Addis Ababa, Ethiopia
7 April - 2 May 2014

STUDY MATERIALS
INTERNATIONAL CRIMINAL LAW

Codification Division of the United Nations Office of Legal Affairs

Copyright © United Nations, 2014
Addis Ababa, Ethiopia
7 April - 2 May 2014

PROFESSOR ANDREAS ZIMMERMANN

Codification Division of the United Nations Office of Legal Affairs

Copyright © United Nations, 2014
Outline

Legal Instruments and Documents

A. International Military Tribunal of Nuremberg /Control Council for Germany

1. Agreement for the prosecution and punishment of the major war criminals of the European Axis and Charter of the International Military Tribunal, 1945 12
2. Control Council Law No. 10, Punishment of persons guilty of war crimes, crimes against peace and against humanity, 1945 20

B. International Military Tribunal for the Far East

3. The International Military Tribunal for the Far East (IMTFE) Charter, 1946 24

C. General Assembly Documents/ Relevant treaties

4. Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal (United Nations General Assembly resolution 95 (I) of 11 December 1946) 30
7. Convention against torture and other cruel, inhuman or degrading treatment or punishment, 1984 50

D. International Criminal Tribunal for the former Yugoslavia (ICTY)/ International Criminal Tribunal for Rwanda (ICTR)/ International Residual Mechanism for Criminal Tribunals

9. Statute of the International Criminal Tribunal for the former Yugoslavia (as amended) 68
E. International Criminal Court

I. Basic Documents

   For text, see *Core Legal Texts of the International Criminal Court*

13. 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

14. 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

15. Elements of Crimes
   For text, *see Core Legal Texts of the International Criminal Court*

   For text, see *Core Legal Texts of the International Criminal Court*

II. Security Council Resolutions


    (excerpts)

20. Letter dated 14 January 2013 from the Chargé d’affaires a.i. of the Permanent Mission
    of Switzerland to the United Nations addressed to the Secretary-General
    (UN Doc. A/67/694–S/2013/19)

III. Issues of Jurisdiction

21. ICC Press Release: “President of Uganda refers situation concerning the Lord’s
    Resistance Army (LRA) to the ICC”, 29 January 2004

22. ICC Press Release: “Registrar confirms that the Republic of Côte d’Ivoire has
    accepted the jurisdiction of the Court”, 15 February 2005

23. Palestinian National Authority Declaration recognizing the Jurisdiction of the
    International Criminal Court, 21 January 2009

24. *Situation in Palestine*, Office of the Prosecutor, International Criminal Court, 3 April
    2012

IV. ICC and third States

25. Declaration of the United States of America on the non-ratification of the Rome
    Statute, 6 May 2002
28. Agreement between the Government of the Kingdom of Lesotho and the Government of the United States of America regarding the surrender of persons to the International Criminal Court, 2006
29. American Service-Members’ Protection Act (ASPA), 2002

F. Special Panels East Timor


G. Special Court for Sierra Leone

31. Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (with Statute), 2002

H. Extraordinary Chambers in the Courts of Cambodia

34. 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, 27 October 2004

I. Special Tribunal for Lebanon


Case Law

A. International Court of Justice

   For text, see Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice 2003-2007

38. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), International Court of Justice, Summary of the Judgment of 20 July 2012

B. International Criminal Tribunal for the former Yugoslavia


C. International Criminal Tribunal for Rwanda


D. Special Court for Sierra Leone

42. Prosecutor v. Sesay, Kallon and Gbao (RUF Case), Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004

E. Special Tribunal for Lebanon

43. Prosecutor v. Salim Jamil Ayyash et al., Appeals Chamber, Decision on the Defence Appeals Against the Trial Chamber’s “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal”, 24 October 2012

F. International Criminal Court

44. Prosecutor v. Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber I ‘Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir,’ 12 December 2011

45. Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012 (summary)
Part A – Introduction: Notion and relevance of international criminal law in the international legal system

Part B – Historical development of international criminal law

I. Until 1945
   1. Pre WW I-developments
   2. Post WW I-developments
      (Treaty of Versailles/national criminal proceedings ‘Leipzig trials’)
   3. Inter war-period: work of the League of Nations

II. Post-WW II-developments until the creation of the ICTY/ICTR
   1. Nuremberg and Tokyo
   2. ‘Nuremberg principles’
   3. Genocide Convention
   4. Geneva Conventions 1949 (system of ‘grave breaches’ and common Art. 3)
   5. 1973 Convention against Apartheid

III. Creation of the ad hoc tribunals
   1. International Criminal Tribunal for the Former Yugoslavia (ICTY)
   2. International Criminal Tribunal for Rwanda (ICTR)

IV. Creation of the International Criminal Court

V. Excursus: The creation of the ‘Special Panels’ in East Timor

VI. Creation of internationalized tribunals
   1. Special Court for Sierra Leone (SCSL)
   2. Extraordinary Chambers in the Courts of Cambodia
   3. Special Tribunal for Lebanon (STL)

Part C – International Criminal Court (jurisdiction, structure, cooperation)

I. Jurisdiction of the International Criminal Court
   1. Jurisdiction: general questions
      a) Form of acceptance of jurisdiction (including ad hoc acceptance under Art. 12 (3) Rome Statute)
      b) Jurisdictional requirements under Art. 12 Rome Statute
      c) ICC and third States
   2. Jurisdiction: ICC and the Security Council
      a) Security Council referrals (Art. 13 lit. b Rome Statute)
      b) Security Council deferrals (Art. 16 Rome Statute)
3. Trigger mechanism (other than Security Council referrals)
   a) Contracting parties (including ‘self-referrals’)
   b) ‘Proprio motu’ triggering by the Prosecutor
5. Temporal jurisdiction

II. Structure of the International Criminal Court (overview)

III. Issue of cooperation (Art. 89 et seq. Rome Statute)

Part D – Substantive international criminal law (as exemplified by Arts. 5 et seq. Rome Statute)

I. General questions
II. Specific crimes
   1. Genocide
   2. Crimes against humanity
      a) General requirements
      b) Specific forms
   3. War crimes
      a) General questions
      b) War crimes in international armed conflicts
         i) General questions
         ii) Specific crimes (selected crimes only)
      c) War crimes in non-international armed conflicts
         i) General questions
         ii) Specific crimes (selected crimes only)
   4. Crime of aggression: the Kampala compromise
      a) Substantive issues
      b) Jurisdiction of the ICC with regard to the crime of aggression
      c) Entry into force of the amendment

III. General principles of international criminal law (overview)

1. Mens rea/actus reus (Art. 30 Rome Statute)
2. Forms of participation (commission, ordering, aiding and abetting) (Art. 25 Rome Statute)
3. Attempt (Art. 25, para. 3, lit. f) Rome Statute)
4. Command responsibility (Art. 28 Rome Statute)
5. Immunities and international criminal law (Art. 27/ 98 para. 1 Rome Statute)

Part E – Domestic implementation of international criminal law (overview)

Part F – Outlook and perspectives: the future of international criminal law and of the ICC
Agreement for the prosecution and punishment of the major war criminals of the European Axis and Charter of the International Military Tribunal, 1945
No. 251

UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND,
UNITED STATES OF AMERICA, FRANCE,
UNION OF SOVIET SOCIALIST REPUBLICS

Agreement for the prosecution and punishment of the major war criminals of the European Axis. Signed at London, on 8 August 1945

Official texts: English, French and Russian.
Filed and recorded at the request of the United Kingdom of Great Britain and Northern Ireland on 15 March 1951.

ROYAUME-UNI DE GRANDE-BRETAGNE
ET D’IRLANDE DU NORD,
ÉTATS-UNIS D’AMÉRIQUE, FRANCE,
UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

Accord concernant la poursuite et le châtiment des grands criminels de guerre des Puissances européennes de l’Axe. Signé à Londres, le 8 août 1945

Textes officiels anglais, français et russe.
Classé et inscrit au répertoire à la demande du Royaume-Uni de Grande-Bretagne et d’Irlande du Nord le 15 mars 1951.

3 In accordance with article 7, the Agreement came into force on the date of its signature, on 8 August 1945, in respect of the following signatory States:

<table>
<thead>
<tr>
<th>Country</th>
<th>Date</th>
<th>Country</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>5 October 1945</td>
<td>Union of Soviet Socialist Republics</td>
<td>9 October 1945</td>
</tr>
<tr>
<td>United Kingdom of Great Britain and Northern Ireland</td>
<td>9 October 1945</td>
<td>United States of America</td>
<td>14 November 1945</td>
</tr>
</tbody>
</table>

It came subsequently into force on the dates indicated in respect of the following States, which, in accordance with article 5, adhered to the Agreement by notice given to the Government of the United Kingdom:

<table>
<thead>
<tr>
<th>Country</th>
<th>Date</th>
<th>Country</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>5 October 1945</td>
<td>Netherlands</td>
<td>25 September 1945</td>
</tr>
<tr>
<td>Belgium</td>
<td>5 October 1945</td>
<td>New Zealand</td>
<td>19 November 1945</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>20 September 1945</td>
<td>Norway</td>
<td>20 October 1945</td>
</tr>
<tr>
<td>Denmark</td>
<td>10 September 1945</td>
<td>Panama</td>
<td>17 October 1945</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>9 October 1946</td>
<td>Paraguay</td>
<td>25 September 1945</td>
</tr>
<tr>
<td>Greece</td>
<td>10 September 1946</td>
<td>Poland</td>
<td>25 September 1945</td>
</tr>
<tr>
<td>Haiti</td>
<td>5 November 1945</td>
<td>Uruguay</td>
<td>11 December 1945</td>
</tr>
<tr>
<td>Honduras</td>
<td>17 October 1945</td>
<td>Venezuela</td>
<td>29 September 1945</td>
</tr>
<tr>
<td>India</td>
<td>22 December 1945</td>
<td>Yugoslavia</td>
<td>29 September 1945</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>1 November 1945</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Union of Soviet Socialist Republics (hereinafter called “the Signatories”) acting in the interests of all the United Nations and by their representatives duly authorised thereto have concluded this Agreement.

Article 1

There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.

Article 2

The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this agreement, which Charter shall form an integral part of this Agreement.

Article 3

Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Article 4

Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5

Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Article 6

Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

Article 7

This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month’s notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.

In witness whereof the Undersigned have signed the present Agreement.

Done in quadruplicate in London this 8th day of August, 1945, each in English, French and Russian, and each text to have equal authenticity.

For the Government of the United Kingdom of Great Britain and Northern Ireland:
JOWITT

For the Government of the United States of America:
Robert H. JACKSON

For the Provisional Government of the French Republic:
Robert FALCO

For the Government of the Union of Soviet Socialist Republics:
I. NIKITCHENKO
A. TRAININ

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

I.—CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1

In pursuance of the Agreement signed on the 8th August, 1945, by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called “the Tribunal”) for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2

The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the
Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfil his functions, his alternate shall take his place.

Article 3

Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a trial, other than by an alternate.

Article 4

(a) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(b) The members of the Tribunal shall, before any trial begins, agree among themselves upon the election from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

(c) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive: provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5

In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II.—JURISDICTION AND GENERAL PRINCIPLES

Article 6

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **Crimes against peace**: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **War crimes**: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) **Crimes against humanity**: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.
Article 9

At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.

After receipt of the indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10

In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.

Article 11

Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organisation and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation.

Article 12

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Article 13

The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III.—COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Article 14

Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.

The Chief Prosecutors shall act as a committee for the following purposes:

(a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,

(b) to settle the final designation of major war criminals to be tried by the Tribunal,

(c) to approve the indictment and the documents to be submitted therewith,

(d) to lodge the indictment and the accompanying documents with the Tribunal,

(e) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15

The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

(a) investigation, collection and production before or at the Trial of all necessary evidence,

(b) the preparation of the indictment for approval by the Committee in accordance with paragraph (c) of Article 14 hereof,

(c) the preliminary examination of all necessary witnesses and of the Defendants,

(d) to act as prosecutor at the Trial,
(e) to appoint representatives to carry out such duties as may be assigned to them,
(f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV.—Fair Trial for Defendants

Article 16

In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(d) A Defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of Counsel.

(e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution.

V.—Powers of the Tribunal and Conduct of the Trial

Article 17

The Tribunal shall have the power:

(a) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,

(b) to interrogate any Defendant,

(c) to require the production of documents and other evidentiary material,
Article 23
One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorised by him.

The function of Council for a Defendant may be discharged at the Defendant’s request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorised thereto by the Tribunal.

Article 24
The proceedings at the Trial shall take the following course:
(a) The Indictment shall be read in court.
(b) The Tribunal shall ask each Defendant whether he pleads “guilty” or “not guilty”.
(c) The Prosecution shall make an opening statement.
(d) The Tribunal shall ask the Prosecution and the Defence what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.
(e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defence. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defence.
(f) The Tribunal may put any question to any witness and to any Defendant, at any time.
(g) The Prosecution and the Defence shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.
(h) Defence shall address the court.
(i) The Prosecution shall address the court.
(j) Each Defendant may make a statement to the Tribunal.
(k) The Tribunal shall deliver judgment and pronounce sentence.

Article 25
All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.
Control Council Law No. 10
Punishment of persons guilty of war crimes, crimes against peace and against humanity, 1945
and whereas it is desired to rectify this discrepancy:

Now, THEREFORE, the undersigned, signatories of the said Agreement on behalf of their respective Governments, duly authorized thereto, have agreed that Article VI, paragraph (c), of the Charter in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semi-colon in the English text should be changed to a comma, and that the French text should be amended to read as follows:

(c) LES CRIMES CONTRE L'HUMANITE: c'est à dire l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux, ou religieux, lorsque ces actes ou persécutions, qu'ils soient constitués ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.

IN WITNESS WHEREOF the Undersigned have signed the present Protocol.
Done in quadruplicate in Berlin this 6th day of October, 1945, each in English, French, and Russian, and each text to have equal authenticity.

For the Government of the United States of America

ROBERT H. JACKSON

For the Provisional Government of the French Republic

FRANÇOIS DE Menthon

For the Government of the United Kingdom of Great Britain and Northern Ireland

HARLEY SHAWCROSS

For the Government of the Union of Soviet Socialist Republics

R. RUDENKO

CONTROL COUNCIL LAW NO. 10

PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:

Article I

The Moscow Declaration of 30 October 1943 “Concerning Responsibility of Hitlerites for Committed Atrocities” and the London Agreement of 8 August 1945 “Concerning Prosecution and Punishment of Major War Criminals of the European Axis” are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

Article II

1. Each of the following acts as recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and war of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of International treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder of or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against Humanity. Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraphs 1 (a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any person found guilty of any of the Crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

(a) Death.

(b) Imprisonment for life or a term of years, with or without hard labour.

(c) Fine, and imprisonment with or without hard labour, in lieu thereof.

(d) Forfeiture of property.

(e) Restitution of property wrongly acquired.

(f) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation or punishment.

(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.
5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.

Article III

1. Each occupying authority, within its Zone of occupation,

(a) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.

(b) shall report to the Legal Directorate the names of all suspected criminals, the reasons for and the places of their detention, if they are detained, and the names and location of witnesses.

(c) shall take appropriate measures to see that witnesses and evidence will be available when required.

(d) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.

2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

3. Persons wanted for trial by an International Military Tribunal will not be tried without the consent of the Committee of Chief Prosecutors. Each Zone Commander will deliver such persons who are within his Zone to that committee upon request and will make witnesses and evidence available to it.

4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the facts of their apprehension has been reported in accordance with Section 1 (d) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned.

5. The execution of death sentences may be deferred by not to exceed one month after the sentence has become final when the Zone Commander concerned has reason to believe that the testimony of those under sentence would be of value in the investigation and trial of crimes within or without his Zone.

6. Each Zone Commander will cause such effect to be given to the judgments of courts of competent jurisdiction, with respect to the property taken under his control pursuant hereto, as he may deem proper in the interest of justice.

Article IV

1. When any person in a Zone in Germany is alleged to have committed a crime, as defined in Article II, in a country other than Germany or in another Zone, the government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the Zone in which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed. Such request for delivery shall be granted by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request, or the Commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority. A similar procedure shall apply to witnesses, material exhibits and other forms of evidence.

2. The Legal Directorate shall consider all requests referred to it, and shall determine the same in accordance with the following principles, its determination to be communicated to the Zone Commander.

(a) A person wanted for trial or as a witness by an International Military Tribunal shall not be delivered for trial or required to give evidence outside Germany, as the case may be, except upon approval of the Committee of Chief Prosecutors acting under the London Agreement of 8 August 1945.

(b) A person wanted for trial by several authorities (other than an International Military Tribunal) shall be disposed of in accordance with the following priorities:

(1) If wanted for trial in the Zone in which he is, he should not be delivered unless arrangements are made for his return after trial elsewhere;

(2) If wanted for trial in a Zone other than that in which he is, he should be delivered to that Zone in preference to delivery outside Germany unless arrangements are made for his return to that Zone after trial elsewhere;

(3) If wanted for trial outside Germany by two or more of the United Nations, of one of which he is a citizen, that one should have priority;

(4) If wanted for trial outside Germany by several countries, not all of which are United Nations, United Nations should have priority;

(5) If wanted for trial outside Germany by two or more of the United Nations, then, subject to Article IV 2 (b) (3) above, that which has the most serious charges against him, which are moreover supported by evidence, should have priority.

Article V

The delivery, under Article IV of this Law, of persons for trial shall be made on demands of the Governments or Zone Commanders in such a manner that the delivery of criminals to one jurisdiction will not become the means of defeating or unnecessarily delaying the carrying out of justice in another place. If within six months the delivered person has not been convicted by the Court of the zone or country to which he has been delivered, then such person shall be returned upon demand of the Commander of the Zone where he was located prior to delivery.

Done at Berlin, 20 December 1945.

JOSEPH T. MCNAIRNEY
General
B. L. MONTGOMERY
Field Marshal
L. KORZE
General de Corps d'Armée
Zou. P. KORZEN
General d'Armée
G. ZHEVROV
Marshal of the Soviet Union

XVIII
XIX
The International Military Tribunal for the Far East (IMTFE) Charter, 1946
International Military Tribunal for the Far East (IMTFE) Charter

The IMTFE Charter

I CONSTITUTION OF TRIBUNAL

Article 1

Tribunal Established. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

Article 2

Members. The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

Article 3

Officers and Secretariat.

(a) President. The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

(b) Secretariat.

(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

(2) The General Secretary shall organize and direct the work of the Secretariat.

(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide

Article 4

Convening and Quorum, Voting and Absence.

(a) Convening and Quorum. When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

(b) Voting. All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those Members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

(c) Absence. If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

II JURISDICTION AND GENERAL PROVISIONS

Article 5

Jurisdiction Over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) Conventional War Crimes: Namely, violations of the laws or customs of war;

(c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6

Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he
is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 7

Rules of Procedure. The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

Article 8

Counsel.

(a) Chief of Counsel. The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal, and will render such legal assistance to the Supreme Commander as is appropriate.

(b) Associate Counsel. Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

III FAIR TRIAL FOR ACCUSED

Article 9

Procedure for Fair Trial. In order to insure a fair trial for the accused the following procedure shall be followed:

(a) Indictment. The indictment shall consist of a plain, concise, and adequate statement of each offence charged. Each accused shall be furnished, in adequate time for defence, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

(b) Language. The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

(c) Counsel for Accused. Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

(d) Evidence for Defence. An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defence, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

(e) Production of Evidence for the Defence. An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness of the document and the relevancy of such facts to the defence. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

Article 10

Applications and Motions before Trial. All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

IV POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

Article 11

Powers. The Tribunal shall have the power

(a) To summon witnesses to the trial, to require them to attend and testify, and to question them,

(b) To interrogate each accused and to permit comment on his refusal to answer any question,

(c) To require the production of documents and other evidentiary material,

(d) To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths,

(e) To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

Article 12

Conduct of Trial. The Tribunal shall

(a) Confine the trial strictly to an expeditious hearing of the issues raised by the charges,

(b) Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever,
(c) Provide for the maintenance of order at the trial and deal summarily with any
contumacy, imposing appropriate punishment, including exclusion of any accused or his
 counsel from some or all further proceedings, but without prejudice to the determination
of the charges,

(d) Determine the mental and physical capacity of any accused to proceed to trial.

Article 13

Evidence

(a) Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall
adopt and apply to the greatest possible extent expeditious and non-technical procedure,
and shall admit any evidence which it deems to have probative value. All purported
admissions or statements of the accused are admissible.

(b) Relevance. The Tribunal may require to be informed of the nature of any evidence
before it is offered in order to rule upon the relevance.

(c) Specific Evidence Admissible. In particular, and without limiting in any way the scope
of the foregoing general rules, the following evidence may be admitted:

(1) A document, regardless of its security classification and without proof of its issuance
or signature, which appears to the Tribunal to have been signed or issued by any officer,
department, agency or member of the armed forces of any government.

(2) A report which appears to the Tribunal to have been signed or issued by the
International Red Cross or a member thereof, or by a doctor of medicine or any medical
service personnel, or by an investigator or intelligence officer, or by any other person
who appears to the Tribunal to have personal knowledge of the matters contained in the
report.

(3) An affidavit, deposition or other signed statement.

(4) A diary, letter or other document, including sworn or unsworn statements which
appear to the Tribunal to contain information relating to the charge.

(5) A copy of a document or other secondary evidence of its contents, if the original is
not immediately available.

(d) Judicial Notice. The Tribunal shall neither require proof, of facts of common
knowledge, nor of the authenticity of official government documents and reports of any
nation nor of the proceedings, records, and findings of military or other agencies of any
of the United Nations.

(e) Records, Exhibits and Documents. The transcript of the proceedings, and exhibits and
documents submitted to the Tribunal, will be filed with the General Secretary of the
Tribunal and will constitute part of the Record.

Article 14

Place of Trial. The first trial will be held at Tokyo and any subsequent trials will be held at
such places as the Tribunal decided

Article 15

Course of Trial Proceedings. The proceedings the Trial will take the following course:

(a) The indictment will be read in court unless the reading is waived by all accused.

(b) The Tribunal will ask each accused whether he pleads "guilty" or "not guilty."

(c) The prosecution and each accused (by counsel only, if represented) may make a
concise opening statement.

(d) The prosecution and defence may offer evidence and the admissibility of the same
shall be determined by the Tribunal.

(e) The prosecution and each accused (by counsel only, if represented) may examine
each witness and each accused who gives testimony.

(f) Accused (by counsel only, if represented) may address the Tribunal.

(g) The prosecution may address the Tribunal.

(h) The Tribunal will deliver judgment and pronounce sentence.

V JUDGMENT AND SENTENCE

Article 16

Penalty. The Tribunal shall have the power to impose upon an accused, on conviction,
death or such other punishment as shall be determined by it to be just.

Article 17

Judgment and Review. The judgment will be announced in open court and will give the
reasons on which it is based. The record of the trial will be transmitted directly to the
Supreme Commander for the Allied Powers for his action thereon. A sentence will be
carried out in accordance with the order of the Supreme Commander for the Allied
Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity.

By command of General MacArthur:

RICHARD J. MARSHALL Major General, General Staff Corps,
Chief of Staff.

OFFICIAL: B. M. FITCH
Brigadier General, AGD,
Adjutant General.
Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal
(United Nations General Assembly resolution 95 (I) of 11 December 1946)
Requests the Secretary-General to provide such assistance as the Committee may require for its work.

Fifty-fifth plenary meeting,
11 December 1946.

... ...

At the same plenary meeting, the General Assembly, on the recommendation of the President, appointed the following States to serve on the Committee:

Argentina, Australia, Brazil, China, Colombia, Egypt, France, India, Netherlands, Panama, Poland, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States of America, Venezuela, Yugoslavia.

95 (1). Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal

The General Assembly,
Recognizes the obligation laid upon it by Article 13, paragraph 1, sub-paragraph a, of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

Takes note of the Agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis signed in London on 8 August 1945, and of the Charter annexed thereto, and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946:

Therefore,
Affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal;

Directs the Committee on the codification of international law established by the resolution of the General Assembly of 11 December 1946,1 to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.

Fifty-fifth plenary meeting,
11 December 1946.

96 (1). The Crime of Genocide

Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the human conscience...
No. 1021

AUSTRALIA, BULGARIA, CAMBODIA, CEYLON, CZECHOSLOVAKIA, etc.


Registered ex officio on 12 January 1951.

AUSTRALIE, BULGARIE, CAMBODGE, CEYLAN, TCHÉCOSLOVAKIE, etc.


Textes officiels anglais, chinois, espagnol, français et russe.
Enregistrée d’office le 12 janvier 1951.

No. 1021. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE. ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 9 DECEMBER 1948

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (1) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world;

Recognizing that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,

HEREBY AGREE AS HEREAFTER PROVIDED:

# Ratifications

<table>
<thead>
<tr>
<th>Ratifications</th>
<th>Accessions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>8 July 1949</td>
</tr>
<tr>
<td>By a notification dated 8 July 1949 the Government of Australia extended the application of the Convention to all territories for the conduct of whose foreign relations Australia is responsible.</td>
<td></td>
</tr>
<tr>
<td>Bulgaria</td>
<td>21 July 1950</td>
</tr>
<tr>
<td>Cambodia</td>
<td>14 October 1950</td>
</tr>
<tr>
<td>El Salvador</td>
<td>29 September 1950</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>1 July 1949</td>
</tr>
<tr>
<td>France</td>
<td>22 December 1949</td>
</tr>
<tr>
<td>Guatemala</td>
<td>15 January 1950</td>
</tr>
<tr>
<td>Haiti</td>
<td>14 October 1950</td>
</tr>
<tr>
<td>Iceland</td>
<td>29 August 1949</td>
</tr>
<tr>
<td>Israel</td>
<td>9 March 1950</td>
</tr>
<tr>
<td>Liechtenstein</td>
<td>5 June 1930</td>
</tr>
<tr>
<td>Norway</td>
<td>22 July 1949</td>
</tr>
<tr>
<td>Panama</td>
<td>11 January 1950</td>
</tr>
<tr>
<td>Philippines</td>
<td>7 July 1950</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>29 August 1950</td>
</tr>
<tr>
<td><em>Czechoslovakia</em></td>
<td>21 December 1950</td>
</tr>
<tr>
<td><em>Egypt</em></td>
<td>14 October 1950</td>
</tr>
<tr>
<td><em>Estonia</em></td>
<td>29 September 1950</td>
</tr>
<tr>
<td><em>Ethiopia</em></td>
<td>1 July 1949</td>
</tr>
<tr>
<td><em>France</em></td>
<td>22 December 1949</td>
</tr>
<tr>
<td><em>Guatemala</em></td>
<td>15 January 1950</td>
</tr>
<tr>
<td><em>Haiti</em></td>
<td>14 October 1950</td>
</tr>
<tr>
<td><em>Iceland</em></td>
<td>29 August 1949</td>
</tr>
<tr>
<td><em>Israel</em></td>
<td>9 March 1950</td>
</tr>
<tr>
<td><em>Liberia</em></td>
<td>5 June 1930</td>
</tr>
<tr>
<td><em>Norway</em></td>
<td>22 July 1949</td>
</tr>
<tr>
<td><em>Panama</em></td>
<td>11 January 1950</td>
</tr>
<tr>
<td><em>Philippines</em></td>
<td>7 July 1950</td>
</tr>
<tr>
<td><em>Yugoslavia</em></td>
<td>29 August 1950</td>
</tr>
<tr>
<td>Laos</td>
<td>8 December 1950</td>
</tr>
<tr>
<td>Monaco</td>
<td>30 March 1950</td>
</tr>
<tr>
<td><em>Mongolia</em></td>
<td>14 November 1950</td>
</tr>
<tr>
<td><em>Romaia</em></td>
<td>2 November 1936</td>
</tr>
<tr>
<td>Saudi Arabia</td>
<td>13 July 1950</td>
</tr>
<tr>
<td><em>Turkey</em></td>
<td>31 July 1950</td>
</tr>
<tr>
<td>Viet-Nam</td>
<td>11 August 1950</td>
</tr>
</tbody>
</table>

* With reservations. For text of reservations, see pp. 314-322 of this volume.

# United Nations — Treaty Series

1951

278

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article III

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 IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.

Article VI

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.

Article VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

1 In accordance with resolution 368 (IV) (United Nations, document A/1251, 28 December 1949), adopted by the General Assembly at its 256th meeting on 3 December 1949, the Secretary-General was requested to dispatch invitations to sign and ratify or to accede to the Convention..."to each non-member State which is or hereafter becomes a member of one or more of the specialized agencies of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice".

Accordingly, invitations were addressed to the following States on the dates indicated below:

<table>
<thead>
<tr>
<th>Country</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>Albania</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Austria</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Ceylon</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Finland</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Hungary</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Iceland</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Italy</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Korea</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Monaco</td>
<td>6 December 1949</td>
</tr>
<tr>
<td>Portugal</td>
<td>31 May 1950</td>
</tr>
<tr>
<td>Romania</td>
<td>31 May 1950</td>
</tr>
<tr>
<td>Switzerland</td>
<td>31 May 1950</td>
</tr>
<tr>
<td>Hashimite Kingdom of the Jordan</td>
<td>31 May 1950</td>
</tr>
<tr>
<td>Indonesia</td>
<td>20 December 1950</td>
</tr>
<tr>
<td>Germany</td>
<td>28 May 1951</td>
</tr>
<tr>
<td>Japan</td>
<td>28 May 1951</td>
</tr>
</tbody>
</table>

No. 1021
The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a protocol and transmit a copy thereof to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effectual subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

Article XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

Article XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

---

1 See note page 282.
2 See p. 312 of this volume.

---

Article XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

Article XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following:

(a) Signatures, ratifications and accessions received in accordance with article XI;
(b) Notifications received in accordance with article XII;
(c) The date upon which the present Convention comes into force in accordance with article XIII;
(d) Denunciations received in accordance with article XIV;
(e) The abrogation of the Convention in accordance with article XV;
(f) Notifications received in accordance with article XVI.

Article XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to each Member of the United Nations and to each of the non-member States contemplated in article XI.

Article XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.
300
United Nations — Treaty Series 1951

FOR AUSTRALIA:
Pour l'Australie:
3a Австралия:
Por Australia:
Herbert Vere Evatt
December 11, 1948

FOR THE KINGDOM OF BELGIUM:
Pour le Royaume de Belgique:
比利时王国:
Por el Reino de Bélgica:
F. Van Langenhove
le 12 décembre 1949

FOR BOLIVIA:
Pour la Bolivie:
玻利维亚:
Por Bolivia:
A. Costa du R.
11 Dbre. 1948

FOR BRAZIL:
Pour le Brésil:
巴西:
Por el Brasil:
João Carlos Muñiz
11 Décembre 1948

FOR THE UNION OF BURMA:
Pour l'Union Birmane:
緬甸联邦:
Por la Unión Birmana:
U So Nyun
Dec. 30th 1949

1951
Nations Unies — Recueil des Traités 301

FOR THE BELARUSIAN SOVIET SOCIALIST REPUBLIC:
Pour la République Socialiste Soviétique de Biélorussie:
白俄罗斯蘇維埃社會主義共和國:
Por la República Socialista Soviética de Bielorrusia:
С сохраняя по статьям IX и XII, установленным в специальном протоколе, составленном при подписании настоящей конвенции.
K. Киселев
16/XII-49 г.

FOR CANADA:
Pour le Canada:
加拿大:
Por el Canadá:
Lester B. Pearson
Nov. 28/1949

For the reservations regarding Articles IX and XII stated in the special Procedural drawn up on signature of the present Convention.
K. Киселев
16/XII-49

These reservations are worded as follows:

"At the time of signing the present Convention the delegation of the Byelorussian Soviet Socialist Republic deemed it essential to state the following:

"As regards Article IX: The Byelorussian SSR does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Byelorussian SSR will, at hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"As regards Article XII: The Byelorussian SSR declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

1. Sous les reserves relatives aux articles IX et XII formulées dans le procès-verbal spécial établi lors de la signature de la présente Convention.
K. KISILEV
16/XII/49

Ces reserves sont consues comme suivi:

"Au moment de signer la présente Convention, la délégation de la République socialiste soviétique de Biélorussie aient exprèsement déclaré ce qui suit:

"En ce qui concerne l'art. IX: La RSS de Bélorussie n'est pas tenue par les dispositions de l'article IX qui stipule que les différends entre les Parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente Convention seront soumis à l'examen de la Cour internationale de Justice à la requête d'une partie au différend, et déclare qu'en ce qui concerne la compétence de la Cour en matière de différends relatifs à l'interprétation, l'application et l'exécution de la Convention, la RSS de Biélorussie continuera à soutenir, comme elle l'a fait jusqu'à ce jour, que, dans chaque cas particulier, l'accord de toutes les parties au différend est nécessaire pour que la Cour internationale puisse être saisie de ce différend aux fins de décision.

"En ce qui concerne l'art. XII: La RSS de Bélorussie déclare qu'elle n'accepte pas les termes de l'article XII de la Convention et estime que toutes les clauses de ladite Convention devraient s'appliquer aux territoires non autonomes, y compris les territoires sous tutelle."

N° 1021
FOR CHILE:
POUR LE CHILI:
智利:
3a Chile:
POR CHILE:

Con la reserva que requiere también la aprobación del Congreso de mi país.¹
H. ARANCIBIA LASO

FOR CHINA:
POUR LA CHINE:
中國:
3a Chine:
POR LA CHINA:

Tingfu F. Tsiang
July 20, 1949

FOR COLOMBIA:
POUR LA COLOMBIE:
哥倫比亞:
3a Colombia:
POR COLOMBIA:

Eduardo Zuleta Angel
Aug. 12, 1949

FOR CUBA:
POUR CUBA:
古巴:
3a Cuba:
POR CUBA:

Carlos Blanco
December 28, 1949

¹ Subject to the reservation that it also requires the approval of the Congress of my country.
H. Arangibia Lazo

FOR CZECHOSLOVAKIA:
POUR LA TCHÉCOSLOVAQUIE:
捷克斯拉夫:
3a Tchecoslovaquie:
POR CHECOSLOVAQUIA:

December 28th, 1949

FOR DENMARK:
POUR LE DANEMARK:
丹麥:
3a Danemark:
POR DINAMARCA:

William Borberg
le 28 septembre 1949

*= These reservations are worded as follows:
"At the time of signing the present Convention the delegation of Czechoslovakia deemed it essential to state the following:
"As regards Article IX, Czechoslovakia does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of this Convention, Czechoslovakia will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision."

"As regards Article XII, Czechoslovakia declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

¹ Sous les réserves* relatives aux articles IX et XII formulées dans le procès-verbale de signature en date de ce jour.

V. Oustrata
le 28 décembre 1949

*= Ces réserves sont consignées comme suit:
"Au moment de signer la présente Convention, la délégation de Tchécoslovaquie a jugé nécessaire de préciser ce qui suit:
"En ce qui concerne l'article IX : La Tchécoslovaquie ne considère pas comme liant pour elle les dispositions de l'article IX qui stipule que les différends entre les Parties contractantes relatifs à l'interprétation, l'application et l'interprétation de la présente Convention seront soumis à l'examen de la Cour internationale de Justice à la requête de l'une des parties au différend, et déclare qu'elle considère la compétence de la Cour en matière de différends relatifs à l'interprétation, l'application, et l'exécution de la Convention, la Tchécoslovaquie continuera à soutenir, comme elle l'a fait jusqu'à ce jour, que dans chaque cas particulier, l'accord de toutes les parties au différend est nécessaire pour que la Cour internationale de Justice puisse être saisie de ce différend aux fins de décision."

N 1021
For the Dominican Republic:
Pour la République Dominicaine:
Joaquín Balaguer
11 dic. 1948.

For Ecuador:
Pour l’Équateur:
Héctor Viteri Lafontte
11 Diciembre de 1948

For Egypt:
Pour l’Égypte:
Ahmed Moh. Kachaba
12-12-48

For El Salvador:
Pour le Salvador:
M. (Rafael Urquia
Abilr 27 de 1949

For Ethiopia:
Pour l’Éthiopie:
Abilr 27 de 1949

For France:
Pour la France:
Robert Schuman
11 déc. 1948.

For Greece:
Pour la Grèce:
Alexis Kyrou
29 décembre 1949

For Guatemala:
Pour le Guatemala:
Carlos García Bauer
June 22, 1949

For Haiti:
Pour Haïti:
Démémin, Sr.:
Le 11 Décembre 1948

For Honduras:
Pour le Honduras:
Tiburcio Carías Jr.
Abilr 22, 1949
For Iceland:
Pour l’Islande:
Iceland:
3a. Iceland:
Por Islandia:

Thor Thors
May 14, 1949

For India:
Pour l’Inde:
India:
3a. India:
Por la India:

B. N. Rau
November 29, 1949

For Iran:
Pour l'Iran:
Iran:
3a. Iran:
Por Irán:

Nasrollah Entezam
December 8th, 1949

For Lebanon:
Pour le Liban:
Lebanon:
3a. Lebanon:
Por el Líbano:

Charles Malik
December 30, 1949

For Liberia:
Pour le Libéria:
Liberia:
3a. Liberia:
Por Liberia:

Henry Cooper
11/12/49

For Mexico:
Pour le Mexique:
Mexico:
3a. Mexico:
Por México:

L. Padilla Nervo

For New Zealand:
Pour la Nouvelle-Zélande:
New Zealand:
3a. New Zealand:
Por Nueva Zelanda:

C. Berendsen
November 25th, 1949

For the Kingdom of Norway:
Pour le Royaume de Norvège:
Norway:
3a. Norway:
Por el Reino de Noruega:

Finn Mor
Le 11 Décembre 1948.

For Pakistan:
Pour le Pakistan:
Pakistan:
3a. Pakistan:
Por el Pakistán:

Zafarulla Khan
Dec. 11. ’48.

For Panama:
Pour le Panama:
Panama:
3a. Panama:
Por Panamá:

R. J. Alfaro
11 décembre 1948.
FOR THE PHILIPPINE REPUBLIC:
POUR LA RÉPUBLIQUE DES PHILIPPINES:
菲侖誥共和國:
Pour la République de Philippines:
Carlos P. Romulo
December 11, 1948

FOR SWEDEN:
POUR LA SUÈDE:
瑞典:
Pour la Suède:
Sven Grafström
December 30, 1949

FOR PERU:
POUR LE PéRou:
秘鲁:
Pour le Pérou:
F. Bergemeier
Diciembre 11/1948

FOR PARAGUAY:
POUR LE PARAGUAY:
巴拉圭:
Pour le Paraguay:

FOR THE UKRAINIAN SOVIET SOCIALIST REPUBLIC:
POUR LA RÉPUBLIQUE SOVIÉTIQUE D'UKRAINE:
Українську Ресpubліку Соціалістичну Республіку:
Pour la République Socialiste Soviétique d'Ukraine:

With the reservations regarding Articles IX and XII stated in the special Procedura drawn up on signature of the present Convention.
A. Vorona
Deputy Minister of Foreign Affairs of the Ukrainian Soviet Socialist Republic.
16/XIII/1949

These reservations are worded as follows:

"As regards Article IX: The Ukrainian SSR does not consider as binding upon itself the provisions of Article IX which provide that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Ukrainian SSR will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"As regards Article XII: The Ukrainian SSR declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

1 Sous les réserves relatives aux articles IX et XII formulées dans le procès-verbal spécial établi lors de la signature de la présente Convention.

A. Vorona
Ministre des affaires étrangères de la République socialiste soviétique d'Ukraine par intérim.
16/XIII/1949

These reservations are worded as follows:

"As regards Article IX: The Ukrainian SSR does not consider as binding upon itself the provisions of Article IX which provide that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Ukrainian SSR will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"As regards Article XII: The Ukrainian SSR declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

1 Sous les réserves relatives aux articles IX et XII formulées dans le procès-verbal spécial établi lors de la signature de la présente Convention.

A. Vorona
Ministre des affaires étrangères de la République socialiste soviétique d'Ukraine par intérim.
16/XIII/1949

These reservations are worded as follows:

"As regards Article IX: The Ukrainian SSR does not consider as binding upon itself the provisions of Article IX which provide that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Ukrainian SSR will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"As regards Article XII: The Ukrainian SSR declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

1 Sous les réserves relatives aux articles IX et XII formulées dans le procès-verbal spécial établi lors de la signature de la présente Convention.

A. Vorona
Ministre des affaires étrangères de la République socialiste soviétique d'Ukraine par intérim.
16/XIII/1949

These reservations are worded as follows:

"As regards Article IX: The Ukrainian SSR does not consider as binding upon itself the provisions of Article IX which provide that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Ukrainian SSR will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"As regards Article XII: The Ukrainian SSR declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."

1 Sous les réserves relatives aux articles IX et XII formulées dans le procès-verbal spécial établi lors de la signature de la présente Convention.

A. Vorona
Ministre des affaires étrangères de la République socialiste soviétique d'Ukraine par intérim.
16/XIII/1949

These reservations are worded as follows:

"As regards Article IX: The Ukrainian SSR does not consider as binding upon itself the provisions of Article IX which provide that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Ukrainian SSR will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

"As regards Article XII: The Ukrainian SSR declares that it is not in agreement with Article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories."
FOR THE UNION OF SOVIET SOCIALIST REPUBLICS:
Pour l'Union des Républiques Socialistas Soviéticas:
Согреваю по статьям IX и XII, включаемые в специальный
протокол, состоящий при подписании посвященной конвенции.

A. Панюшкин
16.12.49

FOR THE UNITED STATES OF AMERICA:
Pour les États-Unis d'Amérique:
3. Since 40 miles above.

Ernest A. Gross
Dec 11, 1948

Note 1:
With the reservations regarding Articles IX
and XII stated in the present, Protokoll drawn
up on signature of the present Convention.
A. Panyushkin
16.12.49

These reservations are worded as follows:

"At the time of signing the present Convention,
the delegation of the Union of Soviet Socialist
Republics deemed it essential to state the following:

"As regards Article IX: The Soviet Union does
not consider as binding upon itself the provisions
of Article IX which provide that disputes between
the Contracting Parties with regard to the inter-
pretation, application and implementation of the
present Convention shall be referred for examina-
tion to the International Court at the request of
any party to the dispute, and declares that, as
regards the International Court's jurisdiction in
respect of disputes concerning the interpretation,
application and implementation of the Conven-
tion, the Soviet Union will, as hitherto, maintain
the position that in each particular case the
agreement of all parties to the dispute is essential
for the submission of any particular dispute to the
International Court for decision.

"As regards Article XII: The Union of Soviet
Socialist Republics declares that it is not in
agreement with Article XII of the Convention and
considers that all the provisions of the Convention
should extend to non-self-governing territories,
including trust territories."
PROCÈS-VERBAL ESTABLISHING
THE DEPOSIT OF TWENTY
INSTRUMENTS OF RATIFI-
CATION OR ACCESSION TO
THE CONVENTION ON THE
PREVENTION AND PUNISH-
MENT OF THE CRIME OF
GENOCIDE

CONSIDERING that article XIII,
paragraphs one and two, of the Con-
vention on the Prevention and Pun-
ishment of the Crime of Genocide
provides that:

"On the day when the first twenty instruments of ratification or accession have been deposited,
the Secretary-General shall draw up a procès-verbal and transmit a
copy of it to each Member of the
United Nations and to each of the
non-member States contemplated
in article XI.

"The present Convention shall
come into force on the ninetieth day
following the date of deposit of the
twentieth instrument of ratification
or accession."

CONSIDÉRANT que l'article XIII de
la Convention pour la prévention et
la répression du crime de génocide
stipule, dans ses paragraphes un et
deux, que:

«Dès le jour où les vingt premiers
instruments de ratification ou
d'adhésion auront été déposés, le
Secrétaire général en dressera pro-
cès-verbal. Il transmettra copie de
ce procès-verbal à tous les États
Membres des Nations Unies et aux
non-membres visés par l'article XI.

«La présente Convention entrera
en vigueur le quatre-vingt-dixième
jour qui suivra la date du dépôt du
vingtième instrument de ratification
ou d'adhésion.»

CONSIDÉRANT que la condition pré-
vue au paragraphe premier a, ce
jour, été réalisée;

Therefore, the Secretary-General
has drawn up this Procès-Verbal in the
English and French languages.

Done at Lake Success, New York, this 14th day of October 1950.

Fait à Lake Success, New York, le 14 octobre 1950.

For the Secretary-General:
Pour le Secrétaire général:

Dr. Ivan S. KARNO
Assistant Secretary-General
Legal Department
Secrétaire général adjoint
Département juridique
RATIFICATIONS WITH RESERVATIONS

PHILIPPINES

WHEREAS, The Convention on the Prevention and Punishment of the Crime of Genocide was approved by the General Assembly of the United Nations during its Third Session on December 9, 1948, and was signed by the authorized representative of the Philippines on December 11, 1948;

WHEREAS, Article XI of the Convention provides that the present Convention shall be ratified and the instruments of ratification deposited with the Secretary-General of the United Nations; and

WHEREAS, the Senate of the Philippines, by its Resolution No. 9, adopted on February 28, 1950, concurred in the ratification by the President of the Philippines of the aforesaid Convention in accordance with the Constitution of the Philippines, subject to the following reservations:

"1. With reference to Article IV of the Convention, the Philippine Government cannot sanction any situation which would subject its Head of State, who is not a ruler, to conditions less favorable than those accorded other Heads of State, whether constitutionally responsible rulers or not. The Philippine Government does not consider said Article, therefore, as overriding the existing immunities from judicial processes guaranteed certain public officials by the Constitution of the Philippines.

2. With reference to Article VII of the Convention, the Philippine Government does not undertake to give effect to said Article until the Congress of the Philippines has enacted the necessary legislation defining and punishing the crime of genocide, which legislation, under the Constitution of the Philippines, cannot have any retroactive effect.

3. With reference to Articles VI and IX of the Convention, the Philippine Government takes the position that nothing contained in said Articles shall be construed as depriving Philippine courts of jurisdiction over all cases of genocide committed within Philippine territory save only in those cases where the Philippine Government consents to have the decision of the Philippine courts reviewed by either of the international tribunals referred to in said Articles. With further reference to Article IX of the Convention, the Philippine Government does not consider said Article to extend the concept of State responsibility beyond that recognized by the generally accepted principles of international law."

NOW, THEREFORE, be it known that I, Elpidio Quirino, President of the Philippines, after having seen and considered the said Convention, do hereby, in pursuance of the aforesaid concurrence of the Senate and subject to the reservations above-quoted, ratify and confirm the same and every article and clause thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the Republic of the Philippines to be affixed.

DONE in the City of Manila, this 23rd day of June, in the year of Our Lord, nineteen hundred and fifty, and of the Independence of the Philippines, the fourth.

(Signed) Quirino

By the President:
(Signed) Felino Neri
Undersecretary of Foreign Affairs

CZECHOSLOVAKIA

TRANSLATION

WHEREAS, we have examined this Convention, and the National Assembly of the Czechoslovak Republic has signified its agreement thereto,

NOW, THEREFORE,

We do hereby approve and ratify it, subject to the reservations stated in the Protocol of signature of the Convention.

IN FAITH WHEREOF we have signed this instrument and affixed thereto the seal of the Czechoslovak Republic.

GIVEN at Prague Castle, 24 October 1950.

(Signed) Gottwald
President of the Czechoslovak Republic

(Signed) Z. Fierlingh
Minister for Foreign Affairs

1 See page 303 of this volume.
ACCESSIONS WITH RESERVATIONS

BULGARIA

TRANSLATION

THE PRESIDIOUM OF THE NATIONAL ASSEMBLY OF THE PEOPLE'S REPUBLIC OF BULGARIA,

HAVING SEEN AND EXAMINED the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide,

CONFIRMS its accession to this Convention with the following reservations:

1. As regards article IX: The People's Republic of Bulgaria does not consider as binding upon itself the provisions of article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court of Justice at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the People's Republic of Bulgaria will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court of Justice for decision.

2. As regards article XII: The People's Republic of Bulgaria declares that it is not in agreement with article XII of the Convention and considers that all the provisions of the Convention should extend to non-self-governing territories, including trust territories.

AND DECLARES its assurance of the application thereof.

IN FAITH WHEREOF has signed the present instrument and has had affixed the seal of the State thereto.

Given at Sofia, on 12 July one thousand nine hundred and fifty.

The President: 
(Illigible)

The Secretary: 
(Illigible)

The Minister for Foreign Affairs:
(Signed) M. Netcheff

320 United Nations — Treaty Series 1951

POLAND

TRANSLATION

In the name of the Polish Republic, BOLESŁAW BIERUT, President of the Polish Republic,

To all men who may see these presents: be it known that

A Convention for the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly of the United Nations on 9 December 1948:

Having read and examined the said Convention, We accede to it in the name of the Polish Republic subject to the following reservations:

“As regards article IX, Poland does not regard itself as bound by the provisions of this article since the agreement of all the parties to a dispute is a necessary condition in each specific case for submission to the International Court of Justice,

“As regards article XII, Poland does not accept the provisions of this article, considering that the Convention should apply to Non-Self-Governing Territories, including Trust Territories.”

We declare that the above-mentioned Convention is accepted, ratified and confirmed and promise that it shall be observed without violation.

IN FAITH WHEREOF, We have issued the present letters bearing the seal of the Republic.

Given at Warsaw, 22 September 1950.

(Signed) J. Cyraniewicz
President of the Council of Ministers

(Signed) St. Skrzeszewski
for Minister for Foreign Affairs
ROMANIA

TRANSLATION

As regards article IX: The People's Republic of Romania does not consider itself bound by the provisions of article IX, which provides that disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute, and declares that as regards the jurisdiction of the Court in disputes relating to the interpretation, application or fulfilment of the Convention, the People's Republic of Romania will adhere to the view which it has held up to the present, that in each particular case the agreement of all the parties to a dispute is required before it can be referred to the International Court of Justice for settlement.

As regards article XII: The People's Republic of Romania declares that it is not in agreement with article XII of the Convention, and considers that all the provisions of the Convention should apply to the Non-Self-Governing Territories, including the Trust Territories.
INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID

The States Parties to the present Convention,
Recalling the provisions of the Charter of the United Nations, in which all Members pledged themselves to take joint and separate action in co-operation with the Organization for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,
Considering the Universal Declaration of Human Rights, which states that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth in the Declaration, without distinction of any kind, such as race, colour or national origin,
Considering the Declaration on the Granting of Independence to Colonial Countries and Peoples, in which the General Assembly stated that the process of liberation is irresistible and irreversible and that, in the interests of human dignity, progress and justice, an end must be put to colonialism and all practices of segregation and discrimination associated therewith,
Observing that, in accordance with the International Convention on the Elimination of All Forms of Racial Discrimination, States particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction,
Observing that, in the Convention on the Prevention and Punishment of the Crime of Genocide, certain acts which may also be qualified as acts of apartheid constitute a crime under international law,

1 Came into force on 18 July 1976 in respect of the following States, 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 XV (1). The instruments of ratification or accession were deposited as follows:

<table>
<thead>
<tr>
<th>State</th>
<th>Date of deposit of the instrument of ratification or accession (a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Benin</td>
<td>8 September 1975</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>8 July 1974</td>
</tr>
<tr>
<td>Byelorussian Soviet Socialist Republic</td>
<td>2 December 1975</td>
</tr>
<tr>
<td>Chad</td>
<td>23 October 1974</td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>6 May 1975</td>
</tr>
<tr>
<td>East Germany</td>
<td>13 November 1975</td>
</tr>
<tr>
<td>Fiji</td>
<td>4 July 1975</td>
</tr>
<tr>
<td>Gambia</td>
<td>2 November 1975</td>
</tr>
<tr>
<td>Madagascar</td>
<td>23 May 1976</td>
</tr>
<tr>
<td>Malawi</td>
<td>9 July 1976</td>
</tr>
<tr>
<td>Mozambique</td>
<td>31 July 1975</td>
</tr>
<tr>
<td>Namibia</td>
<td>20 July 1975</td>
</tr>
<tr>
<td>Nepal</td>
<td>22 January 1975</td>
</tr>
<tr>
<td>Nicaragua</td>
<td>30 June 1975</td>
</tr>
<tr>
<td>New Zealand</td>
<td>24 December 1975</td>
</tr>
<tr>
<td>Nigeria</td>
<td>27 June 1975</td>
</tr>
<tr>
<td>Pakistan</td>
<td>23 March 1975</td>
</tr>
<tr>
<td>Poland</td>
<td>10 November 1975</td>
</tr>
<tr>
<td>Qatar</td>
<td>25 March 1975</td>
</tr>
<tr>
<td>Qatar, Emirate of</td>
<td>10 November 1975</td>
</tr>
<tr>
<td>Syria</td>
<td>30 January 1975</td>
</tr>
<tr>
<td>United Arab Emirates</td>
<td>2 November 1975</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>1 July 1975</td>
</tr>
</tbody>
</table>

Subsequently, the Convention came into force in respect of the following State on the thirtieth day after the date of the deposit of its instrument of accession, in accordance with article XV (2):

<table>
<thead>
<tr>
<th>State</th>
<th>Date of deposit of the instrument of accession (a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S.S.R.</td>
<td>9 July 1976</td>
</tr>
</tbody>
</table>

(With effect from 9 August 1976.)

*For the texts of the declarations made upon ratification, see p. 296 of this volume.

4 ibid., vol. 78, p. 227.
Observing that, in the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, "inhuman acts resulting from the policy of apartheid" are qualified as crimes against humanity, 

Observing that the General Assembly of the United Nations has adopted a number of resolutions in which the policies and practices of apartheid are condemned as a crime against humanity, 

Observing that the Security Council has emphasized that apartheid and its continued intensification and expansion seriously disturb and threaten international peace and security. 

Convinced that an International Convention on the Suppression and Punishment of the Crime of Apartheid would make it possible to take more effective measures at the international and national levels with a view to the suppression and punishment of the crime of apartheid, 

Have agreed as follows:

Article I. The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.

2. The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid.

Article II. For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

(a) denial to a member or members of a racial group or groups of the right to life and liberty of person:

(i) by murder of members of a racial group or groups;

(ii) by the infraction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by submitting them to torture or to cruel, inhuman or degrading treatment or punishment;

(iii) by arbitrary arrest and illegal imprisonment of the members of a racial group or groups;

(b) deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part;

(c) any legislative or other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association;
Article XIV. 1. The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article XV. 1. The present 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 the present Convention or acceding to it after the deposit of the twentieth instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article XVI. A State Party may denounced the present Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article XVII. 1. A request for the revision of the present Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

Article XVIII. The Secretary-General of the United Nations shall inform all States of the following particulars:

(a) signatures, ratifications and accessions under articles XIII and XIV;
(b) the date of entry into force of the present Convention under article XV;
(c) denunciations under article XVI;
(d) notifications under article XVII.

Article XIX. 1. The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of the present Convention to all States.
Convention against torture and other cruel, inhuman or degrading treatment or punishment, 1984
CONVENTION 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 article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,
Having regard also to the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly on 9 December 1975,
Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world,
Have agreed as follows:

PART I

Article 1. 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. See p. 190 of this volume for the texts of the declarations recognizing the competence of the Committee against Torture, in accordance with articles 21 and 22.


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 of concern 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 12. 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 13. 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 14. 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 15. 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 16. 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. 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 shall, 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 members 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.

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


1987

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 accessioning 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 accessions 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. 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.]
DECLARATIONS AND RESERVATIONS
MADE UPON SIGNATURE
10 June 1986

BULGARIA

[Translation provided by the Government of Bulgaria.]

1. Pursuant to Article 28 of the Convention, the People's Republic of Bulgaria states that it does not recognize the competence of the Committee against Torture provided for in Article 20 of the Convention, as it considers that the provisions of Article 20 are not consistent with the principle of respect for sovereignty of the States—parties to the Convention.

2. Pursuant to Article 30, paragraph 2 of the Convention, the People's Republic of Bulgaria states that it does not consider itself bound by the provisions of Article 30, paragraph 1 of the Convention, establishing compulsory jurisdiction of international arbitration or the International Court of Justice in the settlement of disputes between States—parties to the Convention. The People's Republic of Bulgaria maintains its position that disputes between two or more States can be submitted for consideration and settlement by international arbitration or the International Court of Justice.

[Traduction]

1. En application de l'article 28 de la Convention, la République populaire de Bulgarie déclare qu'elle ne reconnaît pas la compétence accordée au Comité contre la torture aux termes de l'article 20 de la Convention puisqu'elle estime que les dispositions de l'article 20 ne sont pas compatibles avec le principe du respect de la souveraineté des États parties à la Convention.

2. En application du paragraphe 2 de l'article 30 de la Convention, la République populaire de Bulgarie déclare qu'elle ne se considère pas liée par les dispositions du paragraphe 1 de l'article 30 de la Convention rendant obligatoire le recours à l'arbitrage international ou à la Cour internationale de Justice pour le règlement des différends entre États parties à la Convention. Elle maintient que les différends entre deux États ou plus ne peuvent être soumis à un arbitrage international ou à la Cour internationale de Justice, pour examen et règlement, que si toutes les parties au différend consentent à une telle intervention.

8 September 1986

CZECHOSLOVAKIA

[For the text of the reservations, see p. 164 of this volume.]

1 Translation provided by the Government of the Byelorussian Soviet Socialist Republic.

8 September 1986

CHRISTOPHER H. RUDY

19 December 1985

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

[Translation provided by the Government of the Byelorussian Soviet Socialist Republic.]

1. La République socialiste soviétique de Biélorussie ne reconnaît pas la compétence du Comité contre la torture, telle qu'elle est définie à l'article 20 de la Convention.

2. La République socialiste soviétique de Biélorussie ne se considère pas liée par les dispositions du paragraphe 1 de l'article 30 de la Convention.

12 December 1986

CHINA

[Traduction — Translation]

1) Le Gouvernement chinois ne reconnaît pas la compétence accordée au Comité contre la torture aux termes de l'article 20 de la Convention.

2) Le Gouvernement chinois ne se considère pas lié par le paragraphe 1 de l'article 30 de la Convention.

8 September 1986

TCHÉCOSLOVAQUIE

[Pour le texte des réserves, voir p. 164 du présent volume.]

1 Traduction fournie par le Gouvernement de la République socialiste soviétique de Biélorussie.
7 April 1986

GERMAN DEMOCRATIC REPUBLIC

REPUBLICA DÉMOCRATIQUE ALLEMANDE

[German text — Texte allemand]

„Die Deutsche Demokratische Republik erklärt in Übereinstimmung mit Artikel 28 Absatz 1 der Konvention, daß sie die in Artikel 20 vorgesehene Kompetenz des Komitees nicht anerkennt.

Die Deutsche Demokratische Republik erklärt in Übereinstimmung mit Artikel 30 Absatz 2 der Konvention, daß sie sich durch Artikel 30 Absatz 1 nicht als gebunden betrachtet.“

[Translation — Traduction]
The German Democratic Republic declares in accordance with Article 28, paragraph 1 of the Convention that it does not recognize the competence of the Committee provided for in Article 20.

The German Democratic Republic declares in accordance with Article 30, paragraph 2 of the Convention that it does not consider itself bound by paragraph 1 of this Article.

13 October 1986

GERMANY,
FEDERAL REPUBLIC OF

ALLEMAGNE,
RÉPUBLIQUE FÉDÉRALE D’

[German text — Texte allemand]

„Die Regierung der Bundesrepublik Deutschland behält sich das Recht vor, bei der Ratifizierung diejenigen Vorbehälte oder Interpretationserklärungen mitzuhalten, die sie insbesondere im Hinblick auf die Anwendbarkeit von Artikel 3 für erforderlich hält.“

[Traduction — Traduction]
The Government of the Federal Republic of Germany reserves the right to communicate, upon ratification, such reservations or declarations of interpretation as are deemed necessary especially with respect to the applicability of article 3.

8 January 1986

MOOROCCO

MAROC

[Arabic text — Texte arabe]

ورفقًا للمفرزة الأولى من المادة 28 فإن الحكومة الملكية المغربية تعترف في المادة 20 وفقًا للمفرق التأسيسي من المادة 30 أن الحكومة الملكية المغربية تعتبر مجزأة من نفس المادة.

[Traduction — Traduction]

In accordance with article 28, paragraph 1, the Government of Morocco declares that it does not recognize the competence of the Committee provided for in article 20.

In accordance with article 30, paragraph 2, the Government of the Kingdom of Morocco declares further that it does not consider itself bound by paragraph 1 of the same article.

1 Translation provided by the Government of Hungary.
2 Traduction fournie par le Gouvernement hongrois.
13 January 1986

POLAND

13 janvier 1986

POLOGNE

[Polish text — Texte polonais]

“Zgodnie z artykułem 28, Polska Rzeczpospolita Ludowa nie uważa się za związaną artykułem 20 Konwencji.

Ponadto Polska Rzeczpospolita Ludowa nie uważa się za związaną artykułem 30 ust.1 Konwencji.”

[Translation¹ — Traduction²]

Under article 28 the Polish People’s Republic does not consider itself bound by article 20 of the Convention.

Furthermore, the Polish People’s Republic does not consider itself bound by article 30, paragraph 1, of the Convention.

25 March 1987

TOGO

25 mars 1987

TOGO

[Translation — Traduction]

The Government of the Togolese Republic reserves the right to formulate, upon ratifying the Convention, any reservations or declarations which it might consider necessary.

27 February 1986

UKRAINIAN SOVIET SOCIALIST REPUBLIC

27 février 1986

RÉPUBLIQUE SOCIALISTE

SOVIÉTIQUE D’UKRAINE

[Russian text — Texte ukrainien]

«1. Українська Радянська Соціалістична Республіка не визнає компетенцію Комітету проти катування, визначену статтею 20 Конвенції.

2. Українська Радянська Соціалістична Республіка не вважає себе зв’язаною положеннями пункту 1 статті 30 Конвенції.»

¹ Translation provided by the Government of Poland.
² Traduction fournie par le Gouvernement polonais.

10 December 1985

UNION OF SOVIET SOCIALIST REPUBLICS

10 décembre 1985

UNION DES RÉPUBLIQUES SOCIALISTES SOVIÉTIQUES

[Russian text — Texte russe]

«1. Союз Советских Социалистических Республик не признает компетенцию Комитета против пыток, определенную статьей 20 Конвенции.

2. Союз Советских Социалистических Республик не считает себя связанным положениями пункта 1 статьи 30 Конвенции.»

¹ Translation provided by the Government of the Ukrainian Soviet Socialist Republic.
² Traduction fournie par le Gouvernement de la République socialiste soviétique d’Ukraine.
³ Translation provided by the Government of the Union of Soviet Socialist Republics.

15 March 1985

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

15 mars 1985

ROYAUME-UNI DE GRANDE-BRETAGNE ET D’IRLANDE DU NORD

[Translation — Traduction]

“The United Kingdom reserves the right to formulate, upon ratifying the Convention, any reservations or interpretative declarations which it might consider necessary.”

¹ Traduction fournie par le Gouvernement de l’Union des Républiques socialistes soviétiques.
DECLARATIONS RECOGNIZING THE COMPETENCE OF THE COMMITTEE AGAINST TORTURE

ARGENTINA

[SPANISH TEXT — TEXTE ESPAGNOL]

"Con arreglo a los artículos 21 y 22 de la presente Convención, la República Argentina reconoce la competencia del Comité contra la tortura para recibir y examinar las comunicaciones en que un Estado Parte alegue que otro Estado Parte no cumple las obligaciones que le impone la Convención. Asimismo, reconoce la competencia del Comité para recibir y examinar las comunicaciones enviadas por personas sometidas a su jurisdicción, o en su nombre, que aleguen ser víctimas de una violación por un Estado Parte de las disposiciones de la Convención."

[TRANSLATION]

In accordance with articles 21 and 22 of this Convention, the Argentine Republic recognizes the competence of the Committee against Torture 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. It also 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.

