick Dailler and Alain Pellet, *Droit international public*, 1999, p. 689.
[90] Olivier T. Covey, "La compétence des Etats", *Droit international. Bilan et perspectives*, 1991, p. 336.
[91] Brigitte Stern, "A propos de la compétence universelle", in *Liber Amicorum Judge Mohammed Bedjaoui*, p. 748.
[92] Jean Combacau and Serge Sur, *Droit international public*, 1993, p. 351.
[93] P. Weckel, "La Cour pénale internationale", *Revue générale de droit international public*, Vol. 102, No. 4, 1998, pp. 986, 989. According to one criminal expert from the Congo, Nyabirungu Mwene Songa, *Droit pénal general*, Kinshasa, 1995, pp. 77 and 79, the "so-called system of universal jurisdiction gives the court of the *place of arrest* the power of trial" (emphasis added).

85. To begin with the internal aspect. Juridically, it seems clear that serving a warrant on a Minister for Foreign Affairs constitutes an unlawful act, as it breaches both his inviolability and his immunity from criminal jurisdiction. Formally, it is by nature an act of coercion. Materially, its terms make no secret of the fate which awaits the Foreign Minister. The agents of the Belgian authorities are required physically to apprehend a Minister for Foreign Affairs of another sovereign State! In terms of its purpose, the warrant seeks to extinguish the freedom to come and go as well as to destroy the inherent dignity of an organ of an independent country. Organically, the investigating judge who acted against the Minister concerned is not to be confused with an agent of State protocol. Regarding the warrant, the Court rightly states:

> "its mere issue violated . . . immunity . . . 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 . . . under international law." (Judgment, para. 70.)

86. These are the objective elements showing that this unprecedented warrant produced legal effects. The fact that it was not physically implemented is another matter. It could have been implemented. That the Respondent may flout the rules of elementary courtesy between supposedly civilized States with respect to another State is one thing in law. The warrant quite simply discredited the Congolese organs of State, treating them in an altogether discourteous and unlawful manner. And that is not all.

87. At international level, our main focus of attention here, since we are dealing with a flagrant breach of customary international law on immunities, I need only refer to my analysis at the provisional measures stage. Moreover, the reasoning of the Judgment does indeed appear to underline the legal harm thus suffered[94].

88. As I indicated at the preliminary measures stage, the disputed warrant caused prejudice to Congolese diplomacy. While the head of the diplomatic corps was nevertheless able to travel unimpeded in the southern hemisphere in order to attend diplomatic meetings aimed at bringing an end to the armed conflict in the Congo, he was, on the other hand, unable so to travel in other regions much more important for settlement of the conflict. Even if the Congolese State was represented there, it was at a lower level. The result was that the substance of the peace talks at foreign ministerial level was adversely affected by virtue of the rule of diplomatic precedence. Ultimately, the Congo's international sovereignty prerogatives suffered prejudice[95].

[94] Judgment, paras. 70 and 71.
[95] See also S. Bula-Bula, dissenting opinion appended to the Order of 8 December 2000, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, I.C.J. Reports 2000*, p. 222, para. 16.

89. In particular, the regular and continuous operation of the country's foreign service was disrupted by this politico-legal interference, the head of the diplomatic corps having been subjected to "arbitrary quarantine". The serving of the warrant also violated the political independence of the Congo. As indicated above, it obliged a weak State, further weakened by armed aggression, to change the composition of its Government — against its wishes according to counsel for the Congo, a member of that country's Government[96] — to please the Respondent. Belgium has not disputed this statement.

90. There is no doubt at all that Belgium's conduct has discredited the Congo. Its effect, as a result of a decision taken in an apparently summary manner, has been to put further pressure on a State already under attack at a time when the Central African States, meeting in Libreville (Gabon) on 24 September 1998, "condemned the aggression against the DR of the Congo and the interference described above in the internal affairs of that country"[97]. The criminal proceedings thus instituted against an organ of a victim of aggression constitute accusations that degrade it in the eyes of the "international community". They had a deleterious effect on the moral rights to honour and dignity of the Congolese people, as represented by their State[98].

91. The fact that, by issuing, circulating and maintaining the arrest warrant of 11 April 2000, the Respondent committed an internationally wrongful act has been demonstrated above. Belgium breached its international obligations under general international law.

92. At this point, the following view expressed by Paul Guggenheim seems particularly instructive:

> "Contrary to widely held opinion, it is not only when it is actually implemented that domestic law may *violate international law*. The very fact of the enactment — or non-enactment — of a general norm capable of being applied directly and thereby causing injury, is an *international wrong*. The enactment of a norm contrary to international law is thus a sanctionable matter . . ."[99]

This is an argument applicable *a fortiori* to the warrant, a mere act — indeed, in the view of Congo's counsel, a wrongful act — of application.

93. On closer examination, the Belgian warrant does not, in international law, constitute a legal act. As noted by Congo's counsel, it is an internationally wrongful act. The proposition that: "[i]n the eyes of international law and of the Court which is its organ, domestic laws are merely facts, manifestations of the will and the activity of States, just as judicial decisions or administrative measures are"[100], is extremely apposite here.

94. The argument seeking to distinguish the *instrumentum* on the one hand and the *negotium* on the other is thus invalid. Wrongfulness does not cease to exist because the organ of State has changed. For, through that organ, it is, of course, the State which is the target. This is even clearer in the case at issue, in which various members of the Government were on the list drawn up by the Belgian judge, the Head of State included! Moreover, an unlawful warrant is not, *ipso facto*, void in law. This is precisely the case here. Generally speaking, in international law, there are national measures (human rights, law of the sea, etc.) enacted perfectly legally, which are nevertheless unlawful. They engage the responsibility of their authors. But the fact that it is adjudged unlawful by an international organ does not of itself annul the national measure. It is for the State transgressing international law to extinguish its unlawful act.

95. The Respondent violated international law on immunities on 11 April 2000 by issuing the warrant. It subsequently confirmed its unlawful conduct by circulating the warrant internationally. The unlawful act was communicated to the Applicant on 12 July 2000. After the violation, which was complete on 11 April 2000, the Respondent claims to have sought, on 15 September 2000, to transmit the case file to the Applicant by diplomatic channels. Not only did it provide no proof of this tardy act of repentance, which, moreover, is contested by Congo's counsel; the attempt to whitewash the wrongful act, rightly repudiated by the Applicant, is devoid of all effect.

96. Worse, there is a major factor which demonstrates Belgium's resolutely wrongful conduct in the course of the proceedings. What other word could be used to describe the Respondent's request for a Red Notice on 12 September 2001? Notwithstanding the international judicial proceedings brought against it, Belgium persists in seeking to implement its unilateral wrongful act by means of a Red Notice. In so doing, not only has the Respondent provided eloquent proof of lack of *good faith* in relation to the conduct of the international legal proceedings; but is it not also guilty of "an encroachment on the functions of the Court"[101]?

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[96] See oral argument of 22 November 2000, CR 2000/34, p. 10.

[97] See *Le Phare*, No. 818 of 28 September 1988, p. 3.

[98] See also S. Bula-Bula, dissenting opinion appended to the Order of 8 December 2000, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, I.C.J. Reports 2000*, pp. 222-223, para. 17.

[99] P. Guggenheim, *Traité de droit international public*, Vol. I, pp. 7-8, quoted by Krystyna Marek, "Les rapports entre le droit international et le droit interne à la lumière de la jurisprudence de la Cour permanente de Justice internationale", *Revue générale de droit international public*, Vol. XXXIII, 1962, p. 276; emphasis added.

[100] Case concerning *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 19.

[101] I am here drawing on the views of Judge Tarazi, dissenting opinion appended to the Judgment of 24 May 1980, case concerning *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 64.

97. While powerful States — a relative notion in terms of time and geography — sometimes tend to invoke international law to justify their conduct *a posteriori*, weak States — an equally relative concept in the same terms — often tend to ensure that their conduct complies with international law, since this is the only power they have.

98. Without regard for the criminal immunities and inviolability of the Minister for Foreign Affairs of the Congo, the Kingdom of Belgium issued an arrest warrant against this distinguished organ of a sovereign State on the basis of allegations that "international crimes" had been committed during the armed attack on the Congo of 2 August 1998.

99. Not only has the Congo demonstrated vis-à-vis the "international community" its status as a subject of international law capable of appearing before the Court, but this victim of aggression has conducted itself as a State of law, in other words, an entity which respects international law.

100. The Congolese people, through the medium of their State, have thus been able to express their international personality. They have also affirmed that they are free. In this respect, has the Respondent mistaken which generation and era it is dealing with? When in 1989 the ruling Government in Kinshasa considered bringing the *Belgo-Congolese dispute* before the Court, its initiative went no further than acceptance of the Court's compulsory jurisdiction. There followed the Rabat Agreement of June 1989, which defused the quarrel between sovereigns States. That is no longer the case today.

101. Whilst R. Aron maintained in 1984 that "the example of Congo suggests that, in the masses, tribal awareness still prevails over national awareness . . ."[102], at the same time, Paul Reuter and Jean Combacau had no hesitation in drawing the following parallel between the nation-building process in "the most centralized European States of today" and in the Congo: "this is the situation of a large and populous African State such as Zaire, where a Zairian nation is daily being forged at the expense of the ethnic communities, whose fate might otherwise have been different"[103]. We, for our part, have taken the view that "for unacknowledged reasons, the collective Zairian will to live, forged by years of sometimes open, sometimes silent resistance to one of the most savage political regimes the twentieth century has seen, is underestimated"[104].

102. Like a two-headed Janus, the Judgment constitutes, on the one hand, an act of repudiation of the unhealthy relations, supposedly of friendship and co-operation, between a dominating and a dominated

[102] Raymond Aron, *Paix et guerre entre les nations*, 1984, p. 389.

[103] Paul Reuter and Jean Combacau, *Institutions et relations internationales*, 1988, p. 24.

[104] Sayeman Bula-Bula, "La doctrine d'ingérence humanitaire revisitée", *Revue africaine de droit international et comparé* (London), Vol. 9, No. 3, September 1997, p. 626, footnote 109.

State immediately following a botched process of decolonization; on the other hand, it is an act which may well serve as the basis of mutually beneficial healthy relations of friendship and lasting co-operation between sovereign partners linked by history. Sooner or later such relations will develop. The sooner the better. It is to be hoped that the Parties, and especially the Respondent, grasp the fundamental significance of this decision. The Court's contribution to the peaceful settlement of the dispute will have been most beneficial. Provided the Respondent adopts a new mindset and jettisons its outmoded conceptions maintained by the weight of history and unequal power relations. Thus, on the eve of the formation of a government inspired by Belgium, academic advisers from that country warned it that:

> "Unless it ensures that it can play a decisive role in revitalizing the national economy, unless it claims such a role for itself and succeeds in playing it, Belgium risks relinquishing its leadership in Zaire and losing its principal asset, as well as its most effective vehicle for the expression of foreign policy. *It is first and foremost Zaire that enables us to play a role on the international stage and frequently to sit at the table of the powerful.*"[105]

103. The African States particularly, which increasingly appear as "ordinary" parties before the Court, have their own reasons for entrusting their disputes to that body of eminent, independent and upright[106] jurists. Here I am particularly thinking of complaints like the one against Congo brought before a national judge, should the Respondent pursue its policy of double standards. Especially as the large number of African, Latin American and Asian leaders brought before Belgian justice might — wrongly — suggest that the presumed violations of international humanitarian law, in particular crimes against peace, crimes against humanity and war crimes, are a monopoly of Africa, Latin America and Asia.

104. This is where "universal" jurisdiction shows its true colours as a "variable geometry" jurisdiction, selectively exercised against some States to the exclusion of others. It requires no great knowledge to be aware that, at global level, it is not just the handful of prominent personalities charged before the Brussels judge who are the subject of public rumours of serious human rights violations.

105. It is clear that the Court's task is to settle disputes between States

[105] See Société nationale d'investissement et administration générale de la coopération au développement, *Zaïre, secteur des parastataux, réactivation de l'économie. Contribution d'entreprise du portefeuille de l'Etat*, report by M. Moll, J.-P. Couvreur and M. Norro, professors at the Université catholique de Louvain, 29 April 1994, p. 231.

[106] See Article 2 of the Statute of the International Court of Justice.

submitted to it by parties. It is not its task to teach the law. Yet the settlement of disputes can provide valuable lessons. Indeed, at the end of the oral argument, one of Belgium's counsel revised his script. One of the merits of the Judgment is that it has contributed to the teaching of international law. The fears we expressed when preliminary measures were requested[107] have not become groundless. The Court has drafted a new chapter on the international law of immunities as it pertains to Ministers for Foreign Affairs[108]. As such, there is no doubt that it is a useful addition to the handbooks on public international law. Intervening at a time when the doctrinal debate is at its height, as witness the proceedings of the Institut de droit international at its Vancouver session in August 2001, the Judgment casts a great deal of light on this issue.

106. The question of the "legal relationship between universal jurisdiction and . . . immunities"[109], which I was concerned to raise, has also implicitly been settled in favour of immunities[110]. And without prejudice to the established nature of the legal principle concerned, with the exception of the power to punish certain violations of conventional provisions recognized as between States parties.

107. The Court has established the existence in customary international law of the rules relating to the criminal immunity and inviolability of Ministers for Foreign Affairs. It has applied them to this case because Mr. A. Yerodia Ndombasi was Minister for Foreign Affairs at the time of the events concerned. Given that the international dispute concerned conflicting claims between the immunities in question and so-called universal jurisdiction, it follows that the Court, by virtue of its decision, has *implicitly* rejected the claim to such jurisdiction in the present case[111]. It has thus ruled that so-called universal jurisdiction, even if it were established in international law, would in any event be inoperative as regards the criminal immunities and inviolability of the Minister for Foreign Affairs, whatever the alleged crimes. The Applicant has not requested a declaratory judgment. The Court has been asked to settle a concrete dispute by stating the law and effectively applying it to the dispute. But a general, abstract, impersonal discussion of this disputed

[107] See Sayeman Bula-Bula, dissenting opinion appended to the Order of 8 December 2000 delivered in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, I.C.J. Reports 2000*, p. 219, para. 4.

[108] According to Dominique Carreau, *Droit international*, Vol. I, 2001, p. 653, the Court performs a "major role" in "the development of contemporary international law".

[109] Sayeman Bula-Bula, dissenting opinion appended to the Order of 8 December 2000 delivered in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium), Provisional Measures, I.C.J. Reports 2000*, p. 220, para. 7.

[110] Judgment, paras. 70 and 71.

[111] See the cases concerning the *North Sea Continental Shelf, I.C.J. Reports 1969*, pp. 6 *et seq.*

jurisdiction, having not been requested by the Applicant, was not required[112], even though, in my view, it would have been desirable for the Congo to have maintained this claim also in its final written and oral submissions. Since the Applicant asked the Court to state the law and settle the dispute, should it not have sought to dispose of every possible ground, whether "universal", humanitarian or other? One thing is certain, the argument seeking to qualify immunities was rejected in the Judgment's operative part. Any other argument founded on other grounds of "trans-frontierism" is also virtually excluded in the reasoning. Faced with the "sound judicial economy"[113] observed by our institution, it was for the opinions to "illuminate the reasoning of the Judgment in counterpoint", so that "the decision's full substance could be extracted and the whole import of its contribution to the jurisprudence could be apprehended"[114].

108. In conclusion, it is clear that the Congo also seems to have acted in accordance with the "functional duality" referred to by Georges Scelle. It brought international legal proceedings not only on its own behalf and for itself, but also for the benefit of the "international community". It has given the Court the opportunity to reaffirm and strengthen the legal mechanism of immunities, which facilitates legal relations between States worldwide, irrespective of the arguments raised against it.

109. There is every likelihood that the Judgment, small in size, yet large in legal substance, will be favourably received by the "international community", if, of course, this is taken to mean all States, international organizations and other international public entities. Irrespective of the divergence of interests, the disparity in the level of development and the diversity of cultures, what has been reaffirmed here is a denominator common to all.

110. The decision should also serve as a rebuke to the opinion manipulators, who should be denied the *de facto* power to exploit "the misfortunes of others" for unstated ends[115].

[112] There are some who trace "universal jurisdiction" back to the Middle Ages. In this respect, one should perhaps be wary of taking as universal what is probably merely regional. Hence, according to E. Ogueri II "the rules of conduct which, for example, governed relations between Ghana and Nigeria in West Africa, or between nations in other parts of Africa and Asia, were regarded as 'universally recognized customary laws'" prior to colonization. See E. Ogueri II, Intervention, *International Law Association Report*, Warsaw Session, 1988, p. 969.

[113] See Manfred Lachs, separate opinion appended to the Judgment of 24 May 1980 in the case concerning *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 47.

[114] Mohammed Bedjaoui, "La 'fabrication' des arrêts de la Cour international de Justice", *Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally*, 1991, p. 105.

[115] See Bernard Kouchner, *Le malheur des autres*, 1991 (241 pages).

111. Lastly, it should call for greater modesty from the new fundamentalist crusaders on behalf of humanitarianism, "skilled at presenting problems in a false light in order to justify damaging solutions"[116], including a certain trend of legal militancy[117].

(Signed) Sayeman BULA-BULA.

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[116] See Aimé Césaire, *Discours sur le colonialisme*, 1995, p. 8.

[117] On legal militancy, see J. Combacau and Serge Sur, *Droit international public*, 1993, p. 46; Nguyen Quoc Dinh, Patrick Dallier and Alain Pellet, *Droit international public*, 1992, p. 79. The authors discern a western current of militancy, supposedly represented by Georg Schwarzenberger and Rosalyn Higgins of the United Kingdom and Myres S. McDougal, Richard Falk and M. Reisman of the United States; an Eastern current, without indicating any authors, and an Ancient World current with Mohammed Bedjaoui, Georges Abi-Saab and Taslim Olawale Elias in the vanguard. In reality, there is always an ideological start, and hence militancy, in the work of any author. To quote just a few, J. Combacau and S. Sur, in *op. cit.*, Avertissement, while stressing their "legal positivism", nonetheless display their liberal tendency. Thus, at a time when the number of ratifications required by the Convention on the Law of the Sea had been reached, they still speculate: "always supposing it ever enters into force" (pp. 452-453); see also the assertion that this Convention has inverted "on purely formal bases the real balance between interests and power" (p. 446) or the assertion that this text is not "like the Geneva Conventions of 1958, a convention of codification but one of progressive development . . ." (p. 452). See also Nguyen Quoc Dinh *et al., op. cit.*, p. 1093, who refer to "the possible entry into force of the Convention".

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo *v.* Belgium), Judgment, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, I.C.J. Reports 2002

DISSENTING OPINION OF JUDGE VAN DEN WYNGAERT

[English Original Text]

Immunities under customary international law — Not applicable to Minister for Foreign Affairs — Principle of international accountability for war crimes and crimes against humanity — Role of civil society in the formation of opinio juris *— Impunity — Extraterritorial jurisdiction for war crimes and crimes against humanity — Universal jurisdiction for such crimes —* "Lotus" *test applied to such crimes — Prescriptive jurisdiction — Rome Statute for an International Criminal Court — Complementarity principle — Internationally wrongful act — Enforcement jurisdiction — (International) arrest warrants — Remedies before the International Court of Justice — Abuse of immunities and Pandora's box.*

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I. Introductory Observations

1. I have voted against paragraphs (2) and (3) of the *dispositif* of this Judgment. International law grants no immunity from criminal process to incumbent Foreign Ministers suspected of war crimes and crimes against humanity. There is no evidence for the proposition that a State is under an obligation to grant immunity from criminal process to an incumbent Foreign Minister under customary international law. By issuing and circulating the warrant, Belgium may have acted contrary to international comity. It has not, however, acted in violation of an international legal obligation (Judgment, para. 78 (2)).

Surely, the warrant based on charges of war crimes and crimes against humanity cannot infringe rules on immunity *today*, given the fact that Mr. Yerodia has now ceased to be a Foreign Minister and has become an ordinary citizen. Therefore, the Court is wrong when it finds, in the last part of its *dispositif*, that Belgium must cancel the arrest warrant and so inform the authorities to which the warrant was circulated (Judgment, para. 78 (3)).

I will develop the reasons for this dissenting view below. Before doing so, I wish to make some general introductory observations.

2. The case was about an arrest warrant based on acts allegedly committed by Mr. Yerodia in 1998 when he was not yet a Minister. These acts included various speeches inciting racial hatred, particularly virulent remarks, allegedly having the effect of inciting the population to attack Tutsi residents in Kinshasa, dragnet searches, manhunts and lynchings. Following complaints of a number of victims who had fled to Belgium, a criminal investigation was initiated in 1998, which eventually, in April 2000, led to the arrest warrant against Mr. Yerodia, who had meanwhile become a Minister for Foreign Affairs in the Congo. This warrant was not enforced when Mr. Yerodia visited Belgium on an official visit in June 2000, and Belgium, although it circulated the warrant internationally via an Interpol Green Notice, did not request Mr. Yerodia's extradition as long as he was in office. The request for an Interpol Red Notice was only made in 2001, *after* Mr. Yerodia had ceased to be a Minister.

3. Belgium has, at present, very broad legislation that allows victims of alleged war crimes and crimes against humanity to institute criminal proceedings in its courts. This triggers negative reactions in some circles, while inviting acclaim in others. Belgium's conduct (by its Parliament, judiciary and executive powers) may show a lack of *international courtesy*. Even if this were true, it does not follow that Belgium actually violated (customary or conventional) international law. *Political wisdom* may command a change in Belgian legislation, as has been proposed in

various circles[1]. *Judicial wisdom* may lead to a more restrictive application of the present statute, and may result from proceedings that are pending before the Belgian courts[2]. This does not mean that Belgium has acted in violation of international law by applying it in the case of Mr. Yerodia. I see no evidence for the existence of such a norm, not in conventional or in customary international law for the reasons set out below[3].

4. The Judgment is shorter than expected because the Court, which was invited by the Parties to narrow the dispute, did not decide the question of (universal) jurisdiction, and has only decided the question of immunity from jurisdiction, even though, logically the question of jurisdiction would have preceded that of immunity[4]. In addition, the Judgment is very brief in its reasoning and analysis of the arguments of the Parties. Some of these arguments were not addressed, others in a very succinct manner, certainly in comparison with recent judgments of national[5] and international courts[6] on issues that are comparable to those that were before the International Court of Justice.

5. This case was to be a test case, probably the first opportunity for the International Court of Justice to address a number of questions that have

[1] The Belgian Foreign Minister, the Belgian Minister of Justice, and the Chairman of the Foreign Affairs Commission House of Representatives have made public statements in which they called for a revision of the Belgian Act of 1993/1999. The Government referred the matter to the Parliament, where a bill was introduced in December 2001 (Proposition de loi modifiant, sur le plan de la procédure, la loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, doc. parl. Chambre 2001-2002, No. 1568/001, available at http://www.lachambre.be/documents_parlementaires.html).

[2] A. Winants, *Le Ministère public et le droit pénal international, Discours prononcé à l'occasion de l'audience solennelle de rentrée de la Cour d'appel de Bruxelles du 3 septembre 2001*, p. 45.

[3] *Infra*, paras. 11 *et seq.*

[4] See further *infra*, para. 41.

[5] Prominent examples are the *Pinochet* cases in Spain and the United Kingdom (*Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena*, 5 November 1998, http://www.derechos.org/nizkor/chile/juicio/audi.html; *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte*, 24 March 1999, [1999] 2 All ER 97, HL, p. 97), the *Qaddafi* case in France (Cour de cassation, 13 March 2001, http://courdecassation.fr/agenda/arrets/arrets/00-87215.htm) and the *Bouterse* case in the Netherlands (Hof Amsterdam, No. R 97/163/12 Sv and R 97/176/12 Sv, 20 November 2000; Hoge Raad, Strafkamer, Zaaknr. 00749/01 CW 2323, 18 September 2001, http://www.rechtspraak.nl).

[6] ECHR (European Commission of Human Rights), *Al-Adsani* v. *United Kingdom*, 21 November 2001, http://www.echr.coe.int.

not been considered since the famous *"Lotus"* case of the Permanent Court of International Justice in 1927[7].

In technical terms, the dispute was about an arrest warrant against an incumbent Foreign Minister. The warrant was, however, based on charges of war crimes and crimes against humanity, which the Court even fails to mention in the *dispositif*. In a more principled way, the case was about how far States can or must go when implementing modern international criminal law. It was about the question what international law requires or allows States to do as "agents" of the international community when they are confronted with complaints of victims of such crimes, given the fact that international criminal courts will not be able to judge *all* international crimes. It was about balancing two divergent interests in modern international (criminal) law: the need of international accountability for such crimes as torture, terrorism, war crimes and crimes against humanity and the principle of sovereign equality of States, which presupposes a system of immunities.

6. The Court has not addressed the dispute from this perspective and has instead focused on the very narrow question of immunities of incumbent Foreign Ministers. In failing to address the dispute from a more principled perspective, the International Court of Justice has missed an excellent opportunity to contribute to the development of modern international criminal law.

Yet international criminal law is becoming a very important branch of international law. This is manifested in conventions, in judicial decisions of national courts, international criminal tribunals and of international human rights courts, in the writings of scholars and in the activities of civil society. There is a wealth of authority on concepts such as universal jurisdiction, immunity from jurisdiction and international accountability for war crimes and crimes against humanity[8]. It is surprising that the International Court of Justice does not use the term international criminal law and does not acknowledge the existence of these authorities.

7. Although, as a matter of logic, the question of jurisdiction comes first[9], I will follow the chronology of the reasoning of the Judgment and deal with immunities first.

[7] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10.*
[8] See further *infra*, footnote 98.
[9] *Infra*, para. 41.

II. Immunities

8. The Court starts by observing that, in the absence of a general text defining the immunities of Ministers for Foreign Affairs, it is on the basis of customary international law that it must decide the questions relating to the immunities of Ministers for Foreign Affairs raised by the present case (Judgment, para. 52 *in fine*). It immediately continues by stating that "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" (Judgment, para. 53). The Court then compares the functions of Foreign Ministers with those of Ambassadors and other diplomatic agents on the one hand, and those of Heads of State and Heads of Governments on the other, whereupon it reaches the following conclusion (Judgment, para. 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."

9. On the other hand, the Court, looking at State practice in the field of war crimes and crimes against humanity (Judgment, para. 58), decides that:

> "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."

10. I disagree with the reasoning of the Court, which can be summarized as follows: *(a)* there is a rule of customary international law granting "full" immunity to incumbent Foreign Ministers (Judgment, para. 54), and *(b)* there is no rule of customary international law departing from this rule in the case of war crimes and crimes against humanity (Judgment, para. 58). Both propositions are wrong.

First, there is no rule of customary international law protecting incumbent Foreign Ministers against criminal prosecution. International comity and political wisdom may command restraint, but there is no obligation under positive international law on States to refrain from exercising jurisdiction in the case of incumbent Foreign Ministers suspected of war crimes and crimes against humanity.

Secondly, international law does not prohibit, but instead encourages States to investigate allegations of war crimes and crimes against humanity, even if the alleged perpetrator holds an official position in another State.

Consequently, Belgium has not violated an obligation under international law by issuing and internationally circulating the arrest warrant against Mr. Yerodia. I will explain the reasons for this conclusion in the following two paragraphs.

1. There Is No Rule of Customary International Law Granting Immunity to Incumbent Foreign Ministers

11. I disagree with the proposition that incumbent Foreign Ministers enjoy immunities on the basis of customary international law for the simple reason that there is no evidence in support of this proposition. Before reaching this conclusion, the Court should have examined whether there is a rule of customary international law to this effect. It is not sufficient to compare the rationale for the protection from suit in the case of diplomats, Heads of State and Foreign Ministers to draw the conclusion that there is a rule of customary international law protecting Foreign Ministers: identifying a common raison d'être for a protective rule is one thing, elevating this protective rule to the status of customary international law is quite another thing. The Court should have first examined whether the conditions for the formation of a rule of customary law were fulfilled in the case of incumbent Foreign Ministers. In a surprisingly short decision, the Court immediately reaches the conclusion that such a rule exists. A more rigorous approach would have been highly desirable.

12. In the brevity of its reasoning, the Court disregards its own case law on the subject on the formation of customary international law. In order to constitute a rule of customary international law, there must be evidence of State practice *(usus)* and *opinio juris* to the effect that this rule exists.

In one of the leading precedents on the formation of customary international law, the *Continental Shelf* case, the Court stated the following:

> "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.

> The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremony and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."[10]

In the *Nicaragua* case, the Court held that:

> "Bound as it is by Article 38 of its Statute to apply, *inter alia*, international custom 'as evidence of a general practice accepted as law', the Court may not disregard the essential role played by general practice . . . The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice."[11]

13. In the present case, there is no settled practice *(usus)* about the postulated "full" immunity of Foreign Ministers to which the International Court of Justice refers in paragraph 54 of its present Judgment. There may be limited State practice about immunities for current[12] or former Heads of State[13] in national courts, but there is no such practice about Foreign Ministers. On the contrary, the practice rather seems to be that there are hardly any examples of Foreign Ministers being granted immunity in foreign jurisdictions[14]. Why this is so is a matter of speculation. The question, however, is what to infer from this "negative practice". Is this the expression of an *opinio juris* to the effect that international law prohibits criminal proceedings or, concomitantly, that Belgium

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[10] *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 77.

[11] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, pp. 97-98, para. 184.

[12] Cour de cassation (Fr.), 13 March 2001 *(Qaddafi)*.

[13] *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte*, 25 November 1998, [1998] 4 All ER 897.

[14] Only one case has been brought to the attention of the Court: *Chong Boon Kim* v. *Kim Yong Shik and David Kim*, Circuit Court (First Circuit, State of Hawaii), 9 September 1963, 58 *AJIL*, 1964, pp. 186-187. This case was about an incumbent Foreign Minister against whom process was served while he was on an *official visit* in the United States (see paragraph 1 of the "Suggestion of Interest Submitted on Behalf of the United States", *ibid.*). Another case where immunity was recognized, not of a Minister but of a prince, was in the case of *Kilroy* v. *Windsor (Prince Charles, Prince of Wales)*, US District Court for the ND of Ohio, 7 December 1978, *International Law Reports*, Vol. 81, 1990, pp. 605-607. In that case, the judge observes:

> "The Attorney-General . . . has determined that the Prince of Wales is immune from suit in this matter and has filed a 'suggestion of immunity' with the Court . . . [T]he doctrine, being based on foreign policy considerations and the Executive's desire to maintain amiable relations with foreign States, applies with even more force to live persons representing a foreign nation *on an official visit*." (Emphasis added.)

is under an international obligation to refrain from instituting such proceedings against an incumbent Foreign Minister?