DENMARK

"The Government of Denmark declares, pursuant to Article 21, paragraph 1 of the Convention that Denmark recognizes the competence of the Committee to receive and consider communications to the effect that the State Party claims that another State Party is not fulfilling its obligations under this Convention.

The Government of Denmark also declares, pursuant to Article 22, paragraph 1 of the Convention that Denmark 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."

FRANCE

[TRANSLATION — TRADUCTION]

... The Government of the French Republic declares, in accordance with article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention.

The Government of the French Republic declares, in accordance with article 22, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture 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.

 NORVÈGE

[TRADUCTION — TRANSLATION]

Le Gouvernement de la République française déclare, conformément au paragraphe 1er de l'article 21 de la Convention, qu’il reconnaît la compétence du Comité contre la torture pour recevoir et examiner des communications dans lesquelles un État partie prétend qu’un autre État partie ne s’acquitte pas de ses obligations au titre de la présente Convention.

Le Gouvernement de la Norvège déclare également, en application de l’article 22, paragraphe 1er, de la Convention, que la Norvège reconnaît la compétence du Comité pour recevoir et examiner des communications présentées par ou pour le compte de particuliers relevant de sa juridiction qui prétendent être victimes d’une violation, par un État partie, des dispositions de la Convention.
SWEDEN

"... Pursuant to Article 21, paragraph 1 of the Convention, ... Sweden 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.

... Pursuant to Article 22, paragraph 1 of the Convention, ... Sweden 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."

SWITZERLAND

[TRANSLATION — TRADUCTION]

(a) Pursuant to the Federal Decree of 6 October 1986 on the approval of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Federal Council declares, in accordance with article 21, paragraph 1, of the Convention, that Switzerland recognizes the competence of the Committee to receive and consider communications to the effect that a State party claims that Switzerland is not fulfilling its obligations under this Convention.

(b) Pursuant to the above-mentioned Federal Decree, the Federal Council declares, in accordance with article 22, paragraph 1, of the Convention, that Switzerland 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 Switzerland of the provisions of the Convention.

SUISSE

RESERVATIONS MADE
UPON RATIFICATION

AFGHANISTAN

RÉSERVES FAITES
LOURS DE LA RATIFICATION

AFGHANISTAN

[DAHI TEXT — TEXTE DARI]

(a) Le Conseil fédéral en vertu de l’Arrêté fédéral du 6 octobre 1986 relatif à l’approbation de la Convention contre la torture et autres peines ou traitements cruelles, inhumains ou dégradants, déclare, conformément à l’article 21, 1er alinéa de la Convention, que la Suisse reconnaît la compétence du Comité pour recevoir et examiner des communications dans lesquelles un Etat partie prétend que la Suisse ne s’acquitte pas de ses obligations au titre de la présente Convention.

b) Le Conseil fédéral en vertu de l’Arrêté fédéral précité déclare, conformément à l’article 22, 1er alinéa de la Convention, que la Suisse reconnaît la compétence du Comité pour recevoir et examiner des communications présentées par ou pour le compte de particuliers relevant de sa juridiction qui prétendent être victimes d’une violation, par la Suisse, des dispositions de la Convention."
[TRANSLATION — TRADUCTION]

While ratifying the above-mentioned convention, the Democratic Republic of Afghanistan, invoking paragraph 1 of the Article 28, of the Convention, does not recognize the authority of the committee as foreseen in the Article 20 of the Convention.

Also according to paragraph 2 of the Article 30, the Democratic Republic of Afghanistan, will not be bound to honour the provision of paragraph 1 of the same Article since according to that paragraph the compulsory submission of disputes in connection with interpretation or the implementation of the provisions of this convention by one of the parties concerned to the International Court of Justice is deemed possible. Concerning to this matter, it declares that the settlement of disputes between the States Parties, such disputes may be referred to arbitration or to the International Court of Justice with the consent of all the Parties concerned and not by one of the Parties.

BULGARIA

[Confirming the reservations made upon signature. See p. 198 of this volume.]

[Traduction — Traduction]

La République démocratique d’Afghanistan ratifie la Convention mais, s’autorisant du paragraphe 1 de l’article 28 de cet instrument, ne reconnaît pas la compétence accordée au Comité aux termes de l’article 20.

En outre, comme le permet le paragraphe 2 de l’article 30, la République démocratique d’Afghanistan déclare qu’elle ne se considère pas lié par les dispositions du paragraphe 1 dudit article, qui établissent qu’en cas de différend concernant l’interprétation ou l’application de la Convention, l’une des parties intéressées peut exiger que ce différend soit soumis à la Cour internationale de Justice. La République démocratique d’Afghanistan déclare que les différends entre États parties ne peuvent être soumis à l’arbitrage ou à la Cour internationale de Justice qu’avec le consentement de toutes les parties intéressées et non pas seulement par la volonté de l’une d’entre elles.

BULGARIE

[Confirming the reservations made upon signature. See p. 198 of this volume.]

BYELORUSSIAN SOVIET SOCIALIST REPUBLIC

RÉPUBLIQUE SOCIALISTE SOVIÉTIQUE DE BIÉLORUSSIE

[Confirming the reservations made upon signature. See p. 198 of this volume.]

FRANCE

[Traduction — Traduction]

The Government of the French Republic declares, in accordance with article 30, paragraph 2, of the Convention, that it shall not be bound by the provisions of paragraph 1 of that article.

« Le Gouvernement de la République française déclare, conformément au paragraphe 2 de l’article 30 de la Convention, qu’il ne sera pas lié par les dispositions du paragraphe 1° de cet article. »

1 Translation provided by the Government of Afghanistan.
2 Traduction fournie par le Gouvernement afghan.
Reaffirming 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 766 (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/2574),

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 obligations 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)
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)

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.)
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)

RESOLUTION 808 (1993) .......................................................................................................................... 15
RESOLUTION 827 (1993) .......................................................................................................................... 17
RESOLUTION 1166 (1998) ......................................................................................................................... 19
Annex .................................................................................................................................................. 20
RESOLUTION 1329 (2000) ......................................................................................................................... 21
Annex I .................................................................................................................................................. 23
Annex II .................................................................................................................................................. 26
RESOLUTION 1411 (2002) ......................................................................................................................... 29
Annex I .................................................................................................................................................. 30
Annex II .................................................................................................................................................. 31
RESOLUTION 1431 (2002) ......................................................................................................................... 33
Annex I .................................................................................................................................................. 34
Annex II .................................................................................................................................................. 37
RESOLUTION 1481 (2003) ......................................................................................................................... 39
Annex .................................................................................................................................................. 40
RESOLUTION 1597 (2005) ......................................................................................................................... 41
Annex .................................................................................................................................................. 42
RESOLUTION 1660 (2006) ......................................................................................................................... 43
Annex .................................................................................................................................................. 44
RESOLUTION 1837 (2008) ......................................................................................................................... 47
Annex .................................................................................................................................................. 49

ICTY RELATED RESOLUTIONS ............................................................................................................. 51
Resolutions with no amendments to the Statute, but relevant to the ICTY.
RESOLUTION 1503 (2003) ......................................................................................................................... 53
Annex I .................................................................................................................................................. 55
RESOLUTION 1504 (2003) ......................................................................................................................... 47
RESOLUTION 1534 (2004) ......................................................................................................................... 59
RESOLUTION 1581 (2005) ......................................................................................................................... 61
RESOLUTION 1613 (2005) ......................................................................................................................... 63
RESOLUTION 1629 (2005) ......................................................................................................................... 65
RESOLUTION 1668 (2006) ......................................................................................................................... 67
RESOLUTION 1775 (2007) ......................................................................................................................... 69
RESOLUTION 1786 (2007) ......................................................................................................................... 71
RESOLUTION 1800 (2008) ......................................................................................................................... 73
Article 1 ...................................................................................................................................................5
Competence of the International Tribunal

Article 2 ...................................................................................................................................................5
Grave breaches of the Geneva Conventions of 1949

Article 3 ...................................................................................................................................................5
Violations of the laws or customs of war

Article 4 ...................................................................................................................................................5
Genocide

Article 5 ...................................................................................................................................................6
Crimes against humanity

Article 6 ...................................................................................................................................................6
Personal jurisdiction

Article 7 ...................................................................................................................................................6
Individual criminal responsibility

Article 8 ...................................................................................................................................................6
Territorial and temporal jurisdiction

Article 9 ...................................................................................................................................................7
Concurrent jurisdiction

Article 10 ..................................................................................................................................................7
Non-bis-in-idem

Article 11 ..................................................................................................................................................7
Organization of the International Tribunal

Article 12 ..................................................................................................................................................7
Composition of the Chambers

Article 13 ..................................................................................................................................................8
Qualifications of judges

Article 13 bis ..............................................................................................................................................8
Election of permanent judges

Article 13 ter ..............................................................................................................................................8
Election and appointment of ad litem judges

Article 14 ................................................................................................................................................10
Status of ad litem judges

Article 15 ................................................................................................................................................10
Officers and members of the Chambers

Article 16 ................................................................................................................................................10
Rules of procedure and evidence

Article 17 ................................................................................................................................................10
The Registry

Article 18 ................................................................................................................................................11
Investigation and preparation of indictment

Article 19 ................................................................................................................................................11
Review of the indictment

Article 20 ................................................................................................................................................11
Commencement and conduct of trial proceedings

Article 21 ................................................................................................................................................11
Rights of the accused

Article 22 ................................................................................................................................................12
Protection of victims and witnesses

Article 23 ................................................................................................................................................12
Judgement

Article 24 ................................................................................................................................................12
Penalties

Article 25 ................................................................................................................................................12
Appellate proceedings

Article 26 ................................................................................................................................................12
Review proceedings

Article 27 ................................................................................................................................................12
Enforcement of sentences

Article 28 ................................................................................................................................................13
Pardon or commutation of sentences

Article 29 ................................................................................................................................................13
Co-operation and judicial assistance

Article 30 ................................................................................................................................................13
The status, privileges and immunities of the International Tribunal

Article 31 ................................................................................................................................................13
Seat of the International Tribunal

Article 32 ................................................................................................................................................13
Expenses of the International Tribunal

Article 33 ................................................................................................................................................13
Working languages

Article 34 ................................................................................................................................................13
Annual report
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)

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, 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 Commited 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.
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 reside over its proceedings.

3. After consultation with the permanent judges of the International Tribunal, the President of the International Tribunal shall assign one of their number to serve in the Appeals Chamber and nine to the Trial Chambers.

4. Two of the permanent judges of the International Tribunal shall be assigned, by the President of the International Tribunal, to the Chamber of the Appeals Chamber and permanent judges of the International Tribunal as may from time to time be appointed to serve in the Appeals Chamber and permanent judges of the International Tribunal shall serve in accordance with Article 13 of the Statute.

5. A judge shall serve only in the Chamber to which he or she is assigned.

Article 15
Rules of procedure and evidence

1. 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.

2. The President of the International Tribunal shall serve in accordance with Article 13 of the Statute.

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

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.

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

4. The Registrar shall be responsible for the administration and servicing of the International Tribunal.

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.

4. The terms and conditions of service of the Registrar and such other staff as may be required shall be those of an Under-Secretary-General of the United Nations.
The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Council of his own choosing;

The International Tribunal 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.

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

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. In imposing the sentences, the Trial Chambers shall have regard to the gravity of the crime, the individual circumstances of the convicted person, and any other matters which they consider relevant.

3. The Trial Chamber shall order the convicted person to pay compensation to victims and witnesses in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

4. The convicted person shall be afforded the following rights:

(a) to be informed of the charges against him and the right to a fair and public hearing,

(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 counsel of his own choosing,

(e) to not be compelled to assist the Prosecutor in his investigation, or to be tried in any other way which might violate his rights as a person accused of an international crime,

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings,

(g) to have the free assistance of defence counsel of his own choosing, or to have counsel assigned to him by the International Tribunal,

(h) to have the assistance of legal counsel of his own choosing, or to have legal counsel assigned to him by the International Tribunal if 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,

(i) to have the assistance of expert witnesses if the interests of justice so require,

(j) to have the assistance of any other expert witnesses if the interests of justice so require,

(k) to have the assistance of any other expert witnesses if the interests of justice so require,

(l) to have the assistance of any other expert witnesses if the interests of justice so require.

5. The convicted person shall be entitled to the following minimum guarantees, in full equality with other persons deprived of their freedom:

(a) to be informed of the charges against him and the right to a fair and public hearing,

(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 counsel of his own choosing,

(e) to not be compelled to assist the Prosecutor in his investigation, or to be tried in any other way which might violate his rights as a person accused of an international crime,

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the proceedings,

(g) to have the free assistance of defence counsel of his own choosing, or to have counsel assigned to him by the International Tribunal,

(h) to have the assistance of legal counsel of his own choosing, or to have legal counsel assigned to him by the International Tribunal if 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,

(i) to have the assistance of expert witnesses if the interests of justice so require,

(j) to have the assistance of any other expert witnesses if the interests of justice so require,
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.
The Security Council,

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

Recalling paragraph 10 of its resolution 764 (1992) of 13 July 1992, in which it reaffirmed that all parties are bound to comply with the obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches,

Recalling also its resolution 771 (1992) of 13 August 1992, in which, inter alia, it demanded that all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law,

Recalling further its resolution 780 (1992) of 6 October 1992, in which it requested the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolutions 771 (1992) and 780 (1992), together with such further information as the Commission of Experts may obtain, with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia,

Having considered the interim report of the Commission of Experts established by resolution 780 (1992) (S/25274), in which the Commission observed that a decision to establish an ad hoc international tribunal in relation to events in the territory of the former Yugoslavia would be consistent with the direction of its work,

Expressing once again its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia, including reports of mass killings and the continuance of the practice of “ethnic cleansing”,

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

Convinced that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

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

Noting also with grave concern the “report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia” (S/25240, Annex 1),

Noting further the report of the committee of jurists submitted by France (S/25266), the report of the commission of jurists submitted by Italy (S/25300), and the report transmitted by the Permanent Representatives of Sweden on behalf of the Chairman-in-Office of the Conference on Security and Cooperation in Europe (CSCE) (S/25307),

1. Decides 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;

2. Requests the Secretary-General to submit for consideration by the Council at the earliest possible date, and if possible no later than 60 days after the adoption of the present resolution, a report on all the aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision contained in paragraph 1 above, taking into account suggestions put forward in this regard by Member States;

3. Decides to remain actively seized of the matter.
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.
The Security Council,

Reaffirming its resolution 827 (1993) of 25 May 1993,

Remaining convinced that the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia contributes to the restoration and maintenance in the former Yugoslavia,

Having considered the letter from the Secretary-General to the President of the Security Council dated 5 May 1998 (S/1998/376),

Convinced of the need to increase the number of judges and Trial Chambers, in order to enable 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 (“the International Tribunal”) to try without delay the large number of accused awaiting trial,

Noting the significant progress being made in improving the procedures of the International Tribunal, and convinced of the need for its organs to continue their efforts to further such progress,

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

1. Decides to establish a third Trial Chamber of the International Tribunal, and to this end decides to amend articles 11, 12 and 13 of the Statute of the International Tribunal and to replace those articles with the provisions set out in the annex to this resolution;

2. Decides that three additional judges shall be elected as soon as possible to serve in the additional Trial Chamber, and decides also, without prejudice to article 13.4 of the Statute of the International Tribunal, that once elected they shall serve until the date of the expiry of the terms of office of the existing judges, and that for the purpose of that election the Security Council shall, notwithstanding article 13.2 (c) of the Statute, establish a list from the nominations received of not less than six and not more than nine candidates;

3. Urges all States to cooperate fully with the International Tribunal and its organs in accordance with their obligations under resolution 827 (1993) and the Statute of the International Tribunal and welcomes the cooperation already extended to the Tribunal in the fulfilment of its mandate;

4. Requests the Secretary-General to make practical arrangements for the elections mentioned in paragraph 2 above and for enhancing the effective functioning of the International Tribunal, including the timely provision of personnel and facilities, in particular for the third Trial Chamber and related offices of the Prosecutor, and further requests him to keep the Security Council closely informed of progress in this regard;

5. Decides to remain actively seized of the matter.
The Security Council,

Reaffirming its resolutions 827 (1993) of 25 May 1993 and 955 (1994) of 8 November 1994,

Remaining convinced that the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia contributes to the restoration and maintenance of peace in the former Yugoslavia,

Remaining convinced also that in the particular circumstances of Rwanda the prosecution of persons responsible for genocide and other serious violations of international humanitarian law contributes to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda and in the region,

Having considered the letter from the Secretary-General to the President of the Security Council dated 7 September 2000 (S/2000/865) and the annexed letters from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General dated 12 May 2000 and from the President of the International Tribunal for Rwanda dated 14 June 2000,

Convinced of the need to establish a pool of ad litem judges in the International Tribunal for the Former Yugoslavia and to increase the number of judges in the Appeals Chambers of the International Tribunals in order to enable the International Tribunals to expedite the conclusion of their work at the earliest possible date,

Noting the significant progress being made in improving the procedures of the International Tribunals, and convinced of the need for their organs to continue their efforts to further such progress,

Recalling that the International Tribunals and national courts have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law, and noting that the Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia provide that a Trial Chamber may decide to suspend an indictment to allow for a national court to deal with a particular case,

Taking note with appreciation of the efforts of the judges of the International Tribunal for the Former Yugoslavia, as reflected in annex I to the letter from the Secretary-General of 7 September 2000, to allow competent organs of the United Nations to begin to form a relatively exact idea of the length of the mandate of the Tribunal,

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

1. Decides to establish a pool of ad litem judges in the International Tribunal for the Former Yugoslavia and to enlarge the membership of the Appeals Chambers of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and to this end decides to amend articles 12, 13 and 14 of the Statute of the International Tribunal for the Former Yugoslavia and to replace those articles with the provisions set out in annex I to this resolution and decides also to amend articles 11, 12 and 13 of the Statute of the International Tribunal for Rwanda and to replace those articles with the provisions set out in annex II to this resolution;

2. Decides that two additional judges shall be elected as soon as possible as judges of the International Tribunal for Rwanda and decides also, without prejudice to Article 12, paragraph 4, of the Statute of that Tribunal, that, once elected, they shall serve until the date of the expiry of the terms of office of the existing judges, and that for the purpose of that election the Security Council shall, notwithstanding Article 12, paragraph 2 (c) of the Statute, establish a list from the nominations received of not less than four and not more than six candidates;

3. Decides that, once two judges have been elected in accordance with paragraph 2 above and have taken up office, the President of the International Tribunal for Rwanda shall, in accordance with Article 13, paragraph 3, of the Statute of the International Tribunal for Rwanda and Article 14, paragraph 4, of the Statute of the International Tribunal for the Former Yugoslavia, take the necessary steps as soon as is practicable to assign two of the judges elected or appointed in accordance with Article 12 of the Statute of the International Tribunal for Rwanda to be members of the Appeals Chambers of the International Tribunals;

4. Requests the Secretary-General to make practical arrangements for the elections mentioned in paragraph 2 above, for the election as soon as possible of twenty-seven ad litem judges in accordance with Article 13 ter of the Statute of the International Tribunal for the Former Yugoslavia, and for the timely provision to the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda of personnel and facilities, in particular, for the ad litem judges and the Appeals Chambers and related offices of the Prosecutor, and further requests him to keep the Security Council closely informed of progress in this regard;

5. Urges all States to cooperate fully with the International Tribunals and their organs in accordance with their obligations under resolutions 827 (1993) and 955 (1994) and the Statutes of the International Tribunals, and welcomes the cooperation already extended to the Tribunals in the fulfilment of their mandates;

6. Requests the Secretary-General to submit to the Security Council, as soon as possible, a report containing an assessment and proposals regarding the date ending the temporal jurisdiction of the International Tribunal for the Former Yugoslavia;

7. Decides to remain actively seized of the matter.
Article 12
Composition of the Chambers

1. The Chambers shall be composed 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 13 ter, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of 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. 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.

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 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 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, 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.

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;

(iv) to adjudicate in pre-trial proceedings.

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.

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.

5. After consultation with the permanent judges of the International Tribunal, the President shall assign such ad hoc 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.

Annex II

Article 11
Composition of the Chambers

The Chambers shall be composed of sixteen 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) seven judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

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. Eleven of the 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 judges 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 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 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 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.

3. In the event of a vacancy in the Chambers amongst the 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 paragraph 1 above, for the remainder of the term of office concerned.

4. The 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 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. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.

3. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign two of the judges elected or appointed in accordance with Article 12 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. A judge shall serve only in the Chamber to which he or she was assigned.

4. The members of the Appeals Chamber of the Former Yugoslavki shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

5. 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.
RESOLUTION 1411 (2002)

Adopted by the Security Council at its 4535th meeting,
on 17 May 2002

The Security Council,


Recognizing that persons who are nominated for, or who are elected or appointed as, judges of the International Tribunal for the Former Yugoslavia or of the International Tribunal for Rwanda may bear the nationalities of two or more States,

Being aware that at least one such person has already been elected a judge of one of the International Tribunals,

Considering that, for the purposes of membership of the Chambers of the International Tribunals, such persons should be regarded as bearing solely the nationality of the State in which they ordinarily exercise civil and political rights,

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

1. Decides to amend article 12 of the Statute of the International Tribunal for the former Yugoslavia and to replace that article with the provisions set out in annex I to this resolution;

2. Decides also to amend article 11 of the Statute of the International Tribunal for Rwanda and to replace that article with the provisions set out in annex II to this resolution;

3. Decides to remain actively seized of the matter.

ANNEX I

Article 12
Composition of the Chambers

1. The Chambers shall be composed 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 13 ter, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of 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. 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.
ANNEX II
Article 11
Composition of the Chambers

1. The Chambers shall be composed of sixteen 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) seven judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.

2. 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.
1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of four 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. Three permanent judges and a maximum at any one time of four 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. 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.
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.

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;

      (iv) To adjudicate in pre-trial proceedings.

**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.

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 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 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.

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.

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.
The Security Council,


Having considered the letter from the Secretary-General to the President of the Security Council dated 18 March 2002 (S/2002/304) and the annexed letter from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General dated 12 March 2002,

Having considered also the letter from the Secretary-General to the President of the Security Council dated 7 May 2003 (S/2003/530) and the annexed letter from the President of the International Tribunal for the Former Yugoslavia addressed to the President of the Security Council dated 1 May 2003,

Convinced of the advisability of enhancing the powers of ad litem judges in the International Tribunal for the Former Yugoslavia so that, during the period of their appointment to a trial, they might also adjudicate in pre-trial proceedings in other cases, should the need arise and should they be in a position to do so,

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

1. Decides to amend article 13 quater of the Statute of the International Tribunal for the Former Yugoslavia and to replace that article with the provisions set out in the annex to this resolution;

2. Decides to remain seized of the matter.

Annex

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.
RESOLUTION 1597 (2005)
Adopted by the Security Council at its 5165th meeting,
on 20 April 2005

The Security Council,


Having considered the letter from the Secretary-General to the President of the Security Council dated 24 February 2005 (S/2005/127) transmitting the list of candidates for election as\textit{ad \emph{litem}} judges of the International Tribunal for the Former Yugoslavia,

Noting that the Secretary-General had suggested that the deadline for nominations be extended until 31 March 2005 and the President’s reply of 14 March 2005 (S/2005/159) indicating that the Security Council had agreed to the extension of the deadline,

Having considered also the letter from the Secretary-General to the President of the Security Council dated 11 April 2005 (S/2005/236) that suggested that the deadline for the nomination of candidates for election as\textit{ad \emph{litem}} judges be further extended,

Noting that the number of candidates continues to fall short of the minimum number required by the Statute of the Tribunal to be elected,

Considering that the 27\textit{ad \emph{litem}} judges elected by the General Assembly at its 102nd plenary meeting on 12 June 2001 whose term of office expires on 11 June 2005, should be eligible for re-election and wishing to amend the Statute for that purpose,

Noting that, should the cumulative period of service of an\textit{ad \emph{litem}} judge of the International Tribunal for the Former Yugoslavia amount to three years or more, this will not result in any change in their entitlements or benefits and, in particular, will not give rise to any additional entitlements or benefits other than those that already exist and which will, in such an eventuality, be extended pro-rata by virtue of the extension of service,

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

1. \textit{Decides} to amend article 13\textit{ter} of the Statute of the International Tribunal for the Former Yugoslavia and to replace that article with the provision set out in the annex to this resolution;

2. \textit{Decides further} to the Secretary-General’s letter of 11 April 2005 (S/2005/236) to extend the deadline for nominations of\textit{ad \emph{litem}} judges under the amended provision of the Statute for a further 30 days from the date of the adoption of this resolution;

3. \textit{Decides} to remain actively seized of the matter.

Annex

Article 13\textit{ter}
\textbf{Election and appointment of \textit{ad \emph{litem}} judges}

1. The \textit{ad \emph{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 \textit{ad \emph{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 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 \textit{ad \emph{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 \textit{ad \emph{litem}} judges shall be declared elected for a term of four years. \textbf{They shall be eligible for re-election}.

2. During any term, \textit{ad \emph{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 \textit{ad \emph{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 paragraph 1 (b) and (c) above and the number of votes the \textit{ad \emph{litem}} judge received in the General Assembly.
RESOLUTION 1660 (2006)

Adopted by the Security Council at its 5382nd meeting,
on 28 February 2006

The Security Council,


Having considered the proposal made by the President of the International Tribunal for the Former Yugoslavia that the Secretary-General at the request of the President appoint reserve judges from among the ad litem judges elected in accordance with Article 13 ter, 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,

Convinced of the advisability of allowing the Secretary-General to appoint reserve judges to specific trials at the International Tribunal for the Former Yugoslavia when so requested by the President of the Tribunal,

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

1. Decides to amend article 12 and article 13 quater of the Statute of the International Tribunal for the Former Yugoslavia and to replace those articles with the provisions set out in the annex to this resolution;

2. Decides to remain seized of the matter.

Annex

Article 12
Composition of the Chambers

1. The Chambers shall be composed 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. Three permanent judges and a maximum at any one time of nine 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 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.
The Security Council,

Taking note of the letter to the President of the Council from the Secretary-General dated 24 September 2008, attaching two letters to him from the President of the International Tribunal for the former Yugoslavia ("the Tribunal") dated 5 June 2008 and 1 September 2008 (S/2008/621),


Recalling in particular its resolutions 1503 (2003) of 28 August 2003 and 1534 (2004) of 26 March 2004, in which the Security Council calls on the Tribunal 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,

Expressing its determination to support the efforts made by the Tribunal toward the completion of its trial work at the earliest date,

Expressing its expectation that the extension of the terms of office of the judges concerned will enhance the effectiveness of trial proceedings and contribute towards the implementation of the Completion Strategy,

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

1. **Decides** to extend the terms of office of the following permanent judges at the Tribunal who are members of the Appeals Chamber until 31 December 2010, or until the completion of the cases before the Appeals Chamber if sooner:
   - Liu Daqun (China)
   - Theodor Meron (United States of America)
   - Fausto Pocar (Italy)
   - Mohamed Shahabuddeen (Guyana)

2. **Decides** to extend the terms of office of the following permanent judges at the Tribunal who are members of the Trial Chambers until 31 December 2009, or until the completion of the cases to which they are assigned if sooner:
   - Carmel Agius (Malta)
   - Jean-Claude Antonetti (France)
   - Iain Bonomy (United Kingdom)
   - Christoph Flügge (Germany)
   - O-Gon Kwon (South Korea)
   - Bakone Justice Moloto (South Africa)
   - Alphons Orie (The Netherlands)
   - Kevin Parker (Australia)
   - Patrick Robinson (Jamaica)
   - Christine Van den Wyngaert (Belgium)

3. **Decides** to extend the terms of office of the following *ad litem* judges, currently serving at the Tribunal, until 31 December 2009, or until the completion of the cases to which they may be assigned if sooner:
   - Ali Nawaz Chowhan (Pakistan)
   - Pedro Davi (Argentina)
   - Elizabeth Gwaunza (Zimbabwe)
   - Frederik Harhoff (Denmark)
   - Tsvetana Kamenova (Bulgaria)
   - Uldis Kinis (Latvia)
   - Flavia Lattanzi (Italy)
   - Antoine Kesia-Mbe Mindua (Democratic Republic of Congo)
   - Janet Nosworthy (Jamaica)
   - Michele Picard (France)
   - Ārpiād Prandler (Hungary)
   - Kimberly Prost (Canada)
   - Ole Bjørn Stele (Norway)
   - Stefan Trechsel (Switzerland)

4. **Decides** to extend the term of office of the following *ad litem* judges, who are not currently appointed to serve at the Tribunal, until 31 December 2009, or until the completion of any cases to which they may be assigned if sooner:
   - Melville Baird (Trinidad and Tobago)
   - Frans Bauduin (The Netherlands)
   - Burton Hall (The Bahamas)
   - Frank Höpfel (Austria)
   - Raimo Lahti (Finland)
   - Jawdat Naboty (Syrian Arab Republic)
   - Chima Egondu Nwosu-Iheme (Nigeria)
   - Prisca Matimba Nyambe (Zambia)
   - Brynomor Pollard (Guyana)
   - Vonimbolana Rasozazany (Madagascar)
   - Kristér Thelin (Sweden)
   - Klaus Tolksdorf (Germany)
   - Tan Sri Dato Lamin Haji Mohd Yunus (Malaysia)

5. **Decides**, without prejudice to the provisions of resolution 1800 (2008) of 20 February 2008, to amend article 12, paragraphs 1 and 2, of the Statute of the Tribunal and to replace those paragraphs with the provisions set out in the annex to this resolution.

6. **Decides** to remain seized of the matter.
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 \textit{ad litem} independent judges appointed in accordance with article 13 \textit{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 \textit{ad litem} judges shall be members of each Trial Chamber. Each Trial Chamber to which \textit{ad litem} judges are assigned may be divided into sections of three judges each, composed of both permanent and \textit{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.
RELATED RESOLUTIONS

Resolutions with no amendments to the Statute, but relevant to the ICTY.

Resolution 1503 of 28 August 2003..............................................................................................53
Annex I..................................................................................................................................................55
Resolution 1504 of 4 September 2003............................................................................................57
Resolution 1534 of 26 March 2004 .....................................................................................................59
Resolution 1581 of 18 January 2005...............................................................................................61
Resolution 1613 of 26 July 2005........................................................................................................63
Resolution 1629 of 30 September 2005..........................................................................................65
Resolution 1668 of 10 April 2006......................................................................................................67
Resolution 1775 of 14 September 2007..........................................................................................69
Resolution 1786 of 28 November 2007...........................................................................................71
Resolution 1800 of 20 February 2008.............................................................................................73
RESOLUTION 1503 (2003)

Adopted by the Security Council at its 4817th meeting, on 28 August 2003

The Security Council,


Noting the letter from the Secretary-General to the President of the Security Council dated 28 July 2003 (S/2003/766),

Commending the important work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in contributing to lasting peace and security in the former Yugoslavia and Rwanda and the progress made since their inception,

Noting that an essential prerequisite to achieving the objectives of the ICTY and ICTR Completion Strategies is full cooperation by all States, especially in apprehending all remaining at-large persons indicted by the ICTY and the ICTR,

Welcoming steps taken by States in the Balkans and the Great Lakes region of Africa to improve cooperation and apprehend at-large persons indicted by the ICTY and ICTR, but noting with concern that certain States are still not offering full cooperation,

Urging Member States to consider imposing measures against individuals and groups or organizations assisting indictees at large to continue to evade justice, including measures designed to restrict the travel and freeze the assets of such individuals, groups, or organizations,

Recalling and reaffirming in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21), which endorsed the ICTY’s strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTY Completion Strategy) (S/2002/678), by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions,

Urging the ICTR to formalize a detailed strategy, modelled on the ICTY Completion Strategy, to transfer cases involving intermediate- and lower-rank accused to competent national jurisdictions, as appropriate, including Rwanda, in order to allow the ICTR to achieve its objective of completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTR Completion Strategy),

Noting that the above-mentioned Completion Strategies in no way alter the obligation of Rwanda and the countries of the former Yugoslavia to investigate those accused whose cases would not be tried by the ICTR or ICTY and take appropriate action with respect to indictment and prosecution, while bearing in mind the primacy of the ICTY and ICTR over national courts,

Noting that the strengthening of national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular,

Noting that an essential prerequisite to achieving the objectives of the ICTY Completion Strategy is the expeditious establishment under the auspices of the High Representative and early functioning of a special chamber within the State Court of Bosnia and Herzegovina (the “War Crimes Chamber”) and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused to the Chamber,

Convinced that the ICTY and the ICTR can most efficiently and expeditiously meet their respective responsibilities if each has its own Prosecutor,

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

1. Calls on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR and encourages the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach programmes;

2. Calls on all States, especially Serbia and Montenegro, Croatia, and Bosnia and Herzegovina, and on the Republika Srpska within Bosnia and Herzegovina, to intensify cooperation with and render all necessary assistance to the ICTY, particularly to bring Radovan Karadzic and Ratko Mladic, as well as Ante Gotovina and all other indictees to the ICTY and calls on these and all other at-large indictees of the ICTY to surrender to the ICTY;

3. Calls on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on this and all other at-large indictees of the ICTR to surrender to the ICTR;

4. Calls on all States to cooperate with the International Criminal Police Organization (ICPO-Interpol) in apprehending and transferring persons indicted by the ICTY and the ICTR;

5. Calls on the donor community to support the work of the High Representative to Bosnia and Herzegovina in creating a special chamber, within the State Court of Bosnia and Herzegovina, to adjudicate allegations of serious violations of international humanitarian law;

6. Requests the Presidents of the ICTY and the ICTR and their Prosecutors, in their annual reports to the Council, to explain their plans to implement the ICTY and ICTR Completion Strategies;

7. Calls on the ICTY and the ICTR 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 (the Completion Strategies);

8. Decides to amend Article 15 of the Statute of the International Tribunal for Rwanda and to replace that Article with the provision set out in Annex I to this resolution, and requests the Secretary-General to nominate a person to be the Prosecutor of the ICTR;

9. Welcomes the intention expressed by the Secretary-General in his letter dated 28 July 2003, to submit to the Security Council the name of Mrs. Carla Del Ponte as nominee for Prosecutor for the ICTY;

10. Decides to remain actively seized of the matter.
Annex I

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.
RESOLUTION 1504 (2003)

Adopted by the Security Council at its 4819th meeting,
on 4 September 2003

The Security Council,

Recalling its resolution 1503 (2003) of 28 August 2003,

Noting that by that resolution the Council created a new position of Prosecutor for the International Tribunal for Rwanda,

Noting that by its resolution 1503 (2003) the Council welcomed the intention of the Secretary-General to submit to the Council the name of Mrs. Carla Del Ponte as nominee for Prosecutor for the International Tribunal for the Former Yugoslavia,

Having regard to Article 16(4) of the Statute of the International Tribunal for the Former Yugoslavia,

Having considered the nomination by the Secretary-General of Mrs. Carla Del Ponte as Prosecutor of the International Tribunal for the Former Yugoslavia,

Appoints Mrs. Carla Del Ponte as Prosecutor of the International Tribunal for the Former Yugoslavia with effect from 15 September 2003 for a four-year term.
The Security Council,


Recalling and reaffirming the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21) endorsing the ICTY’s completion strategy and its resolution 1503 (2003) of 28 August 2003,

Recalling that resolution 1503 (2003) called on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) 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, and urges each Tribunal to plan and act accordingly;

3. Calls on the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, as well as the measures which will need to be taken to meet the Completion Strategies referred to in resolution 1503 (2003) and urges them to carry out this review as soon as possible and to include a progress report in the assessments to be provided to the Council under paragraph 6 of this resolution;

5. Calls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003);

6. Requests each Tribunal to provide to the Council, by 31 May 2004 and every six months thereafter, assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; and expresses the intention of the Council to meet with the President and Prosecutor of each Tribunal to discuss these assessments;

7. Declares the Council’s determination to review the situation, and in the light of the assessments received under the foregoing paragraph to ensure that the time frames set out in the Completion Strategies and endorsed by resolution 1503 (2003) can be met;

8. Commends those States which have concluded agreements for the enforcement of sentences of persons convicted by the ICTY or the ICTR or have otherwise accepted such convicted persons to serve their sentences in their respective territories; encourages other States in a position to do so to act likewise; and invites the ICTY and the ICTR to continue and intensify their efforts to conclude further agreements for the enforcement of sentences or to obtain the cooperation of other States in this regard;

9. Recalls that the strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular;

10. Welcomes in particular the efforts of the Office of the High Representative, ICTY, and the donor community to create a war crimes chamber in Sarajevo; encourages all parties to continue efforts to establish the chamber expeditiously; and encourages the donor community to provide sufficient financial support to ensure the success of domestic prosecutions in Bosnia and Herzegovina and in the region;

11. Decides to remain actively seized of the matter.
RESOLUTION 1581 (2005)

Adopted by the Security Council at its 5112th meeting,
on 18 January 2005

The Security Council,

Taking note of the letter to the President of the Council from the Secretary-General dated 6 January 2005 (S/2005/9),


Bearing in mind the statement made to the Security Council at its 5086th meeting on 23 November 2004 by the President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in which he expressed the commitment by the International Tribunal to the Completion Strategy,

Expressing its expectation that the extension of the terms of office of the ad litem judges concerned will enhance the effectiveness of trial proceedings and contribute towards ensuring the implementation of the Completion Strategy,

1. Decides, in response to the request by the Secretary-General, that:

(a) Judge Rasoazanany and Judge Swart, once replaced as ad litem judges of the International Tribunal, finish the Hadžihasanović case, which they have begun before expiry of their term of office;

(b) Judge Brydensholt and Judge Eser, once replaced as ad litem judges of the International Tribunal, finish the Orić case, which they have begun before expiry of their term of office;

(c) Judge Thelin and Judge Van Den Wyngaert, once replaced as ad litem judges of the International Tribunal, finish the Limaj case, which they have begun before expiry of their term of office;

(d) Judge Canivell, once replaced as an ad litem judge of the International Tribunal, finishes the Krajišnik case, which he has begun before expiry of his term of office;

(e) Judge Šćenić, if appointed to serve in the International Tribunal for the trial of the Halilović case, proceed, once replaced as an ad litem judge of the International Tribunal, to finish that case, which he would have begun before expiry of his term of office;

(f) Judge Hanoteau, if appointed to serve in the International Tribunal for the trial of the Krajišnik case, proceed, once replaced as an ad litem judge of the International Tribunal, to finish that case, which he would have begun before expiry of his term of office;

2. Takes note in this regard of the intention of the International Tribunal to finish the Hadžihasanović case before the end of September 2005, the Halilović before the end of October 2005, the Orić and Limaj cases before the end of November 2005 and the Krajišnik case before the end of April 2006.
RESOLUTION 1613 (2005)

Adopted by the Security Council at its 5236th meeting, on 26 July 2005

The Security Council,


Having considered the nominations for ad litem judges of the International Tribunal for the Former Yugoslavia received by the Secretary-General,

Forwards the following nominations to the General Assembly in accordance with Article 13 ter (1) (d) of the Statute of the International Tribunal:

Mr. Tanvir Bashir Ansari (Pakistan)
Mr. Melville Baird (Trinidad and Tobago)
Mr. Frans Bauduin (The Netherlands)
Mr. Giancarlo Roberto Belleli (Italy)
Mr. Ishaq Usman Bello (Nigeria)
Mr. Ali Nawaz Chowhan (Pakistan)
Mr. Pedro David (Argentina)
Mr. Ahmad Farawati (Syrian Arab Republic)
Ms. Elizabeth Gwaunza (Zimbabwe)
Mr. Burton Hall (The Bahamas)
Mr. Frederik Harhoff (Denmark)
Mr. Frank Höpfel (Austria)
Ms. Tsvetana Kamenova (Bulgaria)
Mr. Muhammad Muzammal Khan (Pakistan)
Mr. Uldis Kinis (Latvia)
Mr. Raimo Lahti (Finland)
Ms. Flavia Lattanzi (Italy)
Mr. Antoine Mindua (Democratic Republic of the Congo)
Mr. Jawdat Naboty (Syrian Arab Republic)
Ms. Janet Nosworthy (Jamaica)
Ms. Chioma Egondu Nwosu-Iheme (Nigeria)
Ms. Prisca Matimba Nyambe (Zambia)
Ms. Michèle Picard (France)
Mr. Brynmor Pollard (Guyana)
Mr. Árpád Prandler (Hungary)
Ms. Kimberly Prost (Canada)
Mr. Sheikh Abdul Rashid (Pakistan)
Ms. Vonimbolana Rasoaazany (Madagascar)
Mr. Ole Bjørn Støle (Norway)
Mr. Krister Thelin (Sweden)
Mr. Klaus Tolksdorf (Germany)
Mr. Stefan Trechsel (Switzerland)
Mr. Abubakar Bashir Wali (Nigeria)
Mr. Tan Sri Dato Lamin Haji Mohd Yunus (Malaysia)
RESOLUTION 1629 (2005)

Adopted by the Security Council at its 5273rd meeting,
on 30 September 2005

The Security Council,

Taking note of the letter to the President of the Security Council from the Secretary-General
dated 14 September 2005 (S/2005/593),

Decides that notwithstanding Article 12 of the Statute of the International Tribunal for the
Former Yugoslavia and notwithstanding that Judge Christine Van Den Wyngaert’s elected term
as a permanent judge of the Tribunal will in accordance with Article 13 bis of the Tribunal’s
Statute only begin on 17 November 2005, she be assigned as a permanent judge to the Mrkić et
al. case which is due to commence on 3 October 2005.
Decides in response to the request by the Secretary-General to confirm that Judge Joaquín Canivell can continue to sit in the Krajinić case beyond April 2006 and see the case through to its completion, notwithstanding the fact that the cumulative period of his service in the International Criminal Tribunal for the Former Yugoslavia would then attain and exceed three years,

Decides to remain seized of the matter.
RESOLUTION 1775 (2007)

Adopted by the Security Council at its 5742nd meeting,
on 14 September 2007

The Security Council,

Recalling its resolution 1504 (2003) of 4 September 2003,

Having regard to Article 16 (4) of the Statute of the International Criminal Tribunal for the former Yugoslavia,

Aware that the term of office for Ms. Carla Del Ponte as Prosecutor for the International Criminal Tribunal for the former Yugoslavia expires on 14 September 2007,

Noting the need to ensure a smooth transition between the departure of Ms. Carla Del Ponte and the assumption of office of her successor,

Noting the intention of the Secretary-General to submit the name of his nominee for the position of Prosecutor of the International Criminal Tribunal for the former Yugoslavia,

Decides, notwithstanding the provisions of article 16 (4) of the Statute, to extend for a final period the appointment of Ms. Carla Del Ponte as Prosecutor of the International Criminal Tribunal for the former Yugoslavia with effect from 15 September 2007 until 31 December 2007.
RESOLUTION 1786 (2007)

Adopted by the Security Council at its 5785th meeting,
on 28 November 2007

The Security Council,

recalling its resolution 1775 (2007) of 14 September 2007,

having regard to Article 16 (4) of the Statute of the International Tribunal for the former Yugoslavia,

having considered the nomination by the Secretary-General of Mr. Serge Brammertz for the position of Prosecutor of the International Tribunal for the former Yugoslavia (S/2007/678),

recalling that resolution 1503 (2003) of 28 August 2003 called upon the International Tribunal for the former Yugoslavia to take all possible measures to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (ICTY completion strategy),

recalling also its resolution 1534 (2004) of 26 March 2004 which emphasized the importance of fully implementing the International Tribunal's completion strategy and urges the Tribunal to plan and act accordingly,

decides to appoint Mr. Serge Brammertz as Prosecutor of the International Tribunal for the former Yugoslavia with effect from 1 January 2008 for a four-year term, which is subject to an earlier termination by the Security Council upon completion of the work of the International Tribunal.
RESOLUTION 1800 (2008)

Adopted by the Security Council at its 5841st meeting,
on 20 February 2008

The Security Council,


Taking note of the letters to the President of the Security Council from the Secretary-General dated 31 December 2007, 22 January 2008 and 8 February 2008,

Having considered the proposal made by the President of the International Tribunal for the former Yugoslavia (the International Tribunal) that the Secretary-General be authorized, within existing resources, to appoint additional ad litem Judges upon request of the President of the International Tribunal notwithstanding that their number will from time to time temporarily exceed the maximum of twelve provided under article 12 (1) of the Statute to a maximum of sixteen at any one time, returning to a maximum of twelve by 31 December 2008, to enable the International Tribunal to conduct additional trials once one or more of the permanent Judges of the International Tribunal become available,

Recalling that resolution 1503 (2003) of 28 August 2003 called upon the International Tribunal to take all possible measures to complete all trial activities at first instance by the end of 2008 and to complete all work in 2010 (the International Tribunal’s completion strategy), and that resolution 1534 (2004) of 26 March 2004 emphasized the importance of fully implementing the International Tribunal’s completion strategy,

Convinced of the advisability of allowing the Secretary-General to appoint additional ad litem Judges to the twelve ad litem Judges authorized by the Statute, as a temporary measure to enable the International Tribunal to conduct additional trials as soon as possible in order to meet completion strategy objectives,

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

1. Decides, therefore, that the Secretary-General may appoint, within existing resources, additional ad litem Judges upon request of the President of the International Tribunal in order to conduct additional trials, notwithstanding the fact that the total number of ad litem Judges appointed to the Chambers will from time to time temporarily exceed the maximum of twelve provided for in article 12 (1) of the Statute of the International Tribunal, to a maximum of sixteen at any one time, returning to a maximum of twelve by 31 December 2008;

2. Decides to remain seized of the matter.
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,

Determining 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 laws 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 that list 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.
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.

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.

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.

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.

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.

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.

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.

-----
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 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,

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 ICTY’s and the ICTR’s rules of procedure and evidence 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;

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.
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, 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 by 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 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 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 the right to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

   (e) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Mechanism;

   (f) 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 organizations 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
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.
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
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,


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 perpetrator was aware of factual circumstances that established the existence of an armed conflict not of an international character.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

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 perpetrator was aware of factual circumstances that established the existence of an armed conflict not of an international character.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

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 perpetrator was aware of factual circumstances that established the existence of an armed conflict.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.

\(^1\) 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
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.

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 articles 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 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.
Resolution 1422 (2002)

Adopted by the Security Council at its 4572nd meeting, on 12 July 2002

The Security Council,

Taking note of the entry into force on 1 July 2002, of the Statute of the International Criminal Court (ICC), done at Rome 17 July 1998 (the Rome Statute),

Emphasizing the importance to international peace and security of United Nations operations,

Noting that not all States are parties to the Rome Statute,

Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity,

Noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes,

Determining that operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and security,

Determining further that it is in the interests of international peace and security to facilitate Member States’ ability to contribute to operations established or authorized by the United Nations Security Council,

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

1. Requests, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;

2. Expresses the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;

3. Decides that Member States shall take no action inconsistent with paragraph 1 and with their international obligations;

4. Decides to remain seized of the matter.
Resolution 1593 (2005)

Adopted by the Security Council at its 5158th meeting, on 31 March 2005

The Security Council,

Taking note of the report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur (S/2005/60),

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Also recalling articles 75 and 79 of the Rome Statute and encouraging States to contribute to the ICC Trust Fund for Victims,

Taking note of the existence of agreements referred to in Article 98-2 of the Rome Statute,

Determining that the situation in Sudan continues to constitute a threat to international peace and security,

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

1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;

2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

3. Invites the Court and the African Union to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity;

4. Also encourages the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur;

5. Also emphasizes the need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore lasting peace, with African Union and international support as necessary;

6. Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;

7. Recognizes that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

8. Invites the Prosecutor to address the Council within three months of the date of adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

9. Decides to remain seized of the matter.
of 26 February 2011 (excerpts)
Resolution 1970 (2011)

Adopted by the Security Council at its 6491st meeting, on 26 February 2011

The Security Council,

Expressing grave concern at the situation in the Libyan Arab Jamahiriya and condemning the violence and use of force against civilians,

Deploring the gross and systematic violation of human rights, including the repression of peaceful demonstrators, expressing deep concern at the deaths of civilians, and rejecting unequivocally the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government,

Welcoming the condemnation by the Arab League, the African Union, and the Secretary General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in the Libyan Arab Jamahiriya,

Taking note of the letter to the President of the Security Council from the Permanent Representative of the Libyan Arab Jamahiriya dated 26 February 2011,

Welcoming the Human Rights Council resolution A/HRC/RES/S-15/1 of 25 February 2011, including the decision to urgently dispatch an independent international commission of inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, to establish the facts and circumstances of such violations and of the crimes perpetrated, and where possible identify those responsible,

Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity,

Expressing concern at the plight of refugees forced to flee the violence in the Libyan Arab Jamahiriya,

Expressing concern also at the reports of shortages of medical supplies to treat the wounded,

Recalling the Libyan authorities’ responsibility to protect its population,

Undertaking the need to respect the freedoms of peaceful assembly and of expression, including freedom of the media,

Stressing the need to hold those responsible for attacks, including by forces under their control, on civilians,

Recalling article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,

Expressing concern for the safety of foreign nationals and their rights in the Libyan Arab Jamahiriya,

Reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya.

Mindful of its primary responsibility for the maintenance of international peace and security under the Charter of the United Nations,

Acting under Chapter VII of the Charter of the United Nations, and taking measures under its Article 41.

1. Demands an immediate end to the violence and calls for steps to fulfil the legitimate demands of the population;

2. Urges the Libyan authorities to:

(a) Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors;

(b) Ensure the safety of all foreign nationals and their assets and facilitate the departure of those wishing to leave the country;

(c) Ensure the safe passage of humanitarian and medical supplies, and humanitarian agencies and workers, into the country; and

(d) Immediately lift restrictions on all forms of media;

3. Requests all Member States, to the extent possible, to cooperate in the evacuation of those foreign nationals wishing to leave the country;

ICC referral

4. Decides to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court;

5. Decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully with the Court and the Prosecutor;

6. Decides that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the

* Second reissue for technical reasons (10 March 2011).
Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State;

7. Invites the Prosecutor to address the Security Council within two months of the adoption of this resolution and every six months thereafter on actions taken pursuant to this resolution;

8. Recognizes that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily;

Arms embargo

9. Decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flagged vessels or aircraft, of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related material, including the provision of armed mercenary personnel whether or not originating in their territories, and decides further that this measure shall not apply to:

(a) Supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training, as approved in advance by the Committee established pursuant to paragraph 24 below;

(b) Protective clothing, including flak jackets and military helmets, temporarily exported to the Libyan Arab Jamahiriya by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel, for their personal use only; or

(c) Other sales or supply of arms and related materiel, or provision of assistance or personnel, as approved in advance by the Committee;

10. Decides that the Libyan Arab Jamahiriya shall cease the export of all arms and related materiel and that all Member States shall prohibit the procurement of such items from the Libyan Arab Jamahiriya by their nationals, or using their flagged vessels or aircraft, and whether or not originating in the territory of the Libyan Arab Jamahiriya;

11. Calls upon all States, in particular States neighbouring the Libyan Arab Jamahiriya, to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to and from the Libyan Arab Jamahiriya, in their territory, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, transfer, or export of which is prohibited by paragraphs 9 or 10 of this resolution for the purpose of ensuring strict implementation of those provisions;

12. Decides to authorize all Member States to, and that all Member States shall, upon discovery of items prohibited by paragraph 9 or 10 of this resolution, seize and dispose (such as through destruction, rendering inoperable, storage or transferring to a State other than the originating or destination States for disposal) items the supply, sale, transfer or export of which is prohibited by paragraphs 9 or 10 of this resolution and decides further that all Member States shall cooperate in such efforts;

13. Requires any Member State when it undertakes an inspection pursuant to paragraph 11 above, to submit promptly an initial written report to the Committee containing, in particular, explanation of the grounds for the inspections, the results of such inspections, and whether or not cooperation was provided, and, if prohibited items for transfer are found, further requires such Member States to submit to the Committee, at a later stage, a subsequent written report containing relevant details on the inspection, seizure, and disposal, and relevant details of the transfer, including a description of the items, their origin and intended destination, if this information is not in the initial report;

14. Encourages Member States to take steps to strongly discourage their nationals from travelling to the Libyan Arab Jamahiriya to participate in activities on behalf of the Libyan authorities that could reasonably contribute to the violation of human rights;

Travel ban

15. Decides that all Member States shall take the necessary measures to prevent the entry into or transit through their territories of individuals listed in Annex I of this resolution or designated by the Committee established pursuant to paragraph 24 below, provided that nothing in this paragraph shall oblige a State to refuse its own nationals entry into its territory;

16. Decides that the measures imposed by paragraph 15 above shall not apply:

(a) Where the Committee determines on a case-by-case basis that such travel is justified on the grounds of humanitarian need, including religious obligation;

(b) Where entry or transit is necessary for the fulfilment of a judicial process;

(c) Where the Committee determines on a case-by-case basis that an exemption would further the objectives of peace and national reconciliation in the Libyan Arab Jamahiriya and stability in the region; or

(d) Where a State determines on a case-by-case basis that such entry or transit is required to advance peace and stability in the Libyan Arab Jamahiriya and the States subsequently notifies the Committee within forty-eight hours after making such a determination;

Asset freeze

17. Decides that all Member States shall freeze without delay all funds, other financial assets and economic resources which are on their territories, which are owned or controlled, directly or indirectly, by the individuals or entities listed in annex II of this resolution or designated by the Committee established pursuant to paragraph 24 below, or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them, and decides further that all
Member States shall ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of the individuals or entities listed in Annex II of this resolution or individuals designated by the Committee;

18. **Expresses** its intention to ensure that assets frozen pursuant to paragraph 17 shall at a later stage be made available to and for the benefit of the people of the Libyan Arab Jamahiriya;

19. **Decides** that the measures imposed by paragraph 17 above do not apply to funds, other financial assets or economic resources that have been determined by relevant Member States:

(a) To be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges or exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services in accordance with national laws, or fees or service charges, in accordance with national laws, for routine holding or maintenance of frozen funds, other financial assets and economic resources, after notification by the relevant State to the Committee of the intention to authorize, where appropriate, access to such funds, other financial assets or economic resources and in the absence of a negative decision by the Committee within five working days of such notification;

(b) To be necessary for extraordinary expenses, provided that such determination has been notified by the relevant State or Member States to the Committee and has been approved by the Committee; or

(c) To be the subject of a judicial, administrative or arbitral lien or judgment, in which case the funds, other financial assets and economic resources may be used to satisfy that lien or judgment provided that the lien or judgment was entered into prior to the date of the present resolution, is not for the benefit of a person or entity designated pursuant to paragraph 17 above, and has been notified by the relevant State or Member States to the Committee;

20. **Decides** that Member States may permit the addition to the accounts frozen pursuant to the provisions of paragraph 17 above of interests or other earnings due on those accounts or payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the provisions of this resolution, provided that any such interest, other earnings and payments continue to be subject to these provisions and are frozen;

21. **Decides** that the measures in paragraph 17 above shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such a person or entity, provided that the relevant States have determined that the payment is not directly or indirectly received by a person or entity designated pursuant to paragraph 17 above, and after notification by the relevant States to the Committee of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, 10 working days prior to such authorization;

Designation criteria

22. **Decides** that the measures contained in paragraphs 15 and 17 shall apply to the individuals and entities designated by the Committee, pursuant to paragraph 24 (b) and (c), respectively:

(a) Involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses against persons in the Libyan Arab Jamahiriya, including by being involved in or complicit in planning, commanding, ordering or conducting attacks, in violation of international law, including aerial bombardments, on civilian populations and facilities; or

(b) Acting for or on behalf of or at the direction of individuals or entities identified in subparagraph (a).

23. **Strongly encourages** Member States to submit to the Committee names of individuals who meet the criteria set out in paragraph 22 above;

New Sanctions Committee

24. **Decides** to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council consisting of all the members of the Council (herein “the Committee”), to undertake to following tasks:

(a) To monitor implementation of the measures imposed in paragraphs 9, 10, 15, and 17;

(b) To designate those individuals subject to the measures imposed by paragraphs 15 and to consider requests for exemptions in accordance with paragraph 16 above;

(c) To designate those individuals subject to the measures imposed by paragraph 17 above and to consider requests for exemptions in accordance with paragraphs 19 and 20 above;

(d) To establish such guidelines as may be necessary to facilitate the implementation of the measures imposed above;

(e) To report within thirty days to the Security Council on its work for the first report and thereafter to report as deemed necessary by the Committee;

(f) To encourage a dialogue between the Committee and interested Member States, in particular those in the region, including by inviting representatives of such States to meet with the Committee to discuss implementation of the measures;

(g) To seek from all States whatever information it may consider useful regarding the actions taken by them to implement effectively the measures imposed above;

(h) To examine and take appropriate action on information regarding alleged violations or non-compliance with the measures contained in this resolution;

25. **Calls upon** all Member States to report to the Committee within 120 days of the adoption of this resolution on the steps they have taken with a view to implementing effectively paragraphs 9, 10, 15 and 17 above;
26. **Calls upon** all Member States, working together and acting in cooperation with the Secretary General, to facilitate and support the return of humanitarian agencies and make available humanitarian and related assistance in the Libyan Arab Jamahiriya, and requests the States concerned to keep the Security Council regularly informed of the progress of actions undertaken pursuant to this paragraph, and expresses its readiness to consider taking additional appropriate measures, as necessary, to achieve this;

**Commitment to review**

27. **Affirms** that it shall keep the Libyan authorities’ actions under continuous review and that it shall be prepared to review the appropriateness of the measures contained in this resolution, including the strengthening, modification, suspension or lifting of the measures, as may be needed at any time in light of the Libyan authorities’ compliance with relevant provisions of this resolution;

28. **Decides** to remain actively seized of the matter.

---

**Annex I**

**Travel ban**

1. **Al-Baghdadi, Dr Abdulqader Mohammed**  
   Passport number: B010574. Date of birth: 01/07/1950.  
   Head of the Liaison Office of the Revolutionary Committees. Revolutionary Committees involved in violence against demonstrators.

2. **Dibri, Abdulqader Yusef**  
   Date of birth: 1946. Place of birth: Houn, Libya.  
   Head of Muammar Qadhafi’s personal security. Responsibility for regime security. History of directing violence against dissidents.

3. **Dorda, Abu Zayd Umar**  

4. **Jabir, Major General Abu Bakr Yunis**  
   Date of birth: 1952. Place of birth: Jalo, Libya.  
   Defence Minister. Overall responsibility for actions of armed forces.

5. **Mataq, Mataq Mohammed**  
   Date of birth: 1956. Place of birth: Khoms.  
   Secretary for Utilities. Senior member of regime. Involvement with Revolutionary Committees. Past history of involvement in suppression of dissent and violence.

6. **Qadhaf Al-dam, Sayyid Mohammed**  
   Date of birth: 1948. Place of birth: Sirte, Libya.  
   Cousin of Muammar Qadhafi. In the 1980s, Sayyid was involved in the dissident assassination campaign and allegedly responsible for several deaths in Europe. He is also thought to have been involved in arms procurement.

7. **Qadhafi, Aisha Muammar**  
   Daughter of Muammar Qadhafi. Closeness of association with regime.

8. **Qadhafi, Hannibal Muammar**  
   Son of Muammar Qadhafi. Closeness of association with regime.

9. **Qadhafi, Khamis Muammar**  
   Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.
10. Qadhafi, Mohammed Muammar
   Son of Muammar Qadhafi. Closeness of association with regime.

11. Qadhafi, Muammar Mohammed Abu Minyar
    Date of birth: 1942. Place of birth: Sirte, Libya.
    Leader of the Revolution, Supreme Commander of Armed Forces.
    Responsibility for ordering repression of demonstrations, human rights abuses.

12. Qadhafi, Mutassim

13. Qadhafi, Saadi
    Commander Special Forces. Son of Muammar Qadhafi. Closeness of association with regime.
    Command of military units involved in repression of demonstrations.

14. Qadhafi, Saif al-Arab
    Son of Muammar Qadhafi. Closeness of association with regime.

15. Qadhafi, Saif al-Islam
    Director, Qadhafi Foundation. Son of Muammar Qadhafi. Closeness of association with regime.
    Inflammatory public statements encouraging violence against demonstrators.

16. Al-Senussi, Colonel Abdullah
    Date of birth: 1949. Place of birth: Sudan.

Annex II

Asset freeze

1. Qadhafi, Aisha Muammar
   Daughter of Muammar Qadhafi. Closeness of association with regime.

2. Qadhafi, Hannibal Muammar
   Son of Muammar Qadhafi. Closeness of association with regime.

3. Qadhafi, Khamis Muammar
   Son of Muammar Qadhafi. Closeness of association with regime. Command of military units involved in repression of demonstrations.

4. Qadhafi, Muammar Mohammed Abu Minyar
   Date of birth: 1942. Place of birth: Sirte, Libya.
   Leader of the Revolution, Supreme Commander of Armed Forces.
   Responsibility for ordering repression of demonstrations, human rights abuses.

5. Qadhafi, Mutassim

6. Qadhafi, Saif al-Islam
   Director, Qadhafi Foundation. Son of Muammar Qadhafi. Closeness of association with regime. Inflammatory public statements encouraging violence against demonstrators.
Letter dated 14 January 2013 from the Chargé d’affaires a.i. of the Permanent Mission of Switzerland to the United Nations addressed to the Secretary-General (UN Doc. A/67/694–S/2013/19)
Letter dated 14 January 2013 from the Chargé d’affaires a.i. of the Permanent Mission of Switzerland to the United Nations addressed to the Secretary-General

Please find attached herewith the text of a letter I sent today to the President of the Security Council for the month of January 2013 jointly with the Governments of Albania, Andorra, Australia, Belgium, Botswana, Bulgaria, Cape Verde, Chile, Cook Islands, Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Maldives, Malta, Marshall Islands, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, San Marino, Samoa, Seychelles, Slovakia, Skypeia, Spain, the former Yugoslav Republic of Macedonia, Tunisia, United Kingdom of Great Britain and Northern Ireland and Uruguay (see annex).

The letter calls upon the Security Council to refer the situation in the Syrian Arab Republic as of March 2011 to the International Criminal Court.

Since we believe that this letter is of interest to all Member States of the United Nations, we would like to request its circulation as a document of the sixty-seventh session of the General Assembly, under agenda item 36, and of the Security Council.

(Signed) Thomas Gürber
Chargé d’affaires a.i.

Annex to the letter dated 14 January 2013 from the Chargé d’affaires a.i. of the Permanent Mission of Switzerland to the United Nations addressed to the Secretary-General

I am writing to you jointly with the Governments of Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Cape Verde, Chile, Cook Islands, Costa Rica, Côte d’Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Maldives, Malta, Marshall Islands, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, San Marino, Samoa, Seychelles, Slovakia, Slovenia, Spain, the former Yugoslav Republic of Macedonia, Tunisia, United Kingdom of Great Britain and Northern Ireland and Uruguay.

Already in November 2011, the United Nations independent international commission of inquiry on the Syrian Arab Republic documented patterns of summary execution, arbitrary arrest, enforced disappearance, torture, including sexual violence, and violations of children’s rights, and it expressed its grave concern that crimes against humanity had been committed since the beginning of the unrest in the country in March 2011. Since then, the situation on the ground has only become more desperate, with attacks on the civilian population and the commission of atrocities having almost become the norm.

Relevant decisions of the Human Rights Council, several appeals of the United Nations High Commissioner for Human Rights and the final communiqué of the Action Group for Syria, which met in Geneva on 30 June 2012, have all placed a strong emphasis on accountability and have made it abundantly clear that there should be no impunity for the most serious crimes under international law.

While acknowledging that accountability is primarily a national responsibility and that the role of international criminal justice is complementary, we note with regret that the Syrian Arab Republic has, so far, not reacted to repeated calls from the international community to ensure accountability through a national procedure which needs to be credible, fair and independent in order to bring all perpetrators of alleged serious crimes to justice. Without accountability, however, there will be no sustainable peace in Syria.