A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Abstinence may be explained by many other reasons, including courtesy, political considerations, practical concerns and lack of extraterritorial criminal jurisdiction[15]. Only if this abstention was based on a conscious decision of the States in question can this practice generate customary international law. An important precedent is the 1927 *"Lotus"* case, where the French Government argued that there was a rule of customary international law to the effect that Turkey was *not* entitled to institute criminal proceedings with regard to offences committed by foreigners abroad[16]. The Permanent Court of International Justice rejected this argument and held:

> "Even if the rarity of the judicial decisions to be found among the reported cases were sufficient to prove in point of fact the circumstance alleged by the Agent for the French Government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom."[17]

[15] In some States, for example, the United States, victims of extraterritorial human rights abuses can bring *civil* actions before the Courts. See, for example, the *Karadzić* case (*Kadić* v. *Karadzić*, 70 F. 3d 232 (2d Cir. 1995)). There are many examples of civil suits against incumbent or former Heads of State, which often arose from criminal offences. Prominent examples are the *Aristeguieta* case (*Jimenez* v. *Aristeguieta*, *ILR*, 1962, p. 353), the *Aristide* case (*Lafontant* v. *Aristide*, 844 F. Supp. 128 (EDNY 1994), noted in 88 *AJIL*, 1994, pp. 528-532), the *Marcos* cases (*Estate of Silme G. Domingo* v. *Ferdinand Marcos*, No. C82-1055V, 77 *AJIL*, 1983, p. 305: *Republic of the Philippines* v. *Marcos and Others* (1986), *ILR*, 81, p. 581 and *Republic of the Philippines* v. *Marcos and Others*, 1987, 1988, *ILR*, 81, pp. 609 and 642) and the *Duvalier* case (*Jean-Juste* v. *Duvalier*, No. 86-0459 Civ (US District Court, SD Fla.), 82 *AJIL*, 1988, p. 596), all mentioned and discussed by Watts (A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 247, pp. 54 *et seq.*). See also the American 1996 Antiterrorism and Effective Death Penalty Act which amended the Foreign Sovereign Immunities Act (FSIA), including a new exception to State immunity in case of torture for civil claims. See J. F. Murphy, "Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution", 12 *Harvard Human Rights Journal*, 1999, pp. 1-56.

[16] See also *infra*, para. 48.

[17] *"Lotus"*, *supra*, footnote 7, p. 28. For a commentary, see I. C. McGibbon, "Customary International Law and Acquiescence", *BYBIL*, 1957, p. 129.

14. In the present case, the Judgment of the International Court of Justice proceeds from a mere analogy with immunities for diplomatic agents and Heads of State. Yet, as Sir Arthur Watts observes in his lectures published in the *Recueil des cours de l'Académie de droit international* on the legal position in international law of Heads of States, Heads of Governments and Foreign Ministers: "analogy is not always a reliable basis on which to build rules of law"[18]. Professor Joe Verhoeven, in his report on the same subject for the Institut de droit international likewise makes the point that courts and legal writers, while comparing the different categories, usually refrain from making "a straightforward analogy"[19].

15. There are fundamental differences between the circumstances of diplomatic agents, Heads of State and Foreign Ministers. The circumstances of *diplomatic agents* are comparable, but not the same as those of Foreign Ministers. Under the 1961 Vienna Convention on Diplomatic Relations[20], diplomatic agents enjoy immunity from the criminal jurisdiction of the receiving State. However, diplomats reside and exercise their functions on the territory of the receiving States whereas Ministers normally reside in the State where they exercise their functions. Receiving States may decide whether or not to accredit foreign diplomats and may always declare them *persona non grata*. Consequently, they have a "say" in what persons they accept as a representative of the other State[21]. They do not have the same opportunity vis-à-vis Cabinet Ministers, who are appointed by their Governments as part of their sovereign prerogatives.

16. Likewise, there may be an analogy between *Heads of State*, who probably enjoy immunity under customary international law[22], and Foreign Ministers. But the two cannot be assimilated for the only reason that their functions may be compared. Both represent the State, but Foreign Ministers do not "impersonate" the State in the same way as Heads of

[18] A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 247, p. 40.

[19] J. Verhoeven, *L'immunité de juridiction et d'exécution des chefs d'Etat et anciens chefs d'Etat*, Report of the 13th Commission of the Institut de droit international, p. 46, para. 18. *[Translation by the Registry]*

[20] Convention on Diplomatic Relations, Vienna, 18 April 1961, United Nations, *Treaty Series (UNTS)*, Vol. 500, p. 95.

[21] See, for example, the Danish hesitations concerning the accreditation of a new ambassador for Israel in 2001, after a new government had come to power in that State: *The Copenhagen Post*, 29 July 2001, *The Copenhagen Post*, 31 July 2001, *The Copenhagen Post*, 24 August 2001, and "Prosecution of New Ambassador?", *The Copenhagen Post*, 7 November 2001 (all available on the Internet: http://cphpost.periskop.dk).

[22] In civil and administrative proceedings this immunity is, however, not absolute. See A. Watts, *op. cit.*, pp. 36 and 54. See also *supra*, footnote 15.

State, who are the State's alter ego. State practice concerning immunities of (incumbent and former) Heads of State[23] does not, *per se*, apply to Foreign Ministers. There is no State practice evidencing an *opinio juris* on this point.

17. Whereas the International Law Commission (ILC), in its mission to codify and progressively develop international law, has managed to codify customary international law in the case of diplomatic and consular agents[24], it has not achieved the same result regarding Heads of State or Foreign Ministers. It is noteworthy that the International Law Commission's Special Rapporteur on Jurisdictional Immunities of States and their Property, in his 1989 report, expressed the view that privileges and immunities enjoyed by Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law[25]. This, according to Sir Arthur Watts, may explain why doubts as to the extent of jurisdictional immunities of Heads of Government and Foreign Ministers under customary international law have survived in the final version of the International Law Commission's 1991 Draft Articles on Jurisdictional Immunities of States and their Property[26], which in Article 3, paragraph 2, only refer to Heads of State, not to Foreign Ministers.

In the field of the criminal law regarding international core crimes such as war crimes and crimes against humanity, the International Law Commission clearly adopts a restrictive view on immunities, which is reflected in Article 7 of the 1996 Draft Code of Offences against the Peace and Security of Mankind. These Articles are intended to apply, not only to *international* criminal courts, but also to *national* authorities exercising jurisdiction (Article 8 of the Draft Code) or co-operating mutually by extraditing or prosecuting alleged perpetrators of international crimes (Article 9 of the Draft Code). I will further develop this when addressing the problem of immunities for incumbent Foreign Ministers charged with war crimes and crimes against humanity[27].

18. The only text of conventional international law, which may be of relevance to answer this question of the protection of Foreign Ministers,

[23] See *supra*, footnotes 12 and 13.

[24] Convention on Diplomatic Relations, Vienna, 18 April 1961, *UNTS*, Vol. 500, p. 95, and Convention on Consular Relations, Vienna, 24 April 1963, *UNTS*, Vol. 596, p. 262.

[25] *Yearbook of the International Law Commission (YILC)*, 1989, Vol. II (2), Part 2, para. 446.

[26] A. Watts, *op. cit.*, p. 107.

[27] See *infra*, paras. 24 *et seq.* and particularly para. 32.

is the 1969 Convention on Special Missions[28]. Article 21 of this Convention clearly distinguishes between Heads of State (para. 1) and Foreign Ministers (para. 2):

> "1. The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State the facilities, privileges and immunities accorded by international law . . .
>
> 2. 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."

Legal opinion is divided on the question to what extent this Convention may be considered a codification of customary international law[29]. This Convention has not been ratified by the Parties to the dispute. It links the "facilities, privileges and immunities" of Foreign Ministers' *official visits* (when they take part in a special mission of the sending State). There may be some political wisdom in the proposition that a Foreign Minister should be accorded the same privileges and immunities as a Head of State, but this may be a matter of courtesy, and does not necessarily lead to the conclusion that there is a rule of customary international law to this effect. It certainly does not follow from the text of the Special Missions Convention. Applying this to the dispute between the Democratic Republic of the Congo and Belgium, the only conclusion that follows from the Special Missions Convention, were it to be applicable between the two States concerned, is that an arrest warrant against an incumbent Foreign Minister cannot be enforced when he is on an official visit (immunity from execution)[30].

19. Another international convention that mentions Foreign Ministers is the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons[31]. This Convention indeed

[28] United Nations Convention on Special Missions, New York, 16 December 1969, Annex to UNGA res. 2530 (XXIV) of 8 December 1969.

[29] J. Salmon observes that the limited number of ratifications of the Convention can be explained because of the fact that the Convention sets all special missions on the same footing, according the same privileges and immunities to Heads of State on a official visit and to the members of an administrative commission which comes negotiating over technical issues. See J. Salmon, *Manuel de droit diplomatique*, 1994, p. 546.

[30] See also *infra*, para. 75 (inviolability).

[31] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, New York, 14 December 1973, 78 *UNTS*, p. 277.

defines "internationally protected persons" so as to include Heads of State, Heads of Government and Foreign Ministers and other representatives of the State, and may hereby create the impression that the different categories mentioned can be assimilated (Art. 1). This assimilation, however, is not relevant for the purposes of the present dispute. The 1973 Convention is not about immunities from criminal proceedings in another State, but about the protection of the high foreign officials it enumerates when they are *victims* of certain acts of terrorism such as murder, kidnapping or other attacks on their person or liberty (Art. 2). It is not about procedural protections for these persons when they are themselves accused of being *perpetrators* of war crimes and crimes against humanity.

20. There is hardly any support in legal doctrine for the International Court of Justice's postulated analogy between Foreign Ministers and Heads of State on the subject of immunities. Oppenheim and Lauterpacht write: "members of a Government have not the exceptional position of Heads of States . . ."[32]. This view is shared by A. Cavaglieri[33], P. Cahier[34], J. Salmon[35], B. S. Murty[36] and J. S. de Erice y O'Shea[37].

Sir Arthur Watts is adamant in observing that principle "suggests that a head of government or foreign minister who visits another State *for official purposes* is immune from legal process *while there*"[38]. Commenting further on the question of "private visits", he writes:

> "Although it may well be that a Head of State, when on a private visit to another State, still enjoys certain privileges and immunities, it is much less likely that the same is true of heads of governments and foreign ministers. Although they may be accorded certain special treatment by the host State, this is more likely to be a matter of

[32] L. Oppenheim and H. Lauterpacht (eds.), *International Law, a Treatise*, Vol. I, 1955, p. 358. See also the Ninth (1992) Edition (Jennings and Watts, eds.) at p. 1046.

[33] A. Cavaglieri, *Corso di Diritto Internazionale*, 2nd ed., pp. 321-322.

[34] P. Cahier, *Le droit diplomatique contemporain*, 1962, pp. 359-360.

[35] J. Salmon, *Manuel de droit diplomatique*, 1994, p. 539.

[36] B. S. Murty, *The International Law of Diplomacy: The Diplomatic Instrument and World Public Order*, 1989, pp. 333-334.

[37] J. S. de Erice y O'Shea, *Derecho Diplomático*, 1954, pp. 377-378.

[38] A. Watts, *op. cit.*, p. 106 (emphasis added). See also p. 54:

> "So far as concerns criminal proceedings, a Head of State's immunity is generally accepted as being *absolute*, as it is for ambassadors, and as provided in Article 31 (1) of the Convention on Special Missions for Heads of States coming within its scope." (Emphasis added.)

> courtesy and respect for the seniority of the visitor, than a reflection of any belief that such a treatment is required by international law."[39]

21. More recently, the Institut de droit international, at its 2001 Vancouver session, addressed the question of the immunity of Heads of State and Heads of Government. The draft resolution explicitly assimilated Heads of Government *and* Foreign Ministers with Heads of State in Article 14, entitled "Le Chef de gouvernement et le ministre des Affaires étrangères". This draft Article does not appear in the final version of the Institut de droit international resolution. The final resolution only mentions Heads of Government, not Foreign Ministers. The least one can conclude from this difference between the draft resolution and the final text is that the distinguished members of the Institut considered but did not decide to place Foreign Ministers on the same footing as Heads of State[40].

The reasons behind the final version of the resolution are not clear. It may or may not reflect the Institut de droit international's view that there is no customary international law rule that assimilates Heads of State and Foreign Ministers. Whatever may be the Institut de droit international's reasons, it was a wise decision. Proceeding to assimilations of the kind proposed in the draft resolution would dramatically increase the number of persons that enjoy 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.

22. Victims of such violations bringing legal action against such persons in third States would face the obstacle of immunity from jurisdiction. Today, they may, by virtue of the application of the principle contained in Article 21 of the 1969 Special Missions Convention[41], face the obstacle of immunity from execution while the Minister is on an official visit, but they would not be barred from bringing an action altogether. Taking immunities further than this may even lead to conflict with inter-

[39] A. Watts, *op. cit.*, p. 109.

[40] See the Report of J. Verhoeven, *supra*, footnote 19 (draft resolutions) and the final resolutions adopted at the Vancouver meeting on 26 August 2001 (publication in the *Yearbook* of the Institute forthcoming). See further H. Fox, "The Resolution of the Institute of International Law on the Immunities of Heads of State and Government", 51 *ICLQ*, 2002, pp. 119-125.

[41] *Supra*, para. 18.

national human rights rules as appears from the recent *Al-Adsani* case of the European Court of Human Rights[42].

23. I conclude that the International Court of Justice, by deciding that incumbent Foreign Ministers enjoy *full* immunity from foreign criminal jurisdiction (Judgment, para. 54), has reached a conclusion which has no basis in positive international law. Before reaching this conclusion, the Court should have satisfied itself of the existence of *usus* and *opinio juris*. There is neither State practice nor *opinio juris* establishing an international custom to this effect. There is no treaty on the subject and there is no legal opinion in favour of this proposition. The Court's conclusion is reached without regard to the 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[43], but also in the field of criminal law, when there are allegations of serious international crimes[44]. Belgium may have acted contrary to international comity, but has not infringed international law. The Judgment is therefore based on flawed reasoning.

[42] ECHR, *Al-Adsani* v. *United Kingdom*, 21 November 2001, http://www.echr.coe.int. In that case, the Applicant, a Kuwaiti/British national, claimed to have been the victim of serious human rights violations (torture) in Kuwait by agents of the Government of Kuwait. In the United Kingdom, he complained about the fact that he had been denied access to court in Britain because the courts refused to entertain his complaint on the basis of the 1978 State Immunity Act. Previous cases before the ECHR had usually arisen from human rights violations committed on the territory of the respondent State and related to acts of torture allegedly committed by the authorities of the respondent State itself, not by the authorities of third States. Therefore, the question of international immunities did not arise. In the *Al-Adsani* case, the alleged human rights violation was committed abroad, by authorities of another State and so the question of immunity did arise. The ECHR (with a 9/8 majority), has rejected Mr. Al-Adsani's application and held that there has been no violation of Article 6, paragraph 1, of the Convention (right of access to court). However, the decision was reached with a narrow majority (9/8 and 8 dissenting opinions) and was itself very narrow: it only decided the question of immunities in a *civil* proceeding, leaving the question as to the application of immunities in a *criminal* proceeding unanswered. Dissenting judges, Judges Rozakis and Caflisch joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić and also Loucaides read the decision of the majority as implying that the court would have found a violation had the proceedings in the United Kingdom been criminal proceedings against an individual for an alleged act of torture (paragraph 60 of the judgment, as interpreted by the dissenting judges in paragraph 4 of their opinion).

[43] *Supra*, footnote 22.

[44] *Infra*, paras. 24 *et seq.*

2. Incumbent Foreign Ministers Are Not Immune from the Jurisdiction of Other States When Charged with War Crimes and Crimes against Humanity

24. On the subject of war crimes and crimes against humanity, the Court reaches the following decision: it holds that it is unable to decide that there exists under customary international law any form of exception to the rule according immunity from criminal process and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity (Judgment, para. 58, first subparagraph).