We are firmly of the view that the Security Council must ensure accountability for the crimes that seem to have been and continue to be committed in the Syrian Arab Republic and send a clear signal to the Syrian authorities. Given the competence of the Council under the Rome Statute of the International Criminal Court, and barring credible and timely measures to establish accountability within the Syrian Arab Republic itself, the most efficient way to ensure accountability in this serious situation would be a referral of the situation to the Court.

We therefore ask the Security Council to act by referring the situation in the Syrian Arab Republic as of March 2011 to the International Criminal Court without exceptions and irrespective of the alleged perpetrators. At the very least, the Council should send out an unequivocal message urging the Syrian authorities and all other parties to fully respect international human rights and humanitarian law in the ongoing conflict and announcing that it intends to refer the situation to the Court unless a credible, fair and independent accountability process is being established in...
a timely manner. We believe that such a warning would have an important dissuasive effect.

In case of a referral, we further call upon the Council to fully commit the necessary resources and its diplomatic support to any subsequent efforts to investigate crimes and to facilitate the execution of potential arrest warrants.

(Signed) Thomas Gürber
Chargé d’affaires a.i.
Permanent Mission of Switzerland to the United Nations
International Criminal Court

“President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC”

I.C.C., Press Release, 29 January 2004
President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC

ICC-20040129-44

Situation: Uganda

In December 2003 the President Yoweri Museveni took the decision to refer the situation concerning the Lord’s Resistance Army to the Prosecutor of the International Criminal Court. The Prosecutor has determined that there is a sufficient basis to start planning for the first investigation of the International Criminal Court. Determination to initiate the investigation will take place in the coming months.

President Museveni met with the Prosecutor in London to establish the basis for future co-operation between Uganda and the International Criminal Court. A key issue will be locating and arresting the LRA leadership. This will require the active co-operation of states and international institutions in supporting the efforts of the Ugandan authorities.

Many of the members of the LRA are themselves victims, having been abducted and brutalised by the LRA leadership. The reintegration of these individuals into Ugandan society is key to the future stability of Northern Uganda. This will require the concerted support of the international community – Uganda and the Court cannot do this alone.

In a bid to encourage members of the LRA to return to normal life, the Ugandan authorities have enacted an amnesty law. President Museveni has indicated to the Prosecutor his intention to amend this amnesty so as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice.

According to the Rome Statute, the Prosecutor has to inform all States Parties to the Statute of the formal initiation of an investigation. Following this the Prosecutor may seek an arrest warrant from the Pre-trial Chamber. To take this step, the Prosecutor must determine that there is a reasonable basis to proceed with an investigation. The Prosecutor will work with Ugandan authorities, other states and international organisations in gathering the necessary information to make this determination.

President Museveni and the Prosecutor of the International Criminal Court will hold a press conference on Thursday 29 January 2004 at 18:00 at the Hotel Intercontinental Hyde Park, London.
International Criminal Court

“Registrar confirms that the Republic of Côte d’Ivoire has accepted the jurisdiction of the Court”

*I.C.C., Press Release, 15 February 2005*
Press Release

**ICC - Registrar confirms that the Republic of Côte d’Ivoire has accepted the jurisdiction of the Court.**

ICC-CPI-20050215-91

Registrar confirms that the Republic of Côte d’Ivoire has accepted the jurisdiction of the Court.

ICC-CPI-20050215-91

The Registrar has confirmed that the Republic of Côte d’Ivoire has accepted the exercise of jurisdiction by the International Criminal Court with respect to crimes committed on its territory since the events of 19 September 2002.

The declaration was sent in accordance with Article 12, paragraph 3 of the Rome Statute of the Court.

Côte d’Ivoire signed the Rome Statute on 30 November 1998.

The text of the declaration will not be disclosed.
Palestinian National Authority Declaration recognizing the Jurisdiction of the International Criminal Court,
21 January 2009
Declaration recognizing the Jurisdiction of the International Criminal Court

In conformity with Article 12, paragraph 3 of the Statute of the International Criminal Court, the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since 1 July 2002.

As a consequence, the Government of Palestine will cooperate with the Court without delay or exception, in conformity with Chapter IX of the Statute.

This declaration, made for an indeterminate duration, will enter into force upon its signature.

Signed in The Hague, the Netherlands, 21 January 2009

For the Government of Palestine

Minister of Justice

ALI KHASAN
Situation in Palestine, Office of the Prosecutor, International Criminal Court, 3 April 2012
Situation in Palestine

1. On 22 January 2009, pursuant to article 12(3) of the Rome Statute, Ali Khashan acting as Minister of Justice of the Government of Palestine lodged a declaration accepting the exercise of jurisdiction by the International Criminal Court for “acts committed on the territory of Palestine since 1 July 2002.”

2. In accordance with article 15 of the Rome Statute, the Office of the Prosecutor initiated a preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation. The Office ensured a fair process by giving all those concerned the opportunity to present their arguments. The Arab League’s Independent Fact Finding Committee on Gaza presented its report during a visit to the Court. The Office provided Palestine with the opportunity to present its views extensively, in both oral and written form. The Office also considered various reports with opposing views. In July 2011, Palestine confirmed to the Office that it had submitted its principal arguments, subject to the submission of additional supporting documentation.

3. The first stage in any preliminary examination is to determine whether the preconditions to the exercise of jurisdiction under article 12 of the Rome Statute are met. Only when such criteria are established will the Office proceed to analyse information on alleged crimes as well as other conditions for the exercise of jurisdiction as set out in articles 13 and 53(1).

4. The jurisdiction of the Court is not based on the principle of universal jurisdiction: it requires that the United Nations Security Council (article 13(b)) or a “State” (article 12) provide jurisdiction. Article 12 establishes that a “State” can confer jurisdiction to the Court by becoming a Party to the Rome Statute (article 12(1)) or by making an ad hoc declaration accepting the Court’s jurisdiction (article 12(3)).

5. The issue that arises, therefore, is who defines what is a “State” for the purpose of article 12 of the Statute? In accordance with article 125, the Rome Statute is open to accession by “all States”, and any State seeking to become a Party to the Statute must deposit an instrument of accession with the Secretary-General of the United Nations. In instances where it is controversial or unclear whether an applicant constitutes a “State”, it is the practice of the Secretary-General to follow or seek the General Assembly’s directives on the matter. This is reflected in General Assembly resolutions which provide indications of whether an

---

1 The declaration can be accessed at: [http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf](http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf)

2 For a summary of submissions see [http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Palestine/](http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Palestine/).
applicant is a “State”.3 Thus, competence for determining the term “State” within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of General Assembly. The Assembly of States Parties of the Rome Statute could also in due course decide to address the matter in accordance with article 112(2)(g) of the Statute.

6. In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term “State” under article 12(3) which would be at variance with that established for the purpose of article 12(1).

7. The Office has been informed that Palestine has been recognised as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nation bodies. However, the current status granted to Palestine by the United Nations General Assembly is that of “observer”, not as a “Non-member State”. The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine, it informs the current legal status of Palestine for the interpretation and application of article 12.

8. The Office could in the future consider allegations of crimes committed in Palestine, should competent organs of the United Nations or eventually the Assembly of States Parties resolve the legal issue relevant to an assessment of article 12 or should the Security Council, in accordance with article 13(b), make a referral providing jurisdiction.

EMBARGOED UNTIL DELIVERY 3 April 2012

---

3 This position is set out in the understandings adopted by the General Assembly at its 2202nd plenary meeting on 14 December 1973; see Summary of Practice of the Secretary-General as Depository of Multilateral Treaties, ST/LEG/7/Rev. 1, paras 81-83; http://untreaty.un.org/ola-internet/Assistance/Summary.htm
Declaration of the United States of America on the non-ratification of the Rome Statute, 6 May 2002
2 With a territorial exclusion to the effect that “Until further notice, the Statute shall not apply to the Faroe Islands and Greenland”.

Subsequently, on 17 November 2004 and 20 November 2006, respectively, the Secretary-General received from the Government of Denmark the following territorial applications:

"With reference to the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, [the Government of Denmark informs the Secretary-General] that by Royal Decrees of 20 August 2004 entering into force on 1 October 2004, and 1 September 2006 entering into force on 1 October 2006, respectively] the above Convention will also be applicable in [Greenland and the Faroe Islands].

Denmark therefore withdraws its declaration made upon ratification of the said Convention to the effect that the Convention should not apply to the Faroe Islands and Greenland."

3 In a communication received on 28 August 2002, the Government of Israel informed the Secretary-General of the following:

"...in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [...] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty."

4 See note 1 under "Montenegro" in the "Historical Information" section in the front matter of this volume.

5 On 24 November 2009, the Secretary-General received a letter from the Permanent Representative of Namibia to the United Nations communicating to him the decision of the Government of Namibia to co-sponsor the proposed amendment to article 16 of the Rome Statute, which was submitted to the Secretary-General by South Africa as agreed upon by African States Parties to the Rome Statute during their meeting held from 3-6 November 2009 in Addis Ababa, Ethiopia.

6 For the Kingdom in Europe, the Netherlands Antilles and Aruba.

7 With a declaration to the effect that "consistent with the constitutional status of Tokelau and taking into account its commitment to the development of self-government through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory."

8 In a communication received on 26 August 2008, the Government of Sudan informed the Secretary-General of the following:

"... Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000."

9 In a communication received on 11 March 2010, the Government of the United Kingdom of Great Britain and Northern Ireland informed the Secretary-General of the following:

"... the Government of the United Kingdom of Great Britain and Northern Ireland wishes the United Kingdom’s ratification of the aforesaid Statute ... to be extended to the following territories for whose international relations the United Kingdom is responsible:

Anguilla
Bermuda
British Virgin Islands
Cayman Islands
Falkland Islands
Montserrat
Pitcairn, Henderson, Ducie and Oeno Islands
St Helena, Ascension and Tristan da Cunha
Sovereign Base Areas of Akrotiri and Dhekelia
Turks and Caicos Islands

The Government of the United Kingdom of Great Britain and Northern Ireland considers the extension of the aforesaid Statute ... to take effect from the date of deposit of this notification, ...
"

10 Territorial application in respect of the Isle of Man effected on 28 November 2012:

"... The Government of the United Kingdom of Great Britain and Northern Ireland wishes the United Kingdom’s Ratification of the Rome Statute to be extended to the territory of the Isle of Man for whose international relations the United Kingdom is responsible.

The Government of the United Kingdom of Great Britain and Northern Ireland considers the extension of the aforesaid Rome Statute to the Isle of Man to enter into force on the first day of the month after the Sixteenth day following deposit of this notification, ...
"

11 In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following:

"This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty."

12 On 13 August 2008, the Government of France informed the Secretary-General that it had decided to withdraw the
Declaration of Israel on the non-ratification of the Rome Statute, 28 August 2002
2 With a territorial exclusion to the effect that “Until further notice, the Statute shall not apply to the Faroe Islands and Greenland”.

Subsequently, on 17 November 2004 and 20 November 2006, respectively, the Secretary-General received from the Government of Denmark the following territorial applications:

"With reference to the Rome Statute of the International Criminal Court, done at Rome on 17 July 1998, [the Government of Denmark informs the Secretary-General] that by Royal [Decrees of 20 August 2004 entering into force on 1 October 2004, and 1 September 2006 entering into force on 1 October 2006, respectively] the above Convention will also be applicable in [Greenland and the Faroe Islands].

Denmark therefore withdraws its declaration made upon ratification of the said Convention to the effect that the Convention should not apply to the Faroe Islands and Greenland."

3 In a communication received on 28 August 2002, the Government of Israel informed the Secretary-General of the following:

"...in connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998, [...] Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.”

4 See note 1 under “Montenegro” in the “Historical Information” section in the front matter of this volume.

5 On 24 November 2009, the Secretary-General received a letter from the Permanent Representative of Namibia to the United Nations communicating to him the decision of the Government of Namibia to co-sponsor the proposed amendment to article 16 of the Rome Statute, which was submitted to the Secretary-General by South Africa as agreed upon by African States Parties to the Rome Statute during their meeting held from 3-6 November 2009 in Addis Ababa, Ethiopia.

6 For the Kingdom in Europe, the Netherlands Antilles and Aruba.

7 With a declaration to the effect that “consistent with the constitutional status of Tokelau and taking into account its commitment to the development of self-government through an act of self-determination under the Charter of the United Nations, this ratification shall not extend to Tokelau unless and until a Declaration to this effect is lodged by the Government of New Zealand with the Depositary on the basis of appropriate consultation with that territory.”.

8 In a communication received on 26 August 2008, the Government of Sudan informed the Secretary-General of the following:

“... Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000.”

9 In a communication received on 11 March 2010, the Government of the United Kingdom of Great Britain and Northern Ireland informed the Secretary-General of the following:

“... the Government of the United Kingdom of Great Britain and Northern Ireland wishes the United Kingdom’s ratification of the aforesaid Statute ... to be extended to the following territories for whose international relations the United Kingdom is responsible:

Anguilla
Bermuda
British Virgin Islands
Cayman Islands
Falkland Islands
Montserrat
Pitcairn, Henderson, Ducie and Oeno Islands
St Helena, Ascension and Tristan da Cunha
Sovereign Base Areas of Akrotiri and Dhekelia
Turks and Caicos Islands

The Government of the United Kingdom of Great Britain and Northern Ireland considers the extension of the aforesaid Statute ... to take effect from the date of deposit of this notification, ... ”

10 Territorial application in respect of the Isle of Man effected on 28 November 2012:

“... The Government of the United Kingdom of Great Britain and Northern Ireland wishes the United Kingdom’s Ratification of the Rome Statute to be extended to the territory of the Isle of Man for whose international relations the United Kingdom is responsible.

The Government of the United Kingdom of Great Britain and Northern Ireland considers the extension of the aforesaid Rome Statute to the Isle of Man to enter into force on the first day of the month after the Sixtieth day following deposit of this notification, ...”

11 In a communication received on 6 May 2002, the Government of the United States of America informed the Secretary-General of the following:

“This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary’s status lists relating to this treaty.”

12 On 13 August 2008, the Government of France informed the Secretary-General that it had decided to withdraw the
Declaration of Sudan on the non-ratification of the
Rome Statute, 27 August 2008
from the Court must be drafted in Portuguese or accompanied by a translation into Portuguese.

**REPUBLIC OF MOLDOVA**

1. According to the provisions of the article 87 paragraph 1 of the Statute, the Republic of Moldova declares that all the cooperation requests and all the related documents shall be transmitted through the diplomatic channel.

2. According to the provisions of the article 87 paragraph 2 of the Statute, the Republic of Moldova declares that all the cooperation requests and any documents supporting the requests shall be prepared in Moldovan language or in English, which is one of the working languages of the International Criminal Court, or be accompanied by a translation into one of these languages.

**ROMANIA**

"1. With reference to article 87 paragraph 1 (a) of the Statute, the Ministry of Justice is the Romanian authority competent to receive the requests of the International Criminal Court, to send them immediately for resolution to the Romanian judicial competent bodies, and to communicate to the International Criminal Court the relevant documents.

2. With reference to article 87 paragraph 2 of the Statute, the requests of the International Criminal Court and the relevant documents shall be transmitted in the English language, or accompanied by official translations in this language."

**SAMOA**

"[The Government of Samoa] has the honour to advise that in pursuance of article 87 paragraphs 1 (a) and 2 of the Rome Statute concerning the designation of channels and languages of communication between the States Parties and the International Criminal Court, such channel and language of communication is as follows:

Channel: Permanent Mission of Samoa to the United Nations 800 Second Avenue, Suite 400 J New York, New York 10017
Tel: (212) 599-6196 Fax: (212) 599-0797
Language: English."

**SERBIA**

26 May 2006

*Confirmed upon succession:*

"...in accordance with article 87, paragraphs 1 (a) and 2 of the Rome Statute, Serbia and Montenegro has designated Diplomatic Channel of communication as its channel of communication with the International Criminal Court and Serbian and English language as the languages of communication."

**SIERRA LEONE**

30 April 2004

"...the Permanent Mission of Sierra Leone to the United Nations remains the main channel of communication between Sierra Leone as a State Party and the Court, the language of communication is English."

**SLOVAKIA**

"Pursuant to Article 87, paragraph 2 of the Statute the Slovak Republic declares that requests from the Court for cooperation and any documents supporting such requests shall be submitted in English which is one of the working languages of the Court along with the translation into Slovak which is the official language of the Slovak Republic."

**SLOVENIA**

27 June 2006

"Pursuant to Article 87, paragraph 1 (a) of the Rome Statute the Republic of Slovenia declares that requests for cooperation made by the Court, shall be addressed to the Ministry of Justice of the Republic of Slovenia.

Pursuant to Article 87, paragraph 2 of the Rome Statute the Republic of Slovenia declares that requests for cooperation and any documents supporting the request shall either be in or be accompanied by translation into Slovene language."

**SPAIN**

In relation to article 87, paragraph 1, of the Statute, the Kingdom of Spain declares that, without prejudice to the fields of competence of the Ministry of Foreign Affairs, the Ministry of Justice shall be the competent authority to transmit requests for cooperation made by the Court or addressed to the Court.

In relation to article 87, paragraph 2, of the Statute, the Kingdom of Spain declares that requests for cooperation addressed to it by the Court and any supporting documents must be in Spanish or accompanied by a translation into Spanish.

**SUDAN**

27 August 2008

"I, Deng Alor Koul, Minister for Foreign Affairs of the Republic of Sudan, hereby notify the Secretary-General of the United Nations, as depositary of Rome Statute of the International Criminal Court, that Sudan does not intend to become a party to the Rome Statute. Accordingly, Sudan has no legal obligation arising from its signature on 8 September 2000."

**SURINAME**

&lt;Right&gt;&lt;25 August 2008&lt;/Right&gt;

"In accordance with article 87 paragraph 1 and 2 of the Rome Statute of the International Criminal Court, the Government of the Republic of Suriname declares that all requests for cooperation and any other supporting documents that it receives from the Court shall be transmitted through diplomatic channels in English, which is one of the working languages of the Court along with the translation into Dutch, which is the official languages of the Republic of Suriname."

**SWEDEN**

"With regard to Article 87, paragraph 1, of the Rome Statute of the International Criminal Court, the Kingdom of Sweden declares that all requests for cooperation made by the Court under part IX of the Statute must be transmitted through the Swedish Ministry of Justice.

With regard to Article 87, paragraph 2, of the Rome Statute of the International Criminal Court, the Kingdom of Sweden declares that all requests for cooperation and any supporting documents that it receives from the Court must be drafted in English or Swedish, or accompanied, where necessary, by a translation into one of these languages."

**SWITZERLAND**

Requests for cooperation made by the Court under article 87, paragraph 1 (a), of the Statute shall be transmitted to the Central Office for Cooperation with the
Agreement between the Government of the Kingdom of Lesotho and the Government of the United States of America regarding the surrender of persons to the International Criminal Court, 2006

The Government of the Kingdom of Lesotho and the Government of the United States of America, hereinafter “the Parties,”

Reaffirming the importance of bringing to justice those who commit genocide, crimes against humanity and war crimes,

Recalling that the Rome Statute of the International Criminal Court done at Rome on July 17, 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court is intended to complement and not supplant national criminal jurisdiction,

Considering that the Parties have each expressed their intention to evaluate available information and where it is appropriate to investigate and to prosecute acts within the jurisdiction of the International Criminal Court alleged to have been committed by their officials, employees, military personnel or other nationals,

Affirming that nothing in this Agreement precludes either Party from exercising its criminal jurisdiction over those responsible for genocide, crimes against humanity, and war crimes,

Bearing in mind Article 98 of the Rome Statute,

Hereby agree as follows:

1. For purposes of this Agreement, “persons of the United States of America” are current or former United States Government officials, employees (including contractors), or military personnel or United States nationals.

2. Persons of the United States of America present in the territory of the Kingdom of Lesotho shall not, absent the express consent of the Government of the United States of America,

(a) be surrendered or transferred by any means to the International Criminal Court for any purpose, or

(b) be surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender to or transfer to the International Criminal Court.

3. When the Government of the Kingdom of Lesotho extradites, surrenders or otherwise transfers a person of the United States of America to a third country, the Government of the Kingdom of Lesotho will not agree to the surrender or transfer of that person to the international Criminal Court by a third country, absent the express consent of the Government of the United States of America.

4. Either Party may request consultations regarding the investigation and prosecution of cases of special interest.
5. This Agreement shall enter into force upon signature thereof and shall remain in force until terminated at any time by either party upon twelve months' written notice. The provisions of this Agreement shall continue to apply with respect to any act occurring, or any allegation arising, before the effective date of termination.

THUS SIGNED AND DONE AT MASERU THIS 21st DAY OF June 2006.

FOR THE GOVERNMENT OF THE KINGDOM OF LESOTHO:

[Signature]

Minister of Foreign Affairs

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

[Signature]
American Service-Members’ Protection Act (ASPA), 2002
TITLE II--AMERICAN SERVICE-MEMBERS' PROTECTION ACT

SEC. 2001. SHORT TITLE.

SEC. 2002. FINDINGS.

1. On July 17, 1998, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, meeting in Rome, Italy, adopted the 'Rome Statute of the International Criminal Court'. The vote on whether to proceed with the statute was 120 in favor to 7 against, with 21 countries abstaining. The United States voted against final adoption of the Rome Statute.

2. As of April 30, 2001, 139 countries had signed the Rome Statute and 30 had ratified it. Pursuant to Article 126 of the Rome Statute, the statute will enter into force on the first day of the month after the 60th day following the date on which the 60th country deposits an instrument ratifying the statute.

3. Since adoption of the Rome Statute, a Preparatory Commission for the International Criminal Court has met regularly to draft documents to implement the Rome Statute, including Rules of Procedure and Evidence, Elements of Crimes, and a definition of the Crime of Aggression.

4. During testimony before the Congress following the adoption of the Rome Statute, the lead United States negotiator, Ambassador David Scheffer stated that the United States could not sign the Rome Statute because certain critical negotiating objectives of the United States had not been achieved. As a result, he stated: 'We are left with consequences that do not serve the cause of international justice.'

5. Ambassador Scheffer went on to tell the Congress that: 'Multinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby United States armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty. Not only is this contrary to the most fundamental principles of treaty law, it could inhibit the ability of the United States to use its military to meet alliance obligations and participate in multinational operations, including humanitarian interventions to save civilian lives. Other contributors to peacekeeping operations will be similarly exposed.'

6. Notwithstanding these concerns, President Clinton directed that the United States sign the Rome Statute on December 31, 2000. In a statement issued that day, he stated that in view of the unremedied deficiencies of the Rome Statute, 'I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied'.

7. Any American prosecuted by the International Criminal Court will, under the Rome Statute, be denied procedural protections to which all Americans are entitled under the Bill of Rights to the United States Constitution, such as the right to trial by jury.

8. Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court.

9. In addition to exposing members of the Armed Forces of the United States to the risk of international criminal prosecution, the Rome Statute creates a risk that the President and other senior elected and appointed officials of the United States Government may be prosecuted by the International Criminal Court. Particularly if the Preparatory Commission agrees on a definition of the Crime of Aggression over United States objections, senior United States officials may be at risk of criminal prosecution for national security decisions involving such matters as responding to acts of terrorism, preventing the proliferation of weapons of mass destruction, and deterring aggression. No less than members of the Armed Forces of the United States, senior officials of the United States Government should be free from the risk of prosecution by the International Criminal Court, especially with respect to official actions taken by them to protect the national interests of the United States.

10. Any agreement within the Preparatory Commission on a definition of the Crime of Aggression that usurps the prerogative of the United Nations Security Council under Article 39 of the charter of the United Nations to 'determine the existence of any .... act of aggression' would contravene the charter of the United Nations and undermine deterrence.

11. It is a fundamental principle of international law that a treaty is binding upon its parties only and that it does not create obligations for nonparties.
without their consent to be bound. The United States is not a party to the Rome Statute and will not be bound by any of its terms. The United States will not recognize the jurisdiction of the International Criminal Court over United States nationals.

Congress makes the following findings:

SEC. 2003. WAIVER AND TERMINATION OF PROHIBITIONS OF THIS TITLE.

a. AUTHORITY TO INITIALLY WAIVE SECTIONS 5 AND 7- The President is authorized to waive the prohibitions and requirements of sections 2005 and 2007 for a single period of 1 year. A waiver under this subsection may be issued only if the President at least 15 days in advance of exercising such authority--

1. notifies the appropriate congressional committees of the intention to exercise such authority; and

2. determines and reports to the appropriate congressional committees that the International Criminal Court has entered into a binding agreement that--

A. prohibits the International Criminal Court from seeking to exercise jurisdiction over the following persons with respect to actions undertaken by them in an official capacity:
   i. covered United States persons;
   ii. covered allied persons; and
   iii. individuals who were covered United States persons or covered allied persons; and

B. ensures that no person described in subparagraph (A) will be arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court.

b. AUTHORITY TO EXTEND WAIVER OF SECTIONS 5 AND 7- The President is authorized to waive the prohibitions and requirements of sections 2005 and 2007 for successive periods of 1 year each upon the expiration of a previous waiver pursuant to subsection (a) or this subsection. A waiver under this subsection may be issued only if the President at least 15 days in advance of exercising such authority--

1. notifies the appropriate congressional committees of the intention to exercise such authority; and

2. determines and reports to the appropriate congressional committees that the International Criminal Court--

A. remains party to, and has continued to abide by, a binding agreement that--

   i. prohibits the International Criminal Court from seeking to exercise jurisdiction over the following persons with respect to actions undertaken by them in an official capacity:

      l. covered United States persons;
      ll. covered allied persons; and
      lll. individuals who were covered United States persons or covered allied persons; and

   ii. ensures that no person described in clause (i) will be arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court; and

B. has taken no steps to arrest, detain, prosecute, or imprison any person described in clause (i) of subparagraph (A).

c. AUTHORITY TO WAIVE SECTIONS 4 AND 6 WITH RESPECT TO AN INVESTIGATION OR PROSECUTION OF A NAMED INDIVIDUAL- The President is authorized to waive the prohibitions and requirements of sections 2004 and 2006 to the degree such prohibitions and requirements would prevent United States cooperation with an investigation or prosecution of a named individual by the International Criminal Court. A waiver under this subsection may be issued only if the President at least 15 days in advance of exercising such authority--

1. notifies the appropriate congressional committees of the intention to exercise such authority; and

2. determines and reports to the appropriate congressional committees that--

   A. a waiver pursuant to subsection (a) or (b) of the prohibitions and requirements of sections 2005 and 2007 is in effect;

   B. there is reason to believe that the named individual committed the crime or crimes that are the subject of the International Criminal Court's investigation or prosecution;

   C. it is in the national interest of the United States for the International Criminal Court's investigation or prosecution of the named individual to proceed; and

   D. in investigating events related to actions by the named individual, none of the following persons will be investigated, arrested, detained, prosecuted, or imprisoned by or on behalf of the International Criminal Court with respect to actions undertaken by them in an official capacity:

      i. Covered United States persons.
American Service-Members’ Protection Act

TERMINATION OF WAIVER PURSUANT TO SUBSECTION (c)- Any waiver or waivers exercised pursuant to subsection (c) of the prohibitions and requirements of sections 2004 and 2006 shall terminate at any time that a waiver pursuant to subsection (a) or (b) of the prohibitions and requirements of sections 2005 and 2007 expires and is not extended pursuant to subsection (b).

e. TERMINATION OF PROHIBITIONS OF THIS TITLE- The prohibitions and requirements of sections 2004, 2005, 2006, and 2007 shall cease to apply, and the authority of section 2008 shall terminate, if the United States becomes a party to the International Criminal Court pursuant to a treaty made under article II, section 2, clause 2 of the Constitution of the United States.

SEC. 2004. PROHIBITION ON COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT.

a. APPLICATION- The provisions of this section--

1. apply only to cooperation with the International Criminal Court and shall not apply to cooperation with an ad hoc international criminal tribunal established by the United Nations Security Council before or after the date of the enactment of this Act to investigate and prosecute war crimes committed in a specific country or during a specific conflict; and

2. shall not prohibit--

A. any action permitted under section 2008; or

B. communication by the United States of its policy with respect to a matter.

b. PROHIBITION ON RESPONDING TO REQUESTS FOR COOPERATION- Notwithstanding section 1782 of title 28, United States Code, or any other provision of law, no agency of the United States Government may transmit for execution any letter rogatory issued, or other request for cooperation made, by the International Criminal Court to the tribunal, officer, or agency in the United States to whom it is addressed.

c. PROHIBITION ON TRANSMITTAL OF LETTERS ROGATORY FROM THE INTERNATIONAL CRIMINAL COURT- Notwithstanding section 1781 of title 28, United States Code, or any other provision of law, no agency of the United States Government may extradite any person from the United States to the International Criminal Court, nor support the transfer of any United States citizen or permanent resident alien to the International Criminal Court.

d. PROHIBITION ON EXTRADITION TO THE INTERNATIONAL CRIMINAL COURT- Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government may extradite any person from the United States to the International Criminal Court.

e. PROHIBITION ON PROVISION OF SUPPORT TO THE INTERNATIONAL CRIMINAL COURT- Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government, including any court, may provide support to the International Criminal Court.

f. PROHIBITION ON USE OF APPROPRIATED FUNDS TO ASSIST THE INTERNATIONAL CRIMINAL COURT- Notwithstanding any other provision of law, no funds appropriated under any provision of law may be used for the purpose of assisting the International Criminal Court.

g. RESTRICTION ON ASSISTANCE PURSUANT TO MUTUAL LEGAL ASSISTANCE TREATIES- The United States shall exercise its rights to limit the use of assistance provided under all treaties and executive agreements for mutual legal assistance in criminal matters, multilateral conventions with legal assistance provisions, and extradition treaties, to which the United States is a party, and in connection with the execution or issuance of any letter rogatory, to prevent the transfer to, or other use by, the International Criminal Court of any assistance provided by the United States under such treaties and letters rogatory.

h. PROHIBITION ON INVESTIGATIVE ACTIVITIES OF AGENTS- No agent of the International Criminal Court may conduct, in the United States or any territory subject to the jurisdiction of the United States, any investigative activity relating to a preliminary inquiry, investigation, prosecution, or other proceeding at the International Criminal Court.

SEC. 2005. RESTRICTION ON UNITED STATES PARTICIPATION IN CERTAIN UNITED NATIONS PEACEKEEPING OPERATIONS.

a. POLICY- Effective beginning on the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, the President should use the voice and vote of the United States in the United Nations Security Council to ensure that each resolution of the Security Council authorizing any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations permanently exempts, at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation.

b. RESTRICTION- Members of the Armed Forces of the United States may not participate in any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations, the creation of which is authorized by the United Nations Security Council on or after the date that the Rome Statute enters into effect pursuant to Article 126 of the
Rome Statute, unless the President has submitted to the appropriate congressional committees a certification described in subsection (c) with respect to such operation.

c. CERTIFICATION- The certification referred to in subsection (b) is a certification by the President that--

1. members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because, in authorizing the operation, the United Nations Security Council permanently exempted, at a minimum, members of the Armed Forces of the United States participating in the operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by them in connection with the operation;

2. members of the Armed Forces of the United States are able to participate in the peacekeeping or peace enforcement operation without risk of criminal prosecution or other assertion of jurisdiction by the International Criminal Court because each country in which members of the Armed Forces of the United States participating in the operation will be present either is not a party to the International Criminal Court and has not invoked the jurisdiction of the International Criminal Court pursuant to Article 12 of the Rome Statute, or has entered into an agreement in accordance with Article 98 of the Rome Statute preventing the International Criminal Court from proceeding against members of the Armed Forces of the United States present in that country; or

3. the national interests of the United States justify participation by members of the Armed Forces of the United States in the peacekeeping or peace enforcement operation.

SEC. 2006. PROHIBITION ON DIRECT OR INDIRECT TRANSFER OF CLASSIFIED NATIONAL SECURITY INFORMATION AND LAW ENFORCEMENT INFORMATION TO THE INTERNATIONAL CRIMINAL COURT.

a. IN GENERAL- Not later than the date on which the Rome Statute enters into force, the President shall ensure that appropriate procedures are in place to prevent the transfer of classified national security information and law enforcement information to the International Criminal Court for the purpose of facilitating an investigation, apprehension, or prosecution.

b. INDIRECT TRANSFER- The procedures adopted pursuant to subsection (a) shall be designed to prevent the transfer to the United Nations and to the government of any country that is party to the International Criminal Court of classified national security information and law enforcement information that specifically relates to matters known to be under investigation or prosecution by the International Criminal Court, except to the degree that satisfactory assurances are received from the United Nations or that government, as the case may be, that such information will not be made available to the International Criminal Court for the purpose of facilitating an investigation, apprehension, or prosecution.

c. CONSTRUCTION- The provisions of this section shall not be construed to prohibit any action permitted under section 2008.

SEC. 2007. PROHIBITION OF UNITED STATES MILITARY ASSISTANCE TO PARTIES TO THE INTERNATIONAL CRIMINAL COURT.

a. PROHIBITION OF MILITARY ASSISTANCE- Subject to subsections (b) and (c), and effective 1 year after the date on which the Rome Statute enters into force pursuant to Article 126 of the Rome Statute, no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court.

b. NATIONAL INTEREST WAIVER- The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that it is important to the national interest of the United States to waive such prohibition.

c. ARTICLE 98 WAIVER- The President may, without prior notice to Congress, waive the prohibition of subsection (a) with respect to a particular country if he determines and reports to the appropriate congressional committees that such country has entered into an agreement with the United States pursuant to Article 98 of the Rome Statute preventing the International Criminal court from proceeding against United States personnel present in such country.

d. EXEMPTION- The prohibition of subsection (a) shall not apply to the government of--

1. a NATO member country;

2. a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand); or

3. Taiwan.

SEC. 2008. AUTHORITY TO FREE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES AND CERTAIN OTHER PERSONS DETAINED OR IMPRISONED BY OR ON BEHALF OF THE INTERNATIONAL CRIMINAL COURT.

a. AUTHORITY- The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.

b. PERSONS AUTHORIZED TO BE FREED- The authority of subsection (a) shall extend to the following persons:

1. Covered United States persons.

2. Covered allied persons.
American Service-Members’ Protection Act

3. Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered allied person, and in the case of a covered allied person, upon the request of such government.

c. AUTHORIZATION OF LEGAL ASSISTANCE- When any person described in subsection (b) is arrested, detained, investigated, prosecuted, or imprisoned by, on behalf of, or at the request of the International Criminal Court, the President is authorized to direct any agency of the United States Government to provide--

1. legal representation and other legal assistance to that person (including, in the case of a person entitled to assistance under section 1037 of title 10, United States Code, representation and other assistance in the manner provided in that section);

2. exculpatory evidence on behalf of that person; and

3. defense of the interests of the United States through appearance before the International Criminal Court pursuant to Article 18 or 19 of the Rome Statute, or before the courts or tribunals of any country.

d. BRIBES AND OTHER INDUCEMENTS NOT AUTHORIZED- This section does not authorize the payment of bribes or the provision of other such incentives to induce the release of a person described in subsection (b).

SEC. 2009. ALLIANCE COMMAND ARRANGEMENTS.

a. REPORT ON ALLIANCE COMMAND ARRANGEMENTS- Not later than 6 months after the date of the enactment of this Act, the President should transmit to the appropriate congressional committees a report with respect to each military alliance to which the United States is party--

1. describing the degree to which members of the Armed Forces of the United States may, in the context of military operations undertaken by or pursuant to that alliance, be placed under the command or operational control of foreign military officers subject to the jurisdiction of the International Criminal Court because they are nationals of a party to the International Criminal Court; and

2. evaluating the degree to which members of the Armed Forces of the United States engaged in military operations undertaken by or pursuant to that alliance may be exposed to greater risks as a result of being placed under the command or operational control of foreign military officers subject to the jurisdiction of the International Criminal Court.

b. DESCRIPTION OF MEASURES TO ACHIEVE ENHANCED PROTECTION FOR MEMBERS OF THE ARMED FORCES OF THE UNITED STATES- Not later than 1 year after the date of the enactment of this Act, the President should transmit to the appropriate congressional committees a description of modifications to command and operational control arrangements within military alliances to which the United States is a party that could be made in order to reduce any risks to members of the Armed Forces of the United States identified pursuant to subsection (a)(2).

c. SUBMISSION IN CLASSIFIED FORM- The report under subsection (a), and the description of measures under subsection (b), or appropriate parts thereof, may be submitted in classified form.

SEC. 2010. WITHHOLDINGS.

Funds withheld from the United States share of assessments to the United Nations or any other international organization during any fiscal year pursuant to section 705 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 (as enacted by section 1000(a)(7) of Public Law 106-113; 113 Stat. 1501A-460), are authorized to be transferred to the Embassy Security, Construction and Maintenance Account of the Department of State.

SEC. 2011. APPLICATION OF SECTIONS 2004 AND 2006 TO EXERCISE OF CONSTITUTIONAL AUTHORITIES.

a. IN GENERAL- Sections 2004 and 2006 shall not apply to any action or actions with respect to a specific matter involving the International Criminal Court taken or directed by the President on a case-by-case basis in the exercise of the President’s authority as Commander in Chief of the Armed Forces of the United States under article II, section 3(3) of the United States Constitution or in the exercise of the executive power under article II, section 1 of the United States Constitution.

b. NOTIFICATION TO CONGRESS-

1. IN GENERAL- Subject to paragraph (2), not later than 15 days after the President takes or directs an action or actions described in subsection (a) that would otherwise be prohibited under section 2004 or 2006, the President shall submit a notification of such action to the appropriate congressional committees. A notification under this paragraph shall include a description of the action, a determination that the action is in the national interest of the United States, and a justification for the action.

2. EXCEPTION- If the President determines that a full notification under paragraph (1) could jeopardize the national security of the United States or compromise a United States law enforcement activity, not later than 15 days after the President takes or directs an action or actions referred to in paragraph (1) the President shall notify the appropriate congressional committees that an action has been taken and a determination has been made pursuant to this paragraph. The President shall provide a full notification under paragraph (1) not later than 15 days after the reasons for the determination under this paragraph no longer apply.

c. CONSTRUCTION- Nothing in this section shall be construed as a grant of statutory authority to the President to take any action.

SEC. 2012. NONDELEGATION.
The authorities vested in the President by sections 2003 and 2011(a) may not be delegated by the President pursuant to section 301 of title 3, United States Code, or any other provision of law. The authority vested in the President by section 2005(c)(3) may not be delegated by the President pursuant to section 301 of title 3, United States Code, or any other provision of law to any official other than the Secretary of Defense, and if so delegated may not be subdelegated.

SEC. 2013. DEFINITIONS.

As used in this title and in section 706 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001:

1. APPROPRIATE CONGRESSIONAL COMMITTEES- The term 'appropriate congressional committees' means the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate.

2. CLASSIFIED NATIONAL SECURITY INFORMATION- The term 'classified national security information' means information that is classified or classifiable under Executive Order 12958 or a successor Executive order.

3. COVERED ALLIED PERSONS- The term 'covered allied persons' means military personnel, elected or appointed officials, and other persons employed by or working on behalf of the government of a NATO member country, a major non-NATO ally (including Australia, Egypt, Israel, Japan, Jordan, Argentina, the Republic of Korea, and New Zealand), or Taiwan, for so long as that government is not a party to the International Criminal Court and wishes its officials and other persons working on its behalf to be exempted from the jurisdiction of the International Criminal Court.

4. COVERED UNITED STATES PERSONS- The term 'covered United States persons' means members of the Armed Forces of the United States, elected or appointed officials of the United States Government, and other persons employed by or working on behalf of the United States Government, for so long as the United States is not a party to the International Criminal Court.

5. EXTRADITION- The terms 'extradition' and 'extradite' mean the extradition of a person in accordance with the provisions of chapter 209 of title 18, United States Code, (including section 3181(b) of such title) and such terms include both extradition and surrender as those terms are defined in Article 102 of the Rome Statute.

6. INTERNATIONAL CRIMINAL COURT- The term 'International Criminal Court' means the court established by the Rome Statute.

7. MAJOR NON-NATO ALLY- The term 'major non-NATO ally' means a country that has been so designated in accordance with section 517 of the Foreign Assistance Act of 1961.

8. PARTICIPATE IN ANY PEACEKEEPING OPERATION UNDER CHAPTER VI OF THE CHARTER OF THE UNITED NATIONS OR PEACE ENFORCEMENT OPERATION UNDER CHAPTER VII OF THE CHARTER OF THE UNITED NATIONS- The term 'participate in any peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations' means to assign members of the Armed Forces of the United States to a United Nations military command structure as part of a peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations in which those members of the Armed Forces of the United States are subject to the command or operational control of one or more foreign military officers not appointed in conformity with article II, section 2, clause 2 of the Constitution of the United States.

9. PARTY TO THE INTERNATIONAL CRIMINAL COURT- The term 'party to the International Criminal Court' means a government that has deposited an instrument of ratification, acceptance, approval, or accession to the Rome Statute, and has not withdrawn from the Rome Statute pursuant to Article 127 thereof.

10. PEACEKEEPING OPERATION UNDER CHAPTER VI OF THE CHARTER OF THE UNITED NATIONS OR PEACE ENFORCEMENT OPERATION UNDER CHAPTER VII OF THE CHARTER OF THE UNITED NATIONS- The term 'peacekeeping operation under chapter VI of the charter of the United Nations or peace enforcement operation under chapter VII of the charter of the United Nations' means any military operation to maintain or restore international peace and security that--

A. is authorized by the United Nations Security Council under chapter VI or VII of the charter of the United Nations; and

B. is paid for from assessed contributions of United Nations members that are made available for peacekeeping or peace enforcement activities.


12. SUPPORT- The term 'support' means assistance of any kind, including financial support, transfer of property or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals.

13. UNITED STATES MILITARY ASSISTANCE- The term 'United States military assistance' means--

A. assistance provided under chapter 2 or 5 of part II of the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.); or

B. defense articles or defense services furnished with the financial assistance of the United States Government, including through loans and guarantees, under section 23 of the Arms Export Control Act (22 U.S.C. 2763).
SEC. 2014. REPEAL OF LIMITATION.

The Department of Defense Appropriations Act, 2002 (division A of Public Law 107-117) is amended by striking section 8173.

SEC. 2015. ASSISTANCE TO INTERNATIONAL EFFORTS.

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity.

This title may be cited as the 'American Service-members' Protection Act of 2002'.
The Special Representative of the Secretary-General (hereinafter: Transitional Administrator),


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),


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, enforced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collective 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.
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 orbombarding, 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 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 judgment 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) 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 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.
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
Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (with Statute), 2002
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. 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 re-located 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.
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) Conscription 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 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”).
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 victims, 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.

ACCORD ENTRE L'ORGANISATION DES NATIONS UNIES ET LE GOUVERNEMENT DE SIERRA LEONE RELATIF À LA CRÉATION D'UN TRIBUNAL SPÉCIAL POUR LA SIERRA LEONE

Considérant que le Conseil de sécurité dans sa résolution 1315 (2000) du 14 août 2000 a exprimé sa profonde préoccupation par les crimes très graves commis sur le territoire de Sierra Leone contre la population civile et des membres du personnel des Nations Unies ainsi que par le climat d'impunité qui y règne,

Considérant que dans ladite résolution, le Conseil de sécurité a demandé au Secrétaire général de négocier un accord avec le Gouvernement sierra-léonais en vue de créer un Tribunal spécial indépendant pour juger les personnes qui sont responsables de violations graves du droit international humanitaire ainsi que les crimes commis au regard du droit sierra-léonais ;

Considérant que le Secrétaire général des Nations Unies (ci-après le "Secrétaire général") et le Gouvernement de Sierra Leone (ci-après "le Gouvernement") ont tenu des négociations en vue de la création du Tribunal spécial pour le Sierra Leone (ci-après le Tribunal spécial);

Les Nations Unies et le Gouvernement de Sierra Leone sont convenus de ce qui suit :

Article 1. Création d'un Tribunal spécial

1. Par la présente, est créé un Tribunal spécial pour le Sierra Leone chargé de juger les personnes qui sont responsables de violations graves du droit international humanitaire ainsi que les crimes commis au regard du droit sierra-léonais depuis le 30 novembre 1996.

2. Le Tribunal spécial s'acquittera de ses fonctions conformément au Statut du Tribunal spécial pour le Sierra Leone. Le Statut est annexé au présent accord et en constitue une partie intégrante.

Article 2. Composition du Tribunal spécial et nomination des juges

1. Le Tribunal spécial est composé d'une chambre de première instance et d'une chambre d'appel et une deuxième chambre de première instance sera créée si le Secrétaire général, le Procureur ou le Président du Tribunal spécial le demande au moins six mois après le début du fonctionnement du Tribunal spécial. Deux juges assesseurs au maximum peuvent être également nommés après un délai de six mois si le Président du Tribunal spécial le demande.

2. Les Chambres seront composées de 8 juges indépendants au minimum et de 11 juges au maximum répartis comme suit :

(a) Trois juges dont un nommé par le Gouvernement de Sierra Leone et les deux autres par le Secrétaire général sur proposition des Etats membres, notamment de la Communauté
économique des États de l'Afrique de l'Ouest et du Commonwealth, siégeront à la chambre de première instance ;

(b) Dans l'hypothèse où il y aurait une deuxième chambre de première instance, elle devra être composée également de la manière décrite ci-dessus ;

(3) Cinq juges siégeront à la Chambre d'appel ; deux seront nommés par le Gouvernement de Sierra Leone et trois par le Secrétaire général sur proposition des États membres, notamment de la Communauté économique des États de l'Afrique de l'Ouest et du Commonwealth.

3. Le gouvernement de Sierra Leone et le Secrétaire général se consulteront à propos de la nomination des juges.

4. Les juges seront nommés pour un mandat de trois ans et sont rééligibles.

5. Si, à la demande du Président du Tribunal spécial, un juge assesseur ou des juges ont été nommés par le Gouvernement de Sierra Leone ou par le Secrétaire général, le juge qui prèside la chambre de première instance ou la chambre d'appel devra demander audit juge assesseur d'être présent à chaque étape du procès afin de remplacer tout juge qui se trouvera dans l'incapacité de siéger.

Article 3. Nomination d'un Procureur ou d'un Procureur adjoint

1. Le Secrétaire général nommera après consultation avec le Gouvernement de Sierra Leone un Procureur pour un mandat de trois ans. Son mandat peut être renouvelé.

2. Le gouvernement de Sierra Leone, en consultation avec le Secrétaire général, devra nommer un procureur adjoint sierra-léonais qui assistera le procureur dans ses enquêtes et dans les poursuites.

3. Le procureur et le procureur adjoint devront être d'une grande intégrité morale et d'un niveau de compétence très élevé et bénéficier d'une longue expérience dans la conduite des enquêtes et des poursuites criminelles. Le procureur et le procureur adjoint seront indépendants dans la conduite de leur tâche et ne devront accepter ni demander d'instructions d'un quelconque gouvernement ou d'une autre source.

4. Le procureur sera assisté d'un personnel sierra-léonais et international qui devra lui permettre d'exercer ses fonctions de manière efficace et optimale.

Article 4. Nomination d'un greffier

1. En consultation avec le Président du Tribunal spécial, le Secrétaire général devra nommer un greffier qui sera attaché aux chambres, au bureau du Procureur et qui aura la charge du recrutement et de l'administration du personnel d'appui. Le greffier sera également chargé d'administrer les ressources financières et humaines du Tribunal spécial.


Article 5. Locaux

Le Gouvernement aidera le Tribunal spécial à obtenir des locaux ainsi que d'autres installations et services nécessaires à son fonctionnement.

Article 6. Dépenses du Tribunal spécial

Les dépenses du Tribunal spécial seront couvertes par des contributions volontaires de la communauté internationale. Il est entendu que le Secrétaire général entamera le processus de la création du Tribunal spécial lorsqu'il y aura des contributions volontaires suffisantes pour sa création et son fonctionnement pendant 12 mois et des engagements de contribution qui devraient permettre au Tribunal de faire face à ses dépenses pendant les 24 mois suivants. Il est en outre entendu que le Secrétaire général continuera à solliciter des contributions pour couvrir les dépenses prévues au-delà de la période initiale de trois ans. Si les contributions volontaires ne sont pas suffisantes pour permettre au Tribunal de mettre en oeuvre son mandat, le Secrétaire général et le Conseil de sécurité devront chercher d'autres moyens de financement du Tribunal.

Article 7. Comité de gestion

Les parties reconnaissent que les États intéressés peuvent vouloir établir un Comité de gestion chargé d'aider le Tribunal spécial à obtenir un financement adéquat, à fournir des conseils sur les questions relatives à l'administration du Tribunal et sur des matières non juridiques.

Le Comité de gestion pourrait comprendre des États intéressés qui contribuent de manière volontaire au Tribunal spécial ainsi que les représentants du gouvernement sierra-léonais et du Secrétariat général.

Article 8. Inviolabilité des locaux, des archives et d'autres documents

1. Les locaux du Tribunal spécial sont inviolables. Les autorités compétentes doivent prendre toutes les mesures nécessaires pour s'assurer que le Tribunal ne sera pas dépossédé d'une partie ou de la totalité de ses locaux sans son consentement formel.

2. Le patrimoine, les fonds et les avoirs du Tribunal spécial où qu'ils soient situés et quel que soit leur détenteur ne peuvent faire l'objet de recherche ou être saisis, réquisitionnés, confisqués ou expropriés ou être l'objet d'une quelconque forme d'interférence par des actions exécutoire, administrative, judiciaire ou législative.

3. Les archives du Tribunal et de manière générale tous les documents et matériel qui lui appartiennent ou qu'il a utilisés où qu'ils soient situés et quel que soit leur détenteur sont inviolables.

Article 9. Fonds, avoirs et autre propriété

1. Le Tribunal spécial, ses fonds, ses avoirs et autre propriété où qu'ils soient situés et quel que soit leur détenteur bénéficient de l'immunité sauf si dans un cas le Tribunal...
renonce à cette immunité. Il est néanmoins entendu que la renonciation à l’immunité ne peut s’appliquer à une mesure d’exécution.

2. Sans qu’il soit limité par des contrôles financiers, par des règlements ou par des moratoires d’aucune sorte, le Tribunal spécial :

(a) peut détenir et utiliser des fonds, de l’or ou des titres négociables de toutes sortes et maintenir et exploiter des comptes en n’importe quelle monnaie et convertir une monnaie en une autre monnaie ;

(b) est libre de transférer ses fonds, l’or ou une monnaie d’un pays à l’autre, sur le territoire de Sierra Leone, aux Nations Unies ou à toute autre institution.

Article 10. Siège du Tribunal spécial
Le siège du Tribunal spécial est au Sierra Leone. Le Tribunal peut se réunir ailleurs s’il considère que c’est nécessaire pour exercer ses fonctions efficacement. Le Tribunal peut avoir son siège en dehors de Sierra Leone si les circonstances l’exigent sous réserve de la conclusion d’un accord de siège entre le Secrétariat général des Nations Unies et le Gouvernement de Sierra Leone, d’une part et le Gouvernement du siège alternatif d’autre part.

Article 11. Capacité judiciaire
Le Tribunal spécial doit avoir la capacité judiciaire nécessaire de :

(a) contracter ;
(b) acquérir et aliéner des propriétés mobilières et immobilières ;
(c) engager des procédures judiciaires ;
(d) conclure des accords avec des États s’ils sont nécessaires pour exercer ses fonctions.

Article 12. Privilèges et immunités des juges, du procureur et du greffier
1. Les juges, le procureur et le greffier ainsi que les membres de leur famille bénéficient des privilèges et immunités ainsi que des exemptions et des privilèges accordés aux agents diplomatiques conformément à la Convention de Vienne de 1961 sur les relations diplomatiques. Ils doivent bénéficier notamment de :

(a) l’inviolabilité personnelle y compris l’immunité contre l’arrestation et la détention ;
(b) l’immunité contre les juridictions criminelles, civiles et administrative conformément à la Convention de Vienne ;
(c) l’inviolabilité de tous leurs dossiers et documents ;
(d) l’exemption des restrictions de l’immigration et des autres immatriculations d’étrangers, si c’est nécessaire ;
(e) les mêmes immunités et privilèges concernant leur bagage personnel qui sont reconnus par la Convention de Vienne aux agents diplomatiques ;
(f) l’exemption d’impôt sur leurs salaires, émoluments et frais.

2. Les privilèges et les immunités sont accordés aux juges, aux procureurs et au greffier dans l’intérêt du Tribunal spécial et non pas pour leur bénéfice personnel. Le droit et le devoir de renonciation à l’immunité dans la mesure où cette renonciation ne porte pas préjudice au but pour lequel elle a été accordée appartiennent au Secrétariat général en consultation avec le président.

Article 13. Privilèges et immunité du personnel sierra-léonais et international
1. Le personnel international et sierra-léonais devra bénéficier :

(a) de l’immunité contre toute poursuite juridique pour des mots écrits ou prononcés ou pour tout acte effectué dans leur fonction officielle. Ils continueront à bénéficier de l’immunité après avoir cessé leur fonction auprès du Tribunal ;
(b) l’exemption d’impôt sur les salaires, émoluments et frais qui leur sont payés.

2. Le personnel international devra bénéficier en outre :

(a) de l’immunité des restrictions de l’immigration ;
(b) du droit d’importer en franchise pour le paiement des services, leur fourniture et leurs effets (personnels) lors de leur prise de fonction officielle pour la première fois au Sierra Leone.

3. Les privilèges et les immunités sont accordés aux hauts fonctionnaires du Tribunal spécial dans l’intérêt du Tribunal et non pas pour leur bénéfice personnel. Le droit de renoncer à l’immunité, dans la mesure où cette renonciation ne porte pas préjudice au but pour lequel elle a été accordée, ne peut être invoqué que par le greffier du Tribunal.

Article 14. Conseil
1. Le Gouvernement doit s’assurer que l’avocat-conseil d’un suspect ou d’un accusé qui a été accepté en tant que tel par le Tribunal spécial ne peut être soumis à aucune mesure qui pourrait nuire à l’exercice de ses fonctions en pleine liberté et indépendance.

2. L’avocat-conseil devra bénéficier en particulier :

a) de l’immunité contre toute arrestation ou détention et contre toute saisie de ses bagages personnels ;

b) du privilège de l’inviolabilité de tout document relatif à l’exercice de ses fonctions en tant qu’avocat-conseil d’un suspect ou d’un accusé ;

c) de l’immunité contre toute poursuite juridique pour des mots écrits ou prononcés ou pour tout acte effectué dans ses fonctions d’avocat-conseil. Il continuera à bénéficier de l’immunité après avoir cessé sa fonction d’avocat-conseil du suspect ou de l’accusé ;

d) de l’immunité vis-à-vis des restrictions de l’immigration durant son séjour dans le pays ou durant ses déplacements.

Article 15. Témoins et experts
Les témoins et les experts qui comparaissent en vertu d’une assignation ou d’une citation des juges ou du procureur ne peuvent être poursuivis, détenus ou sujets à aucune re-
striction de leur liberté par les autorités sierra-léonaises. Ils ne peuvent être soumis à aucune mesure qui pourrait nuire à l'exercice de leurs fonctions en pleine liberté et indépendance. Les dispositions des alinéas a et d du paragraphe 2 de l'article 13 leur sont applicables.

*Article 16. Sécurité, sûreté et protection des personnes mentionnées dans le présent accord*

Reconnaissant la responsabilité du Gouvernement selon le droit international d'assurer la sécurité, la sûreté et la protection des personnes mentionnées dans le présent accord et son incapacité actuelle d'assumer cette responsabilité tant qu’il n’aura pas restructuré et reconstitué ses forces de sécurité, la mission des Nations Unies au Sierra Leone fournira la sécurité nécessaire aux locaux et au personnel du Tribunal spécial dans la limite de ses possibilités, sous réserve d’un mandat approprié du Conseil de sécurité.

*Article 17. Coopération avec le Tribunal spécial*

1. Le Gouvernement coopérera avec tous les organes du Tribunal spécial à toutes les étapes des poursuites. Il devra en particulier faciliter l'accès du procureur aux sites, aux personnes et aux documents pertinents nécessaires à l'enquête.

2. Le Gouvernement répondra sans retard à toute demande d'assistance du Tribunal spécial ou toute requête des chambres y compris (mais non limité):
   a. Identification et location des personnes ;
   b. Service des documents ;
   c. Arrestation et détention des personnes ;
   d. Transfert d’un inculpé au Tribunal.

*Article 18. Langue de travail*

La langue officielle de travail du Tribunal spécial est l'anglais.

*Article 19. Mesures pratiques*

1. Afin que les travaux du Tribunal spécial soient efficaces et rentables, une approche par étape doit être adoptée conformément à l’ordre chronologique du processus juridique.

2. Dans la première étape des travaux du Tribunal spécial, les juges, le Procureur et le Greffier seront nommés en même temps que le personnel chargé des enquêtes et des poursuites. Les enquêtes et les poursuites relatives aux personnes déjà en détention doivent être engagées.

3. Dans la phase initiale, les juges de la chambre de première instance et de la chambre d'appel doivent se réunir sur une base ad hoc pour examiner les questions d'organisation et assumer leur fonction si tôt requis.

4. Les juges de la chambre de première instance occuperont leur poste permanent juste avant que le processus d’enquête soit terminé ; les juges de la chambre d'appel attendront la fin du processus de première instance.

*Article 20. Règlement des différends*

Tout différend entre les parties relatifs à l'interprétation ou à l'application du présent accord doit être réglé par la négociation ou par un mode de règlement mutuellement accepté.

*Article 21. Entrée en vigueur*

Le présent accord entre en vigueur le lendemain du jour de notification des deux parties par écrit que les formalités internes concernées ont été remplies.

*Article 22. Dénonciation*

Le présent accord peut être dénoncé par un accord écrit des parties.

Pour les Nations Unies:
HANS CORELL

Pour le Gouvernement de Sierra Leone:
SOLOMON E. BERWA
STATUT DU TRIBUNAL SPÉCIAL POUR LE SIERRA LEONE


Article 1. Compétence du Tribunal spécial

1. A l’exception des dispositions prévues à l’alinéa 2, le Tribunal spécial est habilité à juger les personnes qui sont responsables de violations graves du droit international humanitaire ainsi que les crimes commis au regard du droit sierra-léonais depuis le 30 novembre 1996 y compris les responsables qui en commettant ces crimes ont porté atteinte à l’établissement et à la mise en œuvre du processus de paix en Sierra Leone.

2. Toute infraction par les casques bleus et le personnel attaché à l’opération de maintien de la paix en Sierra Leone conformément au Statut de l’Accord de mission en vigueur entre les Nations Unies et le Gouvernement de Sierra Leone ou les accords entre le Sierra Leone et d’autres Gouvernements et organisations régionales ou, en l’absence d’un tel accord, à condition que les opérations de maintien de la paix aient été entreprises avec le consentement du Gouvernement de Sierra Leone, relèvera en premier lieu de la juridiction de l’État d’envoi.

3. Dans le cas où l’État d’envoi ne voudrait pas ou est dans l’incapacité de mener une enquête ou d’engager une poursuite, le Tribunal spécial peut exercer sa juridiction à l’encontre des prévenus avec l’autorisation du Conseil de sécurité.

Article 2. Crimes contre l’humanité

Le tribunal spécial est habilité à juger les personnes présumées responsables des crimes suivants lorsqu’ils ont été commis dans le cadre d’une attaque généralisée et systémique contre une population civile :

(a) Assassinat ;
(b) Extermination;
(c) Réduction en esclavage;
(d) Expulsion;
(e) Emprisonnement;
(f) Torture;
(g) Viol, esclavage sexuel, prostitution forcée, grossesse forcée et toute autre forme de violence sexuelle;
(h) Persécution pour des raisons politiques, raciales et religieuses ;
(i) Autres actes inhumains.

Article 3. Violations de l’article 3 commun aux Conventions de Genève et du Protocole additionnel II

Le Tribunal spécial est habilité à poursuivre les personnes qui commettent ou qui donnent l’ordre de commettre des violations graves de l’article 3 commun aux Conventions de Genève du 12 août 1949 pour la protection des victimes en temps de guerre et du Protocole additionnel II du 8 juin 1977.

Ces violations comprennent :

(a) Les atteintes portées à la vie, à la santé et au bien-être physique ou mentaux des personnes, en particulier le meurtre de même que les traitements cruels tels que la torture, les mutilations ou toutes formes de peines corporelles ;
(b) Les punitions collectives ;
(c) La prise d’otages ;
(d) Les actes de terrorisme ;
(e) Les atteintes à la dignité de la personne, notamment les traitements humiliants et dégradants, le viol, la prostitution forcée et tout attentat à la pudeur ;
(f) Le pillage ;
(g) Les condamnations prononcées et les exécutions effectuées sans un jugement préalable rendu par un Tribunal régulièrement constitué, assorti des garanties judiciaires reconnues comme indispensables par les peuples civilisés ;
(h) La menace de commettre les actes précités.

Article 4. Autres violations sérieuses du droit international humanitaire

Le Tribunal spécial a aussi le pouvoir de juger les personnes coupables des violations suivantes du droit humanitaire international :

(a) Attaque dirigée intentionnellement contre la population civile ou contre des personnes civiles qui ne participent pas aux hostilités ;
(b) Attaque dirigée intentionnellement contre le personnel, les installations, le matériel, des unités administratives ou des véhicules qui participent à l’aide humanitaire ou à la mission de maintien de la paix, conformément à la Charte des Nations Unies dans la mesure où ils doivent bénéficier de la protection accordée aux civils ou à des objets civils conformément à la loi internationale relative aux conflits armés ;
(c) Conscription ou enrôle d’enfants âgés de moins de 15 ans dans des forces armées ou dans des groupes armés et les pousser à participer activement aux hostilités.

Article 5. Crimes selon le droit sierra-léonais

Le Tribunal spécial a le pouvoir de juger des personnes qui ont commis les crimes suivants selon le droit sierra-léonais :

(a) Infractions relatives aux sévices infligés aux jeunes filles conformément à l’Acte visant à prévenir des traitements cruels à des enfants, 1926 (Cap 31) ;
i) Sévices infligés à des filles de moins de 13 ans, en violation de la section 6 ;
ii) Sévices infligés à des filles de 13 à 14 ans, en violation de la section 7 ;
iii) Enlèvement d'une fille pour des buts immoraux, en violation de la section 12. (b) Infractions relatives à la destruction injustifiée de la propriété selon l'Acte relatif au dommage malveillant, 1861 :

i) Mettre le feu à des maisons d'habitation, qu'elles soient occupées ou inoccupées, en violation de la section 2 ;
ii) Mettre le feu à des bâtiments publics, en violation des sections 5 et 6 ;
iii) Mettre le feu à d'autres bâtiments, en violation de la section 6.

Article 6. Responsabilité pénale individuelle

1. Quiconque a planifié, encouragé, ordonné, commis ou qui a aidé à la planification, à la préparation ou à l'exécution d'un crime visé aux articles 2 à 4 du présent statut est individuellement responsable du crime.

2. La position officielle d'accusé soit comme Chef d'État ou de gouvernement soit comme haut fonctionnaire ne l'exonère pas de sa responsabilité et n'est pas un motif de diminution de la peine.

3. Le fait que l'un des actes visés aux articles 2 à 4 du présent statut a été commis par un subordonné ne dégage pas son supérieur de sa responsabilité s'il savait ou avait des raisons matérielles pour être informé de la conduite du subordonné et que le supérieur n'a pas pris une mesure pour empêcher la conduite du subordonné ou en punir les auteurs.

4. Le fait que la personne accusée ait agi en exécution d'un ordre d'un supérieur ne l'exonère pas de sa responsabilité, mais elle peut être considérée comme un motif de diminution de la peine si le Tribunal spécial l'estime conforme à la justice.

5. La responsabilité pénale individuelle pour les crimes visés à l'article 5 est déterminée conformément aux lois du Sierra Leone.

Article 7. Juridiction sur les personnes âgées de 15 ans

1. Le Tribunal spécial n'exerce aucune juridiction sur des personnes âgées de moins de 15 ans au moment où le crime a été perpétré. Dans l'hypothèse où une personne aurait entre 15 et 18 ans au moment du crime, elle ne peut être poursuivie par le Tribunal spécial, elle devrait être soumise à un programme de réhabilitation conformément aux normes internationales des droits de l'homme et notamment des droits de l'enfant.

2. En statuant sur un cas relatif à un jeune détenu, le Tribunal spécial ordonnera :

(a) Les Chambres comprenant les Chambres de première instance et la chambre d'appel, d'appeler à un programme de réhabilitation, de réinsertion, de réhabilitation, de réinsertion et de réhabilitation.

(b) Le procureur ; et (c) Le Greffe.
2. Le Bureau du procureur doit avoir le pouvoir d’interroger les suspects, les victimes et les témoins, de recueillir des preuves et de mener des investigations sur le terrain. Pour effectuer ces tâches, le Procureur peut, si c’est nécessaire, être assisté par les autorités sierra-léonaises concernées.

3. Le procureur est nommé par le Secrétaire général pour un mandat de trois ans renouvelable. Il doit être d’une grande intégrité morale et d’un niveau de compétence très élevé et bénéficier d’une longue expérience dans la conduite des enquêtes et des poursuites pénales.

4. Le procureur sera assisté d’un procureur adjoint sierra-léonais et d’un personnel sierra-léonais et international qui doit lui permettre d’exercer ses fonctions de manière efficace et optimale. Étant donné la nature des crimes commis et la sensibilité particulière des jeunes filles, des jeunes femmes et des enfants victimes de viol, de sévices sexuels, d’enlèvement et d’esclavage de toutes sortes, il serait judicieux lors de la nomination du personnel de choisir des procureurs ou des enquêteurs qui bénéficient d’une certaine expérience dans le domaine des crimes sexuels et de la justice des mineurs.

5. Lors de la poursuite de jeunes délinquants, le Procureur devra s’assurer que les programmes de réhabilitation des enfants ne sont pas menacés et, si c’est nécessaire, que l’accent soit mis sur les mécanismes de vérité et de réconciliation, dans la mesure où ils sont disponibles.

Article 16. Le Greffe

1. Le Greffe est chargé d’assurer l’administration et les services du Tribunal spécial.

2. Le Greffe se compose d’un greffier et des autres fonctionnaires nécessaires.


Article 17. Droits des accusés

1. Tous les accusés sont égaux devant le Tribunal spécial.

2. Toute personne contre laquelle des accusations sont portées a droit à ce que sa cause soit entendue équitablement et publiquement, sous réserve des mesures ordonnées par le Tribunal spécial pour la protection des victimes et des témoins.

3. Toute personne accusée est présumée innocente jusqu’à ce que sa culpabilité ait été établie conformément aux dispositions du présent statut.
4. Toute personne contre laquelle une accusation est portée en vertu du présent statut a droit, en pleine égalité, au moins aux garanties suivantes :

(a) Être informée, dans le plus court délai, dans une langue qu'elle comprend et de façon détaillée, de la nature et des motifs de l'accusation portée contre elle ;

(b) A disposer du temps et des facilités nécessaires à la préparation de sa défense et à communiquer avec le conseil de son choix ;

(c) A être jugée sans retard excessif ;

(d) A être présente au procès et à se défendre elle-même ou à avoir l'assistance d'un défenseur de son choix ; si elle n'a pas de défenseur, à être informé de son choix d'en avoir un et, chaque fois que l'intérêt de la justice l'exige, à se voir attribuer d'office un défenseur, sans frais, si elle n'a pas les moyens de le rémunérer ;

(e) A interroger ou faire interroger les témoins à charge et à obtenir la comparution et l'interrogatoire des témoins à décharge dans les mêmes conditions que les témoins à charge ;

(f) A se faire assister gratuitement d'un interprète si elle ne comprend pas ou ne parle pas la langue employée à l'audience ;

(g) A ne pas être forcée de témoigner contre elle même ou de s'avouer coupable.

**Article 18. Sentence**

La sentence est rendue en audience publique à la majorité des juges de la chambre de première instance ou de la chambre d'appel. Elle est établie par écrit et motivée, des opinions individuelles ou dissidentes pouvant y être jointes.

**Article 19. Peines**

1. La chambre de première instance peut imposer à une personne condamnée, mais non à un jeune délinquant, une peine d'emprisonnement pour un certain nombre d'années. En fixant les termes de l'emprisonnement, la chambre de première instance, peut avoir recours, si c'est nécessaire, à la pratique concernant les sentences d'emprisonnement du Tribunal pénal international pour le Rwanda et les tribunaux nationaux du Sierra Leone.

2. En imposant la sentence, la chambre de première instance tient compte de facteurs tels que la gravité de l'infraction et la situation personnelle du condamné ;

3. Outre l'emprisonnement du condamné, la chambre de première instance peut ordonner la saisie de tous biens et ressources acquis par des moyens illicites et leur restitution à leurs propriétaires légitimes ou à l'Etat du Sierra Leone.

**Article 20. Appel**

1. La chambre d'appel connaît les recours introduits par les personnes condamnées par les chambres de première instance, soit par le Procureur, pour les motifs suivants :

(a) Erreur de procédure ;

(b) Erreur sur un point de droit qui invalide la décision ;

(c) Erreur de fait qui a entraîné un déni de justice.

2. La chambre d'appel peut confirmer, annuler ou réviser les décisions prises par la chambre de première instance.

3. Les juges de la Chambre d'appel du Tribunal spécial seront guidés par les décisions des chambres d'appel des tribunaux internationaux pour l'ancienne Yougoslavie et pour le Rwanda. Dans l'interprétation et l'application des lois du Sierra Leone, ils doivent être guidés par les décisions de la Cour suprême du Sierra Leone.

**Article 21. Révision**

1. S'il est découvert un fait nouveau qui n'était pas connu au moment du procès en première instance, ou en appel et qui aurait pu être un élément décisif de la décision, le condamné ou le procureur peut saisir le Tribunal spécial d'une demande de révision de la sentence.

2. Toute demande de révision doit être soumise à la chambre d'appel. La chambre d'appel peut rejeter la demande si elle l'estime non fondée. Si elle estime que la demande est justifiée, elle peut soit :

(a) Réunir à nouveau la chambre de première instance ;

(b) Assurer sa juridiction sur la question.

**Article 22. Exécution des peines**

1. Les peines d'emprisonnement sont exécutées au Sierra Leone. Si les circonstances l'exigent, la peine peut être exécutée dans un Etat qui a conclu avec le Tribunal pénal international pour le Rwanda ou avec le Tribunal pénal international pour l'ancienne Yougoslavie un accord sur l'exécution des sentences et qui a indiqué au greffier du Tribunal spécial qu'il est disposé à recevoir des condamnés. Le Tribunal spécial peut conclure des accords analogues pour l'exécution des sentences avec d'autres Etats.

2. Les conditions d'emprisonnement que ce soit au Sierra Leone ou dans un Etat tiers sont régies par la législation de l'Etat qui a accueilli les condamnés, sous la supervision du Tribunal. Pendant la durée de la sentence, l'Etat qui a accueilli le condamné est soumis à l'article 23 du présent Statut.

**Article 23. Grâce et commutation de peine**

Si le condamné peut bénéficier d'une grâce ou d'une commutation de peine en vertu des lois de l'Etat dans lequel il est emprisonné, cetEtat en avise le Tribunal spécial. Une grâce ou une commutation de peine n'est accordée que si le Président du Tribunal spécial en consultation avec les juges, en décide ainsi dans l'intérêt de la justice et sur la base des principes généraux du droit.
Article 24. Langue de travail

La langue de travail du Tribunal spécial est l'anglais.

Article 25. Rapport annuel

Le Président du Tribunal spécial doit soumettre un rapport annuel sur les travaux et les activités du Tribunal au Secrétaire général et au Gouvernement du Sierra Leone.
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 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 reintegation 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.
Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 2003
AGREEMENT BETWEEN THE UNITED NATIONS AND THE ROYAL GOVERNMENT OF CAMBODIA CONCERNING THE PROSECUTION UNDER CAMBODIAN LAW OF CRIMES COMMITTED DURING THE PERIOD OF DEMOCRATIC KAMPUCHEA

Whereas the General Assembly of the United Nations, in its resolution 57/228 of 18 December 2002, recalled that the serious violations of Cambodian and international humanitarian law during the period of Democratic Kampuchea from 1975 to 1979 continue to be matters of vitally important concern to the international community as a whole;

Whereas in the same resolution the General Assembly recognized the legitimate concern of the Government and the people of Cambodia in the pursuit of justice and national reconciliation, stability, peace and security;

Whereas the Cambodian authorities have requested assistance from the United Nations in bringing 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;

Whereas prior to the negotiation of the present Agreement substantial progress had been made by the Secretary-General of the United Nations (hereinafter, "the Secretary-General") and the Royal Government of Cambodia towards the establishment, with international assistance, of Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea;

Whereas by its resolution 57/228, the General Assembly welcomed the promulgation of the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea and requested the Secretary-General to resume negotiations, without delay, to conclude an agreement with the Government, based on previous negotiations on the establishment of the Extraordinary Chambers consistent with the provisions of the said resolution, so that the Extraordinary Chambers may begin to function promptly;

Whereas the Secretary-General and the Royal Government of Cambodia have held negotiations on the establishment of the Extraordinary Chambers;

Now therefore the United Nations and the Royal Government of Cambodia have agreed as follows:

Article 1. Purpose

The purpose of the present Agreement is to regulate the cooperation between the United Nations and the Royal Government of Cambodia in bringing 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. The Agreement provides, inter alia, the legal basis and the principles and modalities for such cooperation.

**Article 2. The Law on the Establishment of Extraordinary Chambers**

1. The present Agreement recognizes that the Extraordinary Chambers have subject matter jurisdiction consistent with that set forth in "the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea" (hereinafter: "the Law on the Establishment of the Extraordinary Chambers"), as adopted and amended by the Cambodian Legislature under the Constitution of Cambodia. The present Agreement further recognizes that the Extraordinary Chambers have personal jurisdiction over senior leaders of Democratic Kampuchea and those who were most responsible for the crimes referred to in Article 1 of the Agreement.

2. The present Agreement shall be implemented in Cambodia through the Law on the Establishment of the Extraordinary Chambers as adopted and amended. The Vienna Convention on the Law of Treaties, and in particular its Articles 26 and 27, applies to the Agreement.

3. In case amendments to the Law on the Establishment of the Extraordinary Chambers are deemed necessary, such amendments shall always be preceded by consultations between the Parties.

**Article 3. Judges**

1. Cambodian judges, on the one hand, and judges appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General of the United Nations (hereinafter: "international judges"), on the other hand, shall serve in each of the two Extraordinary Chambers.

2. The composition of the Chambers shall be as follows:
   a. The Trial Chamber: three Cambodian judges and two international judges;
   b. The Supreme Court Chamber, which shall serve as both appellate chamber and final instance: four Cambodian judges and three international judges.

3. 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. They shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. In the overall composition of the Chambers due account should be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

5. The Secretary-General of the United Nations undertakes to forward a list of not less than seven nominees for international judges from which the Supreme Council of the Magistracy shall appoint five to serve as judges in the two Chambers. Appointment of international judges by the Supreme Council of the Magistracy shall be made only from the list submitted by the Secretary-General.

6. In the event of a vacancy of an international judge, the Supreme Council of the Magistracy shall appoint another international judge from the same list.

7. The judges shall be appointed for the duration of the proceedings.

8. In addition to the international judges sitting in the Chambers and present at every stage of the proceedings, the President of a Chamber may, on a case-by-case basis, designate from the list of nominees submitted by the Secretary-General, one or more alternate judges to be present at each stage of the proceedings, and to replace an international judge if that judge is unable to continue sitting.

**Article 4. Decision-making**

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 Trial Chamber shall require the affirmative vote of at least four judges;
   b. A decision by the Supreme Court Chamber shall require the affirmative vote of at least five judges.

2. When there is no unanimity, the decision of the Chamber shall contain the views of the majority and the minority.

**Article 5. Investigating judges**

1. There shall be one Cambodian and one international investigating judge serving as co-investigating judges. They shall be responsible for the conduct of investigations.

2. The co-investigating judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to such a judicial office.

3. The co-investigating judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source. It is understood, however, that the scope of the investigation is limited to 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.

4. The co-investigating judges shall cooperate with a view to arriving at a common approach to the investigation. In case the co-investigating judges are unable to agree whether to proceed with an investigation, the investigation shall proceed unless the judges or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

5. In addition to the list of nominees provided for in Article 3, paragraph 5, the Secretary-General shall submit a list of two nominees from which the Supreme Council of the Magistracy shall appoint one to serve as an international co-investigating judge, and one as a reserve international co-investigating judge.
6. In case there is a vacancy or a need to fill the post of the international co-investigating judge, the person appointed to fill this post must be the reserve international co-investigating judge.

7. The co-investigating judges shall be appointed for the duration of the proceedings.

Article 6. Prosecutors

1. There shall be one Cambodian prosecutor and one international prosecutor competent to appear in both Chambers, serving as co-prosecutors. They shall be responsible for the conduct of the prosecutions.

2. The co-prosecutors shall be of high moral character, and possess a high level of professional competence and extensive experience in the conduct of investigations and prosecutions of criminal cases.

3. 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. It is understood, however, that the scope of the prosecution is limited to 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.

4. The co-prosecutors shall cooperate with a view to arriving at a common approach to the prosecution. In case the prosecutors are unable to agree whether to proceed with a prosecution, the prosecution shall proceed unless the prosecutors or one of them requests within thirty days that the difference shall be settled in accordance with Article 7.

5. The Secretary-General undertakes to forward a list of two nominees from which the Supreme Council of the Magistracy shall select one international co-prosecutor and one reserve international co-prosecutor.

6. In case there is a vacancy or a need to fill the post of the international co-prosecutor, the person appointed to fill this post must be the reserve international co-prosecutor.

7. The co-prosecutors shall be appointed for the duration of the proceedings.

8. Each co-prosecutor shall have one or more deputy prosecutors to assist him or her with prosecutions before the Chambers. Deputy international prosecutors shall be appointed by the international co-prosecutor from a list provided by the Secretary General.

Article 7. Settlement of differences between the co-investigating judges or the co-prosecutors

1. In case the co-investigating judges or the co-prosecutors have made a request in accordance with Article 5, paragraph 4, or Article 6, paragraph 4, as the case may be, they shall submit written statements of facts and the reasons for their different positions to the Director of the Office of Administration.

2. The difference shall be settled forthwith by a Pre-Trial Chamber of five judges, three appointed by the Supreme Council of the Magistracy, with one as President, and two appointed by the Supreme Council of the Magistracy upon nomination by the Secretary-General. Article 3, paragraph 3, shall apply to the judges.

3. Upon receipt of the statements referred to in paragraph 1, the Director of the Office of Administration shall immediately convene the Pre-Trial Chamber and communicate the statements to its members.

4. 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 or 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 investigation or prosecution shall proceed.

Article 8. Office of Administration

1. There shall be an Office of Administration to service the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges and the Prosecutors' Office.

2. There shall be a Cambodian Director of this Office, who shall be appointed by the Royal Government of Cambodia. The Director shall be responsible for the overall management of the Office of Administration, except in matters that are subject to United Nations rules and procedures.

3. There shall be an international Deputy Director of the Office of Administration, who shall be appointed by the Secretary-General. The Deputy Director shall be responsible for the recruitment of all international staff and all administration of the international components of the Extraordinary Chambers, the Pre-Trial Chamber, the co-investigating judges, the Prosecutors' Office and the Office of Administration. The United Nations and the Royal Government of Cambodia agree that, when an international Deputy Director has been appointed by the Secretary-General, the assignment of that person to that position by the Royal Government of Cambodia shall take place forthwith.

4. The Director and the Deputy Director shall cooperate in order to ensure an effective and efficient functioning of the administration.

Article 9. Crimes falling within the jurisdiction of the Extraordinary Chambers


Article 10. Penalties

The maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment.
Article 11. Amnesty

1. 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 the present Agreement.

2. This provision is based upon a declaration by the Royal Government of Cambodia that until now, with regard to matters covered in the law, there has been only one case, dated 14 September 1996, when a pardon was granted to only one person with regard to a 1979 conviction on the charge of genocide. The United Nations and the Royal Government of Cambodia agree that the scope of this pardon is a matter to be decided by the Extraordinary Chambers.

Article 12. Procedure

1. The procedure shall be in accordance with Cambodian law. Where Cambodian law does not deal with a particular matter, or where there is uncertainty regarding the interpretation or application of a relevant rule of Cambodian law, or where there is a question regarding the consistency of such a rule with international standards, guidance may also be sought in procedural rules established at the international level.

2. The Extraordinary Chambers 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, to which Cambodia is a party. In the interest of securing a fair and public hearing and credibility of the procedure, it is understood that representatives of Member States of the United Nations, of the Secretary-General, of the media and of national and international non-governmental organizations will at all times have access to the proceedings before the Extraordinary Chambers. Any exclusion from such proceedings in accordance with the provisions of Article 14 of the Covenant shall only be to the extent strictly necessary in the opinion of the Chamber concerned and where publicity would prejudice the interests of justice.

Article 13. Rights of the accused

1. The rights of the accused enshrined in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights shall be respected throughout the trial process. Such rights shall, in particular, include the right: to a fair and public hearing; to be presumed innocent until proved guilty; to engage a counsel of his or her choice; to have adequate time and facilities for the preparation of his or her defence; to have counsel provided if he or she does not have sufficient means to pay for it; and to examine or have examined the witnesses against him or her.

2. The United Nations and the Royal Government of Cambodia agree that the provisions on the right to defence counsel in the Law on the Establishment of Extraordinary Chambers mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the International Covenant on Civil and Political Rights.

Article 14. Premises

The Royal Government of Cambodia shall provide at its expense the premises for the co-investigating judges, the Prosecutors' Office, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration. It shall also provide for such utilities, facilities and other services necessary for their operation that may be mutually agreed upon by separate agreement between the United Nations and the Government.

Article 15. Cambodian personnel

Salaries and emoluments of Cambodian judges and other Cambodian personnel shall be defrayed by the Royal Government of Cambodia.

Article 16. International personnel

Salaries and emoluments of international judges, the international co-prosecutor and other personnel recruited by the United Nations shall be defrayed by the United Nations.

Article 17. Financial and other assistance of the United Nations

The United Nations shall be responsible for the following:

a. remuneration of the international judges, the international co-investigating judge, the international co-prosecutor, the Deputy Director of the Office of Administration and other international personnel;

b. costs for utilities and services as agreed separately between the United Nations and the Royal Government of Cambodia;

c. remuneration of defence counsel;

d. witnesses' travel from within Cambodia and from abroad;

e. safety and security arrangements as agreed separately between the United Nations and the Government;

f. such other limited assistance as may be necessary to ensure the smooth functioning of the investigation, the prosecution and the Extraordinary Chambers.

Article 18. Inviolability of archives and documents

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, belonging to or used by them, wherever located in Cambodia and by whomsoever held, shall be inviolable for the duration of the proceedings.
Article 19. Privileges and immunities of international judges, the international co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

1. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subject to any measure which may affect the free and independent exercise of his or her functions under the present Agreement.

2. The counsel of a suspect or an accused shall not be subject to any measure which may affect the free and independent exercise of his or her functions under the present Agreement.

3. The counsel of a suspect or an accused shall not be subject to any measure which may affect the free and independent exercise of his or her functions under the present Agreement.

Article 20. Privileges and immunities of Cambodian and international personnel.

1. Cambodian judges, the Cambodian co-investigating judge, the Cambodian co-prosecutor, the Deputy Director of the Office of Administration shall enjoy exemptions and facilities accorded to diplomatic agents in accordance with the Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

a. immunity from personal arrest or detention;

b. immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

c. immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

d. immunity from personal arrest or detention and from seizure of personal baggage;

e. inviolability for all papers and documents.

2. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration shall enjoy exemption from taxation in Cambodia on their salaries, emoluments and allowances.

3. The United Nations and the Royal Government of Cambodia agree that the immunity granted by the Law on the Establishment of the Extraordinary Chambers in respect of words spoken or written and all acts performed by them in their official capacity under the present Agreement will apply also after the persons have left the service of the co-investigating judges, the co-prosecutors, the Extraordinary Chambers, the Pre-Trial Chamber and the Office of Administration.

Article 21. Counsel

1. The counsel of a suspect or an accused who has been admitted as such by the Extraordinary Chambers shall not be subject to any measure which may affect the free and independent exercise of his or her functions under the present Agreement.

2. The international judges, the international co-investigating judge, the international co-prosecutor and the Deputy Director of the Office of Administration, 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. immunity from personal arrest or detention;

b. immunity from personal arrest or detention and from seizure of personal baggage;

c. inviolability for all papers and documents.

3. Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Status of the Bar and recognized standards and ethics of the legal profession.

2. The counsel shall be accorded:

a. personal inviolability, including immunity from arrest or detention;

b. immunity from personal arrest or detention and from seizure of personal baggage;

c. inviolability for all papers and documents;

d. exemption from immigration restrictions and alien registration;

e. the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents.

3. Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or a co-accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Status of the Bar and recognized standards and ethics of the legal profession.

2. The counsel shall be accorded:

a. personal inviolability, including immunity from arrest or detention;

b. immunity from personal arrest or detention and from seizure of personal baggage;

c. inviolability for all papers and documents;

d. exemption from immigration restrictions and alien registration;

e. the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents.

3. Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Status of the Bar and recognized standards and ethics of the legal profession.

Article 22. Witnesses and experts

1. Witnesses and experts appearing on a summons or a request of the judges, the co-investigating judges, the co-prosecutors or the Extraordinary Chambers shall not be prosecuted, detained or subjected to any other restriction on their liberty by the Cambodian authorities. They shall not be subjected by the authorities to any measure which may affect the free and independent exercise of their functions.

2. Witnesses and experts appearing on a summons or a request of the judges, the co-investigating judges, the co-prosecutors or the Extraordinary Chambers shall not be prosecuted, detained or subjected to any other restriction on their liberty by the Cambodian authorities. They shall not be subjected by the authorities to any measure which may affect the free and independent exercise of their functions.

3. Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Status of the Bar and recognized standards and ethics of the legal profession.

2. The counsel shall be accorded:

a. personal inviolability, including immunity from arrest or detention;

b. immunity from personal arrest or detention and from seizure of personal baggage;

c. inviolability for all papers and documents;

d. exemption from immigration restrictions and alien registration;

e. the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents.

3. Any counsel, whether of Cambodian or non-Cambodian nationality, engaged by or assigned to a suspect or an accused shall, in the defence of his or her client, act in accordance with the present Agreement, the Cambodian Law on the Status of the Bar and recognized standards and ethics of the legal profession.

Article 23. Protection of victims and witnesses

1. The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall provide 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 identity of a victim or witness.

2. The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall provide 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 identity of a victim or witness.

3. The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall provide 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 identity of a victim or witness.

Article 24. Security, safety and protection of persons referred to in the present Agreement

1. The co-investigating judges, the co-prosecutors and the Extraordinary Chambers shall take all effective and adequate actions which may be required to ensure the security, safety and protection of persons referred to in the present Agreement. The United Nations and the Royal Government of Cambodia agree that the Government is responsible for the security of all accused, irrespective of whether they appear voluntarily before the Extraordinary Chambers or whether they are under arrest.
Article 25. Obligation to assist the co-investigating judges, the co-prosecutors and the Extraordinary Chambers

The Royal Government of Cambodia shall comply without undue delay with any request for assistance by the co-investigating judges, the co-prosecutors and the Extraordinary Chambers or an order issued by any of them, 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 Extraordinary Chambers.

Article 26. Languages

1. The official language of the Extraordinary Chambers and the Pre-Trial Chamber is Khmer.
2. The official working languages of the Extraordinary Chambers and the Pre-Trial Chamber shall be Khmer, English and French.
3. Translations of public documents and interpretation at public hearings into Russian may be provided by the Royal Government of Cambodia at its discretion and expense on condition that such services do not hinder the proceedings before the Extraordinary Chambers.

Article 27. Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Extraordinary Chambers, a phased-in approach shall be adopted for their establishment in accordance with the chronological order of the legal process.
2. In the first phase of the operation of the Extraordinary Chambers, the judges, the co-investigating judges and the co-prosecutors will be appointed along with investigative and prosecutorial staff, and the process of investigations and prosecutions shall be initiated.
3. The trial process of those already in custody shall proceed simultaneously with the investigation of other persons responsible for crimes falling within the jurisdiction of the Extraordinary Chambers.
4. With the completion of the investigation of persons suspected of having committed the crimes falling within the jurisdiction of the Extraordinary Chambers, arrest warrants shall be issued and submitted to the Royal Government of Cambodia to effectuate the arrest.
5. With the arrest by the Royal Government of Cambodia of indicted persons situated in its territory, the Extraordinary Chambers shall be fully operational, provided that the judges of the Supreme Court Chamber shall serve when seized with a matter. The judges of the Pre-Trial Chamber shall serve only if and when their services are needed.

Article 28. Withdrawal of cooperation

Should the Royal Government of Cambodia change the structure or organization of the Extraordinary Chambers or otherwise cause them to function in a manner that does not conform with the terms of the present Agreement, the United Nations reserves the right to cease to provide assistance, financial or otherwise, pursuant to the present Agreement.

Article 29. Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of the present Agreement shall be settled by negotiation, or by any other mutually agreed upon mode of settlement.

Article 30. Approval

To be binding on the Parties, the present Agreement must be approved by the General Assembly of the United Nations and ratified by Cambodia. The Royal Government of Cambodia will make its best endeavours to obtain this ratification by the earliest possible date.

Article 31. Application within Cambodia

The present Agreement shall apply as law within the Kingdom of Cambodia following its ratification in accordance with the relevant provisions of the internal law of the Kingdom of Cambodia regarding competence to conclude treaties.

Article 32. 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.

Done at Phnom Penh on 6 June 2003 in two copies in the English language.

For the United Nations:
HANS CORELL
Under-Secretary-General for Legal Affairs
The Legal Counsel

For the Royal Government of Cambodia:
SOK AN
Senior Minister
in Charge of the Council of Ministers
ACCORD ENTRE L’ORGANISATION DES NATIONS UNIES ET LE GOUVERNEMENT ROYAL CAMBODGIEN CONCERNANT LA POURSUITE, CONFORMÉMENT AU DROIT CAMBODGIEN, DES AUTEURS DES CRIMES COMMIS PENDANT LA PÉRIODE DU KAMPUCHEA DÉMOCRATIQUE

Considérant que, dans sa résolution 57/228 du 18 décembre 2002, l’Assemblée générale des Nations Unies a rappelé que les graves violations du droit cambodgien et du droit international humanitaire commises pendant la période du Kampuchea démocratique, de 1975 à 1979, continuaient d’être un sujet de profonde préoccupation pour l’ensemble de la communauté internationale,

Considérant que, dans la même résolution, l’Assemblée générale a reconnu le souci légitime du Gouvernement et du peuple cambodgiens d’œuvrer pour la justice et la réconciliation nationale, la stabilité, la paix et la sécurité,

Considérant que les autorités cambodgiennes ont demandé l’assistance de l’Organisation des Nations Unies pour traduire en justice les dirigeants du Kampuchea démocratique et les principaux responsables des crimes et graves violations du droit pénal cambodgien, des règles et coutumes du droit international humanitaire ainsi que des conventions internationales auxquelles adhère le Cambodge, commis pendant la période comprise entre le 17 avril 1975 et le 6 janvier 1979,

Considérant qu’avant la négociation du présent Accord des progrès substantiels ont été accomplis par le Secrétaire général de l’Organisation des Nations Unies (ci-après dénommé «le Secrétaire général») et le Gouvernement royal cambodgien en vue de la création, avec l’aide de la communauté internationale, de chambres extraordinaires au sein des tribunaux cambodgiens pour juger les auteurs des crimes commis pendant la période du Kampuchea démocratique,

Considérant que, dans sa résolution 57/228, l’Assemblée générale s’est félicitée de la promulgation de la loi portant création au sein des tribunaux cambodgiens de chambres extraordinaires pour juger les auteurs des crimes commis pendant la période du Kampuchea démocratique et a prié le Secrétaire général de reprendre sans tarder les négociations en vue de conclure avec le Gouvernement royal cambodgien un accord fondé sur les précédentes négociations et portant sur la création de chambres extraordinaires dans l’esprit des dispositions de la résolution susmentionnée, de sorte que les chambres extraordinaires puissent commencer à fonctionner au plus tôt,

Considérant que le Secrétariat général et le Gouvernement royal cambodgien ont tenu des négociations sur la création des chambres extraordinaires,

L’Organisation des Nations Unies et le Gouvernement royal cambodgien sont convenus de ce qui suit :

Article premier. Objet

L’objet du présent Accord est de fixer les règles régissant la coopération entre l’Organisation des Nations Unies et le Gouvernement royal cambodgien aux fins de traduire en justice les dirigeants du Kampuchea démocratique et les principaux responsables des crimes et graves violations du droit pénal cambodgien, des règles et coutumes du droit international humanitaire et des conventions internationales auxquelles adhère le Cambodge, commis pendant la période comprise entre le 17 avril 1975 et le 6 janvier 1979. L’Accord prévoit notamment le fondement juridique de cette coopération, les principes qui la régissent et les modalités qui lui sont applicables.

Article 2. La loi portant création de chambres extraordinaires

1. Conformément au présent Accord, la compétence ratione materiae des chambres extraordinaires est conforme à celle qui leur est reconnue dans la «loi portant création au sein des tribunaux cambodgiens de chambres extraordinaires pour juger les auteurs des crimes commis pendant la période du Kampuchea démocratique» (ci-après dénommée «la loi portant création de chambres extraordinaires»), telle qu’adoptée et modifiée par le corps législatif cambodgien conformément à la Constitution du Cambodge. Le présent Accord établit en outre que les chambres extraordinaires ont compétence ratione personae à l’égard des dirigeants du Kampuchea démocratique et des principaux responsables des crimes visés à son article premier.

2. Le présent Accord est appliqué au Cambodge en vertu de la loi portant création de chambres extraordinaires telle qu’adoptée et modifiée. La Convention de Vienne sur le droit des traités, en particulier ses articles 26 et 27, s’applique à l’Accord.

3. Tout amendement qu’il serait jugé nécessaire d’apporter à la loi portant création de chambres extraordinaires doit toujours être précédé de consultations entre les Parties.

Article 3. Juges


2. La composition des chambres sera la suivante :
   a) Chambre de première instance : trois juges cambodgiens et deux juges internationaux;
   b) Chambre de la Cour suprême, qui fera fonction de chambre d’appel et de dernière instance : quatre juges cambodgiens et trois juges internationaux.

3. Les juges doivent être des personnes possédant les plus hautes qualités de moralité, impartialité et intégrité ayant les qualifications requises dans leurs pays respectifs pour être nommés à des fonctions judiciaires. Ils exercent leurs fonctions en toute indépendance et n’acceptent ni ne sollicitent d’instructions d’aucun gouvernement ni d’aucune autre source.
4. Il est dûment tenu compte, dans la composition globale des chambres, de l’expérience des juges en matière de droit pénal et de droit international, notamment de droit international humanitaire et de droits de l’homme.

5. Le Secrétaire général de l’Organisation des Nations Unies communique une liste d’au moins sept candidats aux fonctions de juges internationaux au Conseil suprême de la magistrature qui en nomme cinq pour siéger aux deux chambres en qualité de juge. Le Conseil suprême de la magistrature ne peut nommer de juges internationaux que parmi les candidats figurant sur la liste soumise par le Secrétaire général.

6. Si un siège de juge international devient vacant, le Conseil suprême de la magistrature nomme un autre juge international parmi les candidats figurant sur ladite liste.

7. Les juges sont nommés pour la durée de la procédure.

8. Outre les juges internationaux qui siègent aux chambres et sont présents à tous les stades de la procédure, le président d’une chambre peut, au cas par cas, désigner, parmi les candidats figurant sur la liste soumise par le Secrétaire général, un ou plusieurs juges suppléants qui seront présents à tous les stades de la procédure et remplaceront un juge international en cas d’empêchement.

Article 4. Prononcé des décisions

1. Les juges s’efforcent de prendre leurs décisions à l’unanimité. Faute de quoi, les dispositions suivantes s’appliquent:

a) Les décisions de la chambre de première instance sont adoptées par un vote de quatre juges au moins;

b) Les décisions de la chambre de la Cour suprême sont adoptées par un vote de cinq juges au moins.

2. En l’absence d’unanimité, les décisions des chambres sont accompagnées d’un exposé des opinions de la majorité et de la minorité.

Article 5. Juges d’instruction

1. Deux juges d’instruction, un juge cambodgien et un juge international, siègent conjointement. Ils sont chargés de diriger l’instruction.

2. Les juges d’instruction sont des personnes possédant les plus hautes qualités de moralité, impartialité et intégrité ayant les qualifications requises dans leurs pays respectifs pour être nommés auxdites fonctions judiciaires.

3. Les juges d’instruction exercent leurs fonctions en toute indépendance et n’acceptent ni ne sollicitent d’instructions d’aucun gouvernement ni d’aucune autre source. Il est entendu, toutefois, que le champ de l’instruction ne s’étend qu’aux dirigeants du Kampuchea démocratique et aux principaux responsables des crimes et graves violations du droit pénal cambodgien, des règles et coutumes du droit international humanitaire ainsi que des conventions internationales aux quelles adhère le Cambodge, commis pendant la période comprise entre le 17 avril 1975 et le 6 janvier 1979.

4. Les juges d’instruction coopèrent en vue de parvenir à une position commune concernant l’instruction. Au cas où ils ne parviennent pas à s’entendre sur la question de savoir s’il y a lieu ou non d’instruire, l’instruction suit son cours à moins que l’un ou l’autre ou les deux juges ne demandent, dans un délai de trente jours, que la divergence de vues soit réglée conformément à l’article 7.

5. Le Conseil suprême de la magistrature choisit, outre les candidats figurant sur la liste visée au paragraphe 5 de l’article 3, entre deux candidats dont les noms lui sont également communiqués par le Secrétaire général, celui qui exercera les fonctions de juge d’instruction international et celui qui en sera le suppléant.

6. En cas de vacance de poste ou d’empêchement du titulaire, les fonctions du juge d’instruction international sont exercées par le suppléant.

7. Les juges d’instruction sont nommés pour la durée de la procédure.

Article 6. Les procureurs

1. Deux procureurs, un procureur cambodgien et un procureur international, siègent conjointement à l’une et l’autre chambre et sont chargés des poursuites.

2. Les procureurs doivent être des personnes de la plus haute moralité et avoir les plus hautes qualités professionnelles et une solide expérience en matière d’enquêtes et de poursuites judiciaires.

3. Les procureurs exercent leurs fonctions en toute indépendance et n’acceptent ni ne sollicitent d’instructions d’aucun gouvernement ni d’aucune autre source. Il est entendu, toutefois, que le champ des poursuites ne s’étend qu’aux dirigeants du Kampuchea démocratique et aux principaux responsables des crimes et graves violations du droit pénal cambodgien, des règles et coutumes du droit international humanitaires ainsi que des conventions internationales aux quelles adhère le Cambodge, commis pendant la période comprise entre le 17 avril 1975 et le 6 janvier 1979.

4. Les procureurs coopèrent en vue de parvenir à une position commune concernant les poursuites. Au cas où ils ne parviennent pas à s’entendre sur la question de savoir s’il y a lieu ou non de poursuivre, la procédure suit son cours à moins que l’un ou l’autre ou les deux procureurs ne demandent, dans un délai de trente jours, que la divergence de vues soit réglée conformément à l’article 7.

5. Le Conseil suprême de la magistrature choisit entre deux candidats dont les noms lui sont communiqués par le Secrétaire général celui qui exercera les fonctions de procureur international et celui qui en sera le suppléant.

6. En cas de vacance de poste ou d’empêchement du titulaire, les fonctions du procureur international sont exercées par le suppléant.

7. Les procureurs sont nommés pour la durée de la procédure.

8. Chaque procureur est secondé par un ou plusieurs assesseurs. Les assesseurs internationaux sont choisis par le procureur international sur une liste soumise par le Secrétaire général.
La peine maximale qui peut être imposée aux personnes reconnues coupables de crimes commis dans la loi portant création de chambres extraordinaires promulguée le 10 août 2001.

**Article 10. Peines**

1. Les juges d'instruction ou les procureurs qui font la demande visée au paragraphe 4 des articles 5 ou 6, respectivement, soumettent au Directeur du Bureau de l'administration un exposé écrit des faits et des raisons motivant la divergence de vues.

2. La divergence de vues est réglée par une chambre préliminaire composée de cinq juges nommés par le Conseil suprême de la magistrature, dont un président, et les deux autres sur proposition du Secrétaire général. Le paragraphe 3 de l'article 3 s'applique aux juges.

3. La chambre préliminaire, qui est appelée par un vote d'au moins quatre juges, est composée d'un président et de cinq autres, qui sont nommés par le Conseil suprême de la magistrature. Le paragraphe 3 de l'article 3 s'applique aux juges.


**Article 11. Amnistie**

1. Le Gouvernement royal cambodgien ne demandera pas l'amnistie ni la grâce de la loi portant création de chambres extraordinaires promulguée le 10 août 2001.

2. Les chambres extraordinaires exercent leur compétence conformément aux normes internationales de justice, d'équité et de respect des formes régulières, spécifiées dans les articles 14 et 15 du Pacte international relatif aux droits civils et politiques de 1966, auquel le Cambodge est partie.

3. La décision de la chambre préliminaire, qui est prise par le Directeur du Bureau de l'administration, est communiquée au Directeur de l'Organisation des Nations Unies et du Gouvernement royal cambodgien.


**Article 12. Procédure**

1. La procédure est réglée par le droit cambodgien. Toutefois, si celui-ci est muet sur un point particulier ou si l'accusé conteste l'admissibilité de la procédure, l'accusé bénéficie d'une audience publique.

2. Les chambres extraordinaires exercent leur compétence conformément aux normes internationales de justice, d'équité et de respect des formes régulières, spécifiées dans les articles 14 et 15 du Pacte international relatif aux droits civils et politiques de 1966, auquel le Cambodge est partie.

3. La chambre préliminaire, qui est composée d'un président et de cinq autres, est nommée par le Gouvernement royal cambodgien.


5. Les chambres extraordinaires exercent leur compétence conformément aux normes internationales de justice, d'équité et de respect des formes régulières, spécifiées dans les articles 14 et 15 du Pacte international relatif aux droits civils et politiques de 1966, auquel le Cambodge est partie.


8. Les chambres extraordinaires exercent leur compétence conformément aux normes internationales de justice, d'équité et de respect des formes régulières, spécifiées dans les articles 14 et 15 du Pacte international relatif aux droits civils et politiques de 1966, auquel le Cambodge est partie.

9. La chambre préliminaire, qui est composée d'un président et de cinq autres, est nommée par le Gouvernement royal cambodgien.

10. La chambre préliminaire, qui est composée d'un président et de cinq autres, est nommée par le Gouvernement royal cambodgien.

11. La chambre préliminaire, qui est composée d'un président et de cinq autres, est nommée par le Gouvernement royal cambodgien.

12. La chambre préliminaire, qui est composée d'un président et de cinq autres, est nommée par le Gouvernement royal cambodgien.

13. La chambre préliminaire, qui est composée d'un président et de cinq autres, est nommée par le Gouvernement royal cambodgien.

14. La chambre préliminaire, qui est composée d'un président et de cinq autres, est nommée par le Gouvernement royal cambodgien.
attribuer d’office un défenseur, sans frais, s’il n’a pas les moyens de le rémunérer et à ce qu’il puisse interroger ou faire interroger les témoins à charge.

2. L’Organisation des Nations Unies et le Gouvernement royal cambodgien conviennent que le droit de se faire assister d’un défenseur prévu par la loi portant création de chambres extraordinaires signifie que l’accusé a le droit d’engager un défenseur de son choix comme le garantit le Pacte international relatif aux droits civils et politiques.

**Article 14. Locaux**


**Article 15. Personnel cambodgien**

Les traitements et autres émoluments des juges cambodgiens et autre personnel cambodgien sont à la charge du Gouvernement royal cambodgien.

**Article 16. Personnel international**


**Article 17. Aide financière et autre de l’Organisation des Nations Unies**

L’Organisation des Nations Unies prend à sa charge :

a) La rémunération des juges internationaux, du juge d’instruction international, du procureur international, du Directeur adjoint du Bureau de l’administration et autre personnel international;

b) Le coût des facilités et services dont il aura été convenu dans un accord distinct entre l’Organisation des Nations Unies et le Gouvernement royal cambodgien;

c) Les honoraires de l’avocat de la défense;

d) Les frais de déplacement des témoins à l’intérieur du Cambodge et depuis l’étranger;

e) Les mesures de sécurité dont il aura été convenu dans un accord distinct entre l’Organisation des Nations Unies et le Gouvernement;

f) Toute autre aide limitée qui pourra être nécessaire pour assurer le bon déroulement de l’instruction et des poursuites et le bon fonctionnement des chambres extraordinaires.

**Article 18. Inviolabilité des archives et des documents**

Les archives des deux juges d’instruction, des deux procureurs, des chambres extraordinaires, de la chambre préliminaire et du Bureau de l’administration, et en général tous les documents et pièces mis à leur disposition, ou leur appartenant ou utilisés par eux, en quel que lieu qu’ils se trouvent au Cambodge et quelle que soit la personne qui les détient, sont inviolables pendant toute la durée de la procédure.

**Article 19. Privilèges et immunités des juges internationaux, du juge d’instruction international, du procureur international et du Directeur adjoint du Bureau de l’administration**

1. Les juges internationaux, le juge d’instruction international, le procureur international et le Directeur adjoint du Bureau de l’administration ainsi que les membres de leur famille qui font partie de leur ménage jouissent des privilèges et immunités, exemptions et facilités accordés aux agents diplomatiques conformément à la Convention de Vienne sur les relations diplomatiques de 1961. Ils jouissent en particulier :

a) De l’inviolabilité de leur personne, y compris de l’immunité d’arrestation ou de détention;

b) De l’immunité de juridiction en matière pénale, civile et administrative conformément à la Convention de Vienne susmentionnée;

c) De l’inviolabilité de tous leurs papiers et documents;

d) De l’exemption de toutes mesures restrictives relatives à l’immigration et de toutes formalités d’enregistrement des étrangers;

2. Les juges internationaux, le juge d’instruction international, le procureur international et le Directeur adjoint du Bureau de l’administration sont exonérés des impôts sur leurs traitements, émoluments et indemnités au Cambodge.

**Article 20. Privilèges et immunités du personnel cambodgien et du personnel international**

1. Les juges cambodgiens, le juge d’instruction cambodgien, le procureur cambodgien et autre personnel cambodgien jouissent de l’immunité de juridiction en ce qui concerne les paroles ou les écrits ou les actes accomplis par eux en leur qualité officielle conformément au présent Accord. Cette immunité continuera de leur être accordée même après qu’ils auront cessé d’exercer leurs fonctions auprès des juges d’instruction, des procureurs, des chambres extraordinaires, de la chambre préliminaire et du Bureau de l’administration.

2. Le personnel international jouit des privilèges et immunités suivants :

a) Immunité de juridiction en ce qui concerne les paroles ou les écrits ou les actes accomplis par eux en leur qualité officielle conformément au présent Accord. Cette immunité continuera de leur être accordée même après qu’ils auront cessé d’exercer leurs
fonctions auprès des juges d'instruction, des procureurs, des chambres extraordinaires, de la chambre préliminaire et du Bureau de l'administration ;

b) Exonération des impôts sur les traitements, émoluments et indemnités qui leur sont versés par l'Organisation des Nations Unies ;

c) Immunité à l'égard des mesures restrictives relatives à l'immigration ;

d) Droit d'importer en franchise, à l'exception de la rémunération de services, leur mobilier et leurs effets à l'occasion de leur première prise de fonctions au Cambodge.

3. L'Organisation des Nations Unies et le Gouvernement royal cambodgien conviennent que l'immunité accordée par la loi portant création des chambres extraordinaires en ce qui concerne les paroles ou les écrits ainsi que tous les actes accomplis par le personnel cambodgien et le personnel international conformément au présent Accord sera accordée même après qu'ils auront cessé d'exercer leurs fonctions auprès des juges d'instruction, des procureurs, des chambres extraordinaires, de la chambre préliminaire et du Bureau de l'administration.

**Article 21. Conseil**

1. Une fois agréé par les chambres extraordinaires, le conseil d'un suspect ou d'un accusé ne fait l'objet de la part du Gouvernement royal cambodgien d'aucune mesure qui pourrait l'empêcher d'exercer ses fonctions en toute liberté et indépendance conformément au présent Accord.

2. En particulier, le conseil jouit des privilèges et immunités suivants :

a) Immunité d'arrestation, de détention et de saisie de ses bagages personnels;

b) Inviolabilité de tous les documents ayant trait à l'exercice de ses fonctions de conseil d'un suspect ou d'un accusé;

c) Immunité de juridiction pénale ou civile en ce qui concerne les paroles ou les écrits ainsi que les actes accomplis par lui en sa qualité officielle. Cette immunité continuera de lui être accordée même après qu'il aura cessé d'exercer ses fonctions de conseil d'un suspect ou d'un accusé.

3. Tout conseil, qu'il soit cambodgien ou non, retenu par un suspect ou un accusé ou qui lui a été commis d'office agit, lors de la défense de son client, conformément au présent Accord, à la loi cambodgienne relative aux statuts du barreau et aux normes et à la déontologie de la profession judiciaire.

**Article 22. Témoins et experts**

Les témoins et experts comparaisant sur citation ou à la demande des juges, des juges d'instruction ou des procureurs ne sont ni poursuivis ni arrêtés par les autorités cambodiennes et leur liberté n'est en aucune manière entravée. Ils ne font l'objet d'aucune mesure susceptible de les empêcher d'exercer leurs fonctions en toute liberté et indépendance.

**Article 23. Protection des victimes et des témoins**

Les juges d'instruction, les procureurs et les chambres extraordinaires veillent à la protection des victimes et des témoins. Les mesures de protection comprennent entre autres la tenue d'audiences à huis clos et la protection de l'identité des victimes ou témoins.

**Article 24. Sécurité et protection des personnes visées dans le présent Accord**

Le Gouvernement royal cambodgien prend toutes les mesures efficaces et appropriées pouvant être requises pour assurer la sécurité et la protection des personnes visées dans le présent Accord. L'Organisation des Nations Unies et le Gouvernement conviennent que le Gouvernement est chargé d'assurer la sécurité de tous les accusés, qu'ils comparaissent de leur plein gré devant les chambres extraordinaires ou qu'ils soient arrêtés.

**Article 25. Obligation d'apporter une assistance aux juges d'instruction, aux procureurs et aux chambres extraordinaires**

Le Gouvernement royal cambodgien donnera suite sans retard indu à toute demande d'assistance que lui adressent les juges d'instruction, les procureurs et les chambres extraordinaires ou à toute ordonnance prise par l'un d'eux en ce qui concerne notamment, mais non exclusivement :

a) L'identification et la localisation de personnes ;

b) Le service des documents ;

c) Les arrestations ou détentions ;

d) Le transfert des accusés aux chambres extraordinaires.

**Article 26. Langues**

1. La langue officielle des chambres extraordinaires et de la chambre préliminaire est le khmer.

2. Les langues de travail officielles des chambres extraordinaires et de la chambre préliminaire sont le khmer, l'anglais et le français.

3. Les traductions de documents publics et l'interprétation des débats publics en russe peuvent être assurées par le Gouvernement royal cambodgien à sa discrétion et à ses frais, à condition que ces services ne nuisent pas au bon déroulement des travaux des chambres extraordinaires.

**Article 27. Dispositions pratiques**

1. Par souci d'efficacité et d'économie, la création des chambres extraordinaires se fera en plusieurs étapes, selon l'ordre chronologique de la procédure.
2. Lors de la première phase, les juges, les juges d'instruction et les procureurs seront désignés ainsi que le personnel chargé des enquêtes et des poursuites, et les enquêtes et les poursuites pourront alors commencer.

3. Les procès des personnes qui sont déjà en détention provisoire et les enquêtes relatives aux autres personnes accusées de crimes relevant de la compétence des chambres extraordinaires se déroulent simultanément.

4. Une fois terminées les enquêtes relatives aux personnes soupçonnées d'avoir commis des crimes relevant de la compétence des chambres extraordinaires, des mandats d'arrêt seront délivrés; ils seront remis au Gouvernement royal cambodgien pour qu'il procède aux arrestations.

5. Lorsque le Gouvernement royal cambodgien aura arrêté les accusés se trouvant sur son territoire, les chambres extraordinaires seront pleinement opérationnelles, étant entendu que les juges de la chambre de la Cour suprême siègeront lorsque la chambre sera saisie d'une affaire. Les juges de la chambre préliminaire ne siègeront que lorsque leurs services seront requis.

Article 28. Cessation de la coopération

Dans l’éventualité où le Gouvernement royal cambodgien modifierait la structure ou l’organisation des chambres extraordinaires ou les ferait fonctionner selon des modalités qui ne seraient pas conformes aux dispositions du présent Accord, l’Organisation des Nations Unies se réserve le droit de mettre fin à l’assistance, financière ou autre, qu’elle apporte conformément au présent Accord.

Article 29. Règlement des différends

Tout différend entre les Parties concernant l’interprétation ou l’application du présent Accord est réglé par voie de négociation ou par tout autre moyen convenu d’un commun accord entre les Parties.

Article 30. Approbation

Pour lier les Parties, le présent Accord doit être approuvé par l’Assemblée générale des Nations Unies et ratifié par le Cambodge. Le Gouvernement royal cambodgien mettra tout en œuvre pour obtenir cette ratification dans les meilleurs délais.

Article 31. Application de l’Accord au Cambodge

Le présent Accord aura force de loi au Royaume du Cambodge après avoir été ratifié conformément aux dispositions du droit interne cambodgien relatives à la compétence de conclure des traités.

Article 32. Entrée en vigueur

Le présent Accord entrera en vigueur le lendemain du jour où les deux Parties se seront mutuellement notifié par écrit que les formalités requises ont été remplies.

Fait à Phnom Penh le 6 juin 2003 en deux exemplaires en langue anglaise.

Pour l’Organisation des Nations Unies :
Le Conseiller juridique,
HANS CORELL
Secrétaire général adjoint aux affaires juridiques

Pour le Gouvernement royal cambodgien :
Ministre hors classe,
SOK AN
En charge du Conseil des Ministres
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, 27 October 2004
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, ethnic, 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, ethnic, 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.

---

Unofficial translation by the Council of Jurists and the Secretariat of the Task Force. Revised 26 August 2007

---

**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:

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.

Unofficial translation by the Council of Jurists and the Secretariat of the Task Force. Revised 26 August 2007

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.

Unofficial translation by the Council of Jurists and the Secretariat of the Task Force. Revised 26 August 2007
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.
Resolution 1757 (2007)

Adopted by the Security Council at its 5685th meeting, on 30 May 2007

The Security Council,


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 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 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 both 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:

____________________  ____________________
(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 1995 (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 *propioto 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.
International Court of Justice

Arrest Warrant of 11 April 2000
(Democratic Republic of Congo v. Belgium)
Judgment

I.C.J. Reports 2002
CASE CONCERNING THE ARREST WARRANT
OF 11 APRIL 2000
(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

JUDGMENT OF 14 FEBRUARY 2002
INTERNATIONAL COURT OF JUSTICE

14 February 2002

CASE CONCERNING THE ARREST WARRANT
OF 11 APRIL 2000

(DEMOCRATIC REPUBLIC OF THE CONGO v. BELGIUM)

Facts of the case — Issue by a Belgian investigating magistrate of “an international arrest warrant in absentia” against the incumbent Minister for Foreign Affairs of the Congo, alleging grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto and crimes against humanity — International circulation of arrest warrant through Interpol — Person concerned subsequently ceasing to hold office as Minister for Foreign Affairs.

* * *

First objection of Belgium — Jurisdiction of the Court — Statute of the Court, Article 36, paragraph 2 — Existence of a “legal dispute” between the Parties at the time of filing of the Application instituting proceedings — Events subsequent to the filing of the Application do not deprive the Court of jurisdiction.

Second objection of Belgium — Mootness — Fact that the person concerned had ceased to hold office as Minister for Foreign Affairs does not put an end to the dispute between the Parties and does not deprive the Application of its object.

Third objection of Belgium — Admissibility — Facts underlying the Application instituting proceedings not changed in a way that transformed the dispute originally brought before the Court into another which is different in character.

Fourth objection of Belgium — Admissibility — Congo not acting in the context of protection of one of its nationals — Inapplicability of rules relating to exhaustion of local remedies.

Subsidiary argument of Belgium — Non ultra petita rule — Claim in Application instituting proceedings that Belgium’s claim to exercise a universal jurisdiction in issuing the arrest warrant is contrary to international law — Claim not made in final submissions of the Congo — Court unable to rule on that ques-
tion in the operative part of its Judgment but not prevented from dealing with certain aspects of the question in the reasoning of its Judgment.

* * *

Immunity from criminal jurisdiction in other States: and also inviolability of an incumbent Minister for Foreign Affairs — Vienna Convention on Diplomatic Relations of 18 April 1961, preamble, Article 32 — Vienna Convention on Consular Relations of 24 April 1963 — New York Convention on Special Missions of 8 December 1969, Article 21, paragraph 2 — Customary international law — 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 immunity.

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 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 Sh. Judges ODA, Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchuetin, Higgins, Parran-Aranguren, Koodmans, Rezek, Al-Khaisaweh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert; Registrar Couveur.

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 Kosiaska 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, Bâttonnier,

Mr. Djéna Wembou, Professor at the University of Abidjan,

as Counsel and Advocates;

Mr. Mazyambo Makengo, Legal Adviser to the Ministry of Justice, as Counselor,

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 Counselor, Director-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. Abdulaie 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 had accepted the jurisdiction of the Court and, in so far as may be required, the [aforementioned] Application signifies[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,
Maitre Kosisaka Komba,
Mr. François Rigaux,
Ms Monique Chemillier-Gendreau,
Mr. Pierre d’Argent.

For Belgium: Mr. Jan Devadder,
Mr. Daniel Bethlehem,
Mr. Eric David.

9. At the hearings, Members of the Court put questions to Belgium, to which replies were given orally or in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. The Congo provided its written comments on the reply that was given in writing to one of these questions, pursuant to Article 72 of the Rules of Court.

* * *

10. In its Application, the Congo formulated the decision requested in the following terms:

“The Court is requested to declare that the Kingdom of Belgium shall annul the international arrest warrant issued on 11 April 2000 by a Belgian investigating judge, Mr. Vandermeersch, of the Brussels Tribunal de première instance against the Minister for Foreign Affairs in office of the Democratic Republic of the Congo, Mr. Abdulaie 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 warrant 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 vic-
tims 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
“[t]he immunity attaching to the official capacity of a person shall not pre-
vent 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 pos-
sible 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

“[t]he violation of the principle that a State may not exercise its author-
ity 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 For-
egn Affairs in office” constituted a “[t]he violation of the diplomatic immu-
nity of the Minister for Foreign Affairs of a sovereign State, as recog-
nized 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 proceed-
ingds, 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 para-
graph 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 Educa-
tion. 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 Ndombesi is no
longer either Minister for Foreign Affairs of the [Congo] or a min-
ister 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
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 the 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.

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

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 obliga-
tion, 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 declara-
tion 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 con-
tained 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 law-
fulness 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 dis-
pute within the meaning of the Court’s jurisprudence, namely “a dis-
agreement 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 Inter-
pretation 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

28. The Court accordingly concludes that at the time that it was seised
of the case it had jurisdiction to deal with it, and that it still has such jurisdiction. Belgium’s first objection must therefore be rejected.

* *

29. The second objection presented by Belgium is the following:

“That in the light of the fact that Mr. Yerodia Ndombasi is no longer either Minister for Foreign Affairs of the [Congo] or a minister occupying any other position in the . . . Government [of the Congo], the case is now without object and the Court should accordingly decline to proceed to judgment on the merits of the case.”

30. Belgium also relies in support of this objection on the Northern Cameroons case, in which the Court considered that it would not be a proper discharge of its duties to proceed further in a case in which any judgment that the Court might pronounce would be “without object” (I.C.J. Reports 1963, p. 38), and on the Nuclear Tests cases, in which the Court saw “no reason to allow the continuance of proceedings which it knows are bound to be fruitless” (I.C.J. Reports 1974, p. 271, para. 58; p. 477, para. 61). Belgium maintains that the declarations requested by the Congo in its first and second submissions would clearly fall within the principles enunciated by the Court in those cases, since a judgment of the Court on the merits in this case could only be directed towards the clarification of the law in this area for the future, or be designed to reinforce the position of one or other Party. It relies in support of this argument on the fact that the Congo does not allege any material injury and is not seeking compensatory damages. It adds that the issue and transmission of the arrest warrant were not predicated on the ministerial status of the person concerned, that he is no longer a minister, and that the case is accordingly now devoid of object.

* *

31. The Congo contests this argument of Belgium, and emphasizes that the aim of the Congo — to have the disputed arrest warrant annulled and to obtain redress for the moral injury suffered — remains unachieved at the point in time when the Court is called upon to decide the dispute. According to the Congo, in order for the case to have become devoid of object during the proceedings, the cause of the violation of the right would have had to disappear, and the redress sought would have to have been obtained.

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-


However, it considers that this is not such a case. The change which has occurred in the situation of Mr. Yerodia has not in fact put an end to the dispute between the Parties and has not deprived the Application of its object. The Congo argues that the arrest warrant issued by the Belgian judicial authorities against Mr. Yerodia was and remains unlawful. It asks the Court to hold that the warrant is unlawful, thus providing redress for the moral injury which the warrant allegedly caused to it. The Congo also continues to seek the cancellation of the warrant. For its part, Belgium contends that it did not act in violation of international law and it disputes the Congo’s submissions. In the view of the Court, it follows from the foregoing that the Application of the Congo is not now without object and that accordingly the case is not moot. Belgium’s second objection must accordingly be rejected.

* *

33. The third Belgian objection is put as follows:

“That the case as it now stands is materially different to that set out in the [Congo’s] Application instituting proceedings and that the Court accordingly lacks jurisdiction in the case and/or that the application is inadmissible.”

34. According to Belgium, it would be contrary to legal security and the sound administration of justice for an applicant State to continue proceedings in circumstances in which the factual dimension on which the Application was based has changed fundamentally, since the respondent State would in those circumstances be uncertain, until the very last moment, of the substance of the claims against it. Belgium argues that the prejudice suffered by the respondent State in this situation is analogous to the situation in which an applicant State formulates new claims during the course of the proceedings. It refers to the jurisprudence of the Court holding inadmissible new claims formulated during the course of the proceedings which, had they been entertained, would have transformed the subject of the dispute originally brought before it under the terms of the Application (see Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp. 447-448, para. 29). In the circumstances, Belgium contends that, if the Congo wishes to maintain its claims, it should be required to institute 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 of 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.

* *

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. 205, para. 72; see also Temple of Preah Vihear, Merits, Judgment, I.C.J. Reports 1962, p. 36).

In these circumstances, the Court considers that Belgium cannot validly maintain that the dispute brought before the Court was transformed in a way that affected its ability to prepare its defence, or that the requirements of the sound administration of justice were infringed. Belgium’s third objection must accordingly be rejected.

* *

37. The fourth Belgian objection reads as follows:

“That, in the light of the new circumstances concerning Mr. Yerodia Dombasi, 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 remit 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 seized of the case file and makes submissions to the Chambre du conseil that the accused can defend himself before the Chamber and seek to have the charge dismissed.

* *

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 the 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 1989, p. 26; Electromatica Sicula S.p.A. (ELSIA), Judgment, I.C.J. Reports 1989, p. 42, para. 49). Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed
(see Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 25-26, paras. 43-44; and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998, pp. 130-131, paras. 42-43). Belgium accepts that, on the date on which the Congo filed the Application instituting proceedings, the Congo had a direct legal interest in the matter, and was asserting a claim in its own name. Belgium's fourth objection must accordingly be rejected.

* * *

41. As a subsidiary argument, Belgium further contends that "[i]n the event that the Court decides that it does have jurisdiction in this case and that the application is admissible... the non ultra petita rule operates to limit the jurisdiction of the Court to those issues that are the subject of the [Congo's] final submissions". Belgium points out that, while the Congo initially advanced a twofold argument, based, on the one hand, on the Belgian judge's lack of jurisdiction, and, on the other, on the immunity from jurisdiction enjoyed by its Minister for Foreign Affairs, the Congo no longer claims in its final submissions that Belgium wrongly conferred upon itself universal jurisdiction in absentia. According to Belgium, the Congo now confines itself to arguing that the arrest warrant of 11 April 2000 was unlawful because it violated the immunity from jurisdiction of its Minister for Foreign Affairs, and that the Court consequently cannot rule on the issue of universal jurisdiction in any decision it renders on the merits of the case.

42. The Congo, for its part, states that its interest in bringing these proceedings is to obtain a finding by the Court that it has been the victim of an internationally wrongful act, the question whether this case involves the "exercise of an excessive universal jurisdiction" being in this connection only a secondary consideration. The Congo asserts that any consideration by the Court of the issues of international law raised by universal jurisdiction would be undertaken not at the request of the Congo but, rather, by virtue of the defence strategy adopted by Belgium, which appears to maintain that the exercise of such jurisdiction can "represent a valid counterweight to the observance of immunities".

* *

43. The Court would recall the well-established principle that "it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions" (Asylum, Judgment, I.C.J. Reports 1950, p. 402). While the Court is thus not entitled to decide upon questions not asked of it, the non ultra petita rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning. Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts. This does not mean, however, that the Court may not deal with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable.

* * *

44. The Court concludes from the foregoing that it has jurisdiction to entertain the Congo's Application, that the Application is not without object and that accordingly the case is not moot and that the Application is admissible. Thus, the Court now turns to the merits of the case.

* * *

45. As indicated above (see paragraphs 41 to 43 above), in its Application instituting these proceedings, the Congo originally challenged the legality of the arrest warrant of 11 April 2000 on two separate grounds: on the one hand, Belgium's claim to exercise a universal jurisdiction and, on the other, the alleged violation of the immunities of the Minister for Foreign Affairs of the Congo then in office. However, in its submissions in its Memorial, and in its final submissions at the close of the oral proceedings, the Congo invokes only the latter ground.

46. As a matter of logic, the second ground should be addressed only once there has been a determination in respect of the first, since it is only where a State has jurisdiction under international law in relation to a particular matter that there can be any question of immunities in regard to the exercise of that jurisdiction. However, in the present case, and in view of the final form of the Congo's submissions, the Court will address first the question whether, assuming that it had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000, Belgium in so doing violated the immunities of the then Minister for Foreign Affairs of the Congo.

* *

47. The Congo maintains that, during his or her term of office, a Minister for Foreign Affairs of a sovereign State is entitled to inviolability
and to immunity from criminal process being “absolute or complete”,
that is to say, they are subject to no exception. Accordingly, the Congo
contends that no criminal prosecution may be brought against a Minister
for Foreign Affairs in a foreign court as long as he or she remains in
office, and that any finding of criminal responsibility by a domestic court
in a foreign country, or any act of investigation undertaken with a view
to bringing him or her to court, would contravene the principle of immu-
nity from jurisdiction. According to the Congo, the basis of such criminal
immunity is purely functional, and immunity is accorded under custom-
ary international law simply in order to enable the foreign State repre-
sentative 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 irrele-
vant 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 immu-
nity 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 evi-
dence that he was then acting in any official capacity. It observes that the
arrest warrant was issued against Mr. Yerodia personally.