It goes on by observing that there is nothing in the rules concerning the immunity or the criminal responsibility of persons having an official capacity contained in the legal instruments creating international criminal tribunals that enables it to find that such an exception exists under customary international law before national criminal tribunals (Judgment, para. 58, second subparagraph).

This immunity, it concludes, "remain[s] opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions" (Judgment, para. 59 *in fine*).

25. I strongly disagree with these propositions. To start with, as set out above, the Court starts from a flawed premise, assuming that incumbent Foreign Ministers enjoy full immunity from jurisdiction under customary international law. This premise taints the rest of the reasoning. It leads to another flaw in the reasoning: in order to "counterbalance" the postulated customary international law rule of "full immunity", there needs to be evidence of another customary international law rule that would negate the first rule. It would need to be established that the principle of international accountability has also reached the status of customary international law. The Court finds no evidence for the existence of such a rule in the limited sources it considers[45] and concludes that there is a violation of the first rule, the rule of immunity.

26. Immunity from criminal process, the International Court of Justice emphasizes, does not mean the impunity of a Foreign Minister for crimes that he may have committed, however serious they may be. It goes

[45] In paragraph 58 of the Judgment, the Court only refers to instruments that are relevant for *international* criminal tribunals (the statutes of the Nuremberg and the Tokyo tribunals, statutes of the *ad hoc* criminal tribunals and the Rome Statute for an International Criminal Court). But there are also other instruments that are of relevance, and that refer to the jurisdiction of *national* tribunals. A prominent example is Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946. See also Article 7 of the 1996 ILC Draft Code of Offences against the Peace and Security of Mankind.

on by making two points showing its adherence to this principle: *(a)* jurisdictional immunity, being procedural in nature, is not the same as criminal responsibility, which is a question of substantive law and the person to whom jurisdictional immunity applies is not exonerated from all criminal responsibility (Judgment, para. 60); *(b)* immunities enjoyed by an incumbent Foreign Minister under international law do not represent a bar to criminal prosecution in four sets of circumstances, which the Court further examines (Judgment, para. 61).

This is a highly unsatisfactory rebuttal of the arguments in favour of international accountability for war crimes and crimes against humanity, which moreover disregards the higher order of the norms that belong to the latter category. I will address both points in subsections *(a)* and *(b)* of this section, below. Before doing so, I wish to make a general comment on the approach of the Court.

27. Apart from being wrong in law, the Court is wrong for another reason. The more fundamental problem lies in its general approach, that disregards the whole recent movement in modern international criminal law towards recognition of the principle of individual accountability for international core crimes. The Court does not completely ignore this, but it takes an extremely minimalist approach by adopting a very narrow interpretation of the "no immunity clauses" in international instruments.

Yet, there are many codifications of this principle in various sources of law, including the Nuremberg Principles[46] and Article IV of the Genocide Convention[47]. In addition, there are several United Nations resolu-

[46] Nuremberg Principles, Geneva, 29 July 1950, *Official Records of the General Assembly, Fifth Session, Supplement No. 12*, United Nations doc. A/1316 (1950).

[47] Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 December 1948, *UNTS*, Vol. 78, p. 277. See also Art. 7 of the Nuremberg Charter (Charter of the International Military Tribunal, London, 8 August 1945, *UNTS*, Vol. 82, p. 279); Art. 6 of the Tokyo Charter (Charter of the Military Tribunal for the Far East, Tokyo, 19 January 1946, *TIAS*, No. 1589); Art. II (4) of the Control Council Law No. 10 (Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, Berlin, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, Berlin, 31 January 1946); Art. 7, para. 2, of the ICTY Statute (Statute of the International Tribunal for the Former Yugoslavia, New York, 25 May 1993, *ILM*, 1993, p. 1192); Art. 6, para. 2, of the ICTR Statute (Statute of the International Tribunal for Rwanda, New York, 8 November 1994, *ILM*, 1994, p. 1598); Art. 7 of the 1996 ILC Draft Code of Offences against the Peace and Security of Mankind (Draft Code of Crimes against the Peace and Security of Mankind, Geneva, 5 July 1996, *YILC* 1996, Vol. II (2)); and Art. 27 of the Rome Statute for an International Criminal Court (Statute of the International Criminal Court, Rome, 17 July 1998, *ILM*, 1998, p. 999).

tions[48] and reports[49] on the subject of international accountability for war crimes and crimes against humanity.

In legal doctrine, there is a plethora of recent scholarly writings on the subject[50]. Major scholarly organizations, including the International Law Association[51] and the Institut de droit international have adopted resolutions[52] and newly established think tanks, such as the drafters of the "Princeton principles"[53] and of the "Cairo principles"[54] have made statements on the issue. Advocacy organizations, such as Amnesty International[55], Avocats sans Frontières[56], Human Rights Watch, The International Federation of Human Rights Leagues (FIDH) and the Interna-

[48] See, for example, Sub-Commission on Human Rights, res. 2000/24, *Role of Universal or Extraterritorial Competence in Preventive Action against Impunity*, 18 August 2000, E/CN.4/SUB.2/RES/2000/24; Commission on Human Rights, res. 2000/68, *Impunity*, 26 April 2000, E/CN.4/RES/2000/68; Commission on Human Rights, res. 2000/70, *Impunity*, 25 April 2001, E/CN.4/RES/2000/70 (taking note of Sub-Commission res. 2000/24).

[49] Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, 2 October 1997, E/CN.4/Sub.2/1997/20/Rev.1; Commission on Human Rights, *Civil and Political Rights, Including the Questions of: Independence of the Judiciary, Administration of Justice, Impunity, the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission res. 1999/33*, E/CN.4/2000/62.

[50] See *infra*, footnote 98.

[51] International Law Association (Committee on International Human Rights Law and Practice), *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, 2000.

[52] See also the Institut de droit international's Resolution of Santiago de Compostela, 13 September 1989, commented by G. Sperduti, "Protection of Human Rights and the Principle of Non-intervention in the Domestic Concerns of States. Rapport provisoire", *Yearbook of the Institute of International Law*, Session of Santiago de Compostela, 1989, Vol. 63, Part I, pp. 309-351.

[53] Princeton Project on Universal Jurisdiction, *The Princeton Principles on Universal Jurisdiction*, 23 July 2001, with a foreword by Mary Robinson, United Nations High Commissioner for Human Rights, http://www.princeton.edu/~lapa/unive_jur.pdf. See M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, pp. 1-100.

[54] Africa Legal Aid (AFLA), *Preliminary Draft of the Cairo Guiding Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective*, Cairo, 31 July 2001, http://www.afla.unimaas.nl/en/act/univjurisd/preliminaryprinciples.htm.

[55] Amnesty International, *Universal Jurisdiction. The Duty of States to Enact and Implement Legislation*, September 2001, AI Index IOR 53/2001.

[56] Avocats sans frontières, "Débat sur la loi relative à la répression des violations graves de droit international humanitaire", discussion paper of 14 October 2001, available on http://www.asf.be.

tional Commission of Jurists[57], have taken clear positions on the subject of international accountability[58]. This may be seen as the opinion of *civil society*, an opinion that cannot be completely discounted in the formation of customary international law today. In several cases, civil society organizations have set in motion a process that ripened into international conventions[59]. Well-known examples are the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[60], which can be traced back to efforts of the International Association of Penal Law, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, probably triggered by Amnesty International's Campaign against Torture, the 1997 Treaty banning landmines[61], to which the International Campaign to Ban Landmines gave a considerable impetus[62] and the 1998 Statute for the International Criminal Court, which was promoted by a coalition of non-governmental organizations.

28. The Court fails to acknowledge this development, and does not discuss the relevant sources. Instead, it adopts a formalistic reasoning, examining whether there is, under customary international law, an international crimes exception to the — wrongly postulated — rule of immunity for incumbent Ministers under customary international law (Judgment, para. 58). By adopting this approach, the Court implicitly establishes a hierarchy between the rules on immunity (protecting incumbent

[57] K. Roth, "The Case for Universal Jurisdiction", *Foreign Affairs*, September/October 2001, responding to an article written by an ex-Minister of Foreign Affairs in the same review (Henry Kissinger, "The Pitfalls of Universal Jurisdiction", *Foreign Affairs*, July/August 2001).

[58] See the joint Press Report of Human Rights Watch, the International Federation of Human Rights Leagues and the International Commission of Jurists, "Rights Group Supports Belgium's Universal Jurisdiction Law", 16 November 2000, available at http://www.hrw.org/press/2000/11/world-court.htm or http://www.icj.org/press/press01/english/belgium11.htm. See also the efforts of the International Committee of the Red Cross in promoting the adoption of international instruments on international humanitarian law and its support of national implementation efforts (http://www.icrc.org/eng/advisory_service_ihl; http://www.icrc.org/eng/ihl).

[59] M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, p. 92.

[60] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, New York, 26 November 1968, *ILM*, 1969, p. 68.

[61] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, Oslo, 18 September 1997, *ILM*, 1997, p. 1507.

[62] The International Campaign to Ban Landmines (ICBL) is a coalition of non-governmental organizations, with Handicap International, Human Rights Watch, Medico International, Mines Advisory Group, Physicians for Human Rights and Vietnam Veterans of America Foundation as founding members.

Foreign Ministers) and the rules on international accountability (calling for the investigation of charges against incumbent Foreign Ministers charged with war crimes and crimes against humanity).

By elevating the former rules to the level of customary international law in the first part of its reasoning, and finding that the latter have failed to reach the same status in the second part of its reasoning, the Court does not need to give further consideration to the status of the principle of international accountability under international law. As a result, the Court does not further examine the status of the principle of international accountability. Other courts, for example the House of Lords in the *Pinochet* case[63] and the European Court of Human Rights in the *Al-Adsani* case[64], have given more thought and consideration to the balancing of the relative normative status of international *jus cogens* crimes and immunities.

Questions concerning international accountability for war crimes and crimes against humanity and that were not addressed by the International Court of Justice include the following. Can international accountability for such crimes be considered to be a general principle of law in the sense of Article 38 of the Court's Statute? Should the Court, in reaching its conclusion that there is no international crimes exception to immunities under international law, not have given more consideration to the factor that war crimes and crimes against humanity have, by many, been considered to be customary international law crimes[65]? Should it not have considered the proposition of writers who suggest that war crimes and crimes against humanity are *jus cogens* crimes[66], which, if it were correct, would only enhance the contrast between the status of the rules punishing these crimes and the rules protecting suspects on the

[63] *R. v. Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte*, 24 March 1999, [1999] 2 All ER 97, HL.

[64] *Al-Adsani* case: ECHR, *Al-Adsani* v. *United Kingdom*, 21 November 2001, http://www.echr.coe.int.

[65] See: American Law Institute, *Restatement of the Law Third. The Foreign Relations Law of the United States*, Vol. 1, para. 404, Comment; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 1999; T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, 1989; T. Meron, "International Criminalization of Internal Atrocities", 89 *AJIL*, 1995, p. 558; A. H. J. Swart, *De berechting van internationale misdrijven*, 1996, p. 7; ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Tadić*, paras. 96-127 and 134 (common Article 3).

[66] M. C. Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", 59 *Law and Contemporary Problems*, 1996, Issue 4, pp. 63-74; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 1999, pp. 210-217; C. J. R. Dugard, Opinion in: *Re Bouterse*, para. 4.5.5, to be consulted at: http://www.icj.org/objectives/opinion.htm; K. C. Randall, "Universal Jurisdiction under International Law", 66 *Texas Law Review*, 1988, pp. 829-832; ICTY, Judgment, 10 December 1998, *Furundzija*, para. 153 (torture).

ground of immunities for incumbent Foreign Ministers, which are probably not part of *jus cogens*[67].

Having made these general introductory observations, I will now turn to the two specific propositions of the International Court of Justice referred to above, i.e., the distinction between substantive and procedural defences and the idea that immunities are not a bar to prosecution[68].

(a) *The distinction between immunity as a procedural defence and immunity as a substantive defence is not relevant for the purposes of this dispute*

29. The distinction between jurisdictional immunity and criminal responsibility of course exists in all legal systems in the world, but is not an argument in support of the proposition that incumbent Foreign Ministers cannot be subject to the jurisdiction of other States when they are suspected of war crimes and crimes against humanity. There are a host of sources, including the 1948 Genocide Convention[69], the 1996 International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind[70], the Statutes of the *ad hoc* international criminal tribunals[71] and the Rome Statute for an International Criminal Court[72]. All these sources confirm the proposition contained in the Principle 3 of the Nuremberg principles[73] which 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."

30. The Congo argued that these sources only address substantive immunities, not procedural immunities and that therefore they offer no exception to the principle that incumbent Foreign Ministers are immune from the jurisdiction of other States. Although some authorities seem to

[67] See the conclusion of Professor J. Verhoeven in his Vancouver report for the Institut de droit international, *supra*, footnote 19, p. 70.

[68] See also *supra*, para. 26.

[69] Convention on the Prevention and Suppression of the Crime of Genocide, Paris, 9 December 1948, *UNTS*, Vol. 78, p. 277.

[70] Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission, 1996, United Nations doc. A/51/10, p. 59.

[71] Statute of the International Tribunal for the former Yugoslavia, New York, 25 May 1993, *ILM*, 1993, p. 1192; Statute of the International Tribunal for Rwanda, 8 November 1994, *ILM*, 1994, p. 1598.

[72] Rome Statute of the International Criminal Court, Rome, 17 July 1998, *ILM*, 1998, p. 999.

[73] *Supra*, footnote 46.

support this view[74], most authorities do not mention the distinction at all and even reject it.

31. Principle 3 of the Nuremberg principles (and the subsequent codifications of this principle), in addition to addressing the issue of (procedural or substantive) immunities, deals with the *attribution* of criminal acts to individuals. International crimes are indeed not committed by abstract entities, but by individuals who, in many cases, may act on behalf of the State[75]. Sir Arthur Watts very pertinently writes:

> "States are artificial legal persons: they can only act through the institutions and agencies of the State, which means, ultimately, through its officials and other individuals acting on behalf of the State. For international conduct which is so serious as to be tainted with criminality to be regarded as attributable only to the impersonal State and not to the individuals who ordered or perpetrated it is both unrealistic and offensive to common notions of justice."[76]

At the heart of Principle 3 is the debate about individual versus State responsibility, not the discussion about the procedural or substantive nature of the protection for government officials. This can only mean that, where international crimes such as war crimes and crimes against humanity are concerned, immunity cannot block investigations or prosecutions to such crimes, regardless of whether such proceedings are brought before national or before international courts.

32. Article 7 of the International Law Commission's 1996 Draft Code of Crimes against the Peace and Security of Mankind[77], which is intended to apply to both national and international criminal courts, only confirms this interpretation. In its Commentary to this Article, the International Law Commission states:

> "The absence of any procedural immunity with respect to

[74] See, for example, Principle 5 of *The Princeton Principles on Universal Jurisdiction*. The Commentary states that "There is an extremely important distinction, however, between 'substantive' and 'procedural' immunity", but goes on by saying that "None of these statutes [Nuremberg, ICTY, ICTR] addresses the issue of procedural immunity", pp. 48-51 (*supra*, footnote 53).

[75] See the Judgment of the International Military Tribunal for the Trial of German Major War Criminals, *Nuremberg Trial Proceedings*, Vol. 22, p. 466, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

[76] A. Watts, "The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers", *Recueil des cours de l'Académie de droit international de La Haye*, 1994, Vol. 247, p. 82.

[77] See also *supra*, para. 17.

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."[78]

33. In adopting the view that the non-impunity clauses in the relevant international instruments only address substantive, not procedural immunities, the International Court of Justice has adopted a purely doctrinal proposition, which is not based on customary or conventional international law or on national practice and which is not supported by a substantial part of legal doctrine. It is particularly unfortunate that the International Court of Justice adopts this position without giving reasons.

(b) *The Court's proposition that immunity does not necessarily lead to impunity is wrong*

34. I now turn to the Court's proposition that immunities protecting an incumbent Foreign Minister under international law are not a bar to criminal prosecution in certain circumstances, which the Court enumerates. The Court mentions four cases where an incumbent or former Minister for Foreign Affairs can, despite his immunities under customary international law, be prosecuted: (1) he can be prosecuted in his own country; (2) he can be prosecuted in other States if the State whom he represents waives immunity; (3) he can be prosecuted after he ceases being a Minister for Foreign Affairs; and (4) he can be prosecuted before an international court (Judgment, para. 61).

In theory, the Court may be right: immunity and impunity are not synonymous and the two concepts should therefore not be conflated. In practice, however, immunity leads to *de facto* impunity. All four cases mentioned by the Court are highly hypothetical.

35. Prosecution in the *first two cases* presupposes a willingness of the State which appointed the person as a Foreign Minister to investigate and prosecute allegations against him domestically or to lift immunity in order to allow another State to do the same.

This, however, is the core of the problem of impunity: where national authorities are not willing or able to investigate or prosecute, the crime

[78] Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission, 1996, United Nations doc. A/51/10, p. 41.

goes unpunished. And this is precisely what happened in the case of Mr. Yerodia. The Congo accused Belgium of exercising universal jurisdiction *in absentia* against an incumbent Foreign Minister, but it had itself omitted to exercise its jurisdiction *in presentia* in the case of Mr. Yerodia, thus infringing the Geneva Conventions and not complying with a host of United Nations resolutions to this effect[79].

The Congo was ill placed when accusing Belgium of exercising universal jurisdiction in the case of Mr. Yerodia. If the Congo had acted appropriately, by investigating charges of war crimes and crimes against humanity allegedly committed by Mr. Yerodia in the Congo, there would have been no need for Belgium to proceed with the case. Belgium repeatedly declared, and again emphasized in its opening and closing statements[80] before the Court, that it had tried to transfer the dossier to the Congo, in order to have the case investigated and prosecuted by the authorities of the Congo. Nowhere does the Congo mention that it has investigated the allegations of war crimes and crimes against humanity against Mr. Yerodia. Counsel for the Congo even perceived this Belgian initiative as an improper pressure on the Congo[81], as if it were adding insult to injury.

The Congo did not come to the Court with clean hands[82]. In blaming Belgium for investigating and prosecuting allegations of international crimes that it was obliged to investigate and prosecute itself, the Congo acts in bad faith. It pretends to be offended and morally injured by Belgium by suggesting that Belgium's exercise of "excessive universal jurisdiction" (Judgment, para. 42) was incompatible with its dignity. However, as Sir Hersch Lauterpacht observed in 1951, "the dignity of a foreign state may suffer more from an appeal to immunity than from a

[79] *Supra*, footnotes 48 and 49.

[80] CR 2001/8, para. 5; CR 2001/11, paras. 3 and 11.

[81] CR 2001/10, p. 7.

[82] G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", *Recueil des cours de l'Académie de droit international de La Haye*, 1957, Vol. 92, p. 119 writes:

> "'He who comes to equity for relief must come with clean hands.' Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality — in short were provoked by it."

See also S. M. Schwebel, "Clean Hands in the Court", in E. Brown Weiss *et al.* (eds.), *The World Bank, International Financial Institutions, and the Development of International Law*, 1999, pp. 74-78, and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, dissenting opinion of Judge Schwebel, pp. 382-384 and 392-394.

denial of it"[83]. The International Court of Justice should at least have made it explicit that the Congo should have taken up the matter itself.

36. The *third case* mentioned by the Court in support of its proposition that immunity does not necessarily lead to impunity is where the person has ceased to be a Foreign Minister (Judgment, para. 61, "Thirdly"). In that case, he or she will no longer enjoy all of the immunities accorded by international law in other States. The Court adds that the lifting of full immunity, in this case, is only for "acts committed prior or subsequent to his or her period of office". For acts committed during that period of office, immunity is only lifted "for acts committed during that period of office in a private capacity". Whether war crimes and crimes against humanity fall into this category the Court does not say[84].

It is highly regrettable that the International Court of Justice has not, like the House of Lords in the *Pinochet* case, qualified this statement[85]. It could and indeed should have added that war crimes and crimes against humanity can never fall into this category. Some crimes under international law (e.g., certain acts of genocide and of aggression) can, for practical purposes, only be committed with the means and mechanisms of a State and as part of a State policy. They cannot, from that perspective, be anything other than "official" acts. Immunity should never apply to crimes under international law, neither before international courts nor national courts. I am in full agreement with the statement of Lord Steyn in the first *Pinochet* case, where he observed that:

> "It follows that when Hitler ordered the 'final solution' his act must be regarded as an official act deriving from the exercise of his functions as Head of State. That is where the reasoning of the Divisional Court inexorably leads."[86]

The International Court of Justice should have made it clearer that its

[83] H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States", 28 *BYBIL*, 1951, p. 232.

[84] See also paragraph 55 of the Judgment, where the Court says that, from the perspective of his "full immunity", 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".

[85] See *supra*, footnotes 12 and 13.

[86] *R.* v. *Bow Street Metropolitan Stipendiary Magistrate and Others*, ex parte *Pinochet Ugarte*, 25 November 1998, [1998] 4 All ER 897, p. 945.

Judgment can never lead to this conclusion and that such acts can never be covered by immunity.

37. The *fourth case* of "non-impunity" envisaged by the Court is that incumbent or former Foreign Ministers can be prosecuted before "certain international criminal courts, where they have jurisdiction" (Judgment, para. 61, "Fourthly").

The Court grossly overestimates the role an international criminal court can play in cases where the State on whose territory the crimes were committed or whose national is suspected of the crime are not willing to prosecute. The current *ad hoc* international criminal tribunals would only have jurisdiction over incumbent Foreign Ministers accused of war crimes and crimes against humanity in so far as the charges would emerge from a situation for which they are competent, i.e., the conflict in the former Yugoslavia and the conflict in Rwanda.

The jurisdiction of an International Criminal Court, set up by the Rome Statute, is moreover conditioned by the principle of complementarity: primary responsibility for adjudicating war crimes and crimes against humanity lies with the States. The International Criminal Court will only be able to act if States which have jurisdiction are unwilling or unable genuinely to carry out investigation or prosecution (Art. 17).

And even where such willingness exists, the International Criminal Court, like the *ad hoc* international tribunals, will not be able to deal with *all* crimes that come under its jurisdiction. The International Criminal Court will not have the capacity for that, and there will always be a need for States to investigate and prosecute core crimes[87]. These States include, but are not limited to, national and territorial States. Especially in the case of sham trials, there will still be a need for third States to investigate and prosecute[88].

Not *all* international crimes will be justiciable before the permanent International Criminal Court. It will only be competent to try cases arising from criminal behaviour occurring *after* the entry into force of the Rome Statute. In addition, there is uncertainty as to whether certain acts of international terrorism or certain gross human rights violations in non-international armed conflicts would come under the jurisdiction of the Court. Professor Tomuschat has rightly observed that it would be a "fatal mistake" to assert that, in the absence of an international criminal

[87] See for example the trial of four Rwandan citizens by a Criminal Court in Brussels: Cour d'assises de l'arrondissement administratif de Bruxelles-capitale, arrêt du 8 juin 2001, not published.

[88] See also *infra*, para. 65.

court having jurisdiction, Heads of State and Foreign Ministers suspected of such crimes would only be justiciable in their own States, and nowhere else[89].

38. My conclusion on this point is the following: the Court's arguments in support of its proposition that immunity does not, in fact, amount to impunity, are very unconvincing.

3. Conclusion

39. My general conclusion on the question of immunity[90] is as follows: the immunity of an incumbent Minister for Foreign Affairs, if any, is not based on customary international law but at most on international comity. It certainly is not "full" or absolute and does not apply to war crimes and crimes against humanity.

III. Universal Jurisdiction

40. Initially, when the Congo introduced its request for the indication of a provisional measure in 2000, the dispute addressed two questions: *(a) universal jurisdiction* for war crimes and crimes against humanity; and *(b) immunities* for incumbent Foreign Ministers charged with such crimes (see Judgment, paras. 1 and 42). In the proceedings on the merits in 2001, the Congo reduced its case to the second point only (see Judgment, paras. 10-12), with no objection from Belgium, which even asked the Court not to judge *ultra petita* (Judgment, para. 41). The Court could, for that reason, not have made a ruling on the question of universal jurisdiction in general.

41. For their own reasons, the Parties thus invited the International Court of Justice to short-cut its decision and to address the question of the immunity from jurisdiction only. The Court, conceding that, as a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, nevertheless decided to address the second question only. It addressed this question assuming, for the purposes of its reasoning, that Belgium had jurisdiction under international law to issue and circulate the arrest warrant (Judgment, para. 46 *in fine*).

[89] C. Tomuschat, Intervention at the Institut de droit international's meeting in Vancouver, August 2001, commenting on the draft resolution on Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law, and giving the example of Iraqi dictator Saddam Hussein: Report of the 13th Commission of the Institut de droit international, Vancouver, 2001, p. 94; see further *supra*, footnote 19 and corresponding text.

[90] On the subject of inviolability, see *infra*, para. 75.

42. While the Parties did not request a general ruling, they nevertheless developed extensive arguments on the subject of (universal) jurisdiction. The International Court of Justice, though it was not asked to rule on this point in its *dispositif*, could and should nevertheless have addressed this question as part of its reasoning. It confines itself to observing "jurisdiction does not imply absence of immunity, while absence of immunity does not imply jurisdiction" (Judgment, para. 59, first sentence). It goes on by observing that various international conventions impose an obligation on States either to extradite or to prosecute, "requiring them to extend their criminal jurisdiction", but immediately adds that "such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs" (Judgment, para. 59, second sentence).

Adopting this narrow perspective, the Court does, again, not need to look at instruments giving effect to the principle of international accountability for war crimes and crimes against humanity. Yet most of the arguments of either Party to this dispute were based on these instruments. By not touching the subject of (universal) jurisdiction at all, the Court did not reply to these arguments and leaves the questions unanswered. I wish to briefly address them here.

43. The Congo accused Belgium of the "exercise of an *excessive* universal jurisdiction" (Judgment, para. 42; emphasis added) because, apart from infringing the rules on international immunities, Belgium's legislation on universal jurisdiction can be applied regardless of the presence of the offender on Belgian territory. This flows from Article 7 of the Belgian Act concerning the Punishment of Grave Breaches of International Humanitarian Law (hereinafter 1993/1999 Act)[91]. The Congo found that this was excessive because Belgium in fact exercised its jurisdiction *in*

[91] Loi du 16 juin 1993 relative à la répression des violations graves du droit international humanitaire, *Moniteur belge*, 5 August 1993, as amended by Loi du 10 février 1999, *Moniteur belge*, 23 March 1999; an English translation has been published in *ILM*, 1999, pp. 921-925. See generally: A. Andries, C. Van den Wyngaert, E. David, and J. Verhaegen, "Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves du droit international humanitaire", *Rev. dr. pén.*, 1994, pp. 1114-1184; E. David, "La loi belge sur les crimes de guerre", 28 *RBDI*, 1995, pp. 668-684; P. d'Argent, "La loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire", 118 *Journal des tribunaux*, 1999, pp. 549-555; L. Reydams, "Universal Jurisdiction over Atrocities in Rwanda: Theory and Practice", *European Journal of Crime, Criminal Law and Criminal Justice*, 1996, pp. 18-47; D. Vandermeersch, "La répression en droit belge des crimes de droit international", 68 *RIDP*, 1997, pp. 1093-1135; D. Vandermeersch, "Les poursuites et le jugement des infractions de droit international humanitaire en droit belge", in D. H. Bosly *et al.*, *Actualité du droit international humanitaire*, 2001, pp. 123-180; J. Verhoeven, "Vers un ordre répressif universel? Quelques observations", *Annuaire français de droit international*, 1999, pp. 55-71.

absentia by issuing the arrest warrant of 11 September 2000 in the absence of Mr. Yerodia.

To this accusation, Belgium answered it was entitled to assert jurisdiction in the present case because international law does not prohibit and even permits States to exercise extraterritorial jurisdiction for war crimes and crimes against humanity.

44. There is no generally accepted definition of universal jurisdiction in conventional or customary international law. States that have incorporated the principle in their domestic legislation have done so in very different ways[92]. Although there are many examples of States exercising extraterritorial jurisdiction for international crimes such as war crimes and crimes against humanity and torture, it may often be on other jurisdictional grounds such as the nationality of the victim. A prominent example was the *Eichmann* case which was in fact based not on universal jurisdiction but on passive personality[93]. In the Spanish *Pinochet* case, an important connecting factor was the Spanish nationality of some of the victims[94]. Likewise, in the case against Mr. Yerodia, some of the complainants were of Belgian nationality[95], even if there were, apparently, no Belgian nationals that were victims[96] of the *violence* that allegedly resulted

[92] For a survey of the implementation of the principle of universal jurisdiction for international crimes in different countries, see, *inter alia*: Amnesty International, *Universal Jurisdiction. The Duty of States to Enact and Implement Legislation*, September 2001, AI Index IOR 53/2001; International Law Association (Committee on International Human Rights Law and Practice), *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, Ann., 2000; Redress, *Universal Jurisdiction in Europe. Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes against Humanity, Torture and Genocide*, 30 June 1999: http://www.redress.org/inpract.html; see also "Crimes internationaux et juridictions nationales" to be published by the Presses universitaires de France (in print).

[93] *Attorney-General of the Government of Israel* v. *Eichmann*, 36 *ILR*, 1961 p. 5. See also *US* v. *Yunis* (No. 2), District Court, DC, 12 February 1988, 82 *ILR*, 1990, p. 343; Court of Appeals, DC, 29 January 1991, *ILM*, 1991, Vol. 3, p. 403.

[94] *Audiencia Nacional, Auto de la Sala de lo Penal de la Audiencia Nacional confirmando la jurisdicción de España para conocer de los crímenes de genocidio y terrorismo cometidos durante la dictadura chilena*, 5 November 1998, http://www.derechos.org/nizkor/chile/juicio/audi.html. See also M. Márquez Carrasco and J. A. Fernandez, "Spanish National Court, Criminal Division (Plenary Session). Case 19/97, 4 Nov. 1998, Case 1/98, 5 Nov. 1998", *AJIL*, 1999, pp. 690-696.

[95] CR 2001/8, p. 16.

[96] Some confusion arose over the difference between the notion of "victim" and the notion of "complainant" *(partie civile)*. Belgian law does not provide an *actio popularis*, but only allows victims and their relatives to trigger criminal investigations through the procedure of a formal complaint *(constitution de partie civile)*. On the Belgian system, see C. Van den Wyngaert, "Belgium", in C. Van den Wyngaert *et al.* (eds.), *Criminal Procedure Systems in the Member States of the European Community*, 1993.

from the hate speeches of which Mr. Yerodia was suspected (Judgment, para. 15)[97].

45. Much has been written in legal doctrine about universal jurisdiction. Many views exist as to its legal meaning[98] and its legal status under international law[99]. This is not the place to discuss them. What matters for the present dispute is the way in which Belgium has codified universal jurisdiction in its domestic legislation and whether it is, as applied in the case of Mr. Yerodia, compatible with international law.