* * *

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 per-
formance 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 Rela-
tions, to which both the Congo and Belgium are parties, reflects custom-
ary 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 Conven-
tion:

“The Head of the Government, the Minister for Foreign Affairs
and other persons of high rank, when they take part in a special mis-
ion of the sending State, shall enjoy in the receiving State or in a
third State, in addition to what is granted by the present Conven-
tion, the facilities, privileges and immunities accorded by interna-
tional 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 Min-
isters 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 exer-
cised 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 repre-
sentative 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 vir-
tue 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 charges 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 officia 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 “international 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, in the Qaddafi 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.

* * *

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 or the prevention and punishment of certain serious crimes impose or State obligations of prosecution or extradition, thereby requiring them to extend their criminal jurisdiction, such extension of jurisdiction in no way affects immunities under customary international law, including those of Ministers for Foreign Affairs. These remain opposable before the courts of a foreign State, even where those courts exercise such a jurisdiction under these conventions.

60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries’ courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter’s Statute expressly provides, in Article 27, paragraph 2, that “[i]mmunities or special procedural rules which may attach to the
official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”.

* * *

62. Given the conclusions it has reached above concerning the nature and scope of the rules governing the immunity from criminal jurisdiction enjoyed by incumbent Ministers for Foreign Affairs, the Court must now consider whether in the present case the issue of the arrest warrant of 11 April 2000 and its international circulation violated those rules. The Court recalls in this regard that the Congo requests it, in its first final submission, to adjudge and declare that:

“[B]y issuing and internationally circulating the arrest warrant of 11 April 2000 against Mr. Abdulaye Yerodia Ndombasi, Belgium committed a violation in regard to the Democratic Republic of the Congo of the rule of customary international law concerning the absolute inviolability and immunity from criminal process of incumbent foreign ministers; in so doing, it violated the principle of sovereign equality among States.”

63. In support of this submission, the Congo maintains that the arrest warrant of 11 April 2000 as such represents a “coercive legal act” which violates the Congo’s immunity and sovereign rights, inasmuch as it seeks to “subject to an organ of domestic criminal jurisdiction a member of a foreign government who is in principle beyond its reach” and is fully enforceable without special formality in Belgium.

The Congo considers that the mere issuance of the warrant thus constituted a coercive measure taken against the person of Mr. Yerodia, even if it was not executed.

64. As regards the international circulation of the said arrest warrant, this, in the Congo’s view, not only involved further violations of the rules referred to above, but also aggravated the moral injury which it suffered as a result of the opprobrium “thus cast upon one of the most prominent members of its Government”. The Congo further argues that such circulation was a fundamental infringement of its sovereign rights in that it significantly restricted the full and free exercise, by its Minister for Foreign Affairs, of the international negotiation and representation functions entrusted to him by the Congo’s former President. In the Congo’s view, Belgium “[t]hus manifests an intention to have the individual concerned arrested at the place where he is to be found, with a view to procuring his extradition”. The Congo emphasizes moreover that it is necessary to avoid any confusion between the arguments concerning the legal effect of the arrest warrant abroad and the question of any responsibility of the foreign authorities giving effect to it. It points out in this regard that no State has acted on the arrest warrant, and that accordingly “no further consideration need be given to the specific responsibility which a State executing it might incur, or to the way in which that responsibility should be related” to that of the Belgian State. The Congo observes that, in such circumstances, “there [would be] a direct causal relationship between the arrest warrant issued in Belgium and any act of enforcement carried out elsewhere”.

65. Belgium rejects the Congo’s argument on the ground that “the character of the arrest warrant of 11 April 2000 is such that it has neither infringed the sovereignty of, nor created any obligation for, the [Congo]”.

With regard to the legal effects under Belgian law of the arrest warrant of 11 April 2000, Belgium contends that the clear purpose of the warrant was to procure that, if found in Belgium, Mr. Yerodia would be detained by the relevant Belgian authorities with a view to his prosecution for war crimes and crimes against humanity. According to Belgium, the Belgian investigating judge did, however, draw an explicit distinction in the warrant between, on the one hand, immunity from jurisdiction and, on the other hand, immunity from enforcement as regards representatives of foreign States who visit Belgium on the basis of an official invitation, making it clear that such persons would be immune from enforcement of an arrest warrant in Belgium. Belgium further contends that, in its effect, the disputed arrest warrant is national in character, since it requires the arrest of Mr. Yerodia if he is found in Belgium but it does not have this effect outside Belgium.

66. In respect of the legal effects of the arrest warrant outside Belgium, Belgium maintains that the warrant does not create any obligation for the authorities of any other State to arrest Mr. Yerodia in the absence of some further step by Belgium completing or validating the arrest warrant (such as a request for the provisional detention of Mr. Yerodia), or the issuing of an arrest warrant by the appropriate authorities in the State concerned following a request to do so, or the issuing of an Interpol Red Notice. Accordingly, outside Belgium, while the purpose of the warrant was admittedly “to establish a legal basis for the arrest of Mr. Yerodia . . . and his subsequent extradition to Belgium”, the warrant had no legal effect unless it was validated or completed by some prior act “requiring the arrest of Mr. Yerodia by the relevant authorities in a third State”. Belgium further argues that “[i]f a State had executed the arrest warrant, it might infringe Mr. Yerodia’s criminal immunity”, but that “the Party directly responsible for that infringement would have been that State and not Belgium”.

* * *

67. The Court will first recall that the “international arrest warrant in absentia”, issued on 11 April 2000 by an investigating judge of the Brussels Tribunal de première instance, is directed against Mr. Yerodia,
stating that he is “currently Minister for Foreign Affairs of the Democratic Republic of the Congo, having his business address at the Ministry of Foreign Affairs in Kinshasa”. The warrant states that Mr. Yerodia is charged with being “the perpetrator or co-perpetrator” of:

— Crimes under international law constituting grave breaches causing harm by act or omission to persons and property protected by the Conventions signed at Geneva on 12 August 1949 and by Additional Protocols I and II to those Conventions (Article 1, paragraph 3, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law)

— Crimes against humanity (Article 1, paragraph 2, of the Law of 16 June 1993, as amended by the Law of 10 February 1999 concerning the punishment of serious violations of international humanitarian law).

The warrant refers to “various speeches inciting racial hatred” and to “particularly virulent remarks” allegedly made by Mr. Yerodia during “public addresses reported by the media” on 4 August and 27 August 1998. It adds:

“These speeches allegedly had the effect of inciting the population to attack Tutsi residents of Kinshasa: there were dragnet searches, manhunts (the Tutsi enemy) andlynchings.

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.”

69. 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 on 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 “infring[ement] of the sovereignty of the [Congo]”. It further points out that no Interpol Red Notice was requested until 12 September 2001, when Mr. Yerodia no longer held ministerial office.

The Court cannot subscribe to this view. As in the case of the warrant’s issue, its international circulation from June 2000 by the Belgian authorities, given its nature and purpose, effectively infringed Mr. Yero
dia’s immunity as the Congo’s incumbent Minister for Foreign Affairs and was furthermore liable to affect the Congo’s conduct of its international relations. Since Mr. Yerodia was called upon in that capacity to undertake travel in the performance of his duties, the mere international circulation of the warrant, even in the absence of “further steps” by Belgium, could have resulted, in particular, in his arrest while abroad. The Court observes in this respect that Belgium itself cites information to the effect that Mr. Yerodia, “on applying for a visa to go to two countries, [apparently] learned that he ran the risk of being arrested as a result of the arrest warrant issued against him by Belgium”, adding that “[t]his, moreover, is what the [Congo] ... hints when it writes that the arrest warrant ‘sometimes forced Minister Yerodia to travel by roundabout routes’”. Accordingly, the Court concludes that the circulation of the warrant, whether or not it significantly interfered with Mr. Yerodia’s diplomatic activity, constituted a violation of an obligation of Belgium towards the Congo, in that it failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law.

* * *

72. The Court will now address the issue of the remedies sought by the Congo on account of Belgium’s violation of the above-mentioned rules of international law. In its second, third and fourth submissions, the Congo requests the Court to adjudge and declare that:

“A formal finding by the Court of the unlawfulness of [the issue and international circulation of the arrest warrant] constitutes an appropriate form of satisfaction, providing reparation for the consequent moral injury to the Democratic Republic of the Congo; the violations of international law underlying the issue and international circulation of the arrest warrant of 11 April 2000 preclude any State, including Belgium, from executing it;
Belgium shall be required to recall and cancel the arrest warrant of 11 April 2000 and to inform the foreign authorities to whom the warrant was circulated that Belgium renounces its request for their co-operation in executing the unlawful warrant.”

73. In support of those submissions, the Congo asserts that the termination of the official duties of Mr. Yerodia in no way operated to efface the wrongful act and the injury flowing from it, which continue to exist. It argues that the warrant is unlawful ab initio, that “[i]t is fundamentally flawed” and that it cannot therefore have any legal effect today. It points out that the purpose of its request is reparation for the injury caused, requiring the restoration of the situation which would in all probability have existed if the said act had not been committed. It states that, inasmuch as the wrongful act consisted in an internal legal instrument, only the “withdrawal” and “cancellation” of the latter can provide appropriate reparation.

The Congo further emphasizes that in no way is it asking the Court itself to withdraw or cancel the warrant, nor to determine the means whereby Belgium is to comply with its decision. It explains that the withdrawal and cancellation of the warrant, by the means that Belgium deems most suitable, “are not means of enforcement of the judgment of the Court but the requested measure of legal reparation/restitution itself”. The Congo maintains that the Court is consequently only being requested to declare that Belgium, by way of reparation for the injury to the rights of the Congo, be required to withdraw and cancel this warrant by the means of its choice.

74. Belgium for its part maintains that a finding by the Court that the immunity enjoyed by Mr. Yerodia as Minister for Foreign Affairs had been violated would in no way entail an obligation to cancel the arrest warrant. It points out that the arrest warrant is still operative and that “there is no suggestion that it presently infringes the immunity of the Congo’s Minister for Foreign Affairs”. Belgium considers that what the Congo is in reality asking of the Court in its third and fourth final submissions is that the Court should direct Belgium as to the method by which it should give effect to a judgment of the Court finding that the warrant had infringed the immunity of the Congo’s Minister for Foreign Affairs.

* * *

75. The Court has already concluded (see paragraphs 70 and 71) that the issue and circulation of the arrest warrant of 11 April 2000 by the Belgian authorities failed to respect the immunity of the incumbent Minister for Foreign Affairs of the Congo and, more particularly, infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by Mr. Yerodia under international law. Those acts engaged Belgium’s international responsibility. The Court considers that the findings so reached by it constitute a form of satisfaction which will make good the moral injury complained of by the Congo.

76. However, as the Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the Factory at Chorzów:

“[t]he essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that reparation must, as far as possible, wipe out all the conse-
quences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed” (P.C.I.J., Series A, No. 17, p. 47).

In the present case, “the situation which would, in all probability, have existed if [the illegal act had not been committed] cannot be re-established merely by a finding by the Court that the arrest warrant was unlawful under international law. The warrant is still extant, and remains unlawful, notwithstanding the fact that Mr. Yerodia has ceased to be Minister for Foreign Affairs. The Court accordingly considers that Belgium must, by means of its own choosing, cancel the warrant in question and so inform the authorities to whom it was circulated.

77. The Court sees no need for any further remedy: in particular, the Court cannot, in a judgment ruling on a dispute between the Congo and Belgium, indicate what that judgment’s implications might be for third States, and the Court cannot therefore accept the Congo’s submissions on this point.

* * *

78. For these reasons,

THE COURT,

(1) By fifteen votes to one,

Finds that 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; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(D) By fifteen votes to one,

Finds that the Application of the Democratic Republic of the Congo is admissible;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal; Judges ad hoc Bula-Bula, Van den Wyngaert;

AGAINST: Judge Oda;

(2) By thirteen votes to three,

Finds that the issue against Mr. Abdulaye Yerodia Ndombasi of the arrest warrant of 11 April 2000, and its international circulation, constituted violations of a legal obligation of the Kingdom of Belgium towards the Democratic Republic of the Congo, in that they failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of the Congo enjoyed under international law;

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Buergenthal; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Al-Khasawneh; Judge ad hoc Van den Wyngaert;

(3) By ten votes to six,

Finds that the Kingdom of Belgium must, by means of its own choosing, cancel the arrest warrant of 11 April 2000 and so inform the authorities to whom that warrant was circulated.

IN FAVOUR: President Guillaume; Vice-President Shi; Judges Ranjeva, Herczegh, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Rezek; Judge ad hoc Bula-Bula;

AGAINST: Judges Oda, Higgins, Kooijmans, Al-Khasawneh, Buergenthal; Judge ad hoc Van den Wyngaert.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this fourteenth day of February, two thousand and two, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Demo-
cratic Republic of the Congo and the Government of the Kingdom of Belgium, respectively.

(Signed) Gilbert GUILLAUME,
President.

(Signed) Philippe COUVREUR,
Registrar.

President GUILLAUME appends a separate opinion to the Judgment of the Court; Judge ODA appends a dissenting opinion to the Judgment of the Court; Judge RANJEVA appends a declaration to the Judgment of the Court; Judge KOROMA appends a separate opinion to the Judgment of the Court; Judges HIGGINS, KOORDANS and BUERGENHAL append a joint separate opinion to the Judgment of the Court; Judge REZIK 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.
International Court of Justice

Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)
Summary of the Judgment of 20 July 2012
Questions relating to the Obligation to Prosecute or Extradite
(Belgium v. Senegal)

Summary of the Judgment of 20 July 2012

The Court begins by setting out the history of the proceedings ( paras. 1-14). It recalls that, on 19 February 2009, Belgium filed in the Registry of the Court an Application instituting proceedings against Senegal in respect of a dispute concerning “Senegal’s compliance with its obligation to prosecute Mr. Hissène Habré, former President of the Republic of Chad, for acts including crimes of torture and crimes against humanity which are alleged against him as perpetrator, co-perpetrator or accomplice, or to extradite him to Belgium for the purposes of criminal proceedings”. In its Application, Belgium based its claims on the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (hereinafter “the Convention against Torture” or the “Convention”), as well as on customary international law. The Court notes that in the said Application, Belgium invoked, as the basis for the jurisdiction of the Court, Article 30, paragraph 1, of the Convention against Torture and the declarations made under Article 36, paragraph 2, of the Statute of the Court, by Belgium on 17 June 1958 and by Senegal on 2 December 1985.

On 19 February 2009, in order to protect its rights, Belgium also filed a Request for the indication of provisional measures, on which the Court made an Order on 28 May 2009. In that Order, the Court found 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.

I. HISTORICAL AND FACTUAL BACKGROUND ( paras. 15-41)

The Court recalls that, after taking power on 7 June 1982 at the head of a rebellion, Mr. Hissène Habré was President of the Republic of Chad for eight years, during which time large-scale violations of human rights were allegedly committed, including arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances. Overthrown on 1 December 1990, Mr. Habré requested political asylum from the Senegalese Government, a request which was granted; he has been living in Dakar ever since.

From 25 January 2000 onwards, a number of proceedings relating to crimes alleged to have been committed during Mr. Habré’s presidency were instituted both before Senegalese and Belgian courts by Chadian nationals, Belgian nationals of Chadian origin and persons with dual Belgian-Chadian nationality, together with an association of victims. The issue of the institution of proceedings against Mr. Habré was also referred to Chadian nationals to the United Nations Committee against Torture and the African Court on Human and People’s Rights.

On 19 September 2005, the Belgian investigating judge issued an international warrant in absentia for the arrest of Mr. Habré, indicted as the perpetrator or co-perpetrator, inter alia, of serious violations of international humanitarian law, torture, genocide, crimes against humanity and war crimes, on the basis of which Belgium requested the extradition of Mr. Habré from Senegal and Interpol circulated a “red notice” serving as a request for provisional arrest with a view to extradition.

In a judgment of 25 November 2005, the Chambre d’accusation of the Dakar Court of Appeal ruled on Belgium’s extradition request, holding that, as “a court of ordinary law, [it could] not extend its jurisdiction to matters relating to the investigation or prosecution of a Head of State for acts allegedly committed in the exercise of his functions”; that Mr. Habré should “be given jurisdictional immunity”, which “is intended to survive the cessation of his duties as President of the Republic”; and that it could not therefore “adjudicate the lawfulness of [the] proceedings and the validity of the arrest warrant against a Head of State”.

The day after the delivery of the said judgment, Senegal referred to the African Union the issue of the institution of proceedings against Mr. Habré. In July 2006, the Union’s Assembly of Heads of State and Government inter alia decided[ed] to consider the Hissène Habré case as falling within the competence of the African Union, . . . mandated[ed] the Republic of Senegal to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial” and “mandated[ed] the Chairperson of the [African] Union, in consultation with the Chairperson of the Commission [of the Union], to provide Senegal with the necessary assistance for the effective conduct of the trial”.

By Note Verbale of 11 January 2006, Belgium, referring to the ongoing negotiation procedure provided for in Article 30 of the Convention against Torture and taking note of the referral of the “Hissène Habré case” to the African Union, stated that it interpreted the said Convention, and more specifically the obligation aut dedere aut judicare (that is to say, “to prosecute or extradite”) provided for in Article 7 thereof, “as imposing obligations only on a State, in this case, in the context of the extradition request of Mr. Hissène Habré, the Republic of Senegal”. Belgium further asked Senegal to “kindly notify it of its final decision to grant or refuse the . . . extradition application” in respect of Mr. Habré. According to Belgium, Senegal did not reply to this Note. By Note Verbale of 9 March 2006, Belgium again referred to the ongoing negotiation procedure provided for in Article 30 and explained that it interpreted Article 4, Article 5, paragraphs (1) (c) and (2), Article 7, paragraph (1), Article 8 paragraphs (1), (2) and (4), and Article 9, paragraph (1), of the Convention as “establishing the obligation, for a State in whose territory a person alleged to have committed any offence referred to in Article 4 of the Convention is found, to extradite him if it does not prosecute him for the offences mentioned in that Article”. Consequently, Belgium asked Senegal to “be so kind as to inform it as to whether its decision to refer the Hissène Habré case to the African Union [was] to be interpreted as meaning that the Senegalese authorities no longer intended to extradite him to Belgium or to have him judged by their own Courts”.

By Note Verbale dated 4 May 2006, Belgium, having noted the absence of an official response from the Senegalese authorities to its earlier Notes and communications, again made it clear that it interpreted Article 7 of the Convention against Torture as requiring the State on whose territory the alleged offender is located to extradite him if it does not prosecute him, and stated that the “decision to refer the Hissène Habré case to the African Union” could not relieve Senegal of its obligation to either judge or extradite the person accused of these offences in accordance with the relevant articles of the Convention. It added that an unresolved dispute regarding this interpretation would lead to recourse to the arbitration procedure provided for in Article 30 of the
The Court further notes that, by a judgment of 18 November 2010, the Court of Justice of the Economic Community of West African States (hereinafter the “ECOWAS Court of Justice”) ruled on an application filed on 6 October 2008, in which Mr. Habré requested the court to find that his human rights would be violated by Senegal if proceedings were instituted against him. Having observed inter alia that the offences for which he was liable under the law of Senegal were also defined under international law, the ECOWAS Court of Justice held that Senegal was bound by the obligations under Article 7, paragraph 1, of the Convention to refer the case to the competent Senegalese authorities. It further stated that Senegal had the option to either try Mr. Habré under the law of Senegal, or, in the alternative, to comply with the request for extradition.

The Court then observes that, in 2007, Senegal implemented a number of legislative reforms in order to bring its domestic law into conformity with the provisions of Article 5 of the Convention, and consequently with the provisions of the Code of Criminal Procedure, according to which “the national courts shall have jurisdiction over all criminal offences, punishable under Senegalese law, that are committed outside the territory of the Republic of Senegal by a national or a foreigner, if he is under the jurisdiction of Senegal or if a victim is resident in the territory of the Republic of Senegal, or if the Government obtains his extradition.”

According to the same report, the Senegalese authorities took note of the Belgian request for arbitration and the Belgian Ambassador drew their attention to the fact that the six-month time-limit under Article 30 began to run from that point.

The Court further notes that the United Nations Committee against Torture found, in a decision of 17 May 2006, that Senegal had not adopted such “measures as may be necessary” to establish its jurisdiction over the offences committed under the Code of Criminal Procedure, as defined in and formally described in paragraphs 2 and 6 of Article 5, paragraph 2, of the Code. It further stated that the Senegalese authorities had failed to perform their obligations under Article 7, paragraph 1, of the Convention, for the purpose of prosecution or, in the alternative, to try Mr. Habré as soon as possible, since a request for extradition had been made by Belgium. The Court then observes that, in 2007, Senegal implemented a number of legislative reforms in order to bring its domestic law into conformity with Article 5 of the Convention, and consequently with the provisions of the Code of Criminal Procedure, according to which “the national courts shall have jurisdiction over all criminal offences, punishable under Senegalese law, that are committed outside the territory of the Republic of Senegal by a national or a foreigner, if he is under the jurisdiction of Senegal or if a victim is resident in the territory of the Republic of Senegal, or if the Government obtains his extradition.”

According to the same report, the Senegalese authorities took note of the Belgian request for arbitration and the Belgian Ambassador drew their attention to the fact that the six-month time-limit under Article 30 began to run from that point.

The Court further notes that the United Nations Committee against Torture found, in a decision of 17 May 2006, that Senegal had not adopted such “measures as may be necessary” to establish its jurisdiction over the offences committed under the Code of Criminal Procedure, as defined in and formally described in paragraphs 2 and 6 of Article 5, paragraph 2, of the Code. It further stated that the Senegalese authorities had failed to perform their obligations under Article 7, paragraph 1, of the Convention, for the purpose of prosecution or, in the alternative, to try Mr. Habré as soon as possible, since a request for extradition had been made by Belgium.
the existence of a dispute between them and, if any dispute exists, its subject-matter. Given that the existence of a dispute is a condition of its jurisdiction under both bases of jurisdiction invoked by Belgium, the Court begins by examining this issue.

Following the delivery of that judgment by the ECOWAS Court of Justice, in January 2011 the Assembly of African Union Heads of State and Government in the United Nations (paras. 44-55) requested the Commission to undertake consultations with Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré on behalf of Africa. Following the delivery of that judgment by the ECOWAS Court of Justice, in January 2011 the Assembly of African Union Heads of State and Government in the United Nations (paras. 44-55) requested the Commission to undertake consultations with Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré on behalf of Africa.

At its eighteenth session, held in January 2012, the Assembly of the Heads of State and Government in the United Nations (paras. 44-55) requested the Commission to undertake consultations with Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré on behalf of Africa. Following the delivery of that judgment by the ECOWAS Court of Justice, in January 2011 the Assembly of African Union Heads of State and Government in the United Nations (paras. 44-55) requested the Commission to undertake consultations with Senegal in order to finalize the modalities for the expeditious trial of Hissène Habré on behalf of Africa.
The Court notes that, while Belgium expressly stated that the numerous exchanges of correspondence and various meetings between the Parties did not result in an agreement on the matter, it did not exclude Mr. H. Habré from consideration as a potential defendant in the proceedings against him. In view of this and of the fact that the last formal communication between the Parties was the Note Verbale of 8 May 2007 from Belgium to Senegal, the Court considers that the only obligations referred to in the diplomatic correspondence between the Parties are those under the Convention against Torture. The Court further notes that the attempt to settle the dispute by negotiation, as proposed by Senegal, appears to have been unsuccessful, as it did not result in an agreement on the matter.

The Court concludes that, at the time of the filing of the Application, the dispute between the Parties was not related to breaches of obligations under customary international law and that it thus fell outside the jurisdiction of the Court. The Court further notes that the inability of the Parties to agree on the organization of the arbitration results from the absence of any response on the part of Senegal to Belgium's request for arbitration.

With regard to the second condition laid down in Article 30, paragraph 1, of the Convention against Torture, namely that at least six months should pass after the request for arbitration before the case is submitted to the Court, the Court considers that, in the present case, this requirement has been complied with, since the Application was filed over two years after the request for arbitration had been made.
The Court notes the divergence of views between the parties concerning the standing of the Convention, which rests on the existence of a special interest not only in the protection of the rights of the individual but also of the protection of the State as a whole. The Court also considers that the obligations laid down in the Convention are of a nature to be fulfilled by all States parties to the Convention and that the observance of these obligations is necessary for the realization of the objectives of the Convention.

III. ADMISSIBILITY OF BELGIUM'S CLAIMS

The Court notes that Belgium's claims are based on its status as a party to the Convention and that these claims are admissible. The Court also considers that Belgium has a special interest in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited, Judgment, paras. 64-70).

The Court observes that Belgium's obligations under the Convention are of a nature to be fulfilled by all States parties to the Convention and that the observance of these obligations is necessary for the realization of the objectives of the Convention. The Court also considers that Belgium has a special interest in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited, Judgment, paras. 64-70).

The Court also notes that Belgium's claims are based on its status as a party to the Convention and that these claims are admissible. The Court also considers that Belgium has a special interest in the protection of the rights involved (Barcelona Traction, Light and Power Company, Limited, Judgment, paras. 64-70).

IV. THE ALLEGED VIOLATIONS OF THE CONVENTION AGAINST TORTURE

The Court notes that Senegal's response to the Court's request for information is not complete and that Senegal has not provided the Court with all the information necessary for the determination of the merits of the case.

The Court also notes that Senegal's response to the Court's request for information is not complete and that Senegal has not provided the Court with all the information necessary for the determination of the merits of the case.

The Court also notes that Senegal's response to the Court's request for information is not complete and that Senegal has not provided the Court with all the information necessary for the determination of the merits of the case.

The Court also notes that Senegal's response to the Court's request for information is not complete and that Senegal has not provided the Court with all the information necessary for the determination of the merits of the case.
The nature and meaning of the obligation laid down in Article 7, paragraph 1, of the Convention

1. The nature and meaning of the obligation laid down in Article 7, paragraph 1, of the Convention

The Court considers that the State has an obligation to prosecute the accused person who has been arrested or detained, or who is within the jurisdiction of the State, unless it is satisfied that the accused person is not responsible for any of the acts of torture, or that there is no evidence of such acts.

Article 7, paragraph 1, provides that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself.

With respect to the question relating to the temporal application of Article 7, paragraph 1, of the Convention, the Court states that the time when the offences are alleged to have been committed and the date of entry into force of the Convention for the State concerned are relevant factors. The Court considers that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself.

The Court notes that, while the choice of means for conducting the inquiry remains open to the State, it is necessary that the inquiry be carried out in a way that is consistent with the provisions of the Convention. The Court considers that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself.

2. The temporal scope of the obligation laid down in Article 7, paragraph 1, of the Convention

In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 1, of the Convention, which is an essential stage in that process, has been imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré. The Court considers that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself.

The Court notes that, while the choice of means for conducting the inquiry remains open to the State, it is necessary that the inquiry be carried out in a way that is consistent with the provisions of the Convention. The Court considers that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself.

2. The temporal scope of the obligation laid down in Article 7, paragraph 1, of the Convention

In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 1, of the Convention, which is an essential stage in that process, has been imperative in the present case at least since the year 2000, when a complaint was filed in Senegal against Mr. Habré. The Court considers that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself.

The Court notes that, while the choice of means for conducting the inquiry remains open to the State, it is necessary that the inquiry be carried out in a way that is consistent with the provisions of the Convention. The Court considers that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself.

The Court notes that, while the choice of means for conducting the inquiry remains open to the State, it is necessary that the inquiry be carried out in a way that is consistent with the provisions of the Convention. The Court considers that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself.

The Court notes that, while the choice of means for conducting the inquiry remains open to the State, it is necessary that the inquiry be carried out in a way that is consistent with the provisions of the Convention. The Court considers that the obligation to prosecute is prescribed by the Convention itself. The Court considers that the obligation to prosecute is prescribed by the Convention itself.
With respect to the question concerning the effect of the date of entry into force of the Convention for Belgium, on the scope of Senegal's obligation to prosecute, the Court observes a notable divergence between the Parties' views. While Belgium contends that Senegal's failure to fulfill its duty to prosecute Mr. Habré after he entered into the Convention falls within the scope of its obligations under the Convention, Senegal argues that the Convention only obliges it to take measures necessary to ensure that Mr. Habré is brought before its courts for the purpose of prosecution. This divergence raises the question of whether Senegal's failure to prosecute Mr. Habré could violate either party's obligations under the Convention.

The Court recalls that, in its final submissions, Belgium requests the Court to adjudge and declare that Senegal is required to proceed without delay with the prosecution of Mr. Habré in accordance with the Convention. Belgium asserts that Senegal's failure to prosecute Mr. Habré, even though he was in its custody for a considerable period of time, constitutes a breach of its obligations under the Convention. Belgium further contends that Senegal's failure to prosecute Mr. Habré, despite knowing that he had committed crimes within its territory, amounts to a violation of article 7, paragraph 1, of the Convention against Torture.

The Court notes that, for its part, Senegal has repeatedly affirmed, throughout the proceedings, its commitment to the Convention. Senegal maintains that it has taken all reasonable steps to ensure that Mr. Habré is brought before its courts for the purpose of prosecution. Senegal further contends that, in accordance with the Convention, it is entitled to invoke the principle of territoriality to avoid the jurisdiction of the Court.

The Court emphasizes that, in failing to comply with its obligations under Article 6, Senegal has not only breached its obligations under the Convention but has also failed to fulfill its obligations under Article 7, paragraph 1, of the Convention against Torture. Senegal must therefore take, without further delay, the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.

The Court further observes that, despite Senegal's failure to initiate proceedings against Mr. Habré, it has taken steps to transfer him to the African Union for prosecution. However, the Court notes that this referral does not constitute a fulfillment of Senegal's obligations under the Convention.

In conclusion, the Court reiterates that Senegal's failure to prosecute Mr. Habré constitutes a breach of its obligations under the Convention against Torture and that, in order to avoid its international responsibility, it must take, without further delay, the necessary measures to submit the case to its competent authorities for the purpose of prosecution.

The Court notes, finally, that Senegal's failure to comply with its obligations under the Convention has not only affected its own jurisdiction but has also had a negative impact on the rights of Mr. Habré and the victims of the crimes he committed. The Court further emphasizes that, in order to fulfill its obligations under the Convention, Senegal must take all necessary measures to ensure that Mr. Habré is brought before its courts for the purpose of prosecution.

The Court emphasizes that, in failing to comply with its obligations under the Convention, Senegal has not only breached its obligations under the Convention against Torture but has also failed to fulfill its obligations under Article 6. Senegal must therefore take, without further delay, the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.
VI. OPERATIVE CLAUSE (para. 122)

For these reasons,

THE COURT,

(1) Unanimously, finds that it has jurisdiction to entertain the dispute between the Parties concerning the interpretation and application of Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which the Kingdom of Belgium submitted to the Court in its Application filed in the Registry on 19 February 2009;

(2) By fourteen votes to two,

finds that it has no jurisdiction to entertain the claims of the Kingdom of Belgium relating to alleged breaches, by the Republic of Senegal, of obligations under customary international law;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde; Judge ad hoc Kirsch;

AGAINST: Judge Abraham; Judge ad hoc Sur;

(3) By fourteen votes to two,

finds that the claims of the Kingdom of Belgium based on Article 6, paragraph 2, and Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 are admissible;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Sebutinde; Judge ad hoc Kirsch;

AGAINST: Judge Xue; Judge ad hoc Sur;

(4) By fourteen votes to two,

finds that the Republic of Senegal, by failing to make immediately a preliminary inquiry into the facts relating to the crimes allegedly committed by Mr. Hissène Habré, has breached its obligation under Article 6, paragraph 2, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Greenwood, Donoghue, Gaja, Sebutinde; Judges ad hoc Sur, Kirsch;

AGAINST: Judges Yusuf, Xue;

(5) By fourteen votes to two,

finds that the Republic of Senegal, by failing to submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, has breached its obligation under Article 7, paragraph 1, of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;

IN FAVOUR: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Donoghue, Gaja, Sebutinde; Judge ad hoc Kirsch;

AGAINST: Judge Xue; Judge ad hoc Sur;

(6) Unanimously,

finds that the Republic of Senegal must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him.

Judge Owada appends a declaration to the Judgment of the Court; Judges Abraham, Skotnikov, Cançado Trindade and Yusuf append separate opinions to the Judgment of the Court; Judge Xue appends a dissenting opinion to the Judgment of the Court; Judge Donoghue appends a declaration to the Judgment of the Court; Judge Sebutinde appends a separate opinion to the Judgment of the Court; Judge ad hoc Sur appends a dissenting opinion to the Judgment of the Court.
International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Duško Tadić
Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction

Appeals Chamber, 2 October 1995
I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

   a) illegal foundation of the International Tribunal;
   b) wrongful primacy of the International Tribunal over national courts;
   c) lack of jurisdiction ratione materiae.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.

4. From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

   a) the jurisdiction of the Appeals Chamber to hear this appeal;
   b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.
B. Jurisdiction Of The Appeals Chamber


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

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

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

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

"I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.

Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.

So, it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.

[. . .]

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter Prosecutor Trial Brief).)

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

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the amicus curiae briefs submitted by Juristes sans Frontières and the Government of the United States of America, to whom it expresses its gratitude.

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

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

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

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

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

   A. Meaning Of Jurisdiction

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

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

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

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

   B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

   (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
   (2) the question whether the Security Council in establishing the international Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (id. at 12-14).

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

"jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

"[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633)."
The Trial Chamber approved this line of argument. This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a "political question" and, as such, "non-justiciable", i.e., regardless of whether or not it falls within its jurisdiction.

1. Does the International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

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

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

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

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

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

"[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgements cannot bind the General Assembly which established it.

[...]

The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body..." (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July) (hereinafter Effect of Awards)).

17. Earlier, the Court had derived the judicial nature of the United Nations Administrative Tribunal ("UNAT") from the use of certain terms and language in the Statute and its possession of certain attributes. Prominent among these attributes of the judicial function figures the power provided for in Article 2, paragraph 3, of the Statute of UNAT:

"In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal." (Id. at 51-2, quoting Statute of the United Nations Administrative Tribunal, art. 2, para. 3.)

18. This power, known as the principle of "Kompetenz-Kompetenz" in German or "la compétence de la compétence" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (see, e.g., Statute of the International Court of Justice, Art. 36, para. 6). But in the words of the International Court of Justice:

"[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [...]. It is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation." (Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. Reports 7, 119 (21 March)).

This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the
19. It is true that this power can be limited by an express provision in the arbitration agreement or in the constitutive instruments of standing tribunals, though the latter possibility is controversial, particularly where the limitation risks undermining the judicial character or the independence of the Tribunal. But it is absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred without an express provision allowing the waiver or the shrinking of such a well-entrenched principle of general international law.

As no such limiting text appears in the Statute of the International Tribunal, the International Tribunal can and indeed has to exercise its “compétence de la compétence” and examine the jurisdictional plea of the Defence, in order to ascertain its jurisdiction to hear the case on the merits.

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

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

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

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

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


All these dicta, however, address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it. Indeed, in the Namibia Advisory Opinion, immediately after the dictum reproduced above and quoted by the Trial Chamber (concerning its "primary" jurisdiction), the International Court of Justice proceeded to exercise the very same "incidental" jurisdiction discussed here:

"[T]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter.” (Id. at para. 89.)

The same sort of examination was undertaken by the International Court of Justice, inter alia, in its advisory opinion on the Effect of Awards Case:

"[T]his question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions.” (Id. at para. 89.)

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.

2. Is The Question At Issue Political And As Such Non-Justiciable?

23. The Trial Chamber accepted this argument and classification. (See Decision at Trial, at para. 24.)

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

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

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

This dictum applies almost literally to the present case.

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

**C. The Issue Of Constitutionality**

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

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

"It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

**1. The Power Of The Security Council To Invoke Chapter VII**

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, 26 June 1945, Art. 39.)

It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).
In particular, Article 24, after declaring, in paragraph 1, that the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security", imposes on it, in paragraph 3, the obligation to report annually (or more frequently) to the General Assembly, and provides, more importantly, in paragraph 2, that:

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

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

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

The Security Council plays the central role in the application of both parts of the Article. It is the Security Council that makes the determination that there exists one of the situations justifying the use of the "exceptional powers" of Chapter VII. And it is also the Security Council that chooses the reaction to such a situation: it either makes recommendations (i.e., opts not to use the exceptional powers but to continue to operate under Chapter VI) or decides to use the exceptional powers by ordering measures to be taken in accordance with Articles 41 and 42 with a view to maintaining or restoring international peace and security.

The situations justifying resort to the powers provided for in Chapter VII are a "threat to the peace", a "breach of the peace" or an "act of aggression." While the "act of aggression" is more amenable to a legal determination, the "threat to the peace" is more of a political concept. But the determination that there exists such a threat is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.

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

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, would be a as a "threat to the peace" of others).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that Appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter Defence Appeal Brief.) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action: as noted above (see para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("Pacific Settlement of Disputes") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, art. 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

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

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

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

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

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

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

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

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such

34. Prima facie, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force." Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:

...[It] is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 3.2.1 (hereinafter Defence Trial Brief).)

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The first argument does not stand by its own language. Article 41 reads as follows:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." (United Nations Charter, art. 41.)

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

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

Moreover, even a simple literal analysis of the Article shows that the first phrase of the first sentence carries a very general prescription which can accommodate both institutional and Member State action. The second phrase can be read as referring particularly to one species of this very large category of measures referred to in the first phrase, but not necessarily the only one, namely, measures undertaken directly by States. It is also clear that the second sentence, starting with "These [measures] not "Those
36. Logically, if the Organization can undertake measures which have to be implemented through the intermediary of its Members, it can a fortiori undertake measures which it can implement directly via its organs, if it happens to have the resources to do so. It is only for want of such resources that the United Nations has to act through its Members. But it is of the essence of “collective measures” that they are collectively undertaken. Action by Member States on behalf of the Organization is but a poor substitute faute de mieux, or a “second best” for want of the first. This is also the pattern of Article 42 on measures involving the use of armed force.

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

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

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

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

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East (“UNEF”) in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the Effect of Awards, the International Court of Justice, in addressing practically the same objection, declared:

"[T]he Charter does not confer judicial functions on the General Assembly [. . .] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (Effect of Awards, at 61.)

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

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

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

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [ . . .]” (European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222 (hereinafter ECHR))
and in Article 8(1) of the American Convention on Human Rights, which provides: "

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

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

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. Indeed, there are three possible interpretations of the term "established by law." First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)


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

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

In addition, the establishment of the International Tribunal has been repeatedly approved and endorsed by the "representative" organ of the United Nations, the General Assembly: this body not only participated in its setting up, by electing the Judges and approving the budget, but also expressed its satisfaction with, and encouragement of the activities of the International Tribunal in various resolutions. (See G.A. Res. 48/88 (20 December 1993) and G.A. Res. 48/143 (20 December 1993), G.A. Res. 49/10 (8 November 1994) and G.A. Res. 49/205 (23 December 1994).)
45. The third possible interpretation of the requirement that the International Tribunal be “established by law” is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.

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

“...If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes.” (See E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg and Tokyo gave the accused a fair trial in a procedural sense (Decision at Trial, at para. 34). The important consideration in determining whether a tribunal has been “established by law” is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.

This concern about ad hoc tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase “established by law” contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that “extraordinary” tribunals or “special” courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it “extraordinary” or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (See General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), Cariboni v. Uruguay H.R.Cmm. 159/83, 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (See, e.g., Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely “special” or “extraordinary” criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus “established by law.”

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

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

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

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

“Concurrent jurisdiction

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

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

Appellant's submission is material to the issue, inasmuch as Appellant is expected to stand trial before this International Tribunal as a conclusion of a request for referral which the International Tribunal submitted to the Government of the Federal Republic of Germany on 8 November 1994 and which this Government, as it was bound to do, agreed to honour by surrendering Appellant to the International Tribunal. (United Nations Charter, art. 25, 48 & 49; Statute of the Tribunal, art. 29.2(e); Rules of
In relevant part, Appellant's motion alleges: "[The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected." ([Defence] Motion on the Jurisdiction of the Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 2.)

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

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) jus de non evocando.

The Prosecutor has contested each of the propositions put forward by Appellant. So have two of the amicus curiae, one before the Trial Chamber, the other in appeal.

The Trial Chamber has analysed Appellant's submissions and has concluded that they cannot be entertained.

51. Before this Chamber, Appellant has somewhat shifted the focus of his approach to the question of primacy. It seems fair to quote here Appellant's Brief in appeal:

"The defence submits that the Trial Chamber should have denied it's [sic] competence to exercise primary jurisdiction while the accused was at trial in the Federal Republic of Germany and the German judicial authorities were adequately meeting their obligations under international law." ([Defence Appeal Brief, at para. 7.5.)

However, the three points raised in first instance were discussed at length by the Trial Chamber and, even though not specifically called in aid by Appellant here, are nevertheless intimately intermingled when the issue of primacy is considered. The Appeals Chamber therefore proposes to address those three points but not before having dealt with an apparent confusion which has found its way into Appellant's brief.

52. In paragraph 7.4 of his Brief, Appellant states that "the accused was diligently prosecuted by the German judicial authorities" ([id., at para 7.4 (Emphasis added)). In paragraph 7.5 Appellant returns to the period "while the accused was at trial." ([id., at para 7.5 (Emphasis added.))

These statements are not in agreement with the findings of the Trial Chamber I in its decision on deferral of 8 November 1994:

"The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Du[ko Tadic, that the said Du[ko Tadic is the subject of an investigation instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof." (Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Du[ko Tadic, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added.).)

There is a distinct difference between an investigation and a trial. The argument of Appellant, based erroneously on the existence of an actual trial in Germany, cannot be heard in support of his challenge to jurisdiction when the matter has not yet passed the stage of investigation.

But there is more to it. Appellant insists repeatedly ([Defence Appeal Brief, at paras. 7.2 & 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognises at once that this vocabulary is borrowed from Article 10, paragraph 2, of the Statute. This provision has nothing to do with the present case. This is not an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

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

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

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

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

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

A. Domestic Jurisdiction

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

Appellant added that:

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

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also seems so to realise. Appellant therefore explores the matter further and raises the question of State sovereignty.

B. Sovereignty Of States

55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest justified by a treaty or customary international law or an opinio juris on the issue." (Defence Trial Brief, at para. 6.2.)

Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

"In any event, the accused not being a State lacks the locus standi to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in Israel v. Eichmann:

"The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State," (36 International Law Reports 5, 62 (1961), affirmed by Supreme Court of Israel, 36 International Law Reports 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States:

"As a general principle of international law, individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judicialities. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

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

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

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

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


b) Decree with Force of Law on Deferral upon Request by the International Tribunal 12 Official Gazette of the Republic of Bosnia and Herzegovina 317 (10 April 1995) (translation);
c) Letter from Vasvija Vidovic, Liaison Officer of the Republic of Bosnia and Herzegovina, to the International Tribunal (4 July 1995).

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

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

"[I]t is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." (Decision at Trial, at para. 41.)

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.

As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

"These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.

[...]

The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.

[...]

Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of lèse-humanité (reati di lesa umanità) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished.

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

"[T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing." (Israel v. Eichmann, 36 International Law Reports 277, 291-93 (Isr. S. Ct. 1962).)

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

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

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

59. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.

The Trial Chamber was fully justified in writing:

"Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community." (Decision at Trial, at para. 42.)

60. The plea of State sovereignty must therefore be dismissed.

C. Jus De Non Evocando

61. Appellant argues that he has a right to be tried by his national courts under his national laws.

No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent Appellant from being tried - and having an equally fair trial (see Statute of the International Tribunal, art. 21) - before an international tribunal?

Appellant contends that such an exclusive right has received universal acceptance: yet one cannot find it expressed either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions.

In support of this stand, Appellant has quoted seven national Constitutions (Article 17 of the Constitution of the Netherlands, Article 101 of the Constitution of Germany (unified), Article 13 of the

Constitution of Belgium, Article 25 of the Constitution of Italy, Article 24 of the Constitution of Spain, Article 10 of the Constitution of Surinam and Article 30 of the Constitution of Venezuela). However, on examination, these provisions do not support Appellant's argument. For instance, the Constitution of Belgium (being the first in time) provides:

"Art. 13: No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, Constitutions of the Countries of the World, (1991).)

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

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

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

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

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

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

No new objections were raised before the Appeals Chamber, which is satisfied with concurring, on this particular point, with the views expressed by the Trial Chamber.
For these reasons the Appeals Chamber concludes that Appellant's second ground of appeal, contesting the primacy of the International Tribunal, is ill-founded and must be dismissed.

IV. LACK OF SUBJECT-MATTER JURISDICTION

Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

A. Preliminary Issue: The Existence Of An Armed Conflict

Appellant now asserts the new position that there did not exist a legally cognizable armed conflict - either internal or international - at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.

With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter Geneva Convention I); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter Geneva Convention III); see also Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter Geneva Convention IV).)

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

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

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

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

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

The same provision specifies in paragraph 2 that:  

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty." (Id. at art. 2, para. 2.)  

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.  

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.  

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opshtina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb takeover and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

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

1. Literal Interpretation Of The Statute  

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

2. Teleological Interpretation Of The Statute  

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

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

74. The Security Council's many statements leading up to the establishment of the International Tribunal reflect an awareness of the mixed character of the conflict. On the one hand, prior to creating the International Tribunal, the Security Council adopted several resolutions concerning the sovereignty of the former states of Yugoslavia. (See, e.g., S.C. Res. 782 (15 May 1992); S.C. Res. 737 (3 May 1992); S.C. Res. 739 (6 Oct. 1992); S.C. Res. 787 (16 Nov. 1992). On the other hand, in none of those many resolutions did the Security Council explicitly state that the conflicts were international.

75. The Security Council's intent to promote a peaceful solution of the conflict without pronouncing upon the question of its international or internal nature is reflected by the Report of the Secretary-General. On 3 May 1992, the Secretary-General stated: “The United Nations do not intend to pronounce upon the question of the international or internal nature of the conflict, but to pursue a peaceful settlement of the conflict in accordance with the provisions of the Geneva Conventions.” (Report of the Secretary-General, S/26544 of 3 May 1992.)

76. The ICRC's failure to act against the parties to the conflict within the former Yugoslavia, despite the ICRC's awareness of the mixed character of the conflict, further supports the conclusion that the ICRC regarded the conflicts as internal. The ICRC, which has a duty to ensure respect for the laws and customs relating to the conduct of armed conflicts, has a duty to ensure respect for the laws and customs relating to the conduct of armed conflicts. As the ICRC has repeatedly stated, it will only act in situations where international humanitarian law is applicable. (See, e.g., ICRC, “The ICRC in Relation to the Laws and Customs Relating to the Conduct of Armed Conflicts,” 2nd ed., ICRC, Geneva, 1979, para. 101.) In the current conflict, the ICRC has not made any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

77. By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflict. The agreement was based on common Article 3 of the Geneva Conventions, mentioning only the parties to the conflict. (See Agreement No. 1, 22 May 1992, art. 2, para. 1-6 (hereinafter Agreement No. 1).) Clearly, this Agreement shows that the parties concerning the armed conflicts in which they were involved were not acting in violation of the provisions of the Geneva Conventions concerning internal conflicts.

78. The varying nature of the conflicts is evidenced by the agreements reached by various parties to the conflict. By contrast, the agreements reached by the parties to the conflict reflect the internal aspects of the conflict. The Agreement was based on common Article 3 of the Geneva Conventions, mentioning only the parties to the conflict. (See Agreement No. 1, 22 May 1992, art. 2, para. 1-6 (hereinafter Agreement No. 1).) Clearly, this Agreement shows that the parties concerning the armed conflicts in which they were involved were not acting in violation of the provisions of the Geneva Conventions concerning internal conflicts. The parties to the conflict were acting as if they were parties to an international armed conflict, not an internal armed conflict.

79. The varying nature of the conflicts is evidenced by the agreements reached by various parties to the conflict. By contrast, the agreements reached by the parties to the conflict reflect the internal aspects of the conflict. The Agreement was based on common Article 3 of the Geneva Conventions, mentioning only the parties to the conflict. (See Agreement No. 1, 22 May 1992, art. 2, para. 1-6 (hereinafter Agreement No. 1).) Clearly, this Agreement shows that the parties concerning the armed conflicts in which they were involved were not acting in violation of the provisions of the Geneva Conventions concerning internal conflicts. The parties to the conflict were acting as if they were parties to an international armed conflict, not an internal armed conflict.

80. The varying nature of the conflicts is evidenced by the agreements reached by various parties to the conflict. By contrast, the agreements reached by the parties to the conflict reflect the internal aspects of the conflict. The Agreement was based on common Article 3 of the Geneva Conventions, mentioning only the parties to the conflict. (See Agreement No. 1, 22 May 1992, art. 2, para. 1-6 (hereinafter Agreement No. 1).) Clearly, this Agreement shows that the parties concerning the armed conflicts in which they were involved were not acting in violation of the provisions of the Geneva Conventions concerning internal conflicts. The parties to the conflict were acting as if they were parties to an international armed conflict, not an internal armed conflict.

81. The varying nature of the conflicts is evidenced by the agreements reached by various parties to the conflict. By contrast, the agreements reached by the parties to the conflict reflect the internal aspects of the conflict. The Agreement was based on common Article 3 of the Geneva Conventions, mentioning only the parties to the conflict. (See Agreement No. 1, 22 May 1992, art. 2, para. 1-6 (hereinafter Agreement No. 1).) Clearly, this Agreement shows that the parties concerning the armed conflicts in which they were involved were not acting in violation of the provisions of the Geneva Conventions concerning internal conflicts. The parties to the conflict were acting as if they were parties to an international armed conflict, not an internal armed conflict.

82. The varying nature of the conflicts is evidenced by the agreements reached by various parties to the conflict. By contrast, the agreements reached by the parties to the conflict reflect the internal aspects of the conflict. The Agreement was based on common Article 3 of the Geneva Conventions, mentioning only the parties to the conflict. (See Agreement No. 1, 22 May 1992, art. 2, para. 1-6 (hereinafter Agreement No. 1).) Clearly, this Agreement shows that the parties concerning the armed conflicts in which they were involved were not acting in violation of the provisions of the Geneva Conventions concerning internal conflicts. The parties to the conflict were acting as if they were parties to an international armed conflict, not an internal armed conflict.

83. The varying nature of the conflicts is evidenced by the agreements reached by various parties to the conflict. By contrast, the agreements reached by the parties to the conflict reflect the internal aspects of the conflict. The Agreement was based on common Article 3 of the Geneva Conventions, mentioning only the parties to the conflict. (See Agreement No. 1, 22 May 1992, art. 2, para. 1-6 (hereinafter Agreement No. 1).) Clearly, this Agreement shows that the parties concerning the armed conflicts in which they were involved were not acting in violation of the provisions of the Geneva Conventions concerning internal conflicts. The parties to the conflict were acting as if they were parties to an international armed conflict, not an internal armed conflict.
In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding of the jurisdiction of the International Tribunal under Article 3 of the Geneva Conventions as well as of the 1977 Additional Protocols to these Conventions (id. at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other member of the Security Council shared our view regarding the following clarifications related to the Statute: (id. at 16).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a reductio ad absurdum argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to prosecute and punish persons responsible for certain crimes committed in a conflict understood to contain both internal and international aspects, this would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage vis-à-vis the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the appellant before the Appeals Chamber.

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

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

82. Article 2 of the Statute of the International Tribunal provides:
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.

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (see, e.g., [Amicus Curiae] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of The Prosecutor of the Tribunal v. Dusan Tadic, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, U.S. Amicus Curiae Brief), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2:

"[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the


file:///C|/Documents%20and%20Settings/Intern.Cod4/Desktop/51002.htm (40 of 68)04/03/2013 5:04:36 PM

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

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26

Conventions themselves for the definition of 'persons or property protected.'"
(protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the amicus curiae brief submitted by the Government of the United States, where it is contended that:

"the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. Amicus Curiae Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in opinio juris of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (see above, para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

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

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

(b) Article 3

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

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

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or willful 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."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907
Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is in casu an internal armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered qua customary law, constitutes an important area of humanitarian international law. (Id.) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (Id., at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (id., at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover all violations of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

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

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

The American delegate stated the following:

"[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute:

Firstly, it is understood that the 'laws or customs of war' referred to in Article 3 include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." (Id., at p. 15.)

The British delegate stated:

"[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (Id., at p. 19.)

It should be added that the representative of Hungary stressed:

"the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (Id., at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.
89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law (on this point see below, para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law", one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "serious violations" of international humanitarian law. (See Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added)). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

91. Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

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

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

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

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

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

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

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife; and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts
a. General

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled (suffice to think of the Spanish civil war, in 1936-39, of the civil war in the Congo, in 1960-1968, the Biafran conflict in Nigeria, 1967-70, the civil strife in Nicaragua, in 1981-1990 or El Salvador, 1980-1993). Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetus development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law hominum causa omne jus constitutum est (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as prescribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.

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

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting to ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. Principal Rules

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:
The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question, I am not in a position to make any statement on the matter. In the meantime, an article of the Geneva Convention of 1930, which was confirmed by the International Red Cross, laid down that the enemy could not be attacked except in the case of enemy warships. The international community, however, had already recognized the necessity of avoiding the destruction of non-combatants. A statement made by the Prime Minister on 21 June 1938, in the House of Commons, in reply to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, stated:

"I think we may say that there are, at any rate, three rules of international law which are applicable to the conduct of hostilities in Spain, as well as to those in other parts of the world. These are: (1) the prohibition of the intentional killing of non-combatants; (2) the prohibition of the destruction of property not used for military purposes; and (3) the prohibition of the use of weapons which may cause unnecessary suffering. I have already said that I am not in a position to say whether these rules are applicable to the conduct of hostilities in Spain, but it is clear that they are applicable to other parts of the world."

Common Article 3 of the Geneva Conventions contains the following principles as a necessary basis for any subsequent regulations:

1. The intentional killing of non-combatants is illegal.
2. The destruction of property not used for military purposes is illegal.
3. The use of weapons which may cause unnecessary suffering is illegal.

Agreements made pursuant to Common Article 3 are the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases, States have unilaterally committed to abide by international humanitarian law. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment:

"For humanitarian reasons, and with a view to reassuring the civilian population, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives. In this matter, the Congolese Government desires not only to protect human lives but also to respect the conduct of hostilities;"
them to that effect - to act in the same manner.

As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages.” (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), reprinted in American Journal of International Law (1965) 614, at 616.)

This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (See A.H.M. Kirk-Greene, 1 Crisis and Conflict in Nigeria, A Documentary Sourcebook 1966-1969, 455-57 (1971).)

This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (see New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (See Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

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

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

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

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

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts,” the General Assembly "affirm[ed]"

the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.” (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)
It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/ SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (See 67 American Journal of International Law (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); see also U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/ PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).) The resolution stated the following:

Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [… the General Assembly] affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.

6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application. (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

"In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impediment of the delivery of food and medical supplies essential for the survival of the civilian population" (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, see Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for
international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

"The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

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

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

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

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

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

"[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, 12 American University Journal of International Law and Policy (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320405, at para. 211 in fine; unofficial translation.)

119. So far we have pointed to the formation of general rules or principles designed to protect civilians or civilian objects from the hostilities or, more generally, to protect those who do not (or no longer) take active part in hostilities. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards means and methods of warfare. As the Appeals Chamber has pointed out above (see para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby: "[w]eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/ CN.4/1995/116 (1995).) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/ CN.4/1995/L.33 (1995)).
on the Defence Motion for Interlocutory Appeal on Jurisdiction

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee, strongly condemned the use of chemical weapons by Iraq (Hearing on Iraq: Application for Release of Secret Documents Concerning Operations in the Gulf, 100th Cong., 2d Sess., 11 September 1988). On 12 October of the same year, Secretary of State George Shultz, on behalf of the United States, reiterated the same position, stating that the use of chemical weapons against the civilian population in Iraq was inhumane and inadmissible in international law. (Statement of Secretary of State George Shultz at United Nations General Assembly, 12 October 1988.)

On 14 September 1988, the European Parliament adopted a resolution condemning the use of chemical weapons by Iraq and calling for a UN investigation. (European Parliament, Resolution on the Use of Military Force in Iraq, 14 September 1988.)

On 7 September 1988, the United Kingdom, on behalf of the United Nations Security Council, put forward a draft resolution condemning the use of chemical weapons by Iraq and calling for an investigation by the International Court of Justice. (U.N. GAOR, 43rd Sess., 1st Comm., 6 September 1988.)

On 9 September 1988, the German Federal Government issued a statement condemning the use of chemical weapons by Iraq and calling for an international investigation. (German Federal Government, Statement on the Use of Chemical Weapons by Iraq, 9 September 1988.)

The German Federal Government, on 9 September 1988, called for an international investigation into the allegations of Iraqi use of chemical weapons against the civilian population in Iraq. (German Federal Government, Statement on the Use of Chemical Weapons by Iraq, 9 September 1988.)

The United States government, on 9 September 1988, issued a statement condemning the use of chemical weapons by Iraq and calling for an international investigation. (United States Department of State, Press Guidance, 9 September 1988.)

On 13 September 1988, Secretary of State George Shultz, in a hearing before the United States Senate Judiciary Committee, strongly condemned the use of chemical weapons by Iraq (Hearing on Iraq: Application for Release of Secret Documents Concerning Operations in the Gulf, 100th Cong., 2d Sess., 11 September 1988). On 12 October of the same year, Secretary of State George Shultz, on behalf of the United States, reiterated the same position, stating that the use of chemical weapons against the civilian population in Iraq was inhumane and inadmissible in international law. (Statement of Secretary of State George Shultz at United Nations General Assembly, 12 October 1988.)

On 14 September 1988, the European Parliament adopted a resolution condemning the use of chemical weapons by Iraq and calling for a UN investigation. (European Parliament, Resolution on the Use of Military Force in Iraq, 14 September 1988.)

On 7 September 1988, the United Kingdom, on behalf of the United Nations Security Council, put forward a draft resolution condemning the use of chemical weapons by Iraq and calling for an investigation by the International Court of Justice. (U.N. GAOR, 43rd Sess., 1st Comm., 6 September 1988.)

On 9 September 1988, the German Federal Government issued a statement condemning the use of chemical weapons by Iraq and calling for an international investigation. (German Federal Government, Statement on the Use of Chemical Weapons by Iraq, 9 September 1988.)

On 9 September 1988, the German Federal Government issued a statement condemning the use of chemical weapons by Iraq and calling for an international investigation. (German Federal Government, Statement on the Use of Chemical Weapons by Iraq, 9 September 1988.)

On 13 September 1988, Secretary of State George Shultz, in a hearing before the United States Senate Judiciary Committee, strongly condemned the use of chemical weapons by Iraq (Hearing on Iraq: Application for Release of Secret Documents Concerning Operations in the Gulf, 100th Cong., 2d Sess., 11 September 1988). On 12 October of the same year, Secretary of State George Shultz, on behalf of the United States, reiterated the same position, stating that the use of chemical weapons against the civilian population in Iraq was inhumane and inadmissible in international law. (Statement of Secretary of State George Shultz at United Nations General Assembly, 12 October 1988.)

On 14 September 1988, the European Parliament adopted a resolution condemning the use of chemical weapons by Iraq and calling for a UN investigation. (European Parliament, Resolution on the Use of Military Force in Iraq, 14 September 1988.)

On 7 September 1988, the United Kingdom, on behalf of the United Nations Security Council, put forward a draft resolution condemning the use of chemical weapons by Iraq and calling for an investigation by the International Court of Justice. (U.N. GAOR, 43rd Sess., 1st Comm., 6 September 1988.)

On 9 September 1988, the German Federal Government issued a statement condemning the use of chemical weapons by Iraq and calling for an international investigation. (German Federal Government, Statement on the Use of Chemical Weapons by Iraq, 9 September 1988.)

On 13 September 1988, Secretary of State George Shultz, in a hearing before the United States Senate Judiciary Committee, strongly condemned the use of chemical weapons by Iraq (Hearing on Iraq: Application for Release of Secret Documents Concerning Operations in the Gulf, 100th Cong., 2d Sess., 11 September 1988). On 12 October of the same year, Secretary of State George Shultz, on behalf of the United States, reiterated the same position, stating that the use of chemical weapons against the civilian population in Iraq was inhumane and inadmissible in international law. (Statement of Secretary of State George Shultz at United Nations General Assembly, 12 October 1988.)

On 14 September 1988, the European Parliament adopted a resolution condemning the use of chemical weapons by Iraq and calling for a UN investigation. (European Parliament, Resolution on the Use of Military Force in Iraq, 14 September 1988.)

On 7 September 1988, the United Kingdom, on behalf of the United Nations Security Council, put forward a draft resolution condemning the use of chemical weapons by Iraq and calling for an investigation by the International Court of Justice. (U.N. GAOR, 43rd Sess., 1st Comm., 6 September 1988.)

On 9 September 1988, the German Federal Government issued a statement condemning the use of chemical weapons by Iraq and calling for an international investigation. (German Federal Government, Statement on the Use of Chemical Weapons by Iraq, 9 September 1988.)

On 13 September 1988, Secretary of State George Shultz, in a hearing before the United States Senate Judiciary Committee, strongly condemned the use of chemical weapons by Iraq (Hearing on Iraq: Application for Release of Secret Documents Concerning Operations in the Gulf, 100th Cong., 2d Sess., 11 September 1988). On 12 October of the same year, Secretary of State George Shultz, on behalf of the United States, reiterated the same position, stating that the use of chemical weapons against the civilian population in Iraq was inhumane and inadmissible in international law. (Statement of Secretary of State George Shultz at United Nations General Assembly, 12 October 1988.)

On 14 September 1988, the European Parliament adopted a resolution condemning the use of chemical weapons by Iraq and calling for a UN investigation. (European Parliament, Resolution on the Use of Military Force in Iraq, 14 September 1988.)

On 7 September 1988, the United Kingdom, on behalf of the United Nations Security Council, put forward a draft resolution condemning the use of chemical weapons by Iraq and calling for an investigation by the International Court of Justice. (U.N. GAOR, 43rd Sess., 1st Comm., 6 September 1988.)

On 9 September 1988, the German Federal Government issued a statement condemning the use of chemical weapons by Iraq and calling for an international investigation. (German Federal Government, Statement on the Use of Chemical Weapons by Iraq, 9 September 1988.)
Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction

124. It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals—a matter on which this Chamber obviously cannot and does not express any opinion—there was undisputedly an emergence, in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts. (309)

125. State practice shows that general rules of customary international law have evolved with regard to internal armed conflicts, as to methods of warfare. In addition, what has been asserted above, with regard to the banning of attacks on civilians in the theatre of hostilities in Nigeria, may be made part of the prohibition of what is called “military necessity.” Thus, for instance, a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations. (See Pius Nwaoga v. The State, 52 International Law Reports, 494, at 496-97 (Nig. S. C. 1972).)

126. The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules governing international armed conflicts have been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts. Rather, the general essence of those rules, and not their detailed content, is what may be considered part of general international law governing civil war. (See, for instance, the important message of the Swiss Federal Council to the Swiss Chambers on the ratification of the two 1977 Additional Protocols (38 Annuaire Suisse de Droit International (1982) 137 at 145-49.))

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as specific prohibitions on cruel treatment and torture of civilians, protection of persons who are not or who are not longer combatants, and protection of certain methods of conducting hostilities. (The military manuals of Germany, for example, provide for the prohibition of certain methods of conducting hostilities, as well as requirements of proof in the case of certain methods of conducting hostilities.)