Article 7 of the 1993/1999 Belgian Act, which is at the centre of the dispute, states the following: "The Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed . . ."[100]

46. Despite uncertainties that may exist concerning the definition of universal jurisdiction, one thing is very clear: the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its raison d'être is to avoid impunity, to prevent suspects of such crimes finding a

[97] The notion "victim" is wider than the *direct* victim of the crime only, and also includes indirect victims (e.g. the relatives of the assassinated person in the case of murder). Moreover, for crimes such as those with which Mr. Yerodia has been charged (incitement to war crimes and crimes against humanity), death or injury of the (direct) victim is not a constituent element of the crime. Not only those who were effectively killed or injured after the alleged hate speeches are victims, but all persons against whom the incitements were directed, including the victims of Belgian nationality who brought the case before the Belgian investigating judge by lodging a *constitution de partie civile* action. By focusing on the victims of the *violence* in paragraph 15 of the Judgment, the International Court of Justice seems to adopt a very narrow definition of the notion of victim.

[98] For a very thorough recent analysis of the various positions, diachronically and synchronically, see M. Henzelin, *Le principe de l'universalité en droit pénal international. Droit et obligation pour les Etats de poursuivre et juger selon le principe de l'universalité*, 2000. Other recent publications are M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, pp. 1-100; L. Benavides, "The Universal Jurisdiction Principle", 1 *Anuario Mexicano de Derecho Internacional*, 2001, pp. 20-96; J. I. Charney, "International Criminal Law and the Role of Domestic Courts", 25 *AJIL*, 2001, pp. 120-124; G. de La Pradelle, "La compétence universelle", in H. Ascensio *et al.* (eds.), *Droit international pénal*, 2000, pp. 905-918; A. Hays Butler, "Universal Jurisdiction: A Review of the Literature", *Criminal Law Forum*, 2000, pp. 353-373; R. van Elst, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", *LJIL*, 2000, pp. 815-854. See also the proceedings of the symposium on Universal Jurisdiction: Myths, Realities, and Prospects, 35 *New England Law Review*, 2001, No. 2.

[99] For example, some writers hold the view that an independent theory of universal jurisdiction exists with respect to *jus cogens* international crimes. See, for example, M. C. Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice", *Virginia Journal of International Law*, 2001, Vol. 42, p. 28.

[100] See footnote 91 for further references.

safe haven in third countries. Scholarly organizations that participated in the debate have emphasized this, for example in the Princeton principles[101], the Cairo principles[102] and the Kamminga report on behalf of the International Law Association[103].

47. It may not have been the International Court of Justice's task to define universal jurisdiction in abstract terms. What it should, however, have considered is the following question: was Belgium under international law entitled to assert *extraterritorial* jurisdiction against Mr. Yerodia (apart from the question of immunity) in the present case? The Court did not consider this question at all.

1. Universal Jurisdiction for War Crimes and Crimes against Humanity Is Compatible with the "Lotus" *Test*

48. The leading case on the question of extraterritorial jurisdiction is the 1927 *"Lotus"* case. In that case, the Permanent Court of International Justice was asked to decide a dispute between France and Turkey, which arose from a criminal proceeding in Turkey against a French national. This person, the captain of a French ship, was accused of involuntary manslaughter causing Turkish casualties after a collision between his ship and a Turkish ship on the high seas. Like in the present dispute, the question was whether the respondent State, Turkey, was entitled to conduct criminal proceedings against a foreign national for crimes committed outside Turkey. France argued that Turkey was not entitled to prosecute the French national before its domestic courts because there was no permission, and indeed a prohibition, under customary international law for a State to assume extraterritorial jurisdiction. Turkey argued that it was entitled to exercise jurisdiction under international law.

49. The Permanent Court of International Justice decided that there was no rule of conventional or customary international law prohibiting Turkey from asserting jurisdiction over facts committed outside Turkey. It started by saying that, as a matter of principle, jurisdiction is territorial and that a State cannot exercise jurisdiction outside its territory without a permission derived from international custom or from a convention. It however immediately added a qualification to this principle in a famous *dictum* that students of international law know very well:

> "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law . . .

[101] *Supra*, footnote 53.
[102] *Supra*, footnote 54.
[103] *Supra*, footnote 51.

> Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[104]

A distinction must be made between *prescriptive jurisdiction* and *enforcement jurisdiction*. The above-mentioned *dictum* concerns *prescriptive jurisdiction*: it is about what a State may do *on its own territory* when investigating and prosecuting crimes committed abroad, not about what a State may do *on the territory of other States* when prosecuting such crimes. Obviously, a State has no *enforcement jurisdiction* outside its territory: a State may, failing permission to the contrary, not exercise its power on the territory of another State. This is "the first and foremost restriction imposed by international law upon a State"[105]. In other words, the permissive rule only applies to prescriptive jurisdiction, not to enforcement jurisdiction: failing a prohibition, State A *may*, on its own territory, prosecute offences committed in State B *(permissive rule)*; failing a permission, State A *may not* act on the territory of State B.

50. Does the arrest warrant of 11 April 2000 come under the first species of jurisdiction, under the second, or under both? In other words: has Belgium, by asserting jurisdiction in the form of the issuing and circulation of an arrest warrant on charges of war crimes and crimes against humanity against a foreign national for crimes committed abroad, engaged in prescriptive jurisdiction, in enforcement jurisdiction, or in both?

Given the fact that the warrant has never been enforced, the dispute is in the first place about prescriptive jurisdiction. However, the title of the warrant ("*international* arrest warrant") gave rise to questions about enforcement jurisdiction also.

I believe that Belgium, by issuing and circulating the warrant, violated neither the rules on prescriptive jurisdiction nor the rules on enforcement jurisdiction. My views on enforcement jurisdiction will be part of my reasoning in Section IV, where I will consider whether there was an internationally wrongful act in the present case[106]. In the present Section, I will deal with prescriptive jurisdiction. I will measure the statutory provision that is at the centre of the dispute, Article 7 of the 1993/1999 Belgian Act, against the yardstick of the *"Lotus"* test on *prescriptive* jurisdiction.

[104] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No 10*, p. 19.
[105] *Ibid.*, p. 18.
[106] See *infra*, paras. 68 *et seq.*

51. It follows from the *"Lotus"* case that a State has the right to provide extraterritorial jurisdiction on its territory unless there is a prohibition under international law. I believe that there is *no prohibition* under international law to enact legislation allowing it to investigate and prosecute war crimes and crimes against humanity committed abroad.

It has often been argued, not without reason, that the *"Lotus"* test is too liberal and that, given the growing complexity of contemporary international intercourse, a more restrictive approach should be adopted today[107]. In the *Nuclear Weapons* case, there were two groups of States each giving a different interpretation of *"Lotus"* on this point[108] and President Bedjaoui, in his declaration, expressed hesitations about *"Lotus"*[109]. Even under the more restrictive view, Belgian legislation stands. There is ample evidence in support of the proposition that international law clearly *permits* States to provide extraterritorial jurisdiction for such crimes.

I will give reasons for both propositions in the next paragraphs. I believe that *(a)* international law does *not prohibit* universal jurisdiction for war crimes and crimes against humanity, *(b)* clearly permits it.

(a) *International law does not prohibit universal jurisdiction for war crimes and crimes against humanity*

52. The Congo argued that the very concept of universal jurisdiction presupposes the presence of the defendant on the territory of the prosecuting State. Universal jurisdiction *in absentia*, it submitted, was contrary to international law. This proposition needs to be assessed in the light of conventional and customary international law and of legal doctrine.

53. As a preliminary observation, I wish to make a linguistic comment. The term "universal jurisdiction" does not necessarily mean that the suspect should be present on the territory of the prosecuting State.

[107] Cf. American Law Institute, *Restatement (Third) Foreign Relations Law of the United States*, 1987, pp. 235-236; I. Cameron, *The Protective Principle of International Criminal Jurisdiction*, 1994, p. 319; F. A. Mann, "The Doctrine of International Jurisdiction Revisited after Twenty Years", *Recueil des cours de l'Académie de droit international de La Haye*, 1964, Vol. 111, p. 35; R. Higgins, *Problems and Process. International Law and How We Use It*, 1994, p. 77. See also Council of Europe, *Extraterritorial Jurisdiction in Criminal Matters*, 1990, pp. 20 *et seq.*

[108] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 238-239, para. 21.

[109] *I.C.J. Reports 1996*, p. 270, para. 12.

Assuming the presence of the accused, as some authors do, does not necessarily mean that it is a legal requirement. The term may be ambiguous, but precisely for that reason one should refrain from jumping to conclusions. The Latin maxims that are sometimes used, and that seem to suggest that the offender must be present *(judex deprehensionis — ubi te invenero ibi te judicabo)* have no legal value and do not necessarily coincide with universal jurisdiction.

54. There is no rule of *conventional international law* to the effect that universal jurisdiction *in absentia* is prohibited. The most important legal basis, in the case of universal jurisdiction for war crimes is Article 146 of the IV Geneva Convention of 1949[110], which lays down the principle *aut dedere aut judicare*[111]. A textual interpretation of this Article does not logically presuppose the presence of the offender, as the Congo tries to show. The Congo's reasoning in this respect is interesting from a doctrinal point of view, but does not logically follow from the text. For war crimes, the 1949 Geneva Conventions, which are almost universally ratified and could be considered to encompass more than mere treaty obligations due to this very wide acceptance, do not require the presence of the suspect. Reading into Article 146 of the IV Geneva Convention a limitation on a State's right to exercise universal jurisdiction would fly in the face of a *teleological interpretation* of the Geneva Conventions. The purpose of these Conventions, obviously, is not to restrict the jurisdiction of States for crimes under international law.

55. There is no *customary international law* to this effect either. The Congo submits there is a State practice, evidencing an *opinio juris* asserting that universal jurisdiction, *per se*, requires the presence of the offender on the territory of the prosecuting State. Many national systems giving effect to the obligation *aut dedere aut judicare* and/or the Rome Statute for an International Criminal Court indeed require the presence of the

[110] Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, *UNTS*, Vol. 75, p. 287. See also Art. 49, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, *UNTS*, Vol. 75, p. 31; Art. 50, Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, *UNTS*, Vol. 75, p. 85; Art. 129, Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, *UNTS*, Vol. 75, p. 135; Art. 85 (1), Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, United Nations, *Official Records of the General Assembly*, doc. A/32/144, 15 August 1977.

[111] See further *infra*, para. 62.

offender. This appears from legislation[112] and from a number of national decisions including the Danish *Saric* case[113], the French *Javor* case[114] and the German *Jorgic* case[115]. However, there are also examples of national systems that do not require the presence of the offender on the territory of the prosecuting State[116]. Governments and national courts in the same State may hold different opinions on the same question, which makes it even more difficult to identify the *opinio juris* in that State[117].

And even where national law requires the presence of the offender, this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law. National decisions should be read

[112] See, for example, the Swiss Penal Code, Art. 6*bis*, 1; the French Penal Code, Art. 689-1; the Canadian Crimes against Humanity and War Crimes Act (2000), Art. 8.

[113] *Public Prosecutor* v. *T.*, Supreme Court (Hojesteret), Judgment, 15 August 1995, *Ugeskrift for Retsvaesen*, 1995, p. 838, reported in *Yearbook of International Humanitarian Law*, 1998, p. 431, and in R. Maison, "Les premiers cas d'application des dispositions pénales des Conventions de Genève: commentaire des affaires danoise et française", *EJIL*, 1995, p. 260.

[114] Cour de cassation (fr.), 26 March 1996, *Bull. Crim.*, 1996, pp. 379-382.

[115] Bundesgerichtshof 30 April 1999, 3 StR 215/98, *NStZ*, 1999, p. 396. See also the critical note *(Anmerkung)* by Ambos, *ibid.*, pp. 405-406, who doesn't share the view of the judges that a "legitimizing link" is required to allow Germany to exercise its jurisdiction over crimes perpetrated outside its territory by foreigners against foreigners, even if these amount to serious crimes under international law (*in casu* genocide). In a recent judgment concerning the application of the Geneva Conventions, the Court, however, decided that such a link was not required, since German jurisdiction was grounded on a binding norm of international law instituting a duty to prosecute, so there could hardly be a violation of the principle of non-intervention (Bundesgerichtshof, 21 February 2001, 3 StR 372/00, retrievable on http://www.hrr-strafrecht.de).

[116] See, for example, the prosecutions instituted in Spain on the basis of Article 23.4 of the Ley Orgánica del Poder Judicial (Law 6/1985 of 1 July 1985 on the Judicial Power) against Senator Pinochet and other South American suspects whose extradition was requested. In New Zealand, proceedings may be brought for international "core crimes" regardless of whether or not the person accused was in New Zealand at the time a decision was made to charge the person with an offence (Sec. 8 (1) *(c)* (iii) of the International Crimes and International Criminal Court Act, 2000).

[117] The German Government very recently reached agreement on a text for an "International Crimes Code" *(Völkerstrafgesetzbuch)* (see Bundesministerium der Justiz, *Mitteilung für die Presse 02/02*, Berlin, 16 January 2002). The new Code would allow German law enforcement agencies to prosecute cases without any link to Germany and without the presence of the offender on the national territory. However, if there is no link to Germany, the law enforcement agencies have discretion to defer prosecution in such a case when an International Court or the Courts of a State basing its jurisdiction on territoriality or personality were in fact prosecuting the suspect (see Bundesministerium der Justiz, *Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches*, pp. 19 and 89, to be consulted on the Internet: http://www.bmj.bund.de/images/11222.pdf).

with much caution. In the *Bouterse* case, for example, the Dutch Supreme Court did not state that the requirement of the presence of the suspect was a requirement under international law, but only under domestic law. It found that, *under Dutch law*, there was no such jurisdiction to prosecute Mr. Bouterse but did not say that exercising such jurisdiction would be contrary to *international law*. In fact, the Supreme Court did *not* follow the Advocate General's submission on this point[118].

56. The *"Lotus"* case is not only an authority on jurisdiction, but also on the formation of customary international law as was set out above. A "negative practice" of States, consisting in their abstaining from instituting criminal proceedings, cannot, in itself, be seen as evidence of an *opinio juris*. Only if this abstinence was based on a conscious decision of the States in question can this practice generate customary international law[119]. As in the case of immunities, such abstinence may be attributed to other factors than the existence of an *opinio juris*. There may be good political or practical reasons for a State not to assert jurisdiction in the absence of the offender.

It may be *politically* inconvenient to have such a wide jurisdiction because it is not conducive to international relations and national public opinion may not approve of trials against foreigners for crimes committed abroad. This does not, however, make such trials illegal under international law.

A *practical* consideration may be the difficulty in obtaining the evidence in trials of extraterritorial crimes. Another practical reason may be that States are afraid of overburdening their court system. This was stated by the Court of Appeal in the United Kingdom in the *Al-Adsani* case[120] and seems to have been an explicit reason for the Assemblée nationale in France to refrain from introducing universal jurisdiction *in absentia* when adopting universal jurisdiction over the crimes falling within the Statute of the Yugoslavia Tribunal[121]. The concern for a linkage with the national order thus seems to be more of a pragmatic than of

[118] See *supra*, footnote 5. The Court of Appeal of Amsterdam had, in its judgment of 20 November 2000, decided, *inter alia*, that Mr. Bouterse could be prosecuted *in absentia* on charges of torture (facts committed in Suriname in 1982). This decision was reversed by the Dutch Supreme Court on 18 September 2001, *inter alia* on the point of the exercise of universal jurisdiction *in absentia*. The submissions of the Dutch Advocate General are attached to the judgment of the Supreme Court, *loc. cit.*, paras. 113-137 and especially para. 138.

[119] See *supra*, para. 13.