128. In view of the customary international law, it now is necessary to address the issue of individual criminal responsibility in internal armed conflict. Appellant argues that such prohibitions do not entail individual criminal responsibility. (The Military Manual of Germany, in accordance with Article 3, includes a prohibition of “war crimes,” which, in accordance with Article 52, is to be read similarly as a violation of “the law of war.”) The Military Manual of Germany, in its 1992 version, includes a prohibition of “war crimes,” which, in accordance with Article 52, is to be read similarly as a violation of “the law of war.” (See H. D. M. Zervidakis, “The Law of War and Internal Armed Conflict,” in The Law of War, (1957) 124-25.)

129. Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as specific prohibitions on cruel treatment and torture of civilians, protection of persons who are not or who are not longer combatants, and protection of certain methods of conducting hostilities. (The military manuals of Germany, for example, provide for the prohibition of certain methods of conducting hostilities, as well as requirements of proof in the case of certain methods of conducting hostilities.)

130. Applying the foregoing criteria to the violations at issue, there is no doubt that they entail individual criminal responsibility. (The Military Manual of Germany, in accordance with Article 3, includes a prohibition of “war crimes,” which, in accordance with Article 52, is to be read similarly as a violation of “the law of war.”) The Military Manual of Germany, in its 1992 version, includes a prohibition of “war crimes,” which, in accordance with Article 52, is to be read similarly as a violation of “the law of war.” (See H. D. M. Zervidakis, “The Law of War and Internal Armed Conflict,” in The Law of War, (1957) 124-25.)
132. Attention should also be drawn to national legislation designed to implement the Geneva Conventions, some of which go so far as to make it possible for national courts to try persons responsible for violations concerning internal armed conflicts. The need to respect the rights of individuals is also felt in the case of international armed conflicts. The legal provisions of international human rights law are thus evident in this respect. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Hercegovina, made under the auspices of the ICRC, have adopted certain resolutions unanimously adopted by the Security Council (Article 132) which specifies that certain violations of international humanitarian law, committed by or on behalf of the Republic of Bosnia and Herzegovina, are punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia, as amended by the law implementing the two Additional Protocols of 1977. The same provisions were made in the law implementing the Additional Protocols of 1977 of the Geneva Conventions. The same conclusion was also reached in the case of the former Yugoslavia, as evidenced by the draft of the decision of the Court of Appeal on the interpretation of the law concerning the cases of violation of international humanitarian law.

133. Of great relevance to the formation of opinio juris to the effect that violations of general international humanitarian law governing internal armed conflict entail the individual criminal responsibility of those committing or ordering such violations is certain resolutions unanimously adopted by the Security Council (Article 132). Such resolutions, in particular, provide that the Security Council, when it is informed of certain violations of international humanitarian law, will consider it appropriate to take appropriate action, including, where necessary, referring the matter to the International Court of Justice. The Security Council may also decide to impose sanctions on States or individuals responsible for violations of international humanitarian law. Such resolutions have been adopted by the Security Council in the context of the conflict in the former Yugoslavia, as evidenced by the draft of the decision of the Court of Appeal on the interpretation of the law concerning the cases of violation of international humanitarian law.

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of armed conflicts and for breaching certain fundamental principles and rules of international humanitarian law.

135. In the light of the intent of the Security Council, the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that Article 3, which is the foundation of the International Criminal Court, is not limited to cases of internal armed conflict. This provision, which is supplemented by Article 4, paragraphs 1 and 2, of the Agreement, implies that all those responsible for offences contrary to the provisions of international humanitarian law, committed in the context of an internal armed conflict, will be unilaterally and unconditionally released (Article 20, paragraph 1).
138. Article 5 of the Statute confers jurisdiction over crimes against humanity. More specifically, the Article provides:

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

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

139. Before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Tribunal. Although the nexus requirement in the Nuremberg Charter was initially within the scope of the article, the requirement was abandoned in subsequent State practice with respect to crimes against humanity committed in a civilian capacity. The requirement has not been abandoned, however, with respect to crimes against humanity committed in a military capacity.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was later abandoned, the requirement has not been abandoned with respect to crimes against humanity committed in a civilian capacity. The requirement has not been abandoned, however, with respect to crimes against humanity committed in a military capacity.

141. It is by now a settled rule of customary international law that a crimes against humanity is committed in a military capacity. The security Council, in its Resolution of 25 November 1973, 10 U.S.T. 243, arts. 1-2, Article 5 of the Statute confers jurisdiction over crimes against humanity. The statute defines crimes against humanity as

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial and religious grounds;
- other inhumane acts.

142. We conclude, therefore, that Article 5 of the Statute may be invoked as a basis of jurisdiction over crimes against humanity. This is because the statute defines crimes against humanity as

- murder;
- extermination;
- enslavement;
- deportation;
- imprisonment;
- torture;
- rape;
- persecutions on political, racial and religious grounds;
- other inhumane acts.

Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.
adhere to a specific treaty. (Report of the Secretary-General, at para. 34.) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law. This analysis of the jurisdiction of the International Tribunal is borne out by the statements made in the Security Council at the time the Statute was adopted. As already mentioned above (paras. 75 and 88), representatives of the United States, the United Kingdom and France all agreed that Article 3 of the Statute did not exclude application of international agreements binding on the parties. (Provisional Verbatim Record, of the U.N.SCOR, 3217th Meeting., at 11, 15, 19, U.N. Doc. S/PV.3217 (25 May 1993).

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

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

V. DISPOSITION

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

The Appeals Chamber

(1) By 4 votes to 1, 

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

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

AGAINST: **Judge** Li

(2) Unanimously

**Decides** that the aforementioned plea is dismissed.

(3) Unanimously

**Decides** that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

**Decides** that the International Tribunal has subject-matter jurisdiction over the current case.

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

AGAINST: **Judge** Sidhwa


Done in English, this text being authoritative.

(Signed) Antonio Cassese, President

**Judges** Li, Abi-Saab and Sidhwa append separate opinions to the Decision of the Appeals Chamber

**Judge** Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague
The Netherlands

[Seal of the Tribunal]

* French translation to follow
1 "Trattasi di norme [concernenti i reati contro la leggi e gli usi della guerra] che, per il loro contenuto altamente etico e umanitario, hanno carattere non territoriale, ma universale... Dalla solidarietà delle varie nazioni, intesa a lenire nel miglior modo possibile gli errori della guerra, scaturisce la necessità di dettare disposizioni che non conoscano barriere, colpendo chi di lìunque, dovunque esso si trovi... 

[...] reati contro le leggi e gli usi della guerra non possono essere considerati delitti politici, poiché non offendono un interesse politico di uno Stato determinato ovvero un diritto politico di un suo cittadino. Essi invece sono reati di lesa umanità, e, come si è precedentemente dimostrato, le norme relative hanno carattere universale, e non semplicemente territoriale. Tali reati sono, di conseguenza, per il loro oggetto giuridico e per la loro particolare natura, proprio di specie opposta e diversa da quella dei delitti politici. Questi, di norma, interessano solo lo Stato a danno del quale sono stati commessi, quelli invece interessano tutti gli Stati civili, e vanno combattuti e repressi, come sono combattuti e repressi il reato di pirateria, la tratta delle donne e dei minori, la riduzione in schiavitù, dovunque siano stati commessi." (art. 537 e 604 c. p.).

2 "En raison de leur nature, les crimes contre l’humanité (...) ne relèvent pas seulement du droit interne français, mais encore d’un ordre répressif international auquel la notion de frontière et les règles extraditionnelles qui en découlent sont fondamentalement étrangères." (6 octobre 1983, 88 Revue Générale de Droit international public, 1984, p. 509.)

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

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

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

6 "Dentro de esta l’n’c a de conducta, su mayor preocupación [de la Fuerza Armada] ha sido el mantenerse apegada estrictamente al cumplimiento de las disposiciones contenidas en los Convenios de Ginebra y en El Protocolo II de dichos Convenios, ya que a actuación no siendo el mismo aplicable a la situación que confronta actualmente el país, el Gobierno de El Salvador acata y cumple las disposiciones contenidas endicho instrumento, por considerar que ellas constituyen el desarrollo y la complementación del Art. 3, común a los Convenios de Ginebra del 12 de agosto de 1949, que a su vez representa la protección mínima que se debe al ser humano en cualquiera tiempo y lugar."

7 "Ebenso wie ihre Verbündeten beachten Soldaten der Bundeswehr die Regeln des humanitären Völkerrechts bei militärischen Operationen in allen bewaffneten Konflikten, gleichgültig welcher Art."

8 "Der Deutsche Bundestag befürchtet, dass Berichte zutreffen könnten, dass die irakischen Streitkräfte auf dem Territorium des Iraks nummehr im Kampf mit kurdischen Aufständischen Giftgas eingesetzt haben. Er weist mit Entscheidung die Auffassung zurück, dass der Einsatz von Giftgas im Innern und bei bürgerkriegsähnlichen Auseinandersetzungen zulässig sei, weil er durch das Genfer Protokoll von 1925 nicht ausdrücklich verboten werde..."
International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Radislav Krstic
Judgment (summary)

Appeals Chamber, 19 April 2004
APPEALS CHAMBER JUDGEMENT IN THE CASE

THE PROSECUTOR v. RADISLAV KRSTIĆ

The Appeals Chamber unanimously finds that “genocide was committed in Srebrenica in 1995”

“…Bosnia Serb forces carried out genocide against the Bosnian Muslims (…) Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.”

Radislav Krstić found “guilty of aiding and abetting genocide”

“…Mr Krstić knew that by allowing Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstić was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources.”

The Appeals Chamber unanimously “sentences Radislav Krstić to 35 years’ imprisonment”

Please find below the summary of the judgement delivered today by the Appeals Chamber, composed of Judges Theodor Meron (Presiding), Fausto Pocar, Mohamed Shahabuddeen, Mehmet Güney and Wolfgang Schomburg, as read out by the Presiding Judge.

The Appeals Chamber is here today to deliver its judgement on appeal in the case of the Prosecutor against Mr Radislav Krstić. Both the Prosecution and the Defence have appealed from the judgement issued by Trial Chamber I of this Tribunal on 2 August 2001. This followed a trial which began here at The Hague on 13 March 2000 and ran for just over one year.

The facts of this case relate mainly to events which took place in the town of Srebrenica around July 1995. Srebrenica is located in eastern Bosnia and Herzegovina. It gave its name to a United Nations so-called “safe area”, which was intended as an enclave of safety set up to protect its civilian population from the surrounding war. Since July 1995, however, Srebrenica has also lent its name to an event the horrors of which form the background to this case. The depravity, brutality and cruelty with which the VRS, the Bosnian Serb Army, treated the innocent inhabitants of the safe area are now well known and documented. Bosnian women, children and elderly were removed from the enclave, and between seven to eight thousand Bosnian Muslim men were systematically murdered.

Srebrenica is located in the area for which the Drina Corps of the VRS was responsible. Radislav Krstić was a General-Major in the VRS and Commander of the Drina Corps at the time the crimes at issue were committed. For his involvement in these events, the Trial Chamber found Radislav Krstić guilty of genocide; persecution through murders, cruel and inhumane treatment, terrorising the civilian population, forcible transfer and destruction of personal property as crimes against humanity; and murder as a violation of the laws or customs of war. For these convictions, the Trial Chamber sentenced Mr Krstić to forty-six years’ imprisonment.

Following the practice of the Tribunal, I will not read out the text of the Appeal Judgement except for the disposition. Instead, I will summarise the issues on appeal and the reasoning and findings of the Appeals Chamber so that you, Radislav Krstić, together with the public, will know the reasons for the Appeals Chamber’s decision. I emphasise, however, that this is only a summary, and that it does not in any way form part of the Judgement of the Appeals Chamber. The only authoritative account of the findings of the Appeals Chamber is in the written Judgement which will be available today at the end of these proceedings.

Because of the importance of this Appeal, the summary of the Judgement which I will read now is longer than our customary practice. To help you understand the Judgement, let me point out in advance that there are two cardinal issues on which the Appeals Chamber is unanimous. The first is the finding that genocide was committed in Srebrenica in 1995. The second is the sentence which I will announce at the end of today’s proceedings.

In this case, the Prosecution bases its appeal on two grounds. First, the Prosecution appeals the Trial Chamber’s conclusion on impermissibly cumulative convictions. Secondly, the Prosecution appeals the sentence imposed by the Trial Chamber. It requests the imposition of a life sentence on Radislav Krstić, with a minimum of 30 years’ imprisonment.

The Defence bases its appeal on four grounds. First, it appeals the conviction for genocide of Radislav Krstić, alleging that both factual and legal errors have been committed by the Trial Chamber; secondly, it appeals on the basis of various disclosure practices of the Prosecution,
which it alleges deprived Mr Krstić of a fair trial; thirdly, the Defence alleges that the Trial Chamber made a number of other factual and legal errors; and fourthly, it appeals the sentence handed down to Mr Krstić, alleging that the Trial Chamber failed to adequately take into account the sentencing practice in the former Yugoslavia, and to give sufficient weight to the mitigating circumstances.

I will now set out in more detail the grounds of appeal as well as the Appeals Chamber's findings in respect of each.

1. The Trial Chamber's Findings that Genocide Occurred in Srebrenica

The Defence appeals Radislav Krstić's conviction for genocide committed against Bosnian Muslims in Srebrenica. The Defence argues that the Trial Chamber misconstrued the legal definition of genocide in two ways.

(a) The Definition of the Part of the Group

First, Mr Krstić contends that the Trial Chamber's definition of the part of the group he was found to have intended to destroy was unacceptably narrow. Article 4 of the Tribunal's Statute, like the Genocide Convention, covers certain acts done with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The targeted group identified in the Indictment, and accepted by the Trial Chamber, was the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995. The size of the Bosnian Muslim population in Srebrenica at that time is estimated to have been approximately 40,000 people. Although this population constituted only a small percentage of the total Muslim population of Bosnia, the capture of Srebrenica was of immense strategic importance to the VRS. The capture of Srebrenica was a key to the goal of forming a viable entity in Bosnia and Herzegovina as a whole, as well as to the continued survival of the Bosnian state. Because of the perceived threat to the survival of the Bosnian state, the capture of Srebrenica was necessary for the VRS to maintain control over the region.

In addition, Srebrenica was important due to its prominence as a "safe area" and the strategic significance of its capture. By capturing Srebrenica, the VRS was able to assert control over the region and thereby impose its will on the Bosnian state. The capture of Srebrenica was a crucial step in the VRS's campaign to establish a Serb-dominated entity in Bosnia and Herzegovina.

2. The Trial Chamber's Findings Regarding Mitigating Circumstances

The Defence appeals Radislav Krstić's conviction for genocide committed against Bosnian Muslims in Srebrenica. The Defence argues that the Trial Chamber misconstrued the legal definition of genocide in two ways.

(a) The Definition of the Part of the Group

First, Mr Krstić contends that the Trial Chamber's definition of the part of the group he was found to have intended to destroy was unacceptably narrow. Article 4 of the Tribunal's Statute, like the Genocide Convention, covers certain acts done with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The targeted group identified in the Indictment, and accepted by the Trial Chamber, was the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995. The size of the Bosnian Muslim population in Srebrenica at that time is estimated to have been approximately 40,000 people. Although this population constituted only a small percentage of the total Muslim population of Bosnia, the capture of Srebrenica was of immense strategic importance to the VRS. The capture of Srebrenica was a key to the goal of forming a viable entity in Bosnia and Herzegovina as a whole, as well as to the continued survival of the Bosnian state. Because of the perceived threat to the survival of the Bosnian state, the capture of Srebrenica was necessary for the VRS to maintain control over the region.

In addition, Srebrenica was important due to its prominence as a "safe area" and the strategic significance of its capture. By capturing Srebrenica, the VRS was able to assert control over the region and thereby impose its will on the Bosnian state. The capture of Srebrenica was a crucial step in the VRS's campaign to establish a Serb-dominated entity in Bosnia and Herzegovina.

3. The Trial Chamber's Findings Regarding Mitigating Circumstances

The Defence appeals Radislav Krstić's conviction for genocide committed against Bosnian Muslims in Srebrenica. The Defence argues that the Trial Chamber misconstrued the legal definition of genocide in two ways.

(a) The Definition of the Part of the Group

First, Mr Krstić contends that the Trial Chamber's definition of the part of the group he was found to have intended to destroy was unacceptably narrow. Article 4 of the Tribunal's Statute, like the Genocide Convention, covers certain acts done with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The targeted group identified in the Indictment, and accepted by the Trial Chamber, was the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995. The size of the Bosnian Muslim population in Srebrenica at that time is estimated to have been approximately 40,000 people. Although this population constituted only a small percentage of the total Muslim population of Bosnia, the capture of Srebrenica was of immense strategic importance to the VRS. The capture of Srebrenica was a key to the goal of forming a viable entity in Bosnia and Herzegovina as a whole, as well as to the continued survival of the Bosnian state. Because of the perceived threat to the survival of the Bosnian state, the capture of Srebrenica was necessary for the VRS to maintain control over the region.

In addition, Srebrenica was important due to its prominence as a "safe area" and the strategic significance of its capture. By capturing Srebrenica, the VRS was able to assert control over the region and thereby impose its will on the Bosnian state. The capture of Srebrenica was a crucial step in the VRS's campaign to establish a Serb-dominated entity in Bosnia and Herzegovina.

4. The Trial Chamber's Findings Regarding Mitigating Circumstances

The Defence appeals Radislav Krstić's conviction for genocide committed against Bosnian Muslims in Srebrenica. The Defence argues that the Trial Chamber misconstrued the legal definition of genocide in two ways.

(a) The Definition of the Part of the Group

First, Mr Krstić contends that the Trial Chamber's definition of the part of the group he was found to have intended to destroy was unacceptably narrow. Article 4 of the Tribunal's Statute, like the Genocide Convention, covers certain acts done with "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The targeted group identified in the Indictment, and accepted by the Trial Chamber, was the Bosnian Muslim population in Srebrenica prior to its capture by the VRS forces in 1995. The size of the Bosnian Muslim population in Srebrenica at that time is estimated to have been approximately 40,000 people. Although this population constituted only a small percentage of the total Muslim population of Bosnia, the capture of Srebrenica was of immense strategic importance to the VRS. The capture of Srebrenica was a key to the goal of forming a viable entity in Bosnia and Herzegovina as a whole, as well as to the continued survival of the Bosnian state. Because of the perceived threat to the survival of the Bosnian state, the capture of Srebrenica was necessary for the VRS to maintain control over the region.

In addition, Srebrenica was important due to its prominence as a "safe area" and the strategic significance of its capture. By capturing Srebrenica, the VRS was able to assert control over the region and thereby impose its will on the Bosnian state. The capture of Srebrenica was a crucial step in the VRS's campaign to establish a Serb-dominated entity in Bosnia and Herzegovina.
Protection Force in Bosnia (UNPROFOR) and reinforced with the deployment of UN troops. The elimination of the Muslim population of Srebrenica, despite the assurances given by the international community, would have served as a potent example to all Bosnian Muslims of their vulnerability and defenselessness in the face of Serb military forces. The fate of the Bosnian Muslims of Srebrenica would be emblematic of that of all Bosnian Muslims.

The Defence does not argue that the Trial Chamber’s characterization of the Bosnian Muslims of Srebrenica as a substantial part of the targeted group contravenes Article 4 of the Tribunal’s Statute. Rather, the Defence contends that the Trial Chamber made a further finding, concluding that the part Mr Krstić intended to destroy was the Bosnian Muslim men of military age of Srebrenica.

In making this argument, the Defence misunderstands the Trial Chamber’s analysis. The Trial Chamber stated that the part of the group Radislav Krstić intended to destroy was the Bosnian Muslim population of Srebrenica. The men of military age, who formed a further part of that group, were not viewed by the Trial Chamber as a separate, smaller part within the meaning of Article 4. Rather, the Trial Chamber treated the killing of the men of military age as evidence from which to infer that Radislav Krstić and some members of the VRS Main Staff had the requisite intent to destroy all the Bosnian Muslims of Srebrenica, the only part of the protected group relevant to the Article 4 analysis.

The Trial Chamber’s determination of the substantial part of the protected group was correct. The Defence’s appeal on this issue is dismissed.

(b) The Determination of the Intent to Destroy

Secondly, the Defence submits that the Trial Chamber impermissibly broadened the definition of genocide by concluding that an effort to displace a community from its traditional residence is sufficient to show that the alleged perpetrator intended to destroy a protected group.

The Appeals Chamber agrees that the Genocide Convention, and customary international law in general, prohibit only the physical or biological destruction of a human group. The Trial Chamber expressly acknowledged this limitation, and eschewed any broader definition. Given that the Trial Chamber correctly identified the governing legal principle, the Defence must discharge the burden of persuading the Appeals Chamber that, despite having correctly stated the law, the Trial Chamber erred in applying it.

The main evidence underlying the Trial Chamber’s conclusion that the VRS forces intended to eliminate all the Bosnian Muslims of Srebrenica was the massacre by the VRS of all men of military age from that community. The Trial Chamber based this conclusion on a number of factual findings, which must be accepted as long as a reasonable Trial Chamber could have arrived at the same conclusions. The Trial Chamber found that, in executing the captured Bosnian Muslim men, the VRS did not differentiate between men of military status and civilians. The Trial Chamber also found that some of the victims were severely handicapped and, for that reason, unlikely to have been combatants. Moreover, as the Trial Chamber emphasized, the term “men of military age” was itself a misnomer, for the group killed by the VRS included boys and elderly men normally considered to be outside that range. The Trial Chamber was also entitled to consider the long-term impact that the elimination of seven to eight thousand men from Srebrenica would have on the survival of that community.

In this case, the factual circumstances, as found by the Trial Chamber, permit the inference that the killing of the Bosnian Muslim men was done with genocidal intent. The scale of the killing, combined with the VRS Main Staff’s awareness of the detrimental consequences it would have for the Bosnian Muslim community of Srebrenica and with the other actions the Main Staff took to ensure that community’s physical demise, is a sufficient factual basis for the finding of specific genocidal intent. The Trial Chamber found, and the Appeals Chamber endorses this finding, that the killing was engineered and supervised by some members of the Main Staff of the VRS. The fact that the Trial Chamber did not attribute genocidal intent to a particular official within the Main Staff does not undermine the conclusion that Bosnian Serb forces carried out genocide against the Bosnian Muslims.

Among the grievous crimes this Tribunal has the duty to punish, the crime of genocide is singled out for special condemnation and opprobrium. The crime is horrific in its scope; its perpetrators identify entire human groups for extinction. Those who devise and implement genocide seek to deprive humanity of the manifold richness its nationalities, races, ethnicities and religions provide. This is a crime against all of humankind, its harm being felt not only by the group targeted for destruction, but by all of humanity.

The gravity of genocide is reflected in the stringent requirements which must be satisfied before this conviction is imposed. These requirements – the demanding proof of specific intent and the showing that the group was targeted for destruction in its entirety or in substantial part – guard against a danger that convictions for this crime will be imposed lightly. Where these requirements are satisfied, however, the law must not shy away from referring to the crime committed by its proper name. By seeking to eliminate a part of the Bosnian Muslims, the Bosnian Serb forces committed genocide. They targeted for extinction
the forty thousand Bosnian Muslims living in Srebrenica, a group which was emblematic of the Bosnian Muslims in general. They stripped all the male Muslim prisoners, military and civilian, elderly and young, of their personal belongings and identification, and deliberately and methodically killed them solely on the basis of their identity. The Bosnian Serb forces were aware, when they embarked on this genocidal venture, that the harm they caused would continue to plague the Bosnian Muslims. The Appeals Chamber states unequivocally that the law condemns, in appropriate terms, the deep and lasting injury inflicted, and calls the massacre at Srebrenica by its proper name: genocide. Those responsible will bear this stigma, and it will serve as a warning to those who may in future contemplate the commission of such a heinous act.

In concluding that some members of the VRS Main Staff intended to destroy the Bosnian Muslims of Srebrenica, the Trial Chamber did not depart from the legal requirements for genocide. The Defence appeal on this issue is dismissed.

2. Alleged Factual Errors relating to Joint Criminal Enterprise to Commit Genocide

In this next ground of appeal, the Defence argues that even if the finding of genocide was correct, the Trial Chamber erred in finding the evidence sufficient to establish that Radislav Krstić was a member of a joint criminal enterprise to commit genocide.

It is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber. However, as the Appeals Chamber has stated, when the Prosecution relies upon proof of a state of mind of an accused by inference, that inference must be the only reasonable inference available on the evidence.

The Trial Chamber based its conclusion that Radislav Krstić shared the intent of a joint criminal enterprise to commit genocide on inferences drawn from its findings with respect to his knowledge about the situation facing the Bosnian Muslim civilians after the take-over of Srebrenica, his interaction with the main participants of the joint criminal enterprise, and the evidence it accepted as establishing that resources and soldiers under his command and control were used to facilitate the killings. Relying on this evidence, the Trial Chamber held that, from the evening of 13 July 1995, Radislav Krstić intentionally participated in the joint criminal enterprise to execute the Bosnian Muslims of Srebrenica.

In attacking this conclusion, the Defence advances three arguments.

First, the Defence challenges the Trial Chamber’s finding that Radislav Krstić assumed effective command over the Drina Corps and Drina Corps assets on 13 July 1995, and not later. The arguments the Defence now puts forward were extensively considered by the Trial Chamber. The Trial Chamber, relying on eye-witness and documentary evidence, found that the transfer of command to Radislav Krstić took place on 13 July. The conclusions of the Trial Chamber are entirely reasonable and supported by ample evidence. The Defence has failed to demonstrate any error on the part of the Trial Chamber, much less that the finding was one that no reasonable Trial Chamber could have reached.

Secondly, the Defence argues that the Trial Chamber erred in rejecting its claim that the executions were ordered and supervised through a parallel chain of command maintained by the VRS security forces, over which Radislav Krstić did not have control. According to the Defence, this chain of command originated with General Mladić, went through his Security Commander, Colonel Beara of the VRS Main Staff, to Colonel Popović of the Drina Corps and finally to the Zvornik Brigade Security Officer, Dragan Nikolić. Acting through this parallel chain of command, the Defence submits, the Main Staff of the VRS could and did commandeer Drina Corps assets without consulting the Drina Corps Command.

In support of this argument, the Defence adduced as additional evidence three police reports made by Dragomir Vasić, Chief of the Centre of Public Security at Zvornik, as well as the statement of a protected witness. These reports do indeed lend support to the Defence’s argument that the MUP was acting on its own in carrying out the executions. The Trial Chamber, however, did not disagree. In fact, it expressly refused to “discount the possibility that the execution plan was initially devised by members of the VRS Main Staff without consultation with the Drina Corps command generally and Radislav Krstić in particular,” and that General Mladić may have directed the operation. As the Trial Chamber emphasised, however, the Main Staff lacked the resources to carry out the execution on its own and therefore had to call on the resources of the Drina Corps. The Trial Chamber found, moreover, that the Drina Corps Command knew about the Main Staff’s requests and about the subsequent use of the resources of the Drina Corps in the executions. These finding’s are supported by two combat reports of 16 and 18 July 1995, signed by Radislav Krstić as the Commander of the Drina Corps, which the Prosecution introduced as rebuttal material on Appeal.

The Appeals Chamber is of the view that the Trial Chamber’s rejection of the Defence’s argument as to the parallel chain of command, even when examined in light of the Defence’s additional evidence, is not one that no reasonable trier of fact could have made.
Drina Corps military police officers, and that military police officers wearing the insignia of
the Drina Corps escorted the buses of Bosnian Muslim civilians to the Branjevo Military
Farm, and supervised their unloading.

In light of these findings, the Appeals Chamber must determine whether the Trial Chamber
correctly found that Radislav Krstić shared the genocidal intent of a joint criminal enterprise
to commit genocide against the Bosnian Muslims of Srebrenica. The case against Radislav Krstić
was one based on circumstantial evidence, and the finding of
the Trial Chamber largely rested upon the joint enterprise to commit genocide, the
convincing Mr. Krstić’s participation in a joint criminal enterprise to commit genocide on the part
of General Mladić and other members of the Bosnian Muslim Command in Srebrenica. The evidence
available to the Trial Chamber included the fact that Mr. Krstić was in a position to have known
of the genocidal intent of General Mladić and General Zerjav, and the evidence that Mr. Krstić
supervised the participation of his subordinates in the joint enterprise.

The Trial Chamber found the contact between Mr. Krstić and General Mladić to be crucial to
establishing Radislav Krstić’s genocidal intent. The parties agreed that General Mladić
was the main figure behind the genocidal plan. The Trial Chamber found that Mr. Krstić and General
Mladić were in constant contact throughout the relevant period. The Trial Chamber concluded
that if General Mladić knew of the genocidal intent of the joint enterprise, it would be natural for Mr. Krstić
to know as well.

In reaching this conclusion, the Trial Chamber relied upon the presence of Mr. Krstić at the
second and third of three meetings convened by General Mladić on 11 and 12 July 1995. All three meetings were attended by UNPROFOR leaders and Bosnian
civilian leaders selected by UNPROFOR. The fate of the Bosnian Muslims following the fall
of Srebrenica was discussed at these meetings. Based on his presence at two of these meetings,
the Trial Chamber concluded that Radislav Krstić was a direct participant in the genocidal
intent.

The insufficiency of Mr. Erdemović’s evidence is highlighted by the testimony of the
Prosecution military expert, Richard Butler. Correcting evidence he gave during trial, Mr.
Butler made clear during the Appeal hearing that Mr. Erdemović had never said that the men
were from the Bratunac Brigade. In light of this fact, Mr. Erdemović was insufficient to establish that the men were from the
Bratunac Brigade.

However, the most direct evidence that Radislav Krstić’s presence at those meetings establishes is his
knowledge of the genocidal intent of General Mladić. Krstić’s presence at those meetings demonstrates his
involvement in the decision-making process that led to the executions. The evidence fails to establish the direct
involvement of the Drina Corps in carrying out the executions, and as such cannot be relied upon
as evidence of Radislav Krstić’s direct involvement in assisting the executions.

The evidence does, however, establish the involvement of the Drina Corps personnel and assets in
facilitating the executions. The Trial Chamber’s finding on this point is supported by Mr.
Erdemović’s evidence. The Trial Chamber unambiguously found that Mr. Krstić was accompanied to the Branjevo Military Farm by two

The evidence fails to establish the direct involvement of the Drina Corps in carrying out the executions, and as such cannot be relied upon
as evidence of Radislav Krstić’s direct involvement in assisting the executions. The evidence does, however, establish the involvement of the Drina Corps personnel and assets in
facilitating the executions. The Trial Chamber’s finding on this point is supported by Mr.
Erdemović’s evidence. The Trial Chamber unambiguously found that Mr. Krstić was accompanied to the Branjevo Military Farm by two
The Trial Chamber did not actually establish that Radislav Krstić knew of the intent to execute the Bosnian Muslim civilians who were to be transferred. Notably, however, the Trial Chamber did not establish that Radislav Krstić knew the prisoners were to be executed.

Further, the Trial Chamber relied upon the presence of Radislav Krstić in and around the Potočari compound for between one and two hours in the afternoon of 12 July, at which time he was seen conversing with other high-ranking military officers, including General Mladić, and as a result of the observation of the Bosnian Muslims who were to be transferred. The Trial Chamber further found that, based on Mr Krstić’s presence at the White House compound in Potočari, it was aware that the segregated men were being detained in terrible conditions and that the segregated men were being sent to the Drina Corps zone of responsibility, where they were being detained in terrible conditions. The Trial Chamber concluded that Mr Krstić knew that the segregated men were being sent to the Drina Corps zone of responsibility, where they were being detained in terrible conditions.

However, the Trial Chamber also concluded that it was not until 13 July 1995 that Dutchbat troops witnessed definite signs that Bosnian Serbs were executing some of the Bosnian Muslim civilians who were to be transferred. It was reasonable for the Trial Chamber to conclude that at least as from 15 July 1995, Radislav Krstić knew that the segregated men were to be executed and that Dutchbat troops witnessed definite signs that Bosnian Serbs were executing some of the Bosnian Muslim civilians who were to be transferred. The Trial Chamber did not establish that Radislav Krstić knew of the intent to execute the Bosnian Muslim civilians who were to be transferred. Notably, however, the Trial Chamber did not establish that Radislav Krstić knew the prisoners were to be executed.

The issue that arose now is the level of Radislav Krstić’s criminal responsibility in the circumstances as they were properly established. All of the crimes that followed the fall of Srebrenica were attributable to the collective responsibility of Radislav Krstić as a principal perpetrator. The issue that arises now is the level of Radislav Krstić’s criminal responsibility in the circumstances as they were properly established. All of the crimes that followed the fall of Srebrenica were attributable to the collective responsibility of Radislav Krstić as a principal perpetrator.
Drina Corps resources to be used he was making a substantial contribution to the execution of the Bosnian Muslim prisoners. Although the evidence suggests that Radislav Krstić was not a supporter of that plan, as Commander of the Drina Corps he permitted the Main Staff to call upon Drina Corps resources and to employ those resources. The criminal liability of Mr Krstić is therefore more properly expressed as that of an aider and abettor to a joint criminal enterprise to commit genocide, and not as that of a perpetrator. This charge is fairly encompassed by the indictment, which alleged that Radislav Krstić aided and abetted in the planning, preparation or execution of genocide against the Bosnian Muslims in Srebrenica.

Mr Krstić’s responsibility is accurately characterized as aiding and abetting genocide under Article 7(1) of the Statute and not as complicity in genocide under Article 4(3)(e). The charge of complicity was also alleged in the indictment, as Count 2. The Trial Chamber did not enter a conviction on this count, concluding that Radislav Krstić’s responsibility was that of a principal perpetrator. There is an overlap between Article 4(3) as the general provision enumerating punishable forms of participation in genocide and Article 7(1) as the general provision for criminal liability which applies to all the offences punishable under the Statute, including the offence of genocide. There is support for a position that Article 4(3) may be the more specific provision (lex specialis) in relation to Article 7(1). There is, however, also authority indicating that modes of participation enumerated in Article 7(1) should be read, as the Tribunal’s Statute directs, into Article 4(3), and so the proper characterization of such individual’s criminal liability is that of aiding and abetting genocide.

The Appeals Chamber concludes that the latter approach is the correct one in this case. Article 7(1) of the Statute, which allows liability to attach to an aider and abettor, expressly applies that mode of liability to any “crime referred to in articles 2 to 5 of the present Statute,” including the offence of genocide prohibited by Article 4. Because the Statute must be interpreted with the utmost respect to the language used by the legislator, the Appeals Chamber may not conclude that the consequent overlap between Article 7(1) and Article 4(3)(e) is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is possible. In this case, the two provisions can be reconciled, because the terms “complicity” and “accomplice” may encompass conduct broader than that of aiding and abetting. Given the Statute’s express statement in Article 7(1) that liability for genocide under Article 4 may attach through the mode of aiding and abetting, Radislav Krstić’s responsibility is properly characterized as that of aiding and abetting genocide.

This, however, raises the question of whether, for liability of aiding and abetting to attach, the individual charged need only possess knowledge of the principal perpetrator’s specific genocidal intent, or whether he must share that intent. The Appeals Chamber has previously explained, on several occasions, that an individual who aids and abets a specific intent offense may be held responsible if he assists the commission of the crime knowing the intent behind the crime. This principle applies to the Statute’s prohibition of genocide, which is also an offence requiring a showing of specific intent. The conviction for aiding and abetting genocide upon proof that the defendant knew about the principal perpetrator’s genocidal intent is permitted by the Statute and case-law of the Tribunal. The same approach is followed by many domestic jurisdictions, both common and civil law.

The fact that the Trial Chamber did not identify individual members of the Main Staff of the VRS as the principal participants in the genocidal enterprise does not negate the finding that Radislav Krstić was aware of their genocidal intent. A defendant may be convicted for having aided and abetted a crime which requires specific intent even where the principal perpetrators have not been tried or identified. In Vasiljević, the Appeals Chamber found the accused guilty as an aider and abettor to persecution without having had the alleged principal perpetrator on trial and without having identified two other alleged co-perpetrators. Accordingly, the Trial Chamber’s conviction of Mr Krstić as a participant in a joint criminal enterprise to commit genocide is set aside and a conviction for aiding and abetting genocide is entered instead.

The Appeals Chamber’s examination of Radislav Krstić’s participation in the crime of genocide has implications for his criminal responsibility for the murders of the Bosnian Muslim civilians under Article 3, violations of the laws or customs of war, and for extermination and persecution under Article 5, all of which arise from the executions of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995. There was no evidence that Mr Krstić ordered any of these murders, or that he directly participated in them. All the evidence establishes is that he knew that those murders were occurring and that he permitted the Main Staff to use personnel and resources under his command to facilitate them. In these circumstances, the criminal responsibility of Radislav Krstić is that of an aider and abettor to the murders, extermination and persecution, and not of a principal co-perpetrator.

3. The Disclosure Practices of the Prosecution and Radislav Krstić’s Right to a Fair Trial

The Defence has alleged, as a further ground for appeal, that the Prosecutor’s disclosure practices violated Radislav Krstić’s right to a fair trial under Article 20 of the Statute. In its Judgement, the Appeals Chamber has addressed each of the alleged practices which the Defence argues resulted in prejudice to its case. These are: withholding copies of exhibits for tactical reasons; concealing a tape for later submission as evidence in cross-examination;
various violations of Rule 68 (disclosure of exculpatory material); and the questionable credibility of the testimony of two witnesses.

As a general proposition, where the Defence seeks a remedy for the Prosecution’s breach of its disclosure obligations under Rule 68, the Defence must show: first, that the Prosecution has acted in violation of its obligations under Rule 68, and secondly, that the Defence’s case suffered material prejudice as a result. In other words, if the Defence satisfies the Tribunal that there has been a failure by the Prosecution to comply with Rule 68, the Tribunal - in addressing the aspect of appropriate remedies - will examine whether or not the Defence has been prejudiced by that failure to comply before considering what remedy is appropriate.

In this case, the Defence has failed to establish that it suffered any prejudice as a result of the four alleged practices. This ground of appeal is therefore dismissed.

However, the right of an accused to a fair trial is a fundamental right, protected by the Statute, and Rule 68 is essential for the conduct of fair trials before the Tribunal. Where an accused can only seek a remedy for the breaches of a Rule in exceptional circumstances - in particular where the very enforcement of that Rule relies for its effectiveness upon the proper conduct of the Prosecution - any failure by the Appeals Chamber to act in defence of the Rule would endanger its application. The Appeals Chamber has a number of options at its disposal in these circumstances, based on Rule 46 (Misconduct of Counsel) and Rule 68bis (Failure to Comply with Disclosure Obligations).

Rule 68bis in particular is specific to disclosure obligations, and provides the Tribunal with a broad discretionary power to impose sanctions on a defaulting party, proprio motu if necessary.

The Appeals Chamber notes that the Prosecution has already described in some detail why certain materials were not disclosed, including declarations by Senior Trial Attorneys in the Office of the Prosecutor. While the disclosure practices of the Prosecution in this case have on occasion fallen short of its obligations under the applicable Rules, the Appeals Chamber is unable to determine whether the Prosecution deliberately breached its obligations.

In light of the absence of material prejudice to the Defence in this case, the Appeals Chamber does not issue a formal sanction against the Prosecution for its breaches of its obligations under Rule 68. The Appeals Chamber is persuaded that, on the whole, the Prosecution acted in good faith in the implementation of a systematic disclosure methodology which, in light of the findings above, must be revised so as to ensure future compliance with the obligations incumbent upon the Office of the Prosecutor. This finding must not however be mistaken for the Appeals Chamber’s acquiescence in questionable conduct by the Prosecution.

In light of the allegations of misconduct being made against the Prosecution in this case, the Appeals Chamber orders that the Prosecutor investigate the complaints alleged and take appropriate action. The Appeals Chamber will not tolerate anything short of strict compliance with disclosure obligations, and considers its discussion of this issue to be sufficient to put the Office of the Prosecutor on notice for its conduct in future proceedings.

4. The Trial Chamber’s Analysis of Cumulative Convictions

In its first ground of appeal, the Prosecution challenges the Trial Chamber’s non-entry, as impermissibly cumulative, of Radislav Krstić’s convictions for extermination and persecution of the Bosnian Muslims of Srebrenica between 13 and 19 July 1995, and for murder and inhumane acts as crimes against humanity committed against the Bosnian Muslim civilians in Potočari between 10 and 13 July 1995. The Trial Chamber disallowed convictions for extermination and persecution as impermissibly cumulative with Mr Krstić’s conviction for genocide. It also concluded that the offences of murder and inhumane acts as crimes against humanity are subsumed within the offence of persecution where murder and inhumane acts form the underlying acts of the persecution conviction.

The Defence urges a dismissal of the Prosecution’s appeal because the Prosecution does not seek an increase of the sentence in the event its appeal is successful. However, the import of cumulative convictions is not limited to their impact on the sentence. Cumulative convictions impose additional stigma on the accused and may imperil his eligibility for early release. On the other hand, multiple convictions, where permissible, serve to describe the full culpability of the accused and to provide a complete picture of his criminal conduct. The Prosecution’s appeal is therefore admissible notwithstanding the fact that it does not challenge the sentence.

The established jurisprudence of the Tribunal is that multiple convictions entered under different statutory provisions, but based on the same conduct, are permissible only if each statutory provision has a materially distinct element not contained within the other. An element is materially distinct from another if it requires proof of a fact not required by the other element. Where this test is not met, only the conviction under the more specific provision will be entered. The more specific offence subsumes the less specific one, because the commission of the former necessarily entails the commission of the latter.
The first vacated conviction that the Prosecution seeks to reinstate is the conviction for extermination under Article 5 based on the killing of the Bosnian Muslim men of Srebrenica. The Trial Chamber held that this conviction was impermissibly cumulative with Radislav Krstić’s conviction for genocide under Article 4, which was based on the same facts. Both statutory provisions contain a materially distinct element not contained within the other. Genocide requires proof of an intent to destroy, in whole or in part, a specified protected group, while extermination requires proof that the crime was committed as part of a widespread and systematic attack against a civilian population. The Trial Chamber’s conclusion that convictions for extermination under Article 5 and genocide under Article 4 are impermissibly cumulative was accordingly erroneous.

The Prosecution next argues that the Trial Chamber erred in setting aside Mr Krstić’s conviction for persecution under Article 5 for the crimes resulting from the killings of Bosnian Muslims of Srebrenica as impermissibly cumulative with the conviction for genocide. For the reasons just given with respect to the offence of extermination, the offence of genocide does not subsume that of persecution. The Trial Chamber’s conclusion to the contrary was erroneous.

The Prosecution appeals the non-entry of two other convictions. The first is the conviction for murder, as a crime against humanity, of Bosnian Muslim civilians in Potočari. The Trial Chamber set aside this conviction as impermissibly cumulative with the conviction for persecution perpetrated through murder of these civilians. The second is the conviction for inhumane acts, based on the forcible transfer of Bosnian Muslim civilians to Potočari. The Trial Chamber concluded that this conviction was subsumed within the conviction for persecution based on the inhumane acts of forcible transfer. The Trial Chamber’s conclusions comport with the Appeals Chamber’s holdings on these issues in Krnojelac and Vasiljević. The Prosecution’s appeal on these issues is therefore dismissed.

5. Sentencing

The Prosecution argues that the sentence imposed by the Trial Chamber was inadequate because it failed properly to account for his responsibility for the gravity of the crimes committed or for the participation of Radislav Krstić in those crimes; is inconsistent with ICTR jurisprudence in comparable genocide cases; is based on Mr Krstić’s “palpably lesser guilt”; and because the Trial Chamber erred in finding that premeditation was inapplicable as an aggravating factor in this case. Consequently, the Prosecution argues that the Trial Chamber imposed a sentence beyond its discretion, and that the sentence should be increased to life imprisonment, with a minimum of 30 years.

The Defence argues that in imposing the sentence, the Trial Chamber failed to have due regard to the sentencing practice of the former Yugoslavia and the courts of Bosnia and Herzegovina, or to give adequate weight to what the Defence submits are mitigating circumstances. The Defence accordingly argues that the sentence should be reduced to a maximum of 20 years.

The Appeals Chamber has emphasised that the imposition of a sentence is a discretionary decision. The Appeals Chamber has further explained that only a “discernible error” in the exercise of that sentencing discretion by the Trial Chamber may justify a revision of the sentence.

For the reasons set out in the Appeal Judgement, the Appeals Chamber has not found a discernible error on the part of the Trial Chamber in imposing a sentence of 46 years on Radislav Krstić in respect of any of the submissions put forward by either the Prosecution or the Defence.

However, the Appeals Chamber has reduced Mr Krstić’s responsibility for genocide and for the murder of the Bosnian Muslims under Article 3 from that of a direct participant to that of an aider and abettor.

In this light, an adjustment of the sentence is necessary. The Appeals Chamber has the power to do so without remitting the matter to the Trial Chamber.

The general sentencing principles applicable in this case include: (i) the gravity of the crime(s) alleged; (ii) the general practice of prison sentences in the courts of the former Yugoslavia; (iii) the individual circumstances of the convicted person; and (iv) any aggravating or mitigating circumstances.

Regarding the gravity of the crimes alleged, as the Appeals Chamber recently acknowledged in the Vasiljević case, aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator. This principle has also been recognized in the ICTR, in the law of the former Yugoslavia and in many national jurisdictions. While Radislav Krstić’s crime is undoubtedly grave, the finding that he lacked genocidal intent significantly diminishes his responsibility. The same analysis applies to the reduction of Mr Krstić’s responsibility for the murders as a violation of laws or customs of
war committed between 13 and 19 July 1995 in Srebrenica. As such, the revision of Mr Krstić's conviction to aiding and abetting these two crimes merits a considerable reduction of his sentence.

The Appeals Chamber has also concluded that the Trial Chamber erred in setting aside Radislav Krstić’s convictions for Counts Three (extermination as a crime against humanity) and Six (persecution as a crime against humanity) as impermissibly cumulative with the conviction for genocide. The Appeals Chamber concluded, however, that Mr Krstić's level of responsibility with respect to these two offences was that of an aider and abettor and not of a principal perpetrator. While these conclusions may alter the overall picture of Radislav Krstić’s criminal conduct, the Prosecution did not seek an increase in sentence on the basis of these convictions. The Appeals Chamber therefore does not take Mr Krstić’s participation in these crimes into account in determining the sentence appropriate to the gravity of his conduct.

As regards the general sentencing practice of the courts of the former Yugoslavia, the Appeals Chamber has already explained that the Tribunal is not bound by such practice, and may, if the interests of justice so merit, impose a greater or lesser sentence than would have been imposed under the legal regime of the former Yugoslavia. In its Judgement, the Appeals Chamber has considered the sentencing practice of the courts of the former Yugoslavia applicable in this case, and has taken those practices into account. In particular, the law of the former Yugoslavia provided that the sentence of a person who aided a principal perpetrator to commit a crime can be reduced to a sentence less than the one given to the principal perpetrator.

The Appeals Chamber believes that four additional factors must be accounted for in mitigation of Mr Krstić’s sentence, namely: (i) the nature of his provision of the Drina Corps assets and resources; (ii) the fact that he had only recently assumed command of the Corps during combat operations; (iii) the fact that he was present in and around the Potočari for at most two hours; and (iv) his written order to treat Muslims humanely.

I shall now read the operative paragraphs of the Appeals Chamber’s judgement, the disposition, in full.

Disposition

FOR THE APPEALS CHAMBER

Pursuant to Article 25 of the Statute and Rules 117 and 118 of the Rules of Procedure and Evidence;

NOTING the respective written submissions of the parties and the arguments they presented at the hearings of 26 and 27 November 2003;

SITTING in open session;

SETS ASIDE, Judge Shahabuddeen dissenting, Radislav Krstić’s conviction as a participant in a joint criminal enterprise to commit genocide (Count 1), and FINDS, Judge Shahabuddeen dissenting, Radislav Krstić guilty of aiding and abetting genocide;

RESOLVES that the Trial Chamber incorrectly disallowed Radislav Krstić’s convictions as a participant in extermination and persecution (Counts 3 and 6) committed between 13 and 19 July 1995, but that his level of responsibility was that of an aider and abettor in extermination and persecution as crimes against humanity;

SETS ASIDE, Judge Shahabuddeen dissenting, Radislav Krstić’s conviction as a participant in murder under Article 3 (Count 5) committed between 13 and 19 July 1995, and FINDS, Judge Shahabuddeen dissenting, Radislav Krstić guilty of aiding and abetting murder as a violation of the laws or customs of war;

AFFIRMS Radislav Krstić’s convictions as a participant in murder as a violation of the laws or customs of war (Count 5) and in persecution (Count 6) committed between 10 and 13 July 1995 in Potočari;

DISMISSES the Defence and the Prosecution appeals concerning Radislav Krstić’s convictions in all other respects;

DISMISSES the Defence and the Prosecution appeals against Radislav Krstić’s sentence and IMPOSES a new sentence, taking into account Radislav Krstić’s responsibility as established on appeal;

SENTENCES Radislav Krstić to 35 years’ imprisonment to run as of this day, subject to credit being given under Rule 101(C) of the Rules of Procedure and Evidence for the period Radislav Krstić has already spent in detention, that is from 3 December 1998 to the present day;

ORDERS, in accordance with Rules 103(C) and 107 of the Rules of Procedure and Evidence, that Radislav Krstić is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served.
The Judgement is signed by Judges Pecar, Shahabuddeen, Güney, Schomburg and myself this
nineteenth day of April 2004 at The Hague, The Netherlands.

Judge Shahabuddeen appends a partial dissenting opinion.
International Criminal Tribunal for Rwanda

Prosecutor v. Jean-Paul Akayesu
Judgment (summary)

Trial Chamber I, 2 September 1998
ICTR - Jean-Paul Akayesu, summary of the Judgement

Source: ICTR-96-4-T Delivered on 2 September 1998

1. Trial Chamber 1 is sitting on this day, 2 September 1998, to deliver its judgment in the case "The Prosecutor versus Jean-Paul Akayesu", case no. ICTR-96-4-T.

2. The Judgment, which is already available in French and English, the two official languages of the Tribunal, is a voluminous document of almost three hundred pages. The Chamber therefore considers that it would be appropriate to limit its delivery to a summary of the content of its Judgment and its Verdict as regards the guilt of Jean-Paul Akayesu on each count with which he is charged.

3. In its Judgment, the Chamber first presents a brief profile of the International Criminal Tribunal for Rwanda, which was established by the United Nations Security Council for the 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 and 31 December 1994. The proceedings before the Tribunal are governed by its Statute annexed to Resolution 955 of the Security Council and its Rules of Procedure and Evidence. The rationale materiæ jurisdiction of the Tribunal is to prosecute persons charged with genocide, crimes against humanity and serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of Victims in Times of War and of Additional Protocol II thereto of 8 June 1977.

4. The Chamber then summarizes the proceedings of the case. It is shown that Jean-Paul Akayesu was arrested in Zambia on 10 October 1995. On 16 February 1996, Judge William Sekule confirmed the Indictment submitted by the Prosecutor against Jean-Paul Akayesu. In all, the said Indictment covers 13 counts relating to genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions of 1949 and of Additional Protocol II of 1977.

5. At the time he confirmed the Indictment, Judge William Sekule also issued a warrant of arrest, accompanied by an order for the continued detention of the Accused. Pursuant to this order, Akayesu was transferred from Zambia to Arusha on 26 May 1996, to be detained at the Detention Facility of the Tribunal.

6. Jean-Paul Akayesu made his initial appearance before this Chamber on 30 May 1996. At that time, he pleaded not guilty to each of the counts charged. The trial on the merits opened on 9 January 1997. During the trial, the Chamber heard forty-two witnesses called by the parties. The proceedings generated more than 4000 pages of transcripts and 125 documents entered in evidence.

7. In the course of the trial on 17 June 1997, the Chamber granted the Prosecutor leave to amend the Indictment in order to add three new counts relating to allegations of rape and sexual violence, to which several witnesses had testified earlier during their appearance before the Chamber. Jean-Paul Akayesu also pleaded not guilty to the counts of rape and other inhumane acts constituting crimes against humanity and other outrages upon personal dignity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II thereto.

8. In its Judgment, the Chamber then gives a profile of the Accused, the responsibilities he had in Taba and the line of defence that he adopted during his trial.

9. Jean-Paul Akayesu, a Rwandan national, was born in 1953. He is married, with five children. Prior to becoming bourgmestre of Taba commune, in the prefecture of Gitarama, in Rwanda, he was a teacher, then an inspector of schools. Akayesu entered politics in 1991, during the establishment of the Mouvement Démocratique Républicain (MDR), of which he is one of the founding members. He was Chairman of the local wing of the MDR in Taba commune, which a vast majority of the population joined. In April 1993, Akayesu, whose candidacy was supported by several key figures and influential groups in the commune, was elected bourgmestre of Taba. He held that position until June 1994, when he fled Rwanda.

10. Based on the evidence submitted to it, the Chamber notes that, in Rwanda, the bourgmestre was traditionally treated with a lot of deference by the people and that he had extensive powers. Akayesu appears to have discharged his various responsibilities relatively well until the period of the events described in the Indictment and to have been a respected bourgmestre.

11. In the opinion of the Chamber, the Defence case, in essence, is that he did not commit, order to be committed or in any way aid and facilitate the acts with which he is charged in the Indictment. Akayesu concedes, nonetheless, that massacres aimed mainly at the Tutsi took place in Taba commune in 1994. The Defence argues that Jean-Paul Akayesu was helpless to prevent the commission of such acts, because the balance of force in the commune was in favour of the Interahamwe, who were under the strict authority of one Silas Kubwimanana. The Defence argues further that the Accused was allegedly so harassed by the Interahamwe that he himself had to flee Taba temporarily. It submits that as soon as the massacres became widespread, the Accused was stripped of all authority and lacked the means to stop the killings. The Defence stated further that Jean-Paul Akayesu could not be required to be a hero, to lay down his life in futile attempt to prevent the massacres. As concerns acts of sexual violence and rape which were allegedly committed in Taba, Jean-Paul Akayesu maintains that he never heard of them and considers that they never even took place.

12. Before rendering its findings on the acts with which Akayesu is charged and the applicable law, the Chamber is of the opinion that it would be appropriate, for a better understanding of the events alleged in the Indictment, to briefly summarise the history of Rwanda. To this end, it recalled the most important events in the country's history, from the pre-colonial period up to 1994, reviewing the colonial period and the "Revolution" of 1959 by Grégoire Kayibanda. The Chamber most particularly highlighted the military and political conflict between the Rwandan Armed Forces (RAF) and the Rwandan Patriot
13. The Chamber then considers whether the events that took place in Rwanda in 1994 occurred solely on the basis of the conflict between the RPF and the largely Hutu-dominated government at the time. The Chamber notes that, according to the evidence presented, the conflict between the RPF and the government was primarily ethnic in nature, and that the violence against Tutsis was not motivated by political considerations.

14. Even though the fact that widespread killings took place during this period, the Chamber finds that the widespread killings were not motivated by political considerations. The Chamber relies on the testimony of Major-General Dallaire, who described the widespread killings as taking place during this period. The Chamber further notes that the widespread killings were not motivated by political considerations, as evidenced by the testimony of Doctor Zachariah, who described the widespread killings as taking place during this period.

15. Consequently, in view of these widespread killings, the Chamber concludes that the perpetrator of these killings was the RPF, which was primarily motivated by ethnic considerations.

16. In the opinion of the Chamber, the RPF's intention to exterminate the Tutsi population cannot be attributed to political considerations. The Chamber finds that the widespread killings were not motivated by political considerations, as evidenced by the testimony of Doctor Zachariah, who described the widespread killings as taking place during this period.

17. Other testimonies heard, especially that of Major-General Dallaire, also show that the perpetrators of these killings were primarily motivated by ethnic considerations. The Chamber relies on the testimony of Doctor Zachariah, who described the widespread killings as taking place during this period.

18. Numerous witnesses testified before the Chamber that the systematic checking of identity cards by the RPF and the Interahamwe was a key factor in the widespread killings. The Chamber relies on the testimony of Doctor Zachariah, who described the widespread killings as taking place during this period.

19. Based on the evidence submitted to the Chamber, it is clear that the perpetrators of these killings were primarily motivated by ethnic considerations, and that the widespread killings were not motivated by political considerations.

20. Consequently, the Chamber concludes that the widespread killings that took place in Rwanda in 1994 were primarily motivated by ethnic considerations, and that the perpetrators of these killings were primarily motivated by ethnic considerations.
accused himself. It emerges that for each of the events described in paragraphs 12 to 23 of the Indictment, the Chamber is convinced beyond a reasonable doubt of the following:

22. Having said that, the Chamber then recalled that the fact that genocide was, indeed, committed by members of the RPF, but also by civilians including thousands of women and children, including ordinary citizens, and that the majority of the Tutsi victims were non-combatants, including thousands of women and children.

23. The Chamber then turned to the assessment of the evidence. The Chamber took note of the fact that the bulk of the evidence on which its assessment was based was adduced by the prosecution, which had the burden of proving its case. The Chamber noted that the evidence adduced by the prosecution was supported by the testimonies of witnesses who were present during the events described in the Indictment. The Chamber also noted that the evidence adduced by the prosecution was supported by other documentary evidence, such as photographs, recordings, and video footage. The Chamber also noted that the evidence adduced by the prosecution was supported by the testimonies of experts, who were qualified to give opinions on the matters at issue.

24. The Chamber then ruled on the admissibility of some evidence. It concluded, in accordance with the Statute and Rules of Procedure and Evidence, that the evidence adduced by the prosecution was admissible if it was relevant and probative and if it was not unduly prejudicial or unduly cumulative of other evidence. The Chamber also noted that the evidence adduced by the prosecution was admissible if it was consistent with the rules of evidence and if it was not barred by the rule of res judicata.

25. The Chamber then dealt with the specific facts of the case. It rendered its detailed factual conclusions, by scrupulously analyzing, for each fact, all the related prosecution and defence testimonies, including that of the accused himself. It emerges that for each of the events described in paragraphs 12 to 23 of the Indictment, the Chamber is convinced beyond a reasonable doubt of the following:

26. The Chamber finds that, as pertains to the acts alleged in paragraph 12 of the Indictment, Ayukewa, in his capacity as bourgmestre of Taba commune, and as such, was responsible for the maintenance of order and public security in the commune. The Chamber further finds that Ayukewa, in his capacity as bourgmestre, was also responsible for the maintenance of order and public security in the commune. The Chamber notes that Ayukewa, in his capacity as bourgmestre, was also responsible for the maintenance of order and public security in the commune. The Chamber notes that Ayukewa, in his capacity as bourgmestre, was also responsible for the maintenance of order and public security in the commune. The Chamber notes that Ayukewa, in his capacity as bourgmestre, was also responsible for the maintenance of order and public security in the commune.

27. With regard to the acts alleged in paragraphs 12 (a) and 12 (b) of the Indictment, the Chamber finds that, as pertains to the acts alleged in paragraph 12 (a) of the Indictment, the prosecution accused Ayukewa of having allegedly been present in Taba commune on the day of the massacre and of having allegedly been present in Taba commune on the day of the massacre. The Chamber notes that Ayukewa, in his capacity as bourgmestre, was also responsible for the maintenance of order and public security in the commune. The Chamber notes that Ayukewa, in his capacity as bourgmestre, was also responsible for the maintenance of order and public security in the commune. The Chamber notes that Ayukewa, in his capacity as bourgmestre, was also responsible for the maintenance of order and public security in the commune. The Chamber notes that Ayukewa, in his capacity as bourgmestre, was also responsible for the maintenance of order and public security in the commune.

28. Regarding the facts alleged in paragraph 13 of the Indictment, the prosecution failed to establish beyond a reasonable doubt that Ayukewa was present in Taba commune on the day of the massacre.

29. The Chamber then turned to the admissibility of some evidence. It concluded, in accordance with the Statute and Rules of Procedure and Evidence, that the evidence adduced by the prosecution was admissible if it was relevant and probative and if it was not unduly prejudicial or unduly cumulative of other evidence. The Chamber also noted that the evidence adduced by the prosecution was admissible if it was consistent with the rules of evidence and if it was not barred by the rule of res judicata.
fight against the accomplices of the Inkotanyi would be understood as exhortations to kill the Tutsi in general. Akayesu who had received from the Interahamwe documents containing lists of names did, in the course of the said gathering, summarize the contents of the same to the crowd by pointing out in particular that the names were those of RPF accomplices. He specifically indicated to the participants that Ephrem Karangwa’s name was on one of the lists. Akayesu admitted before the Chamber that during the period in question, that to publicly label someone as an accomplice of the RPF would put such a person in danger. The statements thus made by Akayesu at that gathering immediately led to widespread killings of Tutsi in Tabwa.

30. With respect to the allegations in paragraph 16 of the Indictment, it is also established that on 19 April 1994, Akayesu on two occasions threatened to kill victim U, a Tutsi woman, while she was being interrogated. He detained her for several hours at the Bureau communal, before allowing her to leave. In the evening of 20 April 1994, during a search conducted in the home of victim V, a Hutu man, Akayesu directly threatened to kill the latter. Victim V was thereafter beaten with a stick and the butt of a rifle by a communal policeman called Mugenzi and one Francois, a member of the Interahamwe militia, in the presence of the accused. One of victim V’s ribs was broken as a result of the beating.

31. Regarding the acts alleged in paragraph 17, proof has not been provided by the Prosecutor to establish them.

32. As for the allegations made in paragraph 18 of the Indictment, it is established that on or about 19 April 1994, Akayesu and a group of men under his control were looking for Ephrem Karangwa and destroyed his house and that of his mother. They then went to search the house of Ephrem Karangwa’s brother-in-law, in Musambira commune and found his three brothers there. When the three brothers, namely Simon Mutijima, Thaddeus Uwanyiligira and Jean-Chrysostome Gakuba, tried to escape, Akayesu ordered that they be captured, and ordered that they be killed, and participated in their killing.

33. Regarding the allegations in paragraph 19, the Chamber is satisfied that it has been established that on or about 19 April 1994, Akayesu took from Taba communal prison eight refugees from Runda commune, handed them over to Interahamwe militiamen and ordered that they be killed. They were killed by the Interahamwe using various traditional weapons, including machetes and small axes, in front of the Bureau communal and in the presence of Akayesu who told the killers “do it quickly”. The refugees were killed because they were Tutsi.

34. The Prosecutor has proved that, as alleged in paragraph 20 of the Indictment, on that same day, Akayesu ordered the local people to kill intellectuals and to look for one Samuel, a professor who was then brought to the Bureau communal and killed with a machete blow to the neck. Teachers in Taba commune were killed later, on Akayesu’s instructions. The victims included the following: Tharcisse Twizeyumuremye, Theogene, Phoebe Uwineze and her fiancé whose name is unknown. They were killed on the road in front of the Bureau communal by the local people and the Interahamwe with machetes and agricultural tools. Akayesu personally witnessed the killing of Tharcisse.

35. The Chamber finds that the acts alleged in paragraph 21 have been proven. It has been established that on the evening of 20 April 1994, Akayesu, and two Interahamwe militiamen and a communal policeman, one Mugenzi, who was armed at the time of the events in question, went to the house of Victim Y, a 69 year old Hutu woman, to interrogate her on the whereabouts of Alexia, the wife of Ntereeye, the teacher. During the questioning which took place in the presence of Akayesu, the victim was hit and beaten several times. In particular, she was hit with the barrel of a rifle on the head by the communal policeman. She was forcibly taken away and ordered by Akayesu to lie on the ground. Akayesu himself beat her on her back with a stick. Later on, he had her lie down in front of a vehicle and threatened to drive over her if she failed to give the information he sought.