[120] ECHR, *Al-Adsani* v. *United Kingdom*, 21 November 2001, para. 18, and the concurring opinions of Judges Pellonpää and Bratza, retrievable at: http://www.echr.coe.int. See the discussion in Marks, "Torture and the Jurisdictional Immunities of Foreign States", *CLJ*, 1997, pp. 8-10.

[121] See *Journal officiel de l'Assemblée nationale*, 20 décembre 1994, 2e séance, p. 9446.

a juridical nature. It is not, therefore, necessarily the expression of an *opinio juris* to the effect that this form of universal jurisdiction is contrary to international law.

57. There is a massive literature of learned scholarly writings on the subject of universal jurisdiction[122]. I confine myself to three studies, which emanate from groups of scholars: the Princeton principles[123], the Cairo principles[124] and the Kamminga report on behalf of the ILA[125], and look at one point: do the authors support the Congo's proposition that universal jurisdiction *in absentia* is contrary to international law? The answer is: no[126].

58. I conclude that there is no conventional or customary international law or legal doctrine in support of the proposition that (universal) jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant is present on the territory of the prosecuting State.

(b) *International law permits universal jurisdiction for war crimes and crimes against humanity*

59. International law clearly permits universal jurisdiction for war crimes and crimes against humanity. For both crimes, permission under international law exists. For crimes *against humanity*, there is no clear treaty provision on the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction[127]. In the case of *war crimes*, however, there is specific conventional international law in support of the proposition that States are entitled to assert

[122] For recent sources see *supra*, footnote 98.
[123] *Supra*, footnote 53.
[124] *Supra*, footnote 54.
[125] *Supra*, footnote 51.
[126] Although the wording of Princeton Principle 1 (2) may appear somewhat confusing, the authors definitely did not want to prevent a State from initiating the criminal process, conducting an investigation, issuing an indictment or requesting extradition when the accused is not present, as is confirmed by Principle 1 (3). See the Commentary on the Princeton Principles at p. 44.

[127] On the subject of genocide and the Genocide Convention of 1948, the International Court of Justice held that "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*" and "that the obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention" (*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. 616, para. 31).

jurisdiction over acts committed abroad: the relevant provision is Article 146 of the IV Geneva Convention[128], which lays down the principle *aut dedere aut judicare* for war crimes committed against civilians[129].

From the perspective of the drafting history of international criminal law conventions, this is probably one of the first codifications of this principle, which, in legal doctrine, goes back at least to Hugo Grotius but has probably much older roots[130]. However, it had not been codified in conventional international law until 1949. There are older Conventions such as the 1926 Slavery Convention[131] or the 1929 Convention on Counterfeiting[132], which require States to lay down rules on *jurisdiction* but which do not provide an *aut dedere aut judicare* obligation. The 1949 Conventions are probably the first to lay down this principle in an article that is meant to cover both jurisdiction and prosecution.

Subsequent Conventions have refined this way of drafting and have laid down distinctive provisions on *jurisdiction* on the one hand and on prosecution *(aut dedere aut judicare)* on the other. Examples are the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Articles 4 and 7 respectively)[133] and the 1984 Convention against Torture (Articles 5 and 7 respectively)[134].

60. In order to assess the "permissibility" of universal jurisdiction for international crimes, it is important to distinguish between *jurisdiction* clauses and *prosecution (aut dedere aut judicare)* clauses in international criminal law conventions.

61. The *jurisdiction* clauses in these Conventions usually oblige States

[128] See *supra*, footnote 110.
[129] See International Committee of the Red Cross, *National Enforcement of International Humanitarian Law: Universal Jurisdiction over War Crimes*, retrievable at: http://www.icrc.org; R. van Elst, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", 13 *LJIL*, 2000, pp. 815-854.

[130] G. Guillaume, "La compétence universelle. Formes anciennes et nouvelles", in *Mélanges offerts à Georges Levasseur*, 1992, p. 27.
[131] Slavery Convention, Geneva, 25 September 1926, League of Nations, *Treaty Series (LNTS)*, Vol. 60, p. 253.
[132] International Convention for the Suppression of Counterfeiting Currency, Geneva, 20 April 1929, *LNTS*, Vol. 112, p. 371.
[133] Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970, *ILM*, 1971, p. 134.
[134] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 10 December 1984, *ILM*, 1984, p. 1027, with changes in *ILM*, 1985, p. 535.

to provide extraterritorial jurisdiction, but do not exclude States from exercising jurisdiction under their national laws. Even where they do not provide universal jurisdiction, they do not exclude it either, nor do they require States to refrain from providing this form of jurisdiction under their domestic law. The standard formulation of this idea is that "[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with national law". This formula can be found in a host of Conventions, including the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Art. 4, para. 3) and the 1984 Convention against Torture (Art. 5, para. 3).

62. The *prosecution* clauses *(aut dedere aut judicare)*, however, sometimes link the prosecution obligation to extradition, in the sense that a State's duty to prosecute a suspect only exists "if it does not extradite him". Examples are Article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft and Article 7 of the 1984 Convention against Torture. This, however, does not mean that prosecution is *only* possible in cases where extradition has been refused.

Surely, this formula cannot be read into Article 146 of the IV Geneva Convention which according to some authors even prioritizes prosecution over extradition: *primo prosequi, secundo dedere*[135]. Even if one adopts the doctrinal viewpoint that the notion of universal jurisdiction assumes the presence of the offender, there is nothing in Article 146 that warrants the conclusion that this is an actual requirement[136].

2. *Universal Jurisdiction Is Not Contrary to the Complementarity Principle in the Statute for an International Criminal Court*

63. Some argue that, in the light of the Rome Statute for an International Criminal Court, it will be for the International Criminal Court, and not for States acting on the basis of universal jurisdiction, to prosecute suspects of war crimes and crimes against humanity. National statutes providing universal jurisdiction, like the Belgian Statute, would be contrary to this new philosophy and could paralyse the International Criminal Court. This was also the proposition of the Congo in the present dispute[137].

[135] The Geneva Conventions of 1949 are unique in that they provide a mechanism which goes further than the *"aut dedere, aut judicare"* model and which can be described as *"aut judicare, aut dedere"*, or, even more poignantly, as *"primo prosequi, secundo dedere"*. See, respectively, R. van Elst, *loc. cit.*, pp. 818-819; M. Henzelin, *op. cit.*, p. 353, para. 1112.

[136] See M. Henzelin, *op. cit.*, p. 354, para. 1113.

[137] See Memorial of the Congo, p. 59. "The obligation not to defeat the object and purpose of the Statute of the International Criminal Court." *[Translation by the Registry.]*

64. This proposition is wrong. The Rome Statute does not prohibit universal jurisdiction. It would be absurd to read the Rome Statute in such a way that it limits the jurisdiction for core crimes to either the national State or the territorial State or the International Criminal Court. The relevant clauses are about the preconditions for the International Criminal Court to exercise jurisdiction (Art. 17, Rome Statute — the complementarity principle), and cannot be construed as containing a general limitation for third States to investigate and prosecute core crimes. Surely, the Rome Statute does not preclude third States (other than the territorial State and the State of nationality) from exercising universal jurisdiction. The preamble, which unequivocally states the objective of avoiding impunity, does not allow this inference. In addition, the *opinio juris*, as it appears from United Nations resolutions[138], focuses on impunity, individual accountability and the responsibility of *all* States to punish core crimes.

65. An important practical element is that the International Criminal Court will not be able to deal with *all* crimes; there will still be a need for States to investigate and prosecute core crimes. These States include, but are not limited to, national and territorial States. As observed previously, there will still be a need for third States to investigate and prosecute, especially in the case of sham trials. Also, the International Criminal Court will not have jurisdiction over crimes committed before the entry into force of its Statute (Art. 11, Rome Statute). In the absence of other mechanisms for the prosecution of these crimes, such as national courts exercising universal jurisdiction, this would leave an unacceptable source of impunity[139].

66. The Rome Statute does not establish a *new* legal basis for third States to introduce universal jurisdiction. It does not prohibit it but does not authorize it either. This means that, as far as crimes in the Rome Statute are concerned (war crimes, crimes against humanity, genocide and in the future perhaps aggression and other crimes), pre-existing sources of international law retain their importance.

3. *Conclusion*

67. Article 7 of Belgium's 1993/1999 Act, giving effect to the principle of universal jurisdiction regarding war crimes and crimes against humanity, is not contrary to international law. International law does not prohibit States from asserting prescriptive jurisdiction of this kind. On the contrary, international law permits and even encourages States to assert this form of jurisdiction in order to ensure that suspects of war crimes

[138] See *supra*, footnotes 48 and 49.

[139] See also *supra*, para. 37.

and crimes against humanity do not find safe havens. It is not in conflict with the principle of complementarity in the Statute for an International Criminal Court.

IV. Existence of an Internationally Wrongful Act

68. Having concluded that incumbent Ministers for Foreign Affairs are fully immune from foreign criminal jurisdiction (Judgment, para. 54), even if charged with war crimes and crimes against humanity (Judgment, para. 58), the International Court of Justice examines whether the issuing and circulating of the warrant of 11 April 2000 constituted a violation of those rules. On the subject of the *issuance* and the *circulation* of the warrant respectively, the Court 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" (Judgment, para. 70)
>
> "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" (Judgment, para. 71).

69. As stated at the outset, I find it highly regrettable that neither of these crucial sentences in the Court's reasoning mention the fact that the arrest warrant was about war crimes and crimes against humanity. The *dispositif* (para. 78 (2)) also fails to mention this fact.

70. I disagree with the conclusion that there was a violation of an obligation of Belgium towards the Congo, because I reject its premise. Mr. Yerodia was not immune from Belgian jurisdiction for war crimes and crimes against humanity for the reasons set out above. As set out before, this may be contrary to international courtesy, but there is no rule of customary or conventional international law granting immunity to incumbent Foreign Ministers who are suspected of war crimes and crimes against humanity.

71. Moreover, Mr. Yerodia was never actually arrested in Belgium, and there is no evidence that he was hindered in the exercise of his functions in third countries. Linking the foregoing with my observations on the question of universal jurisdiction in the preceding section of my dissenting opinion, I wish to distinguish between the two different "acts" that, in the International Court of Justice's Judgment, constitute a violation of customary international law: on the one hand, the *issuing* of the disputed arrest warrant, on the other its *circulation*.

1. The Issuance *of the Disputed Arrest Warrant in Belgium Was Not in Violation of International Law*

72. Mr. Yerodia was never arrested, either when he visited Belgium officially in June 2000[140] or thereafter. Had it applied the only relevant provision of conventional international law to the dispute, Article 21, paragraph 2, of the Special Missions Convention, the Court could not have reached its decision. According to this article, Foreign Ministers

> "when they take part in a special mission of the sending State, shall enjoy in the receiving State or in third State. in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law"[141].

In the present dispute, this could only lead to the conclusion that there was no violation: the warrant was never executed, either in Belgium, or in third countries.

73. Belgium accepted, as a matter of international courtesy, that the warrant could not be executed against Mr. Yerodia were he to have visited Belgium officially. This was explicitly mentioned in the warrant: the warrant was not enforceable and was in fact not served on him or executed when Mr. Yerodia came to *Belgium* on an official visit in June 2001. Belgium thus respected the principle, contained in Article 21 of the Special Missions Convention, that is not a statement of customary international law but only of international courtesy[142].

74. These are the only *objective elements* the Court should have looked

[140] Mr. Yerodia's visit to Belgium is not mentioned in the Judgment because the Parties were rather unclear on this point. Yet, it seems that Mr. Yerodia effectively visited Belgium on 17 June 2000. This was reported in the media (see the statement by the Minister for Foreign Affairs in *De Standaard*, 7 July 2000) and also in a question that was put in Parliament to the Minister of Justice. See oral question put by Mr. Tony Van Parys to the Minister of Justice concerning "the political intervention by the Government in the proceedings against the Congolese Minister for Foreign Affairs Mr. Yerodia" *[translation by the Registry]*, *Chambre des représentants de la Belgique, compte rendu intégral avec compte rendu analytique*, Commission de la Justice, 14 November 2000, CRIV 50 COM 294, p. 12. Despite the fact that this fact is not, as such, recorded in the documents that were before the International Court of Justice, I believe the Court could have taken judicial notice of it.

[141] *Supra*, para. 18.

[142] See the statement of the International Law Commission's Special Rapporteur, referred to *supra*, para. 17.

at. The *subjective* elements, i.e., whether the warrant had a psychological effect on Mr. Yerodia or whether it was perceived as offensive by the Congo (cf. the term *injuria* used by Maître Rigaux throughout his pleadings in October 2001[143] and the term *capitis diminutio* used by Maître Vergès during his pleadings in November 2000[144]) was irrelevant for the dispute. The warrant only had a potential legal effect on Mr. Yerodia as a private person in case he would have visited Belgium privately, *quod non*.

75. In its *dispositif* (Judgment, para. 78 (2)), the Court finds that Belgium failed to respect the immunity from criminal jurisdiction *and inviolability* for incumbent Foreign Ministers. I have already explained why, in my opinion, there has been no infringement of the rules on *immunity* from criminal jurisdiction. I find it hard to see how, *in addition* (the Court using the word "and"), Belgium could have infringed the *inviolability* of Mr. Yerodia by the mere issuance of a warrant that was never enforced.

The Judgment does not explain what is meant by the word "inviolability", and simply juxtaposes it to the word "immunity". This may give rise to confusion. Does the Court put the *mere issuance* of an order on the same footing as the *actual enforcement* of the order? Would this also mean that the mere act of investigating criminal charges against a Foreign Minister would be contrary to the principle of inviolability?

Surely, in the case of diplomatic agents, who enjoy absolute immunity and inviolability under the 1961 Vienna Convention on Diplomatic Relations[145], allegations of criminal offences may be investigated as long as the agent is not interrogated or served with an order to appear. This view is clearly stated by Jean Salmon[146]. Jonathan Brown notes that, in the case of a diplomat, the issuance of a charge or summons is probably contrary to the diplomat's *immunity*, whereas its execution would be likely to infringe the agent's *inviolability*[147].

If the Court's *dispositif* were to be interpreted as to mean that mere investigations of criminal charges against Foreign Ministers would infringe their *inviolability*, the implication would be that Foreign Ministers enjoy greater protection than diplomatic agents under the Vienna Convention. This would clearly go beyond what is accepted under international law in the case of diplomats.

[143] CR 2001/5, p. 14.
[144] CR 2000/32.
[145] Convention on Diplomatic Relations, Vienna, 18 April 1961, *UNTS*, Vol. 500, p. 95.
[146] J. Salmon, *Manuel de droit diplomatique*, 1994, p. 304.
[147] J. Brown, "Diplomatic Immunity: State Practice under the Vienna Convention on Diplomatic Relations", 37 *ICLQ*, 1988, p. 53.

2. *The* International Circulation *of the Disputed Arrest Warrant Was Not in Violation of International Law*

76. The question of the circulation of the warrant may be somewhat different, because it might be argued that circulating a warrant internationally brings it within the realm of *enforcement* jurisdiction, which, under the *"Lotus"* test, is in principle prohibited. Under that test, States can only act on the territory of other States if there is permission to this effect in international law. This is the "first and foremost restriction" that international law imposes on States[148].

77. Even if one would accept, together with the Court, the premise there is a rule under customary law protecting Foreign Ministers suspected of war crimes and crimes against humanity from the criminal process of other States, it still remains to be established that Belgium actually infringed this rule by asserting enforcement jurisdiction. Much confusion arose from the title that was given to the warrant, which was called "*international* arrest warrant" on the document issued by the Belgian judge. However, this is a very misleading term both under Belgian law and under international law. International arrest warrants do not exist as a special category under Belgian law. It is true that the title of the document was misleading, but giving a document a misleading name does not actually mean that this document also has the effect that it suggests it has.