36. Furthermore, as regards the allegations in paragraphs 22 and 23 of the Indictment, it has been established that on the evening of 20 April 1994, in the course of an interrogation, Akayesu forced victim W to lay down in front of a vehicle and threatened to drive over her. That same evening, Akayesu, accompanied by Mugenzi, a communal policeman, and one Francois, an Interahamwe militiaman, interrogated victims Z and Y. The Accused put his foot on the face of victim Z, causing the said victim to bleed, while the police officer and the militiaman beat the victim with the butt of their rifles. The militiaman forced victim Z to beat victim Y with a stick. The two victims were tied together. Victim Z was also beaten on the back with the blade of a machete.

37. Having made its factual findings, the Chamber analysed the legal definitions proposed by the Prosecutor for each of the facts. It thus considered the applicable law for each of the three crimes under its jurisdiction, which is all the more important since this is the very first Judgement on the legal definitions of genocide on the one hand, and of serious violations of Additional Protocol II of the Geneva Conventions, on the other. Moreover, the Chamber also had to define certain crimes which constitute offences under its jurisdiction, in particular, rape, because to date, there is no commonly accepted definition of this term in international law.

38. In the opinion of the Chamber, rape is a form of aggression the central elements of which cannot be captured in a mechanical description of objects and body parts. The Chamber also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of the sexual violence they endured. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, including rape, is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The Chamber notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion.

39. The Chamber reviewed Article 6 (1) of its Statute, on the individual criminal responsibility of the accused for the three crimes constituting ratione materiae of the
Chamber. Article 6(1) enunciates the basic principles of individual criminal liability which are probably common to most national criminal jurisdictions. Article 6(3), by contrast, constitutes something of an exception to the principles articulated in Article 6(1), an exception which derives from military law, particularly the principle of the liability of a commander for the acts of his subordinates or "command responsibility". Article 6(3) does not necessarily require the superior to have had knowledge of such to render him criminally liable. The only requirement is that he had reason to know that his subordinates were about to commit or had committed and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof.

40. The Chamber then expressed its opinion that with respect to the crimes under its jurisdiction, it should adhere to the concept of notional plurality of offences (cumulative charges) which would render multiple convictions permissible for the same act. As a result, a particular act may constitute both genocide and a crime against humanity.

41. On the crime of genocide, the Chamber recalls that the definition given by Article 2 of the Statute is echoed exactly by the Convention for the Prevention and Repression of the Crime of Genocide. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.

42. Contrary to popular belief, the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as such once any one of the acts mentioned in Article 2 of the Statute is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group. Genocide is distinct from other crimes inasmuch as it embodies a special intent or dolus specialis. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which requires that the perpetrator clearly seek to produce the act charged. The special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

43. Specifically, for any of the acts charged under Article 2(2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, targeted as such; hence, the victim of the crime of genocide is the group itself and not the individual alone.

44. On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the Accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.

45. Apart from the crime of genocide, Jean-Paul Akayesu is charged with complicity in genocide and direct and public incitement to commit genocide.

46. In the opinion of the Chamber, an Accused is an accomplice in genocide if he knowingly aided and abetted or provoked a person or persons to commit genocide, knowing that this person or persons were committing genocide, even if the Accused himself lacked the specific intent of destroying in whole or in part, the national, ethnical, racial or religious group, as such.

47. Regarding the crime of direct and public incitement to commit genocide, the Chamber defines it mainly on the basis of Article 91 of the Rwandan Penal Code, as directly provoking another to commit genocide, either through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, or by any other means of audiovisual communication. The moral element of this crime lies in the intent to directly encourage or provoke another to commit genocide. It presupposes the desire of the guilty to create, by his actions, within the person or persons whom he is addressing, the state of mind which is appropriate to the commission of a crime. In other words, the person who is inciting to commit genocide must have the specific intent of genocide: that of destroying in whole or in part, a national, ethnical, racial or religious group, as such. The Chamber believes that incitement is a formal offence, for which the mere method used is culpable. In other words, the offence is considered to have been completed once the incitement has taken place and that it is direct and public, whether or not it was successful.

48. The second crime which comes within the jurisdiction of the Tribunal and of which Jean-Paul Akayesu is charged is that of crimes against humanity. On the law applicable to this crime, the Chamber reviewed the case law on this crime, from the judgements rendered by the Nuremberg and Tokyo Tribunals to more recent cases, including the Touvier and Papon cases in France notably, and the Eichmann trial in Israel. It indicated the circumstances under which the charge of crimes against humanity would be leveled as provided for by Article 3 of the Statute, under which the act must be committed as part of a widespread or systematic attack directed against a civilian population on discriminatory grounds.

49. The third crime on which the Chamber rendered its conclusions is that for which it has competence pursuant to article 4 of the Statute, which provides that the Tribunal is
emPOWERED TO PROSECUTE PERSONS COMMITTING OR ORDEING TO BE COMMITTED SERIOUS

The Chamber has already established that genocide was committed against the Tutsi group in Rwanda in 1994. The Chamber having regard, particularly, to the evidence adduced before it during the hearing, that he repeatedly made statements more or less explicitly calling for the commission of genocide. Yet, according to the evidence, he incites another to commit genocide. The Chamber is satisfied beyond reasonable doubt that he incites another to commit genocide. The Chamber is satisfied beyond reasonable doubt that he incites another to commit genocide. The Chamber is satisfied beyond reasonable doubt that he incites another to commit genocide.
distinct crimes, and that the same person could certainly not be both the principal perpetrator of, and accomplice to, the same offence. Given that genocide and complicity in genocide are mutually exclusive by definition, the accused cannot obviously be found guilty of both these crimes for the same act. However, since the Prosecutor has charged the accused with both genocide and complicity in genocide for each of the alleged acts, the Chamber deems it necessary, in the instant case, to rule on Counts 1 and 2 simultaneously, so as to determine, as far as each proven fact is concerned, whether it constituted genocide or complicity in genocide.

57. Count 3 of the Indictment on crimes against humanity, extermination, the Chamber concludes that the murder of the eight refugees described in paragraph 19 of the Indictment as well as the killing of Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome Gakuba, Samuel, Tharcisse, Théogène, Phoebe Uwineze and her fiancé, facts described in paragraph 20 of the Indictment, constitute, beyond reasonable doubt, a crime of extermination, perpetrated during a widespread and systematic attack against a civilian population on ethnic grounds and, as such, constitutes a crime against humanity for which Akayesu is individually criminally responsible.

58. Regarding Count Four, on the basis of the facts described in paragraphs 14 and 15 of the Indictment and which it believes are well founded, the Chamber is satisfied beyond reasonable doubt that by the speeches made in public, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group as such. Accordingly, the Chamber finds that the said acts constitute the crime of direct and public incitement to commit genocide. In addition, the Chamber finds that the direct and public incitement to commit genocide engaged in by Akayesu, was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of Taba.

59. On Count five of the Indictment, the Accused is charged of crimes against humanity(murder) for the acts alleged in paragraphs 15 and 18 of the Indictment. The Chamber finds beyond a reasonable doubt that the killing of Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome, was committed as part of a widespread and systematic attack against a civilian population of Rwanda on ethnic grounds, and therefore, a crime against humanity. Akayesu thereby incurs individual criminal responsibility for having ordered and participated in the commission of this crime.

60. On Count seven of the Indictment, crimes against humanity (murder) for the acts alleged in paragraph 19 of the Indictment, the Chamber finds beyond reasonable doubt that the killing of the eight refugees constitutes murder committed as part of a widespread or systematic attack on civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the Chamber concludes that the Accused, having ordered the said killings, has incurred individual criminal responsibility as charged in Count Seven of the Indictment.

61. On Count Nine of the Indictment the Accused is charged with a crime against humanity (murder), pursuant to Article 3(a) of the Statute for the acts alleged in paragraph 20 of the Indictment. The Chamber finds beyond a reasonable doubt that the killing of the five individuals does indeed constitute murder as part of a widespread or systematic attack against a civilian population of Rwanda on ethnic grounds and as such constitutes a crime against humanity. Accordingly Akayesu has incurred individual criminal responsibility for having ordered, aided and abetted the planning and execution of the crime.

62. Under Count 11, Akayesu is charged with crimes against humanity (torture), acts alleged in paragraphs 16, 17, 21, 22 and 23 of the indictment. Based on the above factual findings, the Chamber is satisfied beyond reasonable doubt that the acts described in those paragraphs constitute torture. Having been committed as part of a wide spread and systematic attack against a civilian population on ethnic grounds, they constitute crimes against humanity and render Akayesu criminally liable for having ordered, aided and abetted in their commission.

63. With regard to Counts 13 and 14, relating to the acts described in paragraphs 12A and 12B of the indictment and which it considers proven, the Chamber is also satisfied beyond a reasonable doubt that they constitute acts of rape and other inhumane acts, committed as part of a widespread and systematic attack against a civilian population on ethnic grounds and therefore constitute a crime against humanity. Consequently, the Chamber finds the Accused individually criminally liable for the said acts described in counts 13 and 14 and for having through his presence tacitly abetted their commission.

64. With respect to Counts 6, 8, 10, 12 and 15, Akayesu is charged with violations of Common Article 3 of the Geneva Conventions of 1949 in counts 6, 8, 10 and 12, and with violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II thereto of 1977 under count 15. The Chamber finds that it has been established beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF at the time of the facts alleged in the Indictment, and that the said conflict was well within the provisions of Common Article 3 and of the Additional Protocol II. The Chamber however finds that the Prosecution has failed to show beyond reasonable doubt that Akayesu was a member of the armed forces and that he was duly mandated and expected, in his capacity as a public official or agent or person otherwise vested with public authority or a de facto representative of the Government, to support and carry out the war effort.
FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER unanimously finds as follows:

Count 1: Guilty of Genocide

Count 2: Not guilty of Complicity in Genocide

Count 3: Guilty of Crime against Humanity (Extermination)

Count 4: Guilty of Direct and Public Incitement to Commit Genocide

Count 5: Guilty of Crime against Humanity (Murder)

Count 6: Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)

Count 7: Guilty of Crime against Humanity (Murder)

Count 8: Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)

Count 9: Guilty of Crime against Humanity (Murder)

Count 10: Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)

Count 11: Guilty of Crime against Humanity (Torture)

Count 12: Not guilty of Violation of Article 3 common to the Geneva Conventions (Cruel Treatment)

Count 13: Guilty of Crime against Humanity (Rape)

Count 14: Guilty of Crime against Humanity (Other Inhumane Acts)

Count 15: Not guilty of Violation of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II (Outrage upon personal dignity, in particular Rape, Degrading and Humiliating Treatment and Indecent Assault)

Done in English and French,

Signed in Arusha, 2 September 1998,

Laïty Kama Lennart Aspegren Navanethem Pillay
Special Court for Sierra Leone

Prosecutor v. Sesay, Kallon and Gbao (RUF Case)
Decision on Challenge to Jurisdiction: Lomé Accord Amnesty

Appeals Chamber, 13 March 2004
THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice George Gelaya King
Justice Emmanuel Ayoola

Register: Robin Vincent
Date: 13 March 2004

PROSECUTOR Against

MORRIS KALLON
(Case No. SCSL-2004-15-AR72(E))

BRIMA BAZZY KAMARA
(Case No. SCSL-2004-16-AR72(E))

DECISION ON CHALLENGE TO JURISDICTION: LOMÉ ACCORD AMNESTY

Office of the Prosecutor:
Desmond de Silva, QC
Luc Costa
Walter Marcus-Jones
Abdul Tejan-Cole

Defence Counsel for Morris Kallon:
James O’Reilly
Stephen Powles

Defence Counsel for Brima Bassy Kamara:
Ken Fleming, QC

Interlocutors:
Andreas O’Shea for Augustine Gbobo
Michiel Pestman for Matina Sedina

THE APPEALS CHAMBER of the Special Court for Sierra Leone (“Court” or “Special Court”);

BEING SEIZED of (1) a “Preliminary Motion based on lack of Jurisdiction/ Abuse of Process: Amnesty Provided by the Lomé Accord”, filed on behalf of Morris Kallon on 16 June 2003 (“Kallon Preliminary Motion”); and (2) “Application by Brima Bassy Kamara in respect of Jurisdiction and Defects in Indictment”, filed on behalf of Brima Bassy Kamara on 22 September 2003, section 3 of which raises issues relating to the Lomé Accord amnesty (“Kamara Preliminary Motion”),

NOTING that the Prosecution Response to the Kallon Preliminary Motion was filed on 23 June 2003; and that the Prosecution Response to the Kamara Preliminary Motion was filed on 29 September 2003;

NOTING that the Kallon Preliminary Motion was referred to the Appeals Chamber on 30 September 2003 pursuant to Rules 74(E) and (F) of the Rules of Procedure and Evidence for the Special Court for Sierra Leone (“the Rules”), and that the Kamara Preliminary Motion was referred to the Appeals Chamber under Rule 74(E) of the Rules on 9 October 2003;

NOTING that oral submissions were heard on 3 and 4 November 2003;

NOTING that Written Defence Submissions in support of Oral Argument were filed on behalf of Kallon on 3 November 2003; that Defence Post-Hearing Written Submissions were filed on behalf of Kallon on 28 November 2003; and that the Prosecution filed its Response thereto on 3 December 2003;

NOTING that submissions by the Redress Trust, the Lawyer’s Committee for Human Rights and the International Commission of Jurists (“Redress”) as amicus curiae were filed on 24 October 2003, that

1. Three Preliminary Motions were filed under Case No. SCSL-2003-10 and Case No. SCSL-2003-19 respectively. Following the decision and order on Prosecution Motions for joinder on 27 January 2004, and the subsequent Registry Division for the Assignment of a new Case Number of 3 February 2004, they have been assigned the new case numbers referred to herein.
3. Prosecution Response to the Second Defence Preliminary Motion on Lack of Jurisdiction/ Abuse of Process: Amnesty Provided by the Lomé Accord, Case No. SCSL-2003-10; 30 September 2003; Order pursuant to Rule 72(E) of the Lomé Agreement.

Case No SCSL-2004-15-AR72(E)
Case No SCSL-2004-16-AR72(E)

13 March 2004
the application by Redross to make written and oral submissions as amicus curiae was accepted by the Appeals Chamber on 1 November 2003 and that subsequent Post-Hearing Written Submissions were filed by Redross on 21 November 2003.

NOTING FURTHER that at the invitation of the Appeals Chamber submissions were filed by amicus curiae Professor Diane Oriendicher on 27 October 2003 (“Orendicher amicus brief”), and that with leave of the Court written submissions were filed on behalf of the accused Moinina Fofana and Augustine Gbao, intervening, in support of oral arguments;

HAVING CONSIDERED THE ORAL AND WRITTEN SUBMISSIONS OF THE PARTIES, AMICUS CURIAE AND INTERVENERS;

HEREBY DECIDES:

I. GROUNDS OF THE PRELIMINARY MOTION

A. Introduction

1. In summary, the grounds of the two applications, in so far as they are relevant to this Decision, are that the Government of Sierra Leone is bound to observe the amnesty granted under Article IX of the Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (“Lomé Agreement”), the Special Court should not assert jurisdiction over crimes committed prior to July 1999 when an amnesty was granted by virtue of the Lomé Agreement and it would be an abuse of process to allow the prosecution of any of the alleged crimes predating the Lomé Agreement.

2. The Prosecution put its opposition to the Preliminary Motions in several ways. The Prosecution argues that the Special Court is bound by Article 10 of its Statute and that the Lomé Agreement;

3. Case No.SCL-2004-15-A121(d)
Case No.SCL-2004-16-A121(d)

13 March 2004

being an agreement between two national bodies, is limited in effect to domestic law and was, in any event, not intended to cover crimes mentioned in Articles 2 to 4 of the Statute of the Special Court (“Statute”). Furthermore, it is contended that given the gravity of the crimes charged, discretion should not be exercised to grant a stay of proceedings on the basis that there has been an abuse of process of the Court.

B. Historical Background

3. It is commonly said, though no such factual finding is made and can be made at this stage, that on 23 March 1991 forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party rule of the All Peoples’ Congress (APC). That was believed to be the beginning of the armed conflict in Sierra Leone which lasted until 7 July 1999 when the parties to the conflict signed the Lomé Agreement. There was an earlier peace agreement between the Government of Sierra Leone and RUF signed in Abidjan on 30 November 1996 (“Abidjan Peace Agreement”) but that collapsed soon after it was signed.

4. On 7 July 1999 the Lomé Agreement was signed between the Government of Sierra Leone and the RUF, the parties to the Agreement having met in Lomé, Togo from 25 May 1999 to 7 July 1999 under the auspices of the Chairman of ECOWAS at the time, President Gnassingbe Eyadema.

5. Among other things, the parties to the Lomé Agreement stated that they were moved “by the imperative need to meet the desire of the people of Sierra Leone for a definitive settlement of the fratricidal war in their country and for genuine national unity and reconciliation”.

6. Article 34 of the Lomé Agreement shows that the Government of the Togolese Republic, the United Nations, the OAU, ECOWAS and the Commonwealth of Nations stood as moral guarantors of the implementation of the Lomé Agreement with integrity and in good faith by both parties.

C. Article 9 of the Lomé Agreement

7. At the centre of those proceedings is Article 9 of the Lomé Agreement which provides as follows:

11 Statute of the Special Court for Sierra Leone, 30 January 2002.
13 Lomé Agreement, paras.

Case No.SCL-2004-15-A121(d)
Case No.SCL-2004-16-A121(d)

13 March 2004
ARTICLE IX
PARDON AND AMNESTY

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

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

3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-RUF, ex-SLA or CDF in respect of anything done by them in pursuance of their objectives as members of those organizations since March 1994, up to the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legitimacy.

8. By a letter dated 12 June 2000 written to the President of the Security Council by the President of Sierra Leone on behalf of the Government and people of Sierra Leone, the President of Sierra Leone requested the President of the Security Council to initiate a process whereby the United Nations would resolve on the setting up of a Special Court for Sierra Leone.

9. That letter reads as follows:

12 June 2000

On behalf of the Government and people of the Republic of Sierra Leone I write to request you to initiate a process whereby the United Nations would resolve on the setting up of a Special Court for Sierra Leone. The purpose of such a court is to try and bring to credible justice those members of the Revolutionary United Front (RUF) and their accomplices responsible for committing crimes against the people of Sierra Leone and for the taking of UN peacekeepers as hostages. This necessitates the establishment of a strong court in order to bring and maintain peace and security in Sierra Leone and the West African sub-region. For this purpose, I request assistance from the United Nations Security Council in establishing a strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace. To achieve this, a quick response from the Secretary-General and the Security Council is necessary.

As you are aware, the atrocities committed by the RUF in this country for nearly 10 years in its campaign of terror have been described generally as the worst in the history of civil conflicts. In July 1999, my Government and the leadership of the RUF signed the Lome Peace Agreement. The aim of this Agreement was to bring peace and a permanent cessation to those atrocities and the conflict. As a price for such peace, my Government even conceded to the granting of partial amnesty to the RUF leadership and its members in respect of all the acts of terrorism committed by them up to the date of the signing of that Peace Agreement.

But the RUF leadership have since reneged on that Agreement, and have resumed their atrocities, which have always had as their targets mainly civilians, including women and children. They still murder and amputate them and use the women and girls as sex slaves. Lately, they have abducted over 500 United Nations peacekeepers and seized their arms, weapons and uniforms, and even killed some of the peacekeepers. This is in spite of a provision in the Lome Peace Agreement itself requiring both my Government and the RUF to ensure the safety of these peacekeepers. In the process, the RUF have committed crimes against Sierra Leoneans and international law and it is my Government’s view that the issue of individual accountability of the leadership of the RUF for such crimes should be addressed immediately and that it is only by bringing the RUF leadership and their collaborators to justice in the way now requested that peace and national reconciliation and the strengthening of democracy will be assured in Sierra Leone.

I am aware of similar efforts made by the United Nations to respond to similar crimes against humanity in Rwanda and the former Yugoslavia. I ask that similar considerations be given to this request.

I believe that crimes of the magnitude committed by the RUF in this country are of concern to all persons in the world, as they greatly diminish respect for
international law and for the most basic human rights. It is my hope that the United Nations and the international community can assist the people of Sierra Leone in bringing to justice those responsible for those grave crimes.

Because of the sensitivity aroused in Sierra Leone and around the world by the activities of the RUF and their collaborators and the need to dispose of the matters to be tried at the proposed tribunal without delay, I am inviting you or the Security Council to send to Sierra Leone immediately a rapid response team of inquiry to assess the needs and concerns regarding my Government's ability to provide effective, secure, fair and credible justice.

With regard to the magnitude and extent of the crimes committed, Sierra Leone does not have the resources or expertise to conduct trials for such crimes. This is one of the consequences of the civil conflict, which has destroyed the infrastructure, including the legal and judicial infrastructure, of this country. Also, there are gaps in Sierra Leonean criminal law as it does not encompass some heinous crimes as those against humanity and some of the gross human rights abuses committed by the RUF. It is my view, therefore, that, unless a court such as that now requested is established here to administer international justice and humanitarian law, it will not be possible to do justice to the people of Sierra Leone or to the United Nations peacekeepers who fell victim to hostage-taking.

I attach hereto a suggested framework for the type of court intended (see enclosure). As you can see, the framework is meant to produce a court that will meet international standards for the trial of criminal cases while at the same time having a mandate to administer a blend of international and domestic Sierra Leonean law on Sierra Leean law.

(Signed) Ahmad Said Kabbah
President of the Republic of Sierra Leone

10. After rehearsing that “the situation in Sierra Leone continues to constitute a threat to international peace and security in the region” and expressing “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” the Security Council adopted Resolution 1315 (2000), on its own independent assessment of the situation, whereby the Secretary-General was mandated to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with the resolution.

11. In a clause in the Preamble to Resolution 1315, the Security Council reaffirmed the importance of compliance with international humanitarian law; that persons who commit or authorise serious violations of international humanitarian law are individually responsible and accountable for those violations; and that the international community will exert every effort to bring those responsible to justice in accordance with international standards of justice, fairness and due process of law. The establishment of the Special Court was thus an implementation of the determination of the Security Council to bring those responsible for serious violations of international humanitarian law to justice.

D. The Special Court for Sierra Leone

12. On 16 January 2002, after a successful negotiation between the Secretary-General and the Government of Sierra Leone, an agreement was entered into by the United Nations and the Government of Sierra Leone whereby the Special Court for Sierra Leone was established (“Agreement”).

13. The Special Court was established for the sole purpose of prosecuting 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. The competence of the Special Court was extended in its Statute by the addition in Article 1 of the words “including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”

14. The Special Court, though established by an agreement between the United Nations and the Government of Sierra Leone, is an autonomous and independent institution vested with judicial capacity by Article 11 of the Agreement. The involvement of the Government of Sierra Leone in

---

the Special Court after its establishment is defined by the Agreement. It is limited to participation in the appointment of judges, prosecutor and deputy prosecutor, as provided, respectively, in Articles 2 and 3 of the Agreement, and participation in the Management Committee as provided for in Article 7 of the Agreement. The Sierra Leone Government undertook certain responsibilities of a non-managerial nature in regard to the Special Court, such as an obligation to assist in the provision of premises for the Court, and such utilities, facilities and other services as may be necessary for its operation, to grant immunity and inviolability to counsel of a suspect or as accused as provided for in Article 14, and to cooperate with the Special Court as provided for in Article 17.

15. The Statute of the Special Court defined the jurisdiction of the Court as follows:

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 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. Cruelities upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f. Plagia;
- 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

Case No:SCL-2004-15-AR72/(E) 10
Case No:SCL-2004-16-AR72/(E) 13 March 2004
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. Conscription 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.

E. The Three Phases of the Sierra Leone Situation

16. It is evident from the brief historical background that the events starting from the launching of the rebellion in March 1991 and ending with the establishment of the Special Court, described here as 'the Sierra Leone situation,' have three discernible phases, namely: (1) the phase of armed conflict; (2) the Peace Agreement phase and (3) the Justice phase. There are legal perspectives which have some bearing on the issues raised by the Preliminary Motions to each of these phases of the Sierra Leone situation.

17. It must be assumed, since the facts of the case have not been gone into, that the phase of armed conflict was of such a degree as to be recognised as an insurgency, passing beyond the threshold of a rebellion that could be dealt with internally as a matter of domestic security and to be regulated by domestic law, to a level of conflict that had to be regulated by Common Article 3 of the Geneva Conventions. The parties, whether from the Government side or the insurgents, were thereby subjected to the obligations imposed by international law in a situation of internal armed conflict. The competence of the Special Court to prosecute persons who committed violations of Common Article 3 is the basis of that assumption.

18. The Peace Agreement Phase signifies the end of the armed conflict by means of a peaceful settlement. One legal consequence of that phase is that international humanitarian law would normally cease to be applicable to any act of violence in the peace period unless, notwithstanding what would have been regarded as a peaceful resolution, one party or both parties, in breach thereof, continued the armed conflict. Presumably, it is in further protection of the peace process that the competence of the Special Court includes in Article 1(1) of the Statute the prosecution of “those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.” Thereby, impunity is denied to any such person, notwithstanding that there had been a peace agreement which constituted some sort of peaceful resolution of the conflict.

19. The Justice Phase is that phase in which participants in the armed conflict have to answer for crimes committed in the course of the armed conflict. The justice phase itself involves separating what is in the exclusive domain of the municipal authority to be resolved under municipal law from what is in the concurrent jurisdiction of that authority and of the international community to be resolved by application properly of international law.

F. Prosecutorial Choice of Sierra Leone

20. Whether to prosecute the perpetrators of rebellion for their act of rebellion and challenge to the constituted authority of the State as a matter of internal law is for the state authority to decide.
There is no rule against rebellion in international law. The State concerned may decide to prosecute the rebels. It may decide to pardon them, generally or partially, conditionally or unconditionally. It is where, and in this case because, the conduct of the participants in the armed conflict is alleged to amount to international crime that the question arises whether in such a situation a State has the same choice to dispense with the prosecution of the alleged offenders. Furthermore, if it claims to have such choice and exercises it to grant amnesty to alleged offenders, does this conclusively bar prosecution for the alleged commission of grave crimes against humanity in an international tribunal or, for that matter, by another state claiming universal jurisdiction to prosecute?

21. The Preliminary Motions with which this ruling is concerned arose because the Government of Sierra Leone included in the Lomé Agreement Article IX which contained 'Pardon and Amnesty' provisions in terms already stated above, whereby, among other things, it undertook to "grant absolute and free pardon and reprieve to all combatants and collaborators" and undertook also to "ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRIC, ex-SLA or CDF in respect of anything done by them in pursuance of their objectives as members of those organisations". The Motions argue, in effect, that the amnesty granted by the Lomé Agreement in Article IX amounts to an unconditional pardon and that, as such, it was a choice validly made by the Sierra Leone Government that conclusively precluded the prosecution of the accused Kallon and Kamara for any crime whatsoever allegedly committed before the date of the Lomé Agreement by this Court.

II. ARGUMENTS OF THE PARTIES

22. Counsel for the accused Kallon made submissions on the following main lines:

a) The Lomé Accord was binding on the Government of Sierra Leone;

b) The abuse of process doctrine applies to proceedings before the Special Court and crimes of a serious nature;

c) Article 10 of the Special Court Statute is not a bar to the application of the abuse of process doctrine;

d) Not all amnesties, including the Lomé Accord, are unlawful under international law;

e) Morris Kallon acted in good faith pursuant to the Lomé Accord.

23. It is not necessary to approach the issues raised by the Preliminary Motions strictly on those lines. It suffices to consider the issues raised and to advert to submissions made by counsel for the parties and by the amici curiae in the discussion of those issues.

24. The submissions by counsel for Kallon on the Lomé Agreement proceeded on the following lines: as part of the Agreement the Government of Sierra Leone stated that it would, in order to "consolidate the peace and promote the cause of national reconciliation," ensure that "no official or judicial action is taken against any member of the RUF/SL, ex-AFRIC, ex-SLA or CDF in respect of anything done by them in pursuance of their objectives as members of those organisations, since March 1991, up to the time of signing the present agreement".

25. Defence counsel for Kallon pointed out that the Lomé Accord was ratified by the Parliament of Sierra Leone on 15 July 1999 with the passage of the Lomé Peace Agreement (Ratification) Act, 1999 ("Lomé Act"). According to the Defence, since the Preamble to the Lomé Act states that as the Lomé Agreement contained provisions which "alter the law of Sierra Leone and impose a charge on the Consolidated Fund and other funds of Sierra Leone" it was necessary for Parliament to ratify it pursuant to Section 40(4) of the Constitution of Sierra Leone, 1991 ("The Constitution"). Such ratification is only required by Section 40(4) of the Constitution where the President has entered a "Treaty, Agreement, or Convention" in the name of Sierra Leone. Thus, according to the Defence, the Lomé Accord is governed by the 1969 Vienna Convention on the Law of Treaties.

26. Defence Counsel for Kallon argued that the Special Representative of the Secretary-General ("SRSG") purportedly appended a disclaimer to the Lomé Agreement to the effect that the UN did not recognise the validity of the amnesty in respect of war crimes, crimes against humanity or genocide. The Defence argued that the Secretary-General's Report only states

---

23 See para. 7 above.
24 See Kallon Preliminary Motions.
25 Article 2(3) Lomé Agreement.

Case No:SCSL-2004-15-A872(3)
Case No:SCSL-2004-16-A872(3)

13 March 2004
that an instruction was given to the SRSG - not that it was carried out. 26 The Defence observed that it is not clear when and how such a disclaimer was made - whether orally or in writing at the time of signature or indeed sometime after 7 July 1999. Although the Oromchicher Amicus Brief stated that the instructions given to the SRSG to append a disclaimer were issued pursuant to policy guidelines issued by the UN Secretary-General to assist envoys and representatives involved in peace negotiations, 27 that cannot be right according to Kallon’s defence. The Amicus Brief implied that the policy was issued pursuant to a Statement of Secretary-General Kofi Annan on 10 December 1999. Thus, the Defence argued, it would appear that the guidelines were formulated after the adoption of the Lomé Agreement, perhaps in order to avoid any repeat of the confusion or misunderstanding as to the UN’s position resulting from Lomé. The SRSG’s disclaimer is and was limited to any action to be taken by the UN, and the Government of Sierra Leone itself was expected to abide by and honour the amnesty provision.

27. The Defence argued that at the time of signing the Lomé Agreement it was widely accepted that the peace of peace was an amnesty for the warring factions, as the various members of the Security Council explained when adopting Resolution 1260. 28

28. The Defence refers to the State Opening of Parliament (16 June 2000) where President Kabbah said: “My Government for its part remains committed to the Lomé Peace Accord, but the RUF must now demonstrate its own commitment and sincerity, in very practical ways, to convince the people of this country that they will implement the letter and spirit of the Accord and ensure lasting peace and prosperity in Sierra Leone”. 29

29. Furthermore, there was the statement to the Truth and Reconciliation Commission on 5 August 2003 as follows:

We had resisted the persuasion of the international community for the exclusion of war crimes, crimes against humanity and against international humanitarian law from the applicability of the amnesty provision in the Lomé Agreement. We did this deliberately. Thus, we put beyond the ability and outside the jurisdiction of our domestic courts power over the prosecution of crimes committed before the signing of the Lomé Agreement since the amnesty granted amount [sic] to a constitutional bar to any form of prosecution in our domestic courts in respect of the offences amnestied. 30

30. For their part counsel for Fofana argued first, that the Lomé Agreement is an agreement under international law because it was signed by six states and a number of international organisations as well as by the EUB which, it was argued, was an entity subject to rights and obligations which as de facto authority possessed limited international personality, second, that obligations arising from the Lomé Agreement, regarded as a treaty, cannot be altered by later treaties without the consent of the parties and, third, that international law does not prohibit the granting of amnesties. 31

31. Counsel for Gbao submitted in line with the submissions made by the other Defence counsel that the Lomé Agreement created an internationally binding obligation not to prosecute the beneficiaries of the amnesty under the Agreement. 32

32. The Prosecution’s response was that the Lomé Agreement is not a treaty but an agreement signed between two national bodies. It was submitted that others who signed the agreement did not do so as parties but as moral guarantors who were facilitating and supporting the conclusion of the Agreement; the Lomé Agreement has no force under international law but was an agreement which had no legal basis until it was ratified by the enactment of the Lomé Act which itself had force only as a domestic law; the Lomé Agreement is no longer effective in domestic law since the Lomé Ratification Act had been impeded by the enactment of the Special Court (Ratification) Act 2002 (“the Implementing Legislation”); the disclaimer by the SRSG at the time of the signature of the Lomé Agreement that Article IX shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law was a correct interpretation by the UN of Article IX, and, on that correct interpretation, the Lomé Agreement does not apply to the prosecution of persons pursuant to the Statute of the Special Court.

---

26 The report referred to is the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, UN Doc S/2000/915, 4 October 2000.
27 Oromchicher amicus brief, p. 3.
31 See Fofana Submissions, para 11.28.
32 Gbao Submissions, para 14.
33. In the arguments presented by the Redress Trust ("Redress") as amicus curiae, it was submitted that the Special Court would in effect be questioning a measure taken by the Security Council under Chapter VII of the UN Charter if it took upon itself to review the validity of the exception of the applicability of the Lomé amnesty for serious international crimes that was specifically requested in Resolution 1315. The amnesty granted by the Government of Sierra Leone cannot be interpreted as covering violations of international humanitarian law. The Lomé amnesty was a domestic amnesty. Premised on an obligation to prosecute or extradite persons accused of crimes under international law, it was submitted that application of an amnesty would be an unlawful interference with that duty. Appended to the written submissions of Redress are numerous useful materials in support of the submissions.

34. Professor Diane Orentlicher who was invited as amicus curiae made useful and extensive submissions which can be summarized as follows. As Article IX of the Lomé Agreement addressed and could have legal force in respect of the national legal system of Sierra Leone only, the amnesty does not legally circumscribe the jurisdiction of the Special Court which has been established outside the national court system and operates independently of the Sierra Leonean national system. Any amnesty that encompasses crimes against humanity, serious war crimes, genocide or torture would be of doubtful validity under international law. However, Article IX of the Lomé Agreement was addressed to the question of prosecutions before national courts of Sierra Leone. States cannot use domestic legislation to bar international criminal liability.

35. Professor Orentlicher argued that there can be no amnesty where a treaty requires prosecution, or has been interpreted or would be likely to be interpreted by its supervisory bodies as requiring state parties to investigate and, if warranted, prosecute serious violations.

III. DISCUSSION

A. The Status of the Lomé Agreement

36. In view of the submissions made and in order to put the issues in proper perspective, the starting point is to determine the character of the Lomé Agreement. The Defence argues that it is an international agreement having the character of a treaty. The Prosecution, the amicus curiae agreeing, argue that it is an agreement within municipal law between two bodies within the state.

37. In regard to the nature of a negotiated settlement of an internal armed conflict it is easy to assume and to argue with some degree of plausibility, as Defence counsel for the defendants seem to have done, that the mere fact that in addition to the parties to the conflict, the document formalizing the settlement is signed by foreign heads of state or their representatives and representatives of international organizations, means the agreement of the parties is internationalized so as to create obligations in international law.

38. Indeed, such argument finds support in the opinion of Professor Kooijmans. He used as an example the peace accord of 1994 embodied in the Lusaka Protocol concluded to end the armed conflict in Angola. The Lusaka Protocol was signed by the Presidents of the Republic of Angola and of UNITA and by the SRSO of the UN as mediator in the presence of the representatives of the observer states, the United States, Russia and Portugal. Admittedly, the Lusaka Protocol was not an interstate agreement. However, upon UNITA failing to comply with the agreement, the Security Council by Resolution 1127 (1997) ordered mandatory travel sanctions to be imposed on senior UNITA officials and if UNITA continued its obstruction the Council would take further measures such as trade and financial restrictions. The Council emphasized the "urgent need for the Government of Angola and in particular UNITA to complete without further delay the implementation of their obligations under the Lusaka Protocol...and the relevant Security Council resolutions" and deplored the failure by UNITA to comply with its obligations under the relevant peace accords (of which the Lusaka Protocol was one) and the Security Council resolutions. It then demanded that UNITA implement its obligations under the Lusaka Protocol. The Council determined that the resulting situation in Angola constituted a threat to international peace and security in the region, and in consequence acted under Chapter VII of the UN Charter in the measures it took. Upon these facts, Kooijmans was of the opinion as follows in regard to the Lusaka Protocol and the obligation it created:

The fact that it is concluded between a government and an insurrectionary party does not in itself detract from its international character. The United Nations as an organization of states has been deeply involved in the conflict, peace keeping forces have been deployed, the Secretary-General through his Special Representative has continuously mediated. If a settlement is reached which is consigned by the Secretary-

---

39. It is manifest that the learned commentator assumed that the Lusaka Protocol, though not in the form of a 'genuine international instrument' drew its 'internationalised character' from the factors he stated in the passage above. It is difficult to agree with this conclusion. The role of the UN as a mediator of peace, the presence of a peacekeeping force which generally is by consent of the State and the mediation efforts of the Secretary-General cannot add up to a source of obligation to the international community to perform an agreement to which the UN is not a party. As will be seen, action taken by the Security Council upon failure of a party to implement the peace agreement derives from Chapter VII of the UN Charter and not from the peace agreement.

40. Almost every conflict resolution will involve the parties to the conflict and the mediator or facilitator of the settlement, or persons or bodies under whose auspices the settlement took place but who are not at all parties to the conflict, are not contracting parties and who do not claim any obligation from the contracting parties or incur any obligation from the settlement.

41. In this case, the parties to the conflict are the lawful authority of the State and the RUF which has no status of statehood and is to all intents and purposes a faction within the state. The non-contracting signatories of the Lomé Agreement were moral guarantors of the principle that, in the terms of Article XXXIV of the Agreement, "this peace agreement is implemented with integrity and in good faith by both parties". The moral guarantors assumed no legal obligation. It is recalled that the UN by its representative appended, presumably for avoidance of doubt, an understanding of the extent of the agreement to be implemented as not including certain international crimes.

42. An international agreement in the nature of a treaty must create rights and obligations regulated by international law so that a breach of its terms will be a breach determined under international law and which will also provide principle means of enforcement. The Lomé Agreement created neither rights nor obligations capable of being regulated by international law. An agreement such as the Lomé Agreement which brings to an end an internal armed conflict no doubt creates a factual situation of restoration of peace that the international community acting through the Security Council may take note of. That, however, will not

---

13 March 2004
Special Tribunal for Lebanon

Prosecutor v. Salim Jamil Ayyash et al.
Decision on the Defence Appeals Against the Trial Chamber’s “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal”

Appeals Chamber, 24 October 2012
CASE NO.: STL-11-01/PT/AC/AR90.1

Date: 24 October 2012

Mr. Herman von Hebel

English

Public

THE PROSECUTOR

v.

SALIM JAMIL AYYASH
MUSTAFA AMINE BADREDINE
HUSSAIN HASSAN ONSSSI
ASSAD HASSAN SABRA

DECISION ON THE DEFENCE APPEALS AGAINST THE TRIAL CHAMBER’S “DECISION ON THE DEFENCE CHALLENGES TO THE JURISDICTION AND LEGALITY OF THE TRIBUNAL”

Prosecutor:
Mr. Norman Farrell
Mr. Eugene O’Sullivan
Mr. Emile Aoun

Legal Representatives of Victims:
Mr. Peter Haynes
Mr. Mohammad F. Mattar
Ms. Nada Abdelsater-Abusamra

Counsel for Mr. Mustafa Amine Badreddine:
Mr. Antoine Korkmaz
Mr. John Jones

Counsel for Mr. Hussein Hassan Onessi:
Mr. Vincent Courcelle-Labrousse
Mr. Yasser Hassan

Counsel for Mr. Assad Hassan Sabra:
Mr. David Young
Mr. Guénaël Mettraux

HEADNOTE

Defence Counsel for Messrs. Ayyash, Badreddine, Onessi and Sabra—The accused in this case—have challenged the legality of the establishment of the Tribunal before the Trial Chamber. In its Decision, the Trial Chamber dismissed the Defence motions and concluded, inter alia, that (i) a challenge to the legality of the Tribunal is not a preliminary motion challenging jurisdiction; (ii) the Tribunal was established by Security Council Resolution 1757 (2007); and (iii) the Chamber did not have the authority to review this Resolution. Counsel for Messrs. Ayyash, Badreddine and Onessi appeal against the Trial Chamber’s decision. They primarily argue that the Tribunal was established illegitimately and that it has no authority to try the Accused.

The Appeals Chamber unanimously dismisses the three appeals.

The Appeals Chamber holds that the Trial Chamber correctly determined that the Tribunal was established as an independent institution by Security Council Resolution 1757 (2007), adopted under Chapter VII of the United Nations Charter. The Resolution integrates the provisions of a draft agreement negotiated between the United Nations and Lebanon, which was not ratified by the latter. The Appeals Chamber notes that the Security Council has acted in a similar manner on other occasions.

The Appeals Chamber also holds that the Trial Chamber was correct in stating that it lacked the authority to review a Security Council Resolution. The majority considers that the Security Council has a broad discretion as to the characterization of a particular situation as a threat to international peace and security and that the Tribunal cannot judicially review the Security Council’s actions. This finding is also supported by the difficulty of establishing any meaningful standard of review in the absence of legal criteria to that effect. Moreover, the Security Council’s decisions are influenced by a plethora of complex legal, political, and other considerations, which are difficult to evaluate from the outside. Similarly, once the Security Council

---

1 This Headnote does not constitute part of the decision of the Appeals Chamber. It has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.
has found the existence of a threat to international peace and security under Article 39 of the Charter, it lies in its discretion to determine which measures under Articles 41 and 42 of the Charter are required to maintain or restore international peace and security.

The Appeals Chamber consequently rejects all other Defence arguments. Judges Baragwanath and Riahi concur with the dismissal of the appeals but offer additional reasons for doing so.

INTRODUCTION

1. Counsel for the Defence of Messrs Ayyash,7 Badreddine8 and Oneissi9 appeal against the Trial Chamber’s “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal”.10 They primarily argue that the Tribunal was established illegally and that it had no authority to try the Accused.6 After briefing was completed,11 we held an oral hearing on 1 October 2012.9

2. We unanimously determine that the appeals must be dismissed. We hold that the appeals submitted by counsel for Mr Badreddine and Mr Oneissi are admissible. We hold, Judges Baragwanath and Riahi dissenting, that the appeal submitted by counsel for Mr Ayyash is inadmissible. We affirm the Trial Chamber’s decision that this Tribunal was legally established by Security Council Resolution 1757 (2007). We also agree, Judge Baragwanath dissenting, that we are not vested with authority to judicially review the Security Council’s actions with regard to this Resolution and consequently reject all other Defence arguments.

8 STL, Prosecutor v. Ayyash et al., Case No. STL-11-01/PT/AC/AR90-L, Interlocutory Appeal on Behalf of Mr. Ayyash Against the Trial Chamber’s “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal” Dated 30 July 2012, 24 August 2012 (“Ayyash Appeal”). All further references to filings and decisions relate to this case unless otherwise stated.
6 Appellate Brief of the Defence for Mr Badreddine against the “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal”, 24 August 2012 (“Badreddine Appeal”).
7 Appeal Brief of the Oneissi Defence Against the Trial Chamber Decision Relating to the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 24 August 2012 (“Oneissi Appeal”).
9 STL, Prosecutor v. Ayyash et al., Case No. STL-11-01/PT/TC, Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal, 27 July 2012 (“Impugned Decision”).
10 Ayyash Appeal, Badreddine Appeal, para. 114; Oneissi Appeal, para 58-60.
3. Counsel for all three Appellants assert that their appeals are properly before the Appeals Chamber. They request the Appeals Chamber to set aside the Impugned Decision for a number of reasons.

4. Counsel for Mr Ayyash argue that the Trial Chamber erred by finding that Security Council Resolution 1757 is the “sole legal basis” for establishing the STL and by refusing to consider arguments regarding violations of the Lebanese constitution. They add that the Trial Chamber erred in law by failing to review Security Council Resolution 1757. They conclude that the Trial Chamber also erred by rejecting the argument that the Tribunal was improperly created because its jurisdiction is impermissibly narrow and selective.

5. Counsel for Mr Badreddine argue that the Tribunal must review the legality of its establishment. Consequently, in their submission the Impugned Decision is contradictory as it accepts in principle a review of legality but then rejects any review of the actions of the Security Council. Counsel argue that the Security Council is not “sovereign” and that the Tribunal has the power to review the Council’s resolutions in an incidental matter. Counsel aver that in adopting Resolution 1757 the Security Council abused the powers conferred on it by the United Nations Charter. They argue that Resolution 1757 is thus vitiated and the Tribunal illegally constituted.

6. Counsel for Mr Oneissi contend that the Trial Chamber erred in refusing to examine the legality of the Tribunal’s existence as a preliminary motion challenging jurisdiction and in finding that it was established by law. In particular, they claim that the Trial Chamber should have examined Security Council Resolution 1757 for compliance with international law. They argue that

---

\[\text{Footnotes:} \]

352

---

3 Ayyash Appeal, paras 7-11; Badreddine Appeal, paras 3-33; Oneissi Appeal, paras 4-22, 56.
4 Ayyash Appeal, paras 12-19.
5 Id. at paras 20-23.
6 Id. at para 24-25.
7 Badreddine Appeal, paras 34-50.
8 Id. at paras 51-65; see also Badreddine Reply, para. 11.
9 Badreddine Appeal, paras 66-113.
10 Oneissi Appeal, paras 4-22.
11 Id. at paras 23-29.
12 Id. at para 30.
STANDARD OF REVIEW ON APPEAL

9. Under Article 26 of our Statute and Rule 176 of the Rules of Procedure and Evidence, an appeal may be lodged on the grounds of "an error on a question of law invalidating the decision" or "an error of fact that has occasioned a miscarriage of justice". Counsel for the Defence contend that the Trial Chamber committed several errors in its Impugned Decision. These errors are all errors of law.

10. Persuasive and succinct principles of appellate review have been developed by other international courts and tribunals in relation to such errors.26 In particular, we agree with the following standard adopted by the ICTY Appeals Chamber:

A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the decision. An allegation of an error of law that has no chance of changing the outcome of a decision may be rejected on that ground. However, even if the party’s arguments are insufficient to support the contention of an error, the Appeals Chamber may still conclude, for other reasons, that there is an error of law. [...] The Appeals Chamber reviews the Trial Chamber’s findings of law to determine whether or not they are correct.

We record that "not every error of law leads to a reversal or revision of a decision of a Trial Chamber." We will therefore review only errors of law that have the potential to invalidate the decision of the Trial Chamber.27

26 The Statutes of the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), respectively, contain the same grounds for appeal as the Statute of the Special Tribunal for Lebanon, see Art. 25 ICTY, Art. 24 ICTR. The Statutes of the International Criminal Court ("ICC") and the Special Court for Sierra Leone ("SCSL") have similar grounds of appeal.
27 ICTY, Prosecutor v. D. Milosevic, Case No. IT-93-29-A, Judgement, 16 August 2009 ("Milosevic Appeal Judgment"), para. 13-14 (with further references to the case-law of the ICTY Appeals Chamber); see also ICTR, Guite v. The Prosecutor, Case No. ICTR-00-61-A, Judgement, 9 October 2013; (with further references to the case-law of the ICTR Appeals Chamber); SCSL, Prosecutor v. Sesay et al., Case No SCSL-04-15-A, Judgement, 26 October 2009, para. 31; ICC, Prosecutor v. Banda et al., Case No. ICC-02/05-03/09-01-A, Judgement of the Appeals Chamber Against the Decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and Additional Instructions on Translation", 17 February 2012, para. 20.
29 We note, however, that, in exceptional circumstances, we may also address legal issues that would not lead to the invalidation of a Trial Chamber’s decision, but are nevertheless of general significance to the Tribunal’s jurisprudence, see Milosevic Appeal Judgment, para. 12.

Case No. STL-11-01/PT/ACAR90.1  Page 6 of 25  24 October 2012

DISCUSSION

I. Admissibility

11. All three Appellants base their appeals on Rule 90 of the Rules.28 They state that their challenges to the legality of the Tribunal’s existence were preliminary motions challenging jurisdiction and fall within the ambit of Rule 90(A)(i).29 Appeals against decisions on such motions lie as of right. Were the Appellants’ motions to qualify as preliminary motions under Rule 90(B)(i) then their appeals would be admissible. However, the Prosecutor contends that the appeals are inadmissible, because the Impugned Decision was not a decision on a preliminary motion challenging jurisdiction as defined by Rule 90.30

12. Rule 90(A) defines exhaustively31 a number of preliminary motions that must be brought in writing and no later than thirty days after the disclosure of the material supporting the indictment. Rule 90(A)(i) lists such motions and includes motions that “challenge jurisdiction” as one of them. Rule 90(E) defines a motion challenging jurisdiction in the following terms:

For the purpose of paragraphs (A) (i) and B (i), a motion challenging jurisdiction refers exclusively to a motion that challenges an indictment on the ground that it does not relate to the subject-matter, temporal or territorial jurisdiction of the Tribunal, including that it does not relate to the Harrij attack or an attack of a similar nature and gravity that is connected to it in accordance with the principles of criminal justice.

13. The Appellants challenge the legality of the Tribunal’s existence. However, they do not challenge the indictment on any of the grounds listed in Rule 90(E). The Trial Chamber consequently found that such challenges were “not challenges to jurisdiction—as exclusively and correctly defined in Rule 90 [...].” and therefore did not fall within the definition of a ‘Preliminary Motion’ under

28 Badeeddine Appeal, para. 11; Ayyah Appeal, para. 11; Onasis Appeal, para. 10; The Defence for Mr. Hussein Hassan Onasis Request for Extension of the Time and Word Limit to File an Appeal to the “Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal”, 1 August 2012, para 2-3.
29 Badeeddine Appeal, para 15-23; Ayyah Appeal, para. 9.
30 Prosecutor’s Consolidated Response, para. 5.
31 Preliminary motion, being motions which [...]” (Emphasis added). Contrary to the submissions by counsel for Badeeddine during the appeals hearing (Appeals Hearing Transcript, 1 October 2012 “Appeals Hearing”, p. 160, Rule 89(F), (G), and (H) do not support a broader definition of the term “preliminary motion.” All they stand for is that the Pre-Trial Judge may set specific time-limits for the filing of such motions, other than the 30-day limit provided in Rule 90(A). Indeed, this is what happened in this case; when the Pre-Trial Judge set 4 May 2012 as the deadline for the filing of preliminary motions on jurisdiction, explicitly basing his decision on Rule 89(F), see STL, Prosecutor v. Ayyah et al., Case No STL-11-01/PT/RJH, Status Conference Transcript, 12 April 2012 (“Status Conference”), p. 47.
32 Impugned Decision, para. 37.
Rule 90(A).  

14. It is true that in the Tadić case before the ICTY on which the Appellants rely, the Appeals Chamber decided that a challenge to jurisdiction could also encompass a much broader challenge to the legality of that court’s existence. However, the Appeals Chamber’s broad interpretation of the term “jurisdiction” was possible because the ICTY Rules of Procedure and Evidence at the time did not define it. After the term was narrowly defined in an amendment to the ICTY Rules in a manner similar to Rule 90(E), the ICTY Appeals Chamber rejected all challenges that fell outside the definition. Similarly, while in Kanyahani a Trial Chamber of the ICTR entertained a challenge to legality as an objection based on jurisdiction, in Nzirorera a three-member panel of the ICTR Appeals Chamber rejected such challenges after the Rules were later amended to define “jurisdiction” in narrow terms.

15. Counsel for Badreddine argues in essence that the case-law of the ICTY and ICTR after the tightening of their Rules should be disregarded, because the Rules were changed only after challenges to those tribunals’ legality had already been made. However, this argument does not prevail over the clear wording of our Rule 90(E). A motion challenging the legality of the Tribunal simply does not fall under Rule 50(A); and therefore the Appellants have no automatic right to appeal against the Impugned Decision under Rule 90(B).

16. In addition to Rule 90, the Defence also claims that the concept of the court’s jurisdiction is intrinsically linked to its legality. They argue that if a motion challenging the jurisdiction of the Tribunal on the narrow grounds provided under Rule 90(E) is admissible, this should a fortiori apply to the overarching question of the legality of the Tribunal’s existence. The Appellants refer to our decision in El Sayed where we stated that the Tribunal retains inherent jurisdiction to determine its own jurisdiction. But this decision must be viewed in its proper context. It addressed an exceptional situation, namely whether the Tribunal had the authority to address an individual’s request for documents in a criminal file in a case already before the Tribunal in which that individual was neither an accused nor a suspect before the Tribunal. As such, it did not address the Tribunal’s power to rule on its own legality but was limited to whether the Tribunal could “determine incidental legal issues which arise as a direct consequence of the procedures of which the Tribunal is seized by reason of the matter falling under its primary jurisdiction.” Indeed, when discussing the notion of inherent jurisdiction, we made it clear that such jurisdiction “can be exercised only to the extent that it renders possible the full exercise of the court’s primary jurisdiction (as is the case with compétence de la compétence).”

17. Similarly, we described the power of the Appeals Chamber to entertain appeals outside of the Rules as exceptional and limited to cases where “a situation has arisen that was not foreseen by the Rules.” But here the issue is not one that the drafters of the Rules could not anticipate. On the contrary, the language of Rule 90 was drafted in a specific and narrow way. As a consequence, no appeal can be entertained. The jurisprudence of both national courts and international courts shows that they also eschew such a course of action.
18. In sum, the appeals are not admissible under Rule 90 or through the notion of inherent jurisdiction. However, counsel for Mr. Badreddine and Mr. Oneissi requested and received certification to appeal the Impugned Decision from the Trial Chamber pursuant to Rule 126(C) of the Rules. For this Rule to be applicable, the motions filed before the Trial Chamber by counsel for Messrs. Badreddine and Oneissi must first be motions “other than preliminary motions”. We have held above that the motions challenging legality are not motions challenging jurisdiction under Rule 90(A)(2). They also do not fall under the other three categories of preliminary motions in Rule 90(A)(i-iv). They are therefore not preliminary motions. None of the other exceptions set out in Rule 126(A) apply. Consequently, they are “other motions” under this Rule.

19. Rule 126(B) permits a party to apply to the Trial Chamber by motion only “after a case is assigned to the Trial Chamber.” We have previously determined that a case is assigned to the Trial Chamber once the Pre-Trial Judge has transferred the case file to it under Rule 95. The case had not yet been assigned to the Trial Chamber at the time Defence counsel filed their motions challenging legality before it. It could then be argued that the Trial Chamber was not authorized to address the motions.

355

355

355

355

355
appeal. The appeals filed by counsel for Messrs Badreddine and Oneissi are thus properly before the Appeals Chamber.

23. Counsel for Mr Ayyash did not seek certification, as required for an interlocutory appeal of decisions under Rule 126. Consequently, his appeal is inadmissible. There is no unanimous result from this. For one, counsel for Mr Ayyash took a conscious choice not to seek certification from the Trial Chamber.63 While in their view the appeal was based on Rule 90, they should have also considered that this position might be rejected by the Appeals Chamber. Indeed, counsel for Mr Ayyash were put on notice that the Prosecutor objected to the filing of the Defence appeals under Rule 90 when the Defence sought an extension of time from the Appeals Chamber.64 In our decision on this request, we explicitly stated that it would be the Appeals Chamber's task to determine whether that legal basis is correct or not, when we receive the substantive arguments of counsel.65 Subsequent to our decision, counsel for Messrs Badreddine and Oneissi sought certification.66 Moreover, we note that Mr Ayyash suffers no prejudice in this case. The essence of his counsel's arguments was also raised by the other two Appellants. If their appeals were successful, the effects of that decision would also apply to him.66

II. Whether the Trial Chamber erred when it held that the Tribunal was established by Security Council Resolution 1757

24. The Trial Chamber held that "Security Council Resolution 1757 is the sole legal basis of establishing the Tribunal."67 It determined that it was "not necessary to examine any issues in the Defence motions alleging violations of Lebanese domestic law (including its Constitutions) going to the issue of the Tribunal's foundation."68 While counsel for Mr Badreddine "adhered" to the conclusion of the Trial Chamber according to which the Tribunal was established by way of the

63 See Appeals Hearing, para. 42.
64 See Prosecutor Consolidated Response to the Badreddine Defence and Oneissi Defence Requests for Extensions of Time and Pleadings, 13 August 2012, para. 5.
65 See Decision on Defence Requests for Extension of Time and Pleadings, 6 August 2012, para. 12.
66 See STL-11-01/PT/AC/AR89, Page 12 of 25 24 October 2012
67 See STL-11-01/PT/AC/AR89, Page 12 of 25 24 October 2012
68 See Impugned Decision, para. 46.
69 Inf at paras. 56.

Resolution",69 counsel for Mr Oneissi challenge the Trial Chamber's approach. They argue that "[a] Security Council resolution intended to bring into force a treaty cannot achieve the intended goal in that it lacks the requisite legal power."70 In their submission, Security Council Resolution 1757 could not effect this treaty unilaterally and in violation of Lebanese sovereignty.71 The Prosecutor responds that the Trial Chamber did not err.72

25. It is undisputed that the Government of Lebanon and the United Nations initially agreed to enter into negotiations for the purpose of establishing a Tribunal of an international character.73 A draft agreement was subsequently negotiated and signed by both parties but was not ratified by Lebanon. Yet, ratification in the pre-requisite for the entry into force of agreements binding upon Lebanon. In this situation, the Security Council passed Resolution 1757 on 30 May 2007. The Resolution stated:

The Security Council, [...]  
1. Decides, acting under Chapter VII of the Charter of the United Nations, that:
   a. The provisions of the annexed document [the draft agreement], including its attachment [the Statute of the Tribunal], 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. The Government of Lebanon shall, by 10 June 2007, provide the Secretary-General with a notification under Article 19(1) of the annexed document, or it shall notify the Secretary-General of its decision not to provide such a notification. [...]
26. Lebanon was thus given the opportunity to ratify the draft agreement. As an alternative, the Security Council would establish the Tribunal without the explicit consent of Lebanon. Given that Lebanon did not ratify the draft agreement, its provisions entered into force by virtue of the Security Council’s powers under Chapter VII of the United Nations Charter. The Trial Chamber was correct in pointing out this difference and determining that the provisions’ binding effect "derives from their

69 Badreddine Appeal, para. 66.
70 Oneissi Appeal, para. 46; see also paras. 45.
71 Oneissi Appeal, paras. 43-45.
72 Prosecutor’s Consolidated Response, paras 32-38.
73 See S/RES/1644 (2005) (acknowledging the request of the Lebanese Government for the establishment of a tribunal of an international character and requesting the Secretary-General to help the Lebanese Government identify the nature and scope of the international assistance needed in this regard); see also S/RES/1664 (2006) (requesting the Secretary-General to "negotiate an agreement with the Lebanese Government aimed at establishing a tribunal of international character [...]”); see also Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, S/2006/893 (2006), paras 2-5.
27. Counsel maintain that the Tribunal was established by an “agreement” that was adopted with the coercive power of the Security Council. In other words, they suggest that the Security Council unilaterally “enacted” the draft agreement. This assertion lacks any factual or legal basis. Resolution 1757 is carefully worded. It does not make reference to the entering into force of the “agreement” but rather refers only to the provisions of the “annexed document” and its “attachment.” There is no indication that the Security Council considered replacing Lebanon’s consent to the draft agreement by implementing it unilaterally as an agreement,¹⁸ rather than exercising its powers under Chapter VII.

28. Such an approach—where the Security Council decided to effect the provisions of an agreement as opposed to the agreement itself—is unprecedented. In its Resolution 687 (1991) regarding the conflict between Iraq and Kuwait, the Security Council brought into force the provisions of a non-binding minute, agreed to by the parties, but not ratified by Iraq according to the procedure is place at the time, relating to the borders between them. The Security Council did not transform the non-binding minute into a binding contractual instrument, but simply imposed binding legal consequences extracted from its substance under its Chapter VII powers.⁷⁷ This has also been the case in several other instances,⁷⁸ and in particular with respect to terrorism.⁷⁹

⁷⁴ Impugned Decision, para. 48; see also paras. 49.
⁷⁵ Gencal Appeal, paras 43-44.
⁷⁶ We need not decide whether the Security Council in fact possesses such powers. However, we note that under the relevant international legal instruments, including the Vienna Convention on the Law of Treaties (23 May 1969, 1155 U.N.T.S. 331), the proper conclusion of an agreement requires the consent of both parties (see specifically Arts 2, 15).
⁷⁸ Noting that Iraq and Kuwait, as independent sovereign States, signed at Baghdad on 4 October 1963 “Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters”, thereby recognizing formally the boundary between Iraq and Kuwait and the allocation of islands, which were registered with the United Nations in accordance with Article 102 of the Charter of the United Nations and in which Iraq recognized the independence and complete sovereignty of the State of Kuwait within its borders as specified and accepted in the letter of the Prime Minister of Iraq dated 21 July 1932, and as accepted by the Ruler of Kuwait in his letter dated 10 August 1932, …
²⁷ 2. Demands that Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the “Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters”, signed by them in the exercise of their sovereignty at Baghdad on 4 October 1963 and registered with the United Nations and published by the United Nations in document 7083, United Nations, Treaty Series, 1964;
III. Whether the Trial Chamber erred when it held that it could not review Security Council Resolution 1575

32. The Trial Chamber held that the Tribunal "is not vested with any power to review the actions taken by the Security Council." It consequently declined to judicially review the "actions of the Security Council in passing Resolution 1575." Counsel for the Appellants argue that the Trial Chamber committed an error in not reviewing the Resolution. They claim that the Security Council's resort to Chapter VII measures constituted an abuse of power; that it was unjustified because there was no threat to international peace and security; that the Tribunal's establishment was an inappropriate measure; that consequently, the Tribunal was established illegally; and that the proceedings against the Appellants should be dismissed. The Prosecutor responds that the Trial Chamber did not commit any error in this respect.

33. The Security Council is a principal organ of the United Nations. All member States of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security." When carrying out this important function, the Security Council shall act in accordance with the Purposes and Principles of the United Nations. Member States are duty bound to carry out its decisions. Chapters VI, VII, VIII and XII set out the specific powers of the Security Council. Relevant to counsel for the Appellants' submissions are Articles 39 and 41 of the Charter:

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

---

35. Impugned Decision, para. 55.
36. Id. at para. 55.
37. Badzine, Appeal, paras 7-8, 43-76, 114; Demeis, Appeal, paras 14-30.
38. Badzine, Appeal, paras 77-114; Demeis, Appeal, paras 52-59.
39. Prosecutor's Consolidated Response, paras 39-84; see also LRV Observations, para. 4.
40. Art. 3(1) UN Charter.
41. Art. 24(1) UN Charter.
42. Art. 24(1) UN Charter.
43. Art. 25 UN Charter.

---

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

34. Security Council Resolution 1575, establishing the Tribunal, was taken pursuant to these provisions. In particular, the Resolution reaffirmed the Security Council's finding—made in previous resolutions—that "this terrorist act (the 14 February 2005 bombings killing former Lebanese Prime Minister Hariri and others) and its implications constitute a threat to international peace and security." The Resolution explicitly states in its first operative paragraph that the Security Council acted "under Chapter VII of the United Nations Charter." The Resolution was passed with the votes of ten members of the Security Council. Five members abstained. No member voted against the Resolution.

35. Counsel for the Appellants do not question that the Resolution met all the formal requirements under the United Nations Charter. Rather, they argued that the Trial Chamber, "such review would entail reviewing and determining whether the Security Council, as the Defence motions ask, validly assessed a threat to international peace and security under Chapter VII of the United Nations Charter, and then, whether it acted within its powers in creating the Tribunal." We agree with the Trial Chamber, Judge Barugwanz, dissenting, that the Tribunal does not have the authority to make such an assessment. For reasons that follow, the Security Council's determination as to the existence of a threat to international peace and security is not subject to judicial review. The same applies to the Security Council's decision regarding the measures it employs once it has found that such threat exists.
A. The lack of authority to review

36. The Trial Chamber correctly stated that “[t]he Statute of the Tribunal—enacted by the Security Council—provides no explicit source of power authorising the Tribunal to judicially review the actions of the Security Council and make either a binding order or a declaration carrying legal weight in respect of its actions.” 109 Similarly, the United Nations Charter is silent on the possibility of any review of the Security Council’s determinations.