78. The term *international* arrest warrant is misleading, in that it suggests that arrest warrants can be enforced in third countries without the validation of the local authorities. This is not the case: there is always a need for a validation by the authorities of the State where the person, mentioned in the warrant, is found. Accordingly, the Belgian arrest warrant against Mr. Yerodia, even after being circulated in the Interpol system, could not be automatically enforced in all Interpol member States. It may have caused an inconvenience that was perceived as offensive by Mr. Yerodia or by the Congolese authorities. It is not *per se* a limitation of the Congolese Foreign Minister's right to travel and to exercise his functions.

I know of no State that automatically enforces arrest warrants issued in other States, not even in regional frameworks such as the European Union. Indeed, the discussions concerning the *European arrest warrant* were about introducing something that does not exist at present: a rule by which member States of the European Union would automatically

[148] See *supra*, para. 49.

enforce each other's arrest warrants[149]. At present, warrants of the kind that the Belgian judge issued in the case of Mr. Yerodia are not automatically enforceable in Europe.

In inter-State relations, the proper way for States to obtain the presence of offenders who are not on their territory is through the process of *extradition*. The discussion about the legal effect of the Belgian arrest warrant in third States has to be seen from that perspective. When a judge issues an arrest warrant against a suspect whom he believes to be abroad, this warrant may lead to an *extradition* request. This is not automatic: it is up to the Government whether or not to request extradition[150]. Extradition requests are often preceded by a request for *provisional arrest for the purposes of extradition*. This is what the *Interpol Red Notices* are about. Red Notices are issued by Interpol on the request of a State which wishes to have the person named in the warrant provisionally arrested in a third State for the purposes of extradition. Not all States, however, give this effect to an Interpol Red Notice[151].

Requests for the provisional arrest are, in turn, often preceded by an *international tracing request*, which aims at localizing the person named in the arrest warrant. This "communication" does not have the effect of a Red Notice, and does not include a request for the provisional arrest of the person named in the warrant. Some countries may refuse access to a person whose name has been circulated in the Interpol system or against whom a Red Notice has been requested. This is, however, a question of domestic law.

States may also prohibit the official visits of persons who are suspected of international crimes refusing a visa, or by refusing accreditation if such

[149] See the *Proposal for a Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between the Member States*, COM(2001)522, available on the Internet: http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0522.pdf. An amended version can be found in: Council of the European Union, Outcome of Proceedings, 10 December 2001, 14867/1/01 REV 1 COPEN 79 CATS 50.

[150] Often, Governments refrain from requesting extradition for political reasons, as was shown in the case of Mr. Ocalan, where Germany decided not to proceed to request Mr. Ocalan's extradition from Italy. See Press Reports: "Bonn stellt Auslieferungsersuchen für Öcalan zurück", *Frankfurter Allgemeine Zeitung*, 21 November 1998, and "Die Bundesregierung verzichtet endgültig auf die Auslieferung des Kurdenführers Öcalan", *Frankfurter Allgemeine Zeitung*, 28 November 1998.

[151] Interpol, General Secretariat, *Rapport sur la valeur juridique des notices rouges*, ICPO-Interpol, General Assembly, 66th Session, New Delhi, 15-21 October 1997, AGN/66/RAP/8, No. 8 Red Notices, as amended pursuant to resolution No. AGN/66/RES/7.

persons are proposed for a diplomatic function[152], but this, again, is a domestic matter for third States to consider, and not an automatic consequence of a judge's arrest warrant.

79. In the case of Mr. Yerodia, Belgium communicated the warrant to Interpol (end of June 2000), but did not request an Interpol Red Notice until September 2001, which was when Mr. Yerodia had ceased to be a Minister. It follows that Belgium never requested any country to arrest Mr. Yerodia provisionally for the purposes of extradition while he was a Foreign Minister. The Congo claims that Mr. Yerodia was, in fact, restricted in his movements as a result of the Belgian arrest warrant. Yet, it fails to adduce evidence to prove this point. It appears, on the contrary, that Mr. Yerodia has made a number of foreign travels after the warrant had been circulated in the Interpol system (2000), including an official visit to the United Nations. During the hearings, it was said that, when attending this United Nations Conference in New York, Mr. Yerodia chose the shortest way between the airport and the United Nations building, because he feared being arrested[153]. This fear, which he may have had, was based on psychological, not on legal grounds. Under the 1969 Special Missions Convention, he could not be arrested in third countries when on an official visit. On his official visits in third States, no coercive action was taken against him on the basis of the Belgian warrant.

3. Conclusion

80. The warrant could not be and was not executed in the country where it was *issued* (Belgium) or in the countries to which it was *circulated*. The warrant was not executed *in Belgium* when Mr. Yerodia visited Belgium officially in June 2000. Belgium did not lodge an extradition request to *third countries* or a request for the provisional arrest for the purposes of extradition. The warrant was not an "international arrest warrant", despite the language used by the Belgian judge. It could and did not have this effect, neither in Belgium nor in third countries. The allegedly wrongful act was a purely domestic act, with no *actual* extraterritorial effect.

V. Remedies

81. On the subject of remedies, the Congo asked the Court for two different actions: *(a)* a declaratory judgment to the effect that the warrant

[152] See the Danish hesitations concerning the accreditation of an Ambassador for Israel, *supra*, footnote 21.

[153] CR 2001/10/20.

and its circulation through Interpol was contrary to international law and *(b)* a decision to the effect that Belgium should withdraw the warrant and its circulation. The Court granted both requests: it decided *(a)* that the issue and international circulation of the arrest warrant were in breach of a legal obligation of Belgium towards the Congo (Judgment, para. 78 (2) of the *dispositif*) and *(b)* that Belgium must, by means of its own choosing, cancel the arrest warrant and so inform the authorities to whom the warrant was issued (Judgment, para. 78 (3) of the *dispositif*).

82. I have, in Sections II (Immunities), III (Jurisdiction) and IV (Existence of an Internationally Wrongful Act) of my dissenting opinion, given the reasons why I voted against paragraph 78 (2) of the *dispositif* relating to the illegality, under international law, of the arrest warrant: I believe that Belgium was not, under positive international law, obliged to grant immunity to Mr. Yerodia on suspicions of war crimes and crimes against humanity and, moreover, I believe that Belgium was perfectly entitled to assert extraterritorial jurisdiction against Mr. Yerodia for such crimes.

83. I still need to give reasons for my vote against paragraph 78 (3) of the *dispositif*, calling for the cancellation and the "de-circulation" of the disputed arrest warrant. Even assuming, *arguendo*, that the arrest warrant was illegal in the year 2000, it was no longer illegal at the moment when the Court gave Judgment in this case. Belgium's alleged breach of an international obligation did not have a continuing character: it may have lasted as long as Mr. Yerodia was in office, but it did not continue in time thereafter[154]. For that reason, I believe the International Court of Justice cannot ask Belgium to cancel and "decirculate" an act that is not illegal today.

84. In its Counter-Memorial and pleadings, Belgium formulated three preliminary objections based on Mr. Yerodia's change of position. It argued that, due to Mr. Yerodia's ceasing to be a Minister today, the Court *(a)* no longer had jurisdiction to try the case, *(b)* that the case had become moot, and *(c)* that the Congo's Application was inadmissible. The Court dismissed all these preliminary objections.

[154] See Article 14 of the 2001 ILC Draft Articles on State Responsibility, United Nations doc. A/CN.4/L.602/Rev.1, concerning the extension in time of the breach of an international obligation, which states the following:

> "1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
> 2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation . . ."

I voted with the Court on these three points. I agree with the Court that Belgium was wrong on the points of *jurisdiction* and *admissibility*. There is well-established case law to the effect that the Court's jurisdiction to adjudicate a case and the admissibility of the Application must be determined on the date on which the Application was filed (when Mr. Yerodia was still a Minister), not on the date of the Judgment (when Mr. Yerodia had ceased to be a Minister). This follows from several precedents, the most important of which is the *Lockerbie* case[155]. I therefore agree with paragraph 78 (1) (B) and (D) of the Judgment.

I was, however, more hesitant on the subject of *mootness*, where the Court held that the Congo's Application was "not without object" (Judgment, para. 78 (1) (C)). It does not follow from *Lockerbie* that the question of mootness must be assessed on the date of the filing of the application[156]. An event subsequent to the filing of an application can still render a case moot. The question therefore was whether, given the fact that Mr. Yerodia is no longer a Foreign Minister today, there was still a case for the respondent State to answer. I think there was, for the following reason: it is not because an allegedly illegal act has ceased to continue in time that the illegality disappears. From that perspective, I think the case was not moot. This, however, is only true for the Congo's first claim (a declaratory judgment solemnly declaring the illegality of Belgium's act). However, I think the case might have been moot regarding the Congo's second claim, given the fact that Mr Yerodia is no longer a Minister today.

If there was an infringement of international law in the year 2000 (which I do not think exists, for the reasons set out above), it has certainly ceased to exist today. Belgium's alleged breach of an international obligation, if such an obligation existed — which I doubt — was in any event a breach of an obligation not of a continuing character. If the

[155] *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, I.C.J. Reports 1998*, p. 23, para. 38 (jurisdiction) and p. 26, para. 44 (admissibility). See further, S. Rosenne, *The Law and Practice of the International Court, 1920-1996*, Vol. II, 1997, pp. 521-522.

[156] In the *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)* case the Court only decided on the points of jurisdiction (*ibid., Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 30, para. 53 (1)) and admissibility (*ibid.*, para. 53 (2)), not on mootness (*ibid.*, p. 31, para. 53 (3)). The *ratio decidendi* for paragraphs 53 (1) and (2) is that the relevant date for the assessment of both jurisdiction and admissibility is the date of the filing of the Application. The Court did not make such a statement in relation to mootness.

Court would take its own reasoning about immunities to its logical conclusion (the temporal linkage between the protection of immunities and the function of the Foreign Minister), then it should have reached the conclusion that the Congo's third and fourth submissions should have been rejected. This is why I have voted with the Court on paragraph 78 (1) (C) concerning Belgium's preliminary objection regarding mootness, but against the Court on paragraph 78 (3) of the *dispositif*.

I also believe, assuming again that there has been an infringement of an international obligation by Belgium, that the declaratory part of the Judgment should have sufficed as reparation for the moral injury suffered by Congo. If there *was* an act constituting an infringement, which I do not believe exists (a Belgian arrest warrant that was not contrary to customary international law and that was moreover never enforced), it was trivial in comparison with the Congo's failure to comply with its obligation under Article 146 of the IV Geneva Convention (investigating and prosecuting charges of war crimes and crimes against humanity committed on its territory). The Congo did not come to the International Court with clean hands[157], and its Application should have been rejected. *De minimis non curat lex*[158].

VI. Final Observations

85. For the reasons set out in this opinion, I think the International Court of Justice has erred in finding that there is a rule of customary international law protecting incumbent Foreign Ministers suspected of war crimes and crimes against humanity from the criminal process in other States. No such rule of customary international law exists. The Court has not engaged in the balancing exercise that was crucial for the present dispute. Adopting a minimist and formalistic approach, the Court has *de facto* balanced in favour of the interests of States in conducting international relations, not the international community's interest in asserting international accountability of State officials suspected of war crimes and crimes against humanity.

86. The Belgian 1993/1999 Act may go too far and it may be politically wise to provide procedural restrictions for foreign dignitaries or to restrict the exercise of universal jurisdiction. Proposals to this effect are under study in Belgium. Belgium may be naive in trying to be a forerunner in

[157] See *supra*, para. 35.

[158] This expression is not synonymous with *de minimis non curat praetor* in civil law systems. See *Black's Law Dictionary*.

the suppression of international crimes and in substantiating the view that, where the territorial State fails to take action, it is the responsibility of third States to offer a forum to victims. It may be politically wrong in its efforts to transpose the "sham trial" exception to complementarity in the Rome Statute for an International Criminal Court (Art. 17)[159] into *"aut dedere aut judicare"* situations. However, the question that was before the Court was not whether Belgium is naive or has acted in a politically wise manner or whether international comity would command a stricter application of universal jurisdiction or a greater respect for foreign dignitaries. The question was whether Belgium had violated an obligation under international law to refrain from issuing and circulating an arrest warrant on charges of war crimes and crimes against humanity against an incumbent Foreign Minister.

87. An implicit consideration behind this Judgment may have been a concern for abuse and chaos, arising from the risk of States asserting unbridled universal jurisdiction and engaging in abusive prosecutions against incumbent Foreign Ministers of other States and thus paralysing the functioning of these States. The *"monstrous cacophony"* argument[160] was very present in the Congo's Memorial and pleadings. The argument can be summarized as follows: if a State would prosecute members of foreign Governments without respecting their immunities, chaos will be the result; likewise, if States exercise unbridled universal jurisdiction without any point of linkage to the domestic legal order, there is a danger for political tensions between States.

In the present dispute, there was no allegation of abuse of process on the part of Belgium. Criminal proceedings against Mr. Yerodia were not frivolous or abusive. The warrant was issued after two years of criminal investigations and there were no allegations that the investigating judge who issued it acted on false factual evidence. The accusation that Belgium applied its War Crimes Statute in an offensive and discriminatory manner against a Congolese Foreign Minister was manifestly ill founded. Belgium, rightly or wrongly, wishes to act as an agent of the world community by allowing complaints brought by foreign victims of serious human rights abuses committed abroad. Since the infamous *Dutroux* case (a case of child molestation attracting great media attention in the late 1990s), Belgium has amended its laws in order to improve victims' procedural rights, without discriminating between Belgian and foreign victims. In doing so, Belgium has also opened its courts to victims bring-

[159] See *supra*, para. 37.

[160] J. Verhoeven, "M. Pinochet, la coutume internationale et la compétence universelle", *Journal des tribunaux*, 1999, p. 315; J. Verhoeven, "Vers un ordre répressif universel? Quelques observations", *AFDI*, 1999, p. 55.

ing charges based on war crimes and crimes against humanity committed abroad. This new legislation has been applied not only in the case against Mr. Yerodia but also in cases against Mr. Pinochet, Mr. Sharon, Mr. Rafzanjani, Mr. Hissen Habré, Mr. Fidel Castro, etc. It would therefore be wrong to say that the War Crimes Statute has been applied against a Congolese national in a discriminatory way.

In the abstract, the chaos argument may be pertinent. This risk may exist, and the Court could have legitimately warned against this risk in its Judgment without necessarily reaching the conclusion that a rule of customary international law exists to the effect of granting immunity to Foreign Ministers. However, granting immunities to incumbent Foreign Ministers may open the door to other sorts of abuse. It dramatically increases the number of persons that enjoy international immunity from jurisdiction. Recognizing immunities for other members of government is just one step further: in present-day society, all Cabinet members represent their countries in various meetings. If Foreign Ministers need immunities to perform their functions, why not grant immunities to other Cabinet members as well? The International Court of Justice does not state this, but doesn't this flow from its reasoning leading to the conclusion that Foreign Ministers are immune? The rationale for assimilating Foreign Ministers with diplomatic agents and Heads of State, which is at the centre of the Court's reasoning, also exists for other Ministers who represent the State officially, for example, Ministers of Education who have to attend Unesco conferences in New York or other Ministers receiving honorary doctorates abroad. *Male fide* Governments may appoint persons to Cabinet posts in order to shelter them from prosecutions on charges of international crimes. Perhaps the International Court of Justice, in its effort to close one Pandora's box for fear of chaos and abuse, has opened another one: that of granting immunity and thus *de facto* impunity to an increasing number of government officials.

(Signed) Christine VAN DEN WYNGAERT.