37. Under Chapter VII of the Charter, the Security Council has broad discretion to characterize a particular situation as a threat to international peace and security. 110 Yet, according to Article 24(2) of the United Nations Charter, in exercising its powers the Security Council may act only “in accordance with the Purposes and Principles of the United Nations”. Indeed, in its advisory opinion on the Condition of Admission of a State to Membership in the United Nations, the International Court of Justice (“ICJ”) has held that:

[the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.]

[109 Id. at para. 55.]

38. The composition of the Security Council under the United Nations Charter (five permanent members and ten non-permanent members, elected on the basis of geographical representation, five of which are replaced each year) and its voting regime (requiring at least nine votes for a decision as well as the absence of a veto by any of the permanent members) ensure an inherent system of internal checks on the Security Council’s exercise of its powers. 112

39. Beyond that notion of self-restraint, however, there is nothing in the Charter that gives any of the other organs of the United Nations the power to review the Security Council’s actions. Attempts to introduce such powers of review for the ICJ—the principal judicial organ of the United Nations—

109 Id. at para. 55.
112 See Krist, Article 39, margin number 6 with further references (noting that “SC members regularly debate the limits of the scope of action under Art. 39, thus indicating their convicrs that the concepts carry some meaning and are not completely indeterminate”).

at the time the United Nations Charter was drafted were defeated. 113 Indeed, the ICJ has categorically stated that it “does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned.” 114 While the ICJ may pronounce itself incidentally on the legality of Security Council decisions in the course of proceedings before it, 115 the extent of the Court’s power to do so and its practical effects are unclear. 116 In any event, this Tribunal’s authority as an independent institution created by the Security Council outside of the United Nations system 117 must necessarily be much more limited than that of the ICJ.

40. The Defence has referred to case-law from other international and regional courts that in their view support a power of this Tribunal to review the actions of the Security Council in general, and Resolution 1757 in particular. However, with one exception, none of the cited courts did in fact hold that they had the authority to judicially review Security Council resolutions.

41. In Jedić, the only exception, a majority of Judges of the Appeals Chamber of the ICTY decided that it had the authority “to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council” 118 and that it was not barred from doing so “by the so-

115 Ibid.
116 See ICJ, Questions of Interpretation and Application of the 1973 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 3 (1992) (“Iskender Order”), Dissenting Opinion of Judge Wamanck, p. 66: “However, once we enter the sphere of Chapter VII, the matter takes on a different complexion, for the determination under Article 39 of the existence of any threat to the peace, breach of the peace or act of aggression, is one entirely within the discretion of the Council. It would appear that the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. That decision is taken by the Security Council in its own judgment, and in the exercise of the full discretion given to it by Article 39. Once taken, the door is opened to the various decisions the Council may make under that Chapter. Thus, any matter which is the subject of a valid Security Council decision under Chapter VII does not appear, prima facie, to be one with which the Court can properly deal.” See also ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 325 (1993), Separate Opinion of Judge Lauterpacht, para. 99.
117 The Tribunal is not part of the United Nations, as demonstrated by its operating mechanisms. For instance, although following the United Nations common system in several ways of its work, the Tribunal is not funded through the United Nations budget approved by its General Assembly. While created by a Security Council Resolution, the Tribunal is not an organ of the United Nations. The Convention on Privileges and Immunities of the United Nations (15 February 1946, 1 U.N.T.S. 15) does not apply per se to the Tribunal. Thus, the Tribunal does not enjoy a status similar to that of the ICTY and ICTR. It is a separate subject of international law.
118 We need not address case-law advanced by the Defence that does not relate to judicial review of Security Council resolutions. (See Bededine Appeal, paras 35-36, 39; Osiebch Appeal, para. 25).
119 Jedić Appeal Decision, para. 22.
called ‘political’ or ‘non-justiciable’ nature of the issues it raises”. We note that even though we may generally rely on the persuasive jurisprudence of other international courts and tribunals, we are not bound by it. In this particular case, we are not persuaded by the reasoning of the ICTY Appeals Chamber. We note that the decision was taken by majority and that it overturned a contrary decision of the Trial Chamber, indicating the starkly different legal views on the issue even then. In particular, as pointed out by the Prosecutor, the majority’s reliance on two cases from the ICJ does not withstand closer scrutiny.

42. For one, as the ICTY Appeals Chamber itself stated, these cases addressed questions of incidental jurisdiction. But the question of whether the Tribunal may review—and potentially find invalid—a Security Council resolution is not merely a question of incidental jurisdiction. Indeed, if the ultimate consequence of such a finding would be to discontinue all proceedings at the Tribunal then this would directly render nugatory the will of the Security Council as expressed in Security Council Resolution 1757. As such, it would not be incidental at all—it would have the effect of a binding legal order.

43. Second, both pronouncements of the ICJ relied on by the Tadić Appeals Chamber were advisory opinions requested by the Security Council and the General Assembly respectively. As such, while certainly carrying great legal authority, they did not have a binding effect on either United Nations organ. On the contrary, the ICTY was not requested by the Security Council to examine either the legality or the effects of the resolution establishing it. Had the ICTY Appeals Chamber found that that resolution was indeed invalid, this would have resulted in the discontinuation of all proceedings before the ICTY. As such, this decision would have gone beyond the mere provision of advice and guidance.

110 Id. in para. 23.
111 Tadić Appeal Decision, Dissenting Opinion of Judge Li, para 2-4.
112 ICTY, Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 5 (holding that the ICTY was “not a constitutional court set up to scrutinise the actions of organs of the United Nations” and did not have the authority to “investigate the legality of its creation by the Security Council”).
113 Prosecutor’s Consolidated Response, paras 48, 50-55.
114 Tadić Appeal Decision, paras 20-21.
115 Legal Consequences Opinion, para. 1.
117 See ICJ, Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 177 (1989), para. 31 (holding that “[t]he jurisdiction of the Court [...] to give advisory opinions on legal questions, enables United Nations entities to seek guidance from the Court in order to conduct their activities in accordance with law. These opinions are advisory, not binding”). See also ICJ, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, I.C.J. Reports 63 (1950), p. 71.

Case No. STL-11-04/PT/AC/AR90.1 Page 20 of 25 24 October 2012

44. In conclusion, we do not find the reasoning of the ICTY Appeals Chamber in the Tadić case persuasive in this regard and decline to follow it. We also note that in a later decision, the ICTY Appeals Chamber appears to have applied a more cautious approach.

45. None of the other decisions cited by the Defence stand for the proposition that courts have the power to review the Security Council’s actions.

46. Contrary to the submissions by counsel for Mr Badreddine, the ICTR Trial Chamber in Kanyaruchinya did not state that it had the power to review the Security Council resolution establishing that Tribunal. Rather, it held that “the question of whether or not the Security Council was justified in taking actions under Chapter VII when it did, is a matter to be determined by the Security Council itself.” It explicitly held that the question of whether a threat to international peace and security existed “was a matter to be decided exclusively by the Security Council.” Moreover, in a subsequent decision, another Trial Chamber of the ICTR held in Kavenza that [...]

118 ICTY, Prosecutor v. Krstić, Case No. IT-00-39-AR73.2, Decision on Krstić’s Appeal Against the Trial Chamber’s Decision Dismissing the Defence Motion on a Ruling that Judge Canwell is Unable to Continue Sitting in the Case, 15 September 2006, paras 14-16 (stating that “[t]he Appellant appears not to be disputing the procedural validity of the UN Security Council Resolution 1682/2005 (extending the mandate of a particular Judge), but argues that it is not binding upon the Tribunal since the Statute has not been amended. The Appeals Chamber recalls that the UN Security Council, acting under Chapter VII of the UN Charter as a legislator, has adopted the Statute and established the Tribunal as an instrument for the exercise of its own principal function of maintenance of peace and security [...]. Without assuming competence to adjudicate on the validity of a resolution passed by the UN Security Council, the Appeals Chamber considers that the UN Security Council Resolution 1682/2005 was directed to administrative matters and did not interfere with the Tribunal’s judicial function” [emphasis added]).
119 Badreddine Appeal, paras 35, 46.
120 Kanyaruchinya Decision, paras 26.
121 Id. at para. 22.

Case No. STL-11-04/PT/AC/AR90.1 Page 21 of 25 24 October 2012
effect to the international agreement at issue, and not to the latter as such.” The court held the following:

With more particular regard to a Community act which, like the contested regulation, is intended to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, it is not, therefore, for the Community judicature, under the exclusive jurisdiction provided for by Article 220 EC, to review the lawfulness of such a resolution adopted by an international body, even if that review were to be limited to examination of the compatibility of that resolution with its objects.”

48. The European Court of Human Rights in the *Nada* case explicitly followed the reasoning of *Kadi* when it limited its review to measures implementing a Security Council resolution. With regard to certain allegations of violations of the European Convention on Human Rights by Switzerland, it held that “there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions.” In a concurring opinion, one Judge of the court pointed out that the Security Council was required to act within the confines of the United Nations Charter. Yet, he recognized that “Security Council resolutions as such fall outside the Court’s direct supervision, the United Nations not being a party to the Convention” and that it was only acts taken by States pursuant to those resolutions that could be reviewed.

49. Our own decision in *El Sayed* does not support an authority of this Tribunal to review Security Council resolutions. As stated above, this decision must be viewed in its narrow factual context. It did not touch on any authority of the Tribunal to assess the legality of its own creation by reviewing the Security Council resolution establishing it.

50. Finally, we are of the view that this Tribunal is not comparable to national administrative or constitutional courts that are vested with power to review decisions of other organs of the State. 

Unlike those courts, the Tribunal is not endowed with any legal guidelines with which to undertake such an exercise. Moreover, as a body not integrated in the United Nations system, the Tribunal cannot pretend to possess the power to supervise any of the organs of the United Nations in the discharge of their mandate under the Charter. We do not therefore consider the decisions of national courts in this respect to be relevant or helpful.

**B. The existence of a threat to international peace and security**

51. Our finding that we lack the authority to review Security Council Resolution 1757 is also supported by the difficulty in establishing any meaningful standard of such review. What the Defence effectively asks the Tribunal is to evaluate the Security Council’s assessment that the attack of 14 February 2005 and its implications were a threat to international peace and security. However, the United Nations Charter does not specify any legal criteria that the Security Council had to take into account when making this determination. Nor does the Charter define or spell out the prerequisites of what precisely constitutes “peace”, “security” or the “threat to peace”. This appears to be a deliberate choice in order to ensure that the Security Council enjoys a great measure of freedom and flexibility when carrying out its responsibility to maintain international peace and security. As such, any findings by the Security Council are necessarily subjective in nature and influenced by a plethora of complex legal, political, and other considerations. Furthermore, the Security Council is not required to provide the specific reasons behind such calculations. Any outside attempt to evaluate whether the Security Council made a “correct” decision would therefore amount to mere speculation. It would be impossible to verify the facts on which the Security Council based its decision, how it weighed those facts, and whether it did so properly.

legality under the Constitution, in the United Nations system the International Court of Justice is not vested with the review or appellate jurisdiction often given to the highest courts within a domestic framework. [...] An important difference must also be noted between the division of powers in municipal systems and the distribution of powers between the principal organs of the United Nations, for there is not among the United Nations organizations the same strict principle of separation of powers as existing in municipal systems. [...] Nor is there a hierarchical arrangement of the organs of the United Nations [...] and each principal organ is par inert paries.”

See fn. 107 above.

Joe Kruch, Article 39, margin number 2 (stating that “(the SC was to enjoy great freedom in no decision on the existence of a threat to the peace, a breach of the peace, or an act of aggression”), see fn. 4 above margin number 4.

See also Kupchick Decision, para. 20 (holding that “the Security Council has a wide margin of discretion in deciding whether there exists a threat to international peace and security. By their very nature, such discretionary assessments are not justiciable since they involve the consideration of a number of social, political and constitutional factors which cannot be weighed and balanced objectively by this Trial Chamber”).
C. The nature of the measures taken by the Security Council

52. Likewise, once the Security Council has established the existence of a threat to international peace and security under Article 59 of the United Nations Charter, it retains the sole and exclusive prerogative to determine which measures under Articles 41 and 42 of the Charter are required to maintain or to restore international peace and security. While the establishment of criminal tribunals is not included in the list of measures open to the Security Council under Article 41, this list is by no means exhaustive (“may include”).136 Indeed, the Security Council has resorted to such a measure on two previous occasions.137 This is not an issue of “customary development” of the Charter as counsel for Mr Badreddine asserts.138 Rather, it is a matter of applying the Charter’s provisions, which provide the Security Council with broad discretion as to which measures appropriately “give effect to its decisions.”139 What is important is that this decision is essentially political in nature, and as such not amenable to judicial review.

D. Conclusion

53. We conclude, Judge Baragwanath dissenting, that the Trial Chamber was correct in holding that the Tribunal does not possess the authority to judicially review the Security Council’s actions when creating the Tribunal, in particular Security Council Resolution 1577. We thus reject all Defence arguments in this regard, including related arguments going to the contents of that Resolution.

54. In this context, we note that despite its finding that it could not review Security Council Resolution 1577, the Trial Chamber nonetheless proceeded to address Defence arguments challenging the legality of the Tribunal’s establishment. This was an error. However, neither the Appellants nor the Prosecutor appealed this particular point. Moreover, the Trial Chamber’s error does not invalidate the Impugned Decision because the Trial Chamber dismissed the Appellants’ motions in their entirety. Therefore, there is no reason for the Appeals Chamber to intervene.

---

136 See above para. 33, see also Neo Krasz, “Article 41”, in Charter of the United Nations, margin number 12.
138 Badreddine Appeal, paras. 65.
139 Art. 41 UN Charter.
SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE
BARAGWANATH

1. Introduction

1. I agree that the Defence challenges to the legality of the Special Tribunal for Lebanon must fail. Because my reasons differ, I write separately. Our difference is the latest stage of the long-standing debate whether a Security Council decision is subject to judicial review.¹

2. The Security Council is, rightly and necessarily, the holder of great power. But that power is limited in law by the Charter of the United Nations which conferred it. The Judges of this Tribunal have been appointed ultimately under the same Charter and are directed both to apply the highest standards of international criminal justice² and to be independent in the performance of their functions.³ A court which exercises criminal jurisdiction must consider and determine all arguable defences. Here the argument that the decision of the United Nations Security Council to establish it by Resolution 1757 of 30 May 2007 fell outside the limits of its legal authority. Such defence is, in my opinion, a legal issue which we must decide.

3. Messrs Ayyash, Badreddine, Oneissi and Sabra are charged with crimes over which the Prosecutor claims the Tribunal has jurisdiction under Article 1 of the Statute appended to the Resolution. The primary issues on appeal are whether this Tribunal has power to review the decision of the Security Council to establish it by Resolution 1757; and if so what are the consequences. Three accused have appealed the Trial Chamber's decision. Mr Sabra did not seek to appeal. A further issue is whether procedurally Mr Ayyash has brought a valid appeal; I am satisfied that he has.

4. In support of their arguments, counsel for Messrs Ayyash, Badreddine and Oneissi advance two reasons. The first is that, within the context of the attack of 14 February 2005, the practice of the Security Council did not justify a decision that the conditions for triggering Articles 39 and 41 were satisfied.⁴ The second is that the Resolution entailed abuse of power by the Security Council, which being unable to reach an agreement conforming with the Constitution of Lebanon, imposed the Resolution for reasons unrelated to the proper purposes of Chapter VII to get over that obstacle.⁵ It follows, they argue, that the Special Tribunal for Lebanon was not lawfully established and so has no authority over them. Therefore their appeals from the decision of the Trial Chamber, dismissing motions challenging the jurisdiction of the Tribunal, should be allowed and the Tribunal's activities, including all proceedings against the accused, should be brought to an end.

5. The Prosecutor contends that the Tribunal has no authority to review such decisions of the Security Council and that, in any event, the context justified the Council's decision. So the appeals should fail.

6. The Legal Representatives for Victims contend that the Tribunal has and should exercise authority to review Resolution 1757 and support the Prosecutor's argument that the context justified the Council's decision.

7. I conclude that the Tribunal does have, and this Chamber should exercise, authority to consider the legality of UN Security Council Resolution 1757, but that the Appellants have not made out their challenges.

II. Right to Appeal

8. Counsel for theAppellants argued that their appeals are based on Rule 90(3) of the Rules and may be brought as of right. Out of caution, counsel for Messrs Oneissi and Badreddine also secured certificates from the Trial Chamber pursuant to Rule 126(C) authorizing appeal. The Prosecutor, who consented to the issue of certification, accepts that we are seized of the appeals by Messrs Oneissi and Badreddine.

9. However the Prosecutor argues that Rule 90(3) on which Mr Ayyash relied has no application because of the very precise and narrow wording of subparagraph (E) and so Mr Ayyash has no right of appeal. Since Mr Ayyash and also Mr Sabra may take advantage of any decision on the appeals by Messrs Oneissi and Badreddine that the Tribunal was never validly established, it might be thought unnecessary to deal with the Prosecutor's present argument. But the importance of the case is such that Mr Ayyash is entitled to know where he stands.

¹ Compare the various approaches in ICTY, Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("Tadić Jurisdiction Decision").
² Art 28(2) STLSt.
³ Article 91(1) STLSt.
⁴ Appeals Hearing, p. 164.
⁵ See Rule 90(3) to the Rules of Procedure.
10. I conclude that he may appeal as of right, essentially on an application of the following principles:

(1) no-one may be tried except by a tribunal established by law;
(2) the Appellants claim the Tribunal was not validly established;
(3) the substantive right under (1) must import a procedural right to have their claim under (2) determined.

11. Rule 90 reads:

(A) Preliminary motions, being motions which:

1. challenge jurisdiction;
2. allege defects in the form of the indictment;
3. seek the severance of counts joined in one indictment under Rule 70 or seek separate trials under Rule 141; or
4. raise objections based on the refusal of a request for assignment of counsel made under Rule 59(A)

shall be in writing and shall be brought not later than thirty days after disclosure by the Prosecutor to the Defence of all materials and statements referred to in Rule 110(A)(i). Such motions shall be disposed of by the Trial Chamber or, in the case under (iv), by the Pre-Trial Judge.

(B) Decisions on preliminary motions are without interlocutory appeal save:

1. in the case of motions challenging jurisdiction;
2. in other cases where certification has been granted upon the basis that 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 an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. There is awkwardness in applying Rule 90. The defence motions do not fall within the literal language of paragraph (E).

13. There is also a textual difficulty with the second rule permitting appeal prior to conclusion of the case. Rule 126 provides:

(A) This Rule applies to all motions other than preliminary motions, motions relating to release, and others for which an appeal lies as of right according to these Rules.

(B) After a case is assigned to the Trial Chamber, either Party may apply for appropriate ruling or relief. Such a motion shall be oral unless decided by the Trial Chamber.

(C) Decisions on all motions under this rule are without interlocutory appeal save with 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 an immediate resolution by the Appeals Chamber may materially advance the proceedings.

This case has not yet been assigned to the Trial Chamber in the sense of Rule 95(B) which states: “[a]s soon as the Trial Chamber has received the file pursuant to paragraph (A), it shall be seized of the case.” So, on a narrow literal reading, it can be argued there is no right of appeal under Rule 126 either. I am attracted to the argument that any lawful decision of the Trial Chamber should be appealable with a certificate, which would justify Messrs Badreddine and Oueissi’s appeal here under Rule 126. I do not however agree with my brethren that what they hold to be an invalid motion under Rule 90 can act as a springboard for the application of Rule 126: an invalid motion should simply be dismissed.

14. But as was held in our decision of 16 February 2011,6 interpretation is not confined to the literal language of any text; indeed in the present case it must also consider the very validity of the Statute and Rules in question. If the appellants are correct in their submission that the Security Council lacked authority to pass Resolution 1757, both it and the Statute to which it refers lack validity. Fundamental illegality would be destructive of, in this case, everything from and including

---

6 At which stage appeal is permitted by Article 26 of the Statute, echoed by Rule 176.
7 That would entail reading “[a]fter a case is assigned to the Trial Chamber” as including “whenever the Trial Chamber has jurisdiction to deal with an issue.”
9 Interlocutory Decision on the Applicable Law, paras 19-32.
the Resolution and its accompanying Statute, down to the Rules which rely upon it: all of these, including Rules 90 and 126, would be invalid.

A. Inherent power

15. The Rules were purportedly made under Article 28 of the Statute. This Article contains a statement of Security Council policy that there must be both “fair and expeditious trial” and compliance with “the highest standards of international criminal procedure”. If the Resolution is ultra vires the United Nations Charter, it would be wholly unfair to keep the accused subject to constraints of a nonexistent STL jurisdiction; and to wait until the end of the trial to pronounce on this matter. It would not be expeditious; nor would it be the highest standards of international criminal procedure be complied with.

16. The courts will infer power to avoid fundamental injustice. So in R v Bow St Magistrate ex p Pinochet (No 2), following a House of Lords decision which had been tainted by the appearance of judicial bias, Lord Browne-Wilkinson stated:

In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unchallenged.10

17. That technique was applied in the El Saeed case.11 There, to avoid fundamental injustice, an appeal right was granted where none at all had been provided by the Rules. For reasons comparable to those given in that case, this Chamber must construe the appeal rights actually conferred as including the entitle to the accused to challenge the Trial Chamber decision on the ground asserted by appeal to this Chamber, to which at least de facto authority must be attributed until there is a decision to the contrary.12 It would be sensible for this Chamber to regulate such appeal by analogy with the Rules whose status is in issue. But the analogy should not be so close as to deprive the appellants of their ability to appeal.

10 R v Bow St Magistrate ex p Pinochet (No 2) [2000] 1 AC 119 (HL).
11 STL, In the Matter of El Saeed, Case No. CH/AC/2011/01, Decision on Appeal of Pre-Trial Judge’s Order regarding Jurisdiction and Standing, 10 November 2010; STL, In the Matter of El Saeed, Case No. CH/AC/2011/01, Decision on Partial Appeal by Mr. El Saeed of Pre-Trial Judge’s Decision of 12 May 2011, 19 July 2011.
23. The Rules draw extensively on the rules of other Tribunals, and Rule 90(E) is expressed in very narrow terms in order to avoid appeals as of right save in the case of fundamental absence of jurisdiction.\(^{13}\) What the authors of the Rules cannot have had in mind was the circumstance that they were bequeathing the air: lacking authority to make any rules at all, because the Statute on which they relied was invalid.

24. Since the Statute requires that rules be made “with a view to ensuring a fair and expeditious trial,” Rules 90 and 126 cannot be interpreted as having the opposite effect. On the contrary, Rule 3 requires:

(A) The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

(B) Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstance then under consideration.

25. Subparagraph (A), invoking the “spirit of the Statute”, which requires fairness and expedition, makes a literal interpretation of Rule 90 impossible: its acceptance would entail impermissible unfairness and delay. It follows that there is evident ambiguity. Since the words cannot mean what they apparently say, what do they mean? That engages Rule 3(B) and the principle that the accused is entitled to whatever available interpretation is most favourable to him. An obvious method of interpretation is to infer the right to avoid injustice already mentioned, which is employed by courts where no other means of recourse exist.

26. It follows that Rule 90(E) must be construed so as to include the further ground of appeal of right: that it raises the even more fundamental ground of challenge, that the Tribunal was never validly established.

27. I do not, with respect, agree with the approach that Rule 126, even if available, provides a sufficient answer. That Rule, like Rule 90(B)(ii), requires a certificate rather than permitting appeal as of right. The ground that the Resolution creating the Tribunal is wholly invalid is so fundamental that appeal must be as of right, not by leave.

28. In summary, the reasons for appeal as of right given in Rule 90(E) are of even stronger force in the present case. Since, if the appellants are correct, Rules 90 and 126 are based on an invalid Statute under an invalid Resolution, the verbal limitations of Rule 90(E) cannot be permitted to deprive the appellants of their absolute right to justice: to have the final Chamber of the Tribunal hear their argument to that effect.

29. I therefore take into account, in what follows, the submissions made in writing and orally by counsel appointed to represent Mr. Ayyash.

III. Whether the Tribunal was established by agreement or by UN Security Council Resolution

30. I concur with the reasoning in Section II of the Majority Decision.

IV. The Authority of the Security Council

31. Since the Tribunal could be established by a valid Security Council resolution, the next question is—as Appellants’ counsel contend—should the Tribunal proceed to consider whether Resolution 1757 validly created the Tribunal? To answer that important question requires that the Resolution be examined within its context.

32. The Security Council is the executive mind and arm of the United Nations, given immense authority to respond urgently on behalf of the world community through measures which may include military force. It has a major, but by no means exclusive, political role which is, however, to be performed in accordance with the law;\(^{14}\) it possesses elements of executive and legislative authority;\(^{15}\) its decisions must often be made on the basis of confidential information; it even has unique capacity, in the interests of international peace and justice, to override the autonomous authority of states within their domestic jurisdiction, which forms the basis of the principle of

---

\(^{13}\) For the distinction between major and minor classes of “jurisdiction”, see UK House of Lords, Animus Ltd v. Foreign Compensation Commission (1969) 2 AC 147 (HL).

\(^{14}\) See Sir Michael Wood, The UN Security Council and International Law, Hersch Lauterpacht Memorial Lecture, 7 November 2006, p. 7, para. 21: “The Security Council is often referred to as a political organ. That expression is presumably used to distinguish it from “legal” organs, or perhaps technical and administrative organs. But the term “political organ” may carry the unfortunate implication that the Council need pay little attention to the law.”

\(^{15}\) Id. para. 23.
The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security. [...]  

Article 41  
The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. [...]

Article 42  
Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

36. Even so, the power of the Security Council is not without limits. That is made plain by Article 24(2):

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

37. It must follow, as the Study Group of the International Law Commission has accepted, that the Security Council lacks plenary authority, which means that its resolutions may be ultra vires the Charter.

38. It is indisputable that the broad terms in which the Purposes are stated further evidence the intention of the authors of the Charter to give the Security Council, with its major responsibility to perform them, very wide scope indeed. The Principles stated specifically in Article 2 are also expressed broadly.

---

32 Art. 2(1) and (7) UN Charter.  
33 Art. 103 UN Charter.  
34 Art. 24(1) UN Charter.  
35 Art. 23 UN Charter.  
36 Emphasis added  
37 This report is cited by the Grand Chamber of the European Court of Human Rights in Case of A-Jedda v The United Kingdom (2011), 53 ECHR 23, para. 57.  
38 Article 1 of the Charter provides: The Purposes of the United Nations are:  
1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;  
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;  
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and  
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.  
39 Article 2 provides: The Organization and its Members, in pursuance of the Purposes stated in Article 1, shall act in accordance with the following Principles:  
1. The Organization is based on the principles of the sovereign equality of all its Members.  
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.  
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.  
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.  
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
38. Of particular note is that the sovereign equality of all United Nations member states (Principle 1), and their exclusive authority over matters essentially within their domestic jurisdiction (first clause of Principle 7), does not prejudice the application of enforcement measures under Chapter VII (second clause of Principle 7). It follows that, unless the conditions for activating Chapter VII are met and satisfied, the Security Council may not intrude into the affairs of a member State.

39. But the claim of the Appellants is, in essence, that when creating the Special Tribunal for Lebanon the Security Council has performed such an intrusion without lawful justification. Has this Tribunal authority to consider that contention?

V. The competing principles

A. Recognition of the status of the Security Council

40. The uniquely high status of the Security Council, given by each United Nations Member state when ratifying the UN Charter in partial derogation of its own sovereignty, and the fact that the Security Council has primary responsibility for the maintenance of international peace and security, coupled in particular with its expansive powers under Chapter VII, has led many responsible observers to the conclusion that its conduct is beyond the scope of any judicial review. To a large degree the need for judicial abstention is overwhelming. The question is whether the rule of law requires any, and if so what, scope for some limited review.

41. Courts have long recognised that their role cannot extend to a second-guessing of the decisions of political decision-makers. Politicians at the national level have the legitimacy of the ballot box which is coupled with vulnerability to loss of office at the next election. They have access to the best advice and the opportunity for consultation and debate. They derive from a wide range of backgrounds and disciplines.

6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.
B. Recognition of the rule of law

44. But in this case the high public interest in not interfering with the difficult and important work of the Security Council is opposed by nothing less than the rule of law itself. The appellants assert, as is indisputable: (i) all accused are entitled to a hearing which is not only fair and impartial and by a competent, independent and impartial tribunal, but by one which is duly established by law;28 (ii) the accused, who are presumed to be innocent unless and until proved guilty according to law, are entitled to advance whatever defences may be legally open to them. They further assert that such defences include their claim that the Tribunal lacks authority to try them.

VI. The authority to consider Security Council resolutions

45. How is one to resolve the clash between two vital principles: that the Security Council should be permitted to carry out its work without interference; and that the accused should be able to advance their defence to the tribunal before which they are charged? Normally clashes between competing public interests are to be dealt with taking into account the principles of legality and proportionality.29 Here – however – the right to fair trial, including the rights both to a court established by law and to advance the accused’s defence, is absolute and may not be trampled. Yet, a similar claim is made for immunity of Security Council resolutions from judicial consideration.

So, two issues arise. The present one is whether the court has authority to review or otherwise assess the Security Council’s decision in this case. The next is how such assessment is performed.

A. Power to consider?

46. In the present case, the Trial Chamber declined to assess Resolution 1757, on the ground that it was not vested with any power to review the actions taken by the Security Council; that the Tribunal is purely a creature of a Security Council Resolution; and that the Statute of the Tribunal provides no explicit source of power authorizing such review.30

28 Art. 14(1) of the International Covenant on Civil and Political Rights.
29 See UK, Court of Appeal, Douglas v Halifax Ltd [2001] 1 QB 967, 1005 where the human rights principles of privacy and freedom of expression were in dispute. Sedley LJ held that “Neither element is a trump card. They will be articulated by the principles of legality and proportionality which, as always, constitute the mechanism by which the court reaches its conclusion on countervailing or qualified rights. It will be remembered that in the jurisprudence of the [European] Convention [of Human Rights] proportionality is tested by, among other things, the standard of what is necessary in a democratic society.”
30 Impugned Decision, paras 53-55. See further Beddieskine Appeal, para. 47.
is unchallengeable if it conflicts with the Purposes and Principles of the very Charter under which it is made and in accordance with which Article 24(2) requires it to act.

50. The Appellants assert that, contrary to Article 24(2) of the Charter, the Security Council has infringed Principles 1 and 7: it has “interfere[d] in matters which are essentially within the jurisdiction of [Lebanon]” and cannot rely on the second clause of Principle 7—“the application of enforcement measures under Chapter VII” — because: (i) there was no basis for determining the existence of any threat to international peace (Article 39); alternatively there was abuse by the Security Council of its Article 39 powers which were used for an unauthorized purpose; and (ii) there was no basis under Article 41 for recourse to an international criminal tribunal. It will be necessary to answering the submission to consider the further critical question: how would such an assessment of acts by the Security Council be performed?

51. Much discussion on this topic before the Appeals Chamber has turned upon the case-law of other, especially (but not only) international criminal tribunals.34

52. In Tadić the present point was determined by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in favour of a certain authority to review incidentally a Security Council resolution. The Prosecutor had disputed such authority. At first instance the Trial Chamber accepted his submission. On appeal the majority judges wrote:

This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one amicus curiae, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try this case. What is this if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal?

Furthermore:

All these dicta ... address the hypothesis of the Court exercising such judicial review as a matter of “primary” jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of “incidental” jurisdiction, in order to ascertain and be able to exercise its “primary” jurisdiction over the matter before it.36

34 Badreddine Appeal, paras 35 ff.
35 Tadić Jurisdiction Decision, para. 6.
36 Tadić Jurisdiction Decision, para. 21.

53. That decision was followed by the Appeals Chamber of the Special Court for Sierra Leone in Kallon.37 A Trial Chamber of the International Criminal Tribunal for Rwanda also took judicial notice of the events in Rwanda around the genocide as justifying the creation of that ad hoc tribunal,38 while ostensibly stating that the question of the existence of a threat to international peace and security was “a matter to be decided exclusively by the Security Council”.39

54. In Kadi, the Grand Chamber of the European Court of Justice found it necessary to determine that the effects of a Security Council resolution did not conform to fundamental European Union law. It stated:

[... it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations. What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty].40

55. The decision can of course be said to be distinguishable, on the basis that for the Court it was European Union law rather than the United Nations Charter that was treated as fundamental. But the point is that its own “fundamental law” did not permit even such a powerful norm as a Security Council resolution to infringe it. Here, both for the Security Council and for this Tribunal, the fundamental law is the UN Charter, in particular its Purposes and Principles. So the case affords some authority for the notion that a Security Council resolution which infringes those Purposes and Principles can be challengeable.

56. In Nada, the Grand Chamber of the European Court of Human Rights found that Switzerland could have done more to alleviate the applicant's situation within the scope of Security

39 Id. paras 21.
Council resolutions which imposed on it an obligation to take measures capable of breaching human rights. Judge Malimverni, concurring, stated:

...Of course, under Article 25 of the United Nations Charter, the member States are required to accept and apply its decisions. Moreover, Article 103 of the Charter stipulates that in the event of any conflict between the obligations of United Nations members under the Charter and their obligations under any other international agreement, the Charter obligations will prevail. And according to the case-law of the International Court of Justice, that primacy is not limited to the provisions of the Charter itself but extends to all obligations arising from binding resolutions of the Security Council.

But do these two Charter provisions actually give the Security Council carte blanche? That is far from certain. Like any other organ of the United Nations, the Security Council is itself also bound by the provisions of the Charter. And Article 25 in fine thereof stipulates that members of the world organisation are required to carry out the decisions of the Security Council "in accordance with the present Charter". In Article 24 § 2 the Charter also provides that in discharging its duties "the Security Council shall act in accordance with the Purposes and Principles of the United Nations". Article 1 § 3 of the Charter reveals that these purposes and principles precisely include "respect for human rights and for fundamental freedoms". One does not need to be a genius to conclude from this that the Security Council itself must also respect human rights, even when acting in its peace-keeping role.43

57. That opinion took a harder line than did the leading speech in R (Al-Jedda) v Defence Secretary of State for Defence (2007). There, the House of Lords was faced with a conflict between the appellant's right to liberty guaranteed by Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms scheduled to the UK Human Rights Act 1998, and Security Council Resolution 1546 of 8 June 2004 adopted under Article 42 of the Charter. By that Resolution, a multi-national force was authorized to operate in Iraq and to undertake internment where this was "necessary for imperatives reasons of security."

58. Lord Bingham provided the following analysis:

Emphasis has often been laid on the special character of the European Convention as a human rights instrument. But the reference in article 103 to "any other international agreement" leaves no room for any excepted category, and such appears to be the consensus of learned opinion. The decisions of the International Court of Justice [...] give no warrant for drawing any distinction save where an obligation is jus cogens and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments44 [...].

59. In short, Kadi would subordinate any Security Council resolution to a competing fundamental principle of its own constitutional document. Judge Malimverni in Nada suggests that human rights may predominate over the operation of such a resolution. A l-Jedda considers that "binding Security Council decisions taken under Chapter VII supersede all other treaty commitments" and limit compelling rights, albeit to the minimum extent practicable.

60. It is not necessary on this appeal to choose between the reasons given by Lord Bingham and those of Judge Malimverni in the case of binding resolutions. This case concerns a Security Council resolution that is said to be not binding because it is ultra vires the United Nations Charter.45

---

43 ECtHR, Nada v Switzerland, App. No. 10593/08, Judgment, 12 September 2012 (“Nada Judgment”), para 172 ff.
45 Emphasis added.
61. Here the fundamental provision of law is the Charter, which binds both the Security Council and also, as a purported creation of the Council under Chapter VII, this Tribunal. In principle, an inconsistency between a resolution of the Security Council and the Charter should receive the same legal analysis as in Kadi: the Charter must prevail.

62. The raison d'être of the Tribunal is to respond to alleged breaches of the rule of law. It would be a singular paradox if it were itself to infringe that rule – usurping a jurisdiction it does not possess by sitting when it has no jurisdiction.

63. It follows from the very outset that a judge must determine at the first opportunity whether he or she possesses authority to try the case. That may involve a double question: am I personally disqualified? What is my warrant to sit?

64. As it happens, both questions potentially arise here. Since the decision whether the Tribunal may continue is one on which its judges are interested, if there were any alternative they would pass that decision to another tribunal. So had there been a reference to the International Court of Justice, that would no doubt have provided the answer to a further question: what is the most appropriate forum to undertake the review? But since, as occurs not infrequently in domestic litigation, there is no such alternative tribunal available, the necessity principle applies and the Tribunal judges must sit.

65. The second question depends on the answer to the Defence challenge. If it is substantiated we may no longer continue to exercise authority over the accused. The Defence are entitled to an answer to it.

66. The rule of law requires that the legality of the conduct of any body lacking plenary authority be subject to judicial review. That principle is of special importance where it concerns a political power's conduct which affects fundamental human rights, including the right of liberty and the absolute right of fair trial. Here it is, in my opinion, the task of this Tribunal to perform such review.

---

67. That is not to assert that all issues are necessarily within the competence of the Tribunal to evaluate. The role of the Tribunal, like that of a court of general jurisdiction, having accepted authority to review a challenged decision, is then to make a judicial evaluation of whether and, if so, with what degree of intensity, it should examine it. 47

68. But to be meaningful, the jus cogens character of fair trial, accepted by the Security Council in Article 16(2) of our Statute, must express the Resolution, on which the existence of the Tribunal depends, to assessment of its compliance with the fundamental norms of the Purposes, Principles and Article 24(2) of the Charter. Not to do so could be seen as abdicating the judicial responsibility to ensure the "highest standards of international criminal procedure" stipulated in Article 28(2) of the Statute. That a judicial decision could render nugatory the will of the Security Council as expressed in Resolution 1757 is no justification for withholding judicial review of whether the expression of that will was within its powers conferred by the Charter. On the contrary, a major purpose of judicial review is to ensure that powerful decision-makers comply with the law. The relevant law is the expression of the will of the member States who, when adopting the Charter, chose to create the Security Council as a body having plenary authority but as one limited by law.

---

47 The notion that courts involving high issues of state are beyond consideration by the court was flatly rejected by the Supreme Court of Canada in Operation Dismantle v The Queen [1985] 1 SCR 441. In that case the Supreme Court rejected the contention that such argument in relation to the decision of the Canadian government to permit the United States to test its cruise missiles in Canada was non-justiciable. Having cited the passage from Chandler reproduced at fn 24 above Wilson J stated at 54:

"I cannot accept the proposition that difficulties of evidence or proof abroad the Court from making a certain kind of decision it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts should or must rather than whether they can deal with each matter. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us."

At 61, she cited and emphasised a passage from Lord Devlin's speech in Chandler (at 81): "It is the duty of the courts to be an alert now as they have always been to prevent abuse of the prerogatives". She continued:

"It seems to me that the point being made by Lord Devlin ... is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realise that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision making power has been committed. The first step is to determine whether as a constitutional matter the decision making power has been committed; the second is to determine the scope of any judicial review of the exercise of that power (at 62) [...]. I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter to do so." (at 64)

The decision better represents the "higest standards of international ... procedure", a fortiori when applied to a criminal case, than domestic authorities which wholly decline to embark upon judicial review.

48 As recognized by the unanimous Appeals Chamber in Interlocutory Decisions on the Applicable Law, para. 76.
69. The argument that the Tribunal cannot pretend to possess authority to supervise any of the organs of the United Nations overlooks the fact that the Security Council chose to create an independent international tribunal, which may be expected to apply the rule of law to all — whatever their authority: "The judges shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source."

70. Such conclusion is supported by both principle and practice.

B. The principle of judicial review

71. To assert that there is no judicial review of a decision-maker’s decisions is to give it plenary authority. Nowadays in the great majority of States even the elected legislature is liable to have its statutes subjected to judicial review for breach of fundamental rights. There is no difference in principle between judicial review by a domestic court of decisions of an important domestic decision-maker with limited authority, and judicial review by an international court of decisions of an important international decision-maker with limited authority. The issue is not whether a court of law seized of the issue may review, but what should be the intensity of the review. 72

72. There are many forms of judicial review. At one extreme is de novo consideration of decisions about personal liberty, in which the judges have specialist expertise and of which bail and habeas corpus are celebrated examples. At the other extreme, there are issues of high policy where the nature of the decisions, the political element, and the judges’ own lack of relevant knowledge and expertise all require them to assume a minimal role. 51

73. In France, the recours pour excès de pouvoir is an example of review operated by French administrative courts and specifically the Conseil d’État—the higher administrative court—on administrative decisions of officials, when these decisions violate a legal rule. 52 Under French law, 53

51 Opérations Démarche, above, fn. 47.
52 See G. Contav, Vocabulaire juridique, 9ème édition, Presses Universitaires de France, Paris 2005, where recours pour excès de pouvoir is defined as « Recours contentieux tendant à l’annulation d’une décision administrative et fondé sur la violation par cette décision d’une règle de droit. »
53 Art. 9(1) TLSL.
54 Such was the consensus of the 2010 Congress, in Sydney and Canberra, of the International Association of Supreme Administrative Court Justices attended by senior judges of more than 50 states, embracing each continent and the world’s major legal systems. The former common law nation, that the statutes of an elected parliament are immune from judicial review for breach of fundamental rights, has been largely abandoned.

this recours is admissible even in the absence of a text because it ensures respect of legality. 35 The court will review and declare null administrative decisions of State authorities violating the law.

74. In England Laws LJ has stated:

[J]he intensity of review in a public act case will depend on the subject matter in hand; and so in particular any interference by the action of a public body with a fundamental right will require a substantial objective justification. In this context the following passage from the judgment of Sir Thomas Bingham MR in R v. Ministry of Defence, Ex p Smith [1996] QB 517, 554 has often been repeated: "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied ... that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

[...] There is ... what may be called a sliding scale of review; the graver the impact of the decision in question upon the individual affected by it, the more substantial the justification that will be required. It is in the nature of the human condition that cases where, objectively, the individual is most gravely affected will be those where what we have come to call his fundamental rights are or are said to be put in jeopardy. 36

75. In applying the sliding scale a number of considerations can be relevant. 37 Here they include:

(i) The subject-matter of Chapter VII of the Charter, which is to provide for effective response to threats to international peace.

(ii) Its scheme, which is that member States accord broad power on the Security Council to act promptly for that purpose.

(iii) The language of both Articles 39 and 41 already recorded. Each of these articles is expressed in subjective terms: “the Security Council shall determine the existence of any threat to the peace...”; “Should the Security Council consider that measures provided for in Article 41 would be inadequate...” So too are Articles 40 and 42: “the Security Council may decide what measures not
involving the use of force are to be employed”, “Should the Security Council consider...” While this does not prevent judicial review, it limits the scope for such a review. This is a situation with which the law is well familiar. In *Secretary of State for Education and Science v Metropolitan Borough Council of Tameside* (1977),* 56 Lord Wilberforce gave the answer:

The section is framed in a "subjective" form - if the Secretary of State "is satisfied." This form of section is quite well known, and at first sight might seem to exclude judicial review. *Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge..." 35

(iv) The implications of a decision to apply Articles 39 and 41, which are profound, arming the Security Council with powerful means to restore peace even at the cost of some involvement in the affairs of the State concerned.  

(v) The particular expertise residing with the Council and not the Tribunal, encompassing the determination whether a threat to international peace exists and what measures should be taken to restore peace and to give effect to the Security Council’s decisions. Although composed of experienced judges, and competent to assess broadly the nature and character of decisions under Articles 39 and 41, the Tribunal lacks both the experience and the access to specialist advice available from diplomatic and other resources within the Council and its members.

(vi) The context of the decision, including the fact that civil law and common law alike assume that the law should be interpreted in favorem libertatis. This Chamber applied it in its Interlocutory Decision on the Applicable Law of 16 February 2011. The context also includes the important elements of international politics and an unprecedented breadth of discretionary authority.

76. Decisions of the Security Council will often entail issues of pure judgment with which Courts will not interfere. But if clear error of law is established, it is the duty of a court of law to say so.

---

35 Emphasis added.
these objections before determining any legal consequence arising from those resolutions. While there can be no claim to any general power of judicial review of Security Council resolutions, their legality may require judicial determination within a specific context against competing norms.

80. When it decides to create a tribunal, the Security Council must be deemed to have endowed such a tribunal with not only the trappings of legality, but also implicit authority to consider whether the fundamental norms are duly respected. It is inconceivable that the Security Council would itself accept any lower standard.

81. Such particular consideration of a UN Security Council resolution does not lead to a general review of the legality of the resolution, but rather to a specific interpretation and an evaluation of the effects of such resolution, within the scope of the Tribunal's mandate to ensure a fair trial by an independent tribunal established by law.

VII. The Power and Purpose of the Security Council's Acts: this case

A. Power

82. Drawing these themes together, the right of the accused to a fair trial demands application of the due process required by the high order legal system enshrined in our Statute. It follows that the Security Council Resolution 1757 is not beyond review by the Tribunal. But the difficulty and complexity of the Council's task, the extent of its resources and experience, and the scope of what

83. Security Council Resolution 1757 recited the Security Council's "strongest condemnation of the 14 February 2005 terrorist bombings as well as other attacks in Lebanon since October 2004" and reaffirmed "its determination that this terrorist act and its implications constitute a threat to international peace and security." The Statute of the Tribunal which was appended sought to give it the jurisdiction already mentioned over persons responsible for the attack of 14 February 2005 and also over persons responsible for other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, which were found to be relevantly connected with the former attack. There is provision for similar jurisdiction in relation to any subsequent attacks that are similarly connected if Lebanon, the Security Council and the United Nations agree.

84. A major theme of the Defence submissions was that as at May 2007 there was no "threat to international peace" but only serious political trouble of only a national scope. The Tribunal was created with the task of applying not international but domestic Lebanese criminal law. It was submitted that there could be no valid determination under Art 39 of existence of a threat to international peace unless there was some precedent decision of the Security Council accepted by the General Assembly or otherwise as customary law; otherwise, there must be international crimes, war crimes, genocide, crimes against humanity: international crimes that have been accepted as such; none existed here. The charges of terrorism that can be brought against individuals pursuant to the Statute do not stem from international law, but rather from domestic Lebanese criminal law; the 14 February 2005 attack took place in Lebanon targeting a local political figure and there was no international crime that might have constituted a threat to international peace and security.

85. It was further submitted for the Defence that the Security Council response in the case of Benazir Bhutto (27 December 2007), being of a different kind because it was by way of
Presidential Statement and did not give rise to a special tribunal.\textsuperscript{68} was not a relevant precedent.\textsuperscript{69} The Defence has made much of the fact that even in cases of terrorism, never has the measure of an international tribunal been adopted (except of course in the present case).\textsuperscript{69}

86. I do not accept that submission. First of all, it has been long recognized that “non-military sources of instability [...] have become threats to peace and security”.\textsuperscript{70} More specifically, over the past decade, the Security Council has been entrusted by United Nations member States – including Lebanon – with a wide competence to deal with terrorism, even domestic terrorism, in the recognition that this type of attacks poses a threat to international peace and security. Various Security Council resolutions have referred to incidents of domestic terrorism as threats to international peace and security.\textsuperscript{71} The Security Council, while Lebanon was a member thereof, also made various general statements according to which terrorism in all its forms and manifestations constitutes a threat to international peace and security.\textsuperscript{72}

87. The theme “[the Security Council reaffirming that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security”, expressed in the case of Ms Bhutto, in language adopting earlier Presidential Statements,\textsuperscript{73} is one which clearly embraces the circumstances of the attack of 14 February 2005. The fact that the \textit{Bhutto} Resolution post-dated the attack by 15 months does not alter that conclusion. In construing treaties there shall be taken into account any subsequent practice in the application of the treaty which establishes the

\textsuperscript{68} Appeals Hearing, p. 164.
\textsuperscript{69} Appeals Hearing, pp. 157-158.
\textsuperscript{70} Badreddine Appeal, para. 65.
\textsuperscript{71} UN Doc. S/23560 of 31 January 1992, p. 3 (referred to by LRV Observations, para. 15).
\textsuperscript{73} See, e.g., UN Security Presidential Statement S/PRST/19 (1999). Since 2003, therefore, the Security Council has been broadening the scope of terrorist acts falling within Chapter VII by omitting “international” from Resolutions and Presidential Statements condemning such acts.

States have also argued that the difference between domestic and international terrorism is only an academic distinction: “[a]ll terrorism is one and the same despite its thousand different faces” (UN Security Council Verbatim Record, UN Doc. SPV/4752 (2003)). In correspondence with the Security Council, for instance, Tunisian has received its effect “to become involved in the global system against terrorism and [has supported international efforts in this regard”. (Report to the Counter-Terrorism Committee (Tunisia), 4 February 2005, S/2005/194, at 3). Iran announced that “the Islamic Republic of Iran attaches great importance to the implementation of the United Nations Security Council Resolutions, particularly Resolution 1373 (2001)” (Report to the Counter-Terrorism Committee (Iran), 27 December 2001, S/2001/1332, at 1).

37 See, e.g., ibid., fn.71.

agreement of the parties regarding its interpretation.\textsuperscript{74} The \textit{Bhutto} attack is closely analogous to the 14 February 2005 attack and illustrates the standard adopted by the Security Council.

88. It has been noted that there were further attacks to 12 December 2005 over which the Tribunal will have jurisdiction if connection is established and Article 1 recognises the possibility of subsequent “connected cases”. During the whole period from 14 February 2005 until the creation of the Tribunal the United Nations had maintained close supervision of the enquiry; it was clearly open to the Security Council to find that the threat was still smouldering. The various resolutions dealing with the United Nations International Independent Investigation Commission and the Tribunal are under the heading “Situation in the Middle East” – the Security Council perceived these events through their impact on the region.

89. The choice of means utilized by the Security Council vis-à-vis these different terrorist attacks has varied widely, from mere condemnation to imposition of treaty obligations upon United Nations member States,\textsuperscript{75} to the requirement that states impose administrative sanctions on individuals,\textsuperscript{76} to the establishment of a Special Tribunal.\textsuperscript{77} The fact that this is the first such tribunal is no more an impediment to its validity than the novel creation of an international criminal tribunal in 1993 was an impediment to the work of the ICTY.\textsuperscript{78}

B. Purpose

90. It is evident, from the conduct of the Security Council at the time of the Resolution and since, that the Security Council has been concerned to bring to justice those who killed and injured the victims. I am satisfied that there is no basis to support the contention that the Security Council acted for an improper purpose and not for the purposes of Chapter VII of the Charter.

C. Conclusion on power and purpose

91. For these reasons I am satisfied, contrary to the approach of the Trial Chamber, that it is the Tribunal’s responsibility to contextualise Resolution 1757; and, having done so, that the Appellants

\textsuperscript{75} S/RES/1373 (2001).
\textsuperscript{77} S/RES/1757 (2007).
\textsuperscript{78} See also VLR Observations, para. 11.
have failed to establish that the Security Council acted beyond its authority under Article 39 in passing the Resolution.

92. Nor, in terms of Article 41 of the Charter, can the establishment of the Tribunal be said to be beyond the Council’s lawful authority. A tribunal of an international character – a special tribunal for Lebanon, applying Lebanese law and with a strong judicial Lebanese component – is an appropriate means of responding to a threat, according to the Security Council, where the practical alternative is impunity.

VIII. Creation of a selective and ex post facto tribunal

93. Now, however, it cannot accurately be said that the creation of the Tribunal is discriminatory so as to be unlawfully selective. This Tribunal has no interest in Lebanese or any other politics. It is concerned solely with the law and any evidence that tends to prove or disprove the commission of crimes within its jurisdiction. At the time it was established, the identity of the 14 February 2005 killers was unknown except by the participants and perhaps those close to them. That is still not known: who they were can only be a matter of speculation unless and until there is a judicial finding that the Prosecutor has rebutted the presumption of innocence of any accused who are brought to trial. The Judge does no more than try to bring Lebanese criminal law to bear in an effective manner to ensure due investigation and fair trial of persons alleged to have committed the attacks over which the Tribunal has jurisdiction.

94. While it is great to be preferred that all who commit criminal conduct are brought to justice, failure to meet that standard does not as a rule afford a defence to any who are brought to trial. Their right is to fairness of their trial, not to a discharge on the ground that others have not, or not yet, been charged. The latter will continue to face the prospect that in time they too will be

79 Ayyash Appeal, paras. 25. In AXA General Insurance Ltd v HM Advocate UK Supreme Court, [2011] UKSC 46, para. 97 Lord Manucoe stated:

[“... It is the duty of the courts to ensure that the law is applied fairly...”]

80 - “Trials of civilians by military or special courts should be exceptional, i.e., limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offenses in issue the regular civil courts are unable to undertake the trials...” (UN Human Rights Committee, General Comment No. 32, Article 14, Right to Equality Before Courts and Tribunals, and to Fair Trial, UN Doc. CCPR/C/GC/32 (2007), para. 22). The European Court of Human Rights focuses on independence and impartiality embodied in the rules applicable to the tribunal in question, rather than on selectivity and special status within the system. See, e.g., ECtHR, Findlay v. United Kingdom, App. No. 22107/93 (1997); Akinyi v. Turkey, App. No. 29281/95 (2001); Sağık Yıldırım v. Turkey, App. No. 30451/01 (2001). While the Inter-American Court of Human Rights has adopted a broader approach to special courts and tribunals (“[i]n respect of the prosecution of civilians, this requires that by regularly constituted courts that are demonstrably independent from the other branches of government and comprised of judges with appropriate tenure and training, and generally prohibits the use of ad hoc, special, or military tribunals or commissions to try civilians”), Reports of the Inter-American Commission on Human Rights on Terrorism and Human Rights: Executive Summary and Recommendations, OEA/Ser.L/V/III.116, Doc. 5 rev. 1 corr., paras 18, 236, 261 (22 October 2002) (emphasis added). Even under this regime, ex post facto jurisdictions are not completely proscribed, if they are established as independent and impartial.
SEPARATE AND PARTIALLY DISSERTING OPINION OF JUDGE RIACHY

1. I concur with my colleagues that the appeals must be dismissed. However, I consider that all three appeals must be admitted as of right. I also offer additional reasoning that in my view supports the Appeals Chamber’s conclusion that this Tribunal cannot review the actions of the Security Council.

2. Right to appeal

3. I disagree with the view of my colleagues regarding Rule 126 and its application in the present case. Our Rules are designed in a logical sequence. The interpretation adopted by the Majority does not, in my view, take that logic into account. Rule 126 has a limited scope. It is designed to be applied to motions “other than preliminary motions.” But a challenge to the legality of this Tribunal can only be entertained, if entertained at all, as a preliminary motion. It is essentially a preliminary matter that must logically – and exceptionally – be addressed in limine litis, before the start of the proceedings proper. Therefore, in my view, the characterization of a motion challenging legality as “other motion” under Rule 126 is incorrect.

3. I turn to the question of whether counsel had a right to appeal the Impugned Decision. The question of the legality of the Tribunal is not specifically mentioned in our Rules. Counsel have considered that the issue falls within the scope of Rule 90 and should be considered a preliminary motion challenging jurisdiction. A decision on such a motion is appealable as of right, pursuant to Rule 90(B)(i). However, in the Impugned Decision, the Trial Chamber has rejected counsel’s assertion. Counsel have appealed the findings of the Trial Chamber, considering that their appeals were based on Rule 90(B)(i). The matter brought before the Appeals Chamber is whether the challenges to legality fall within the scope of a motion challenging jurisdiction.

---

4. In determining whether a particular matter is jurisdictional in nature, other international tribunals have given straightforward answers based on their Rules. These answers have determined whether the appeal lodged before them was admissible or not. Should this approach be followed in the present case, our Chamber would be required to give a definitive answer to the question of whether a challenge to the legality of the Tribunal is comprised within the challenges listed under the Rules. As a consequence, the appeals would be dismissed outright or, alternatively, we would address the merits.

5. In the present case, counsel dispute the Trial Chamber’s assertion that legality is not encompassed in jurisdiction. In counsel’s view, our Tribunal has no jurisdiction to try the Appellants because it was illegally established. Legality as such becomes a fundamental question of merit, as it not only relates to the admissibility of the appeals before our Chamber but also to the admissibility of the motions before the Trial Chamber. If the Tribunal cannot review the legality of its own establishment, logically, counsel cannot procedurally raise this challenge.

6. Thus, a question which is intrinsically linked to the merits impacts the admissibility of the appeals before our Chamber. This problem, in my view, does not have a clear answer in our Rules. Construction of the Rules is thus required. Rule 3 of the Rules provides:

(A) The Rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence, (i) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969), (ii) international standards on human rights (iii) the general principles of international criminal law and procedure, and, as appropriate, (iv) the Lebanese Code of Criminal Procedure.

(B) Any ambiguity that has not been resolved in the manner provided for in paragraph (A) shall be resolved by the adoption of such interpretation as is considered to be the most favourable to any relevant suspect or accused in the circumstance then under consideration.

These provisions offer avenues to facilitate the construction of all other Rules. In my opinion, the first three avenues of interpretation do not provide a clear and explicit solution to the issue.

---

3. See ICTY, Prosecutor v. Tadic, Case No. IT-95-88/2-AR72, Decision on Zdravko Tadic’s Appeal Against the Decision on Submissions of the Accused Concerning Legality of Arrest, 12 March 2009, para 11-12.
before us. Consequently, the most relevant avenue to be explored is Lebanese law and the way in which it would address the matter.

7. Under Lebanese law, in the absence of clear language to the contrary, the admissibility of an appeal is determined by the nature of the dispute brought before the court. The decision of the court of first instance does not preclude a party from bringing forward an appeal, when that party disputes the characterization given by the lower court. In the present case, the dispute relates to the question of whether or not the challenge made to the legality of the Tribunal is jurisdictional in nature. It follows that, if we interpret our Rules in the light of Lebanese law, as directed by one of the prongs listed in Rule 3, the appeals must be admitted on the basis of Rule 90(B)(c) to allow us to discuss, in the merits, whether legality is encompassed under jurisdiction. In addition, this interpretation is also the most favourable to the accused as it allows us to admit all three appeals.

8. On this basis, the three appeals of Messrs Ayash, Badreddine and Oueissi are, in my view, admissible at this stage.

II. Merits

9. First, the issue of whether a challenge to legality is jurisdictional in nature must be addressed. To that extent, I agree with the views advanced by my colleagues in paragraphs 12 to 16 of this Decision. For reasons that follow, I consider that a challenge to legality does not fall within the ambit of jurisdiction. This is a direct consequence of the distinctive nature of the two concepts and of the clear limitative wording of Rule 90(E).

---

10. The question of whether Resolution 1757 was legal is an evaluation of the instrument that created the Tribunal. On the other hand, jurisdiction relates to the ability of a court to hear a certain matter. In addressing the jurisdiction of a court, there is an underlying assumption that this court was legally constituted. The result of an illegal constitutive instrument is that a court's decisions are invalid and the court must be considered to be non-existent. In contrast, a challenge to a court's jurisdiction, if successful, will only limit the scope of its powers. As a result, questions of jurisdiction and legality are not similar and one cannot be subsumed in the other. This justifies the narrow scope and limitative nature of Rule 90(E).

11. However, if it is not jurisdictional, can a challenge to legality be considered to be a different kind of preliminary motion subject to our authority? To answer that question, we must turn to the instrument that has established this Tribunal. I concur with the views adopted in the Decision. We are constituted by Security Council Resolution 1757 (2007) and we have no power to review the actions of the Security Council to that end.

12. I add the following: in my view, and for reasons that follow, Security Council resolutions enjoy a presumption of legality.

13. As noted in paragraph 37 of the Decision, the Security Council can make determinations as to the existence of a threat to international peace and security, but only to the extent that it is in conformity with the Purposes and Principles of the United Nations. As such, they are the legal boundaries for the Council's discretion.

14. In turn, the resolutions of the Security Council are presumed legal, i.e. in conformity with the Purposes and Principles of the United Nations Charter, and indeed with the Charter as a whole, because of the following considerations:

(i) An overarching commitment to justice and international law: Article 1(1) of the Charter defining the Purposes of the United Nations indicates that member states of

---

3. See Arts 1 and 2 of the UN Charter.
the United Nations express their commitment to the principles of justice and international law when maintaining peace and security.

(ii) A body mandated by law to take actions: Under Article 24 of the Charter, the member States of the United Nations “confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf,” i.e. the Security Council is the appropriate body, as determined by the Charter, to undertake actions aimed at maintaining international peace and security.

(iii) The need to ensure a “prompt and effective action”: This requirement results from the urgency that sometimes characterizes the actions of the Council. Questioning these actions defeats the purpose of promptness and effectiveness.

(iv) An internal system of checks: The Security Council is a politically heterogeneous body. Fifteen different sovereign states, with different political wills, are represented. The voting process, with a requirement of nine votes and the existence of veto powers, is very strict. Thus, the composition and voting regime of the Council ensure that its decisions may be presumed legal.

15. This presumption of legality of the Security Council resolutions may in theory appear rebuttable, i.e. compliance of the Security Council’s actions with the Purposes and Principles of the Charter can be verified. However, in practice, a review of such actions is not possible. For one, there is no mechanism that would vest authorization in any institution to do so. Moreover, any review would encounter various obstacles such as the impossibility of assessing the appropriateness of the Council’s actions and the fact that such a review might hamper these actions. The same applies to the Security Council’s decision regarding the measures it applies once it has found that such a threat exists.

16. In sum, the actions of the Security Council benefit from a presumption of legality, which may appear to be rebuttable, but in practice is not. For this reason and those mentioned in the Decision, I concur with the majority’s view that any review of the Security Council’s actions by the Tribunal is therefore impossible.

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

Dated 24 October 2012,
Leidschendam, the Netherlands

Judge Ralph Rischy
International Criminal Court

Prosecutor v. Omar Hassan Ahmad Al Bashir
Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir

Pre-Trial Chamber I, 12 December 2011
Document to be notified, in accordance with regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor
Mr Luis Moreno-Ocampo
Ms Fatou Bensouda

Legal Representatives of Victims
Legal Representatives of Applicants

Unrepresented Victims
Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
The Office of Public Counsel for the Defence

States Representatives
Competent authorities of the Republic of Malawi

Amicus Curiae

REGISTRY
Registrar
Ms Silvana Arbia

Deputy Registrar
Mr Didier Preira

Victims and Witnesses Unit
Detention Section

Victims Participation and Reparations Section

Others
Pre-Trial Chamber I of the International Criminal Court (the "Chamber" and the "Court", respectively) hereby issues the present decision on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court for the arrest and surrender of Omar Hassan Ahmad Al Bashir ("Omar Al Bashir").

Background and submissions by the Republic of Malawi

1. On 31 March 2005, the United Nations Security Council issued Resolution 1593 (2005),1 whereby it referred the situation in Darfur to the Court and "urge[d] all States and concerned regional and other international organizations to cooperate fully" with the Court.

2. On 4 March 2009, the Chamber issued its "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir"2 (the "4 March 2009 Decision") where it stated in relation to the position of Omar Al Bashir as Head of State:

41. Furthermore, in light of the materials presented by the Prosecution in support of the Prosecution Application, and without prejudice to a further determination of the matter pursuant to article 19 of the Statute, the Chamber considers that the current position of Omar Al Bashir as Head of a state which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case.

42. The Chamber reaches this conclusion on the basis of the four following considerations. First, the Chamber notes that, according to the Preamble of the Statute, one of the core goals of the Statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which "must not go unpunished".

43. Second, the Chamber observes that, in order to achieve this goal, article 27(1) and (2) of the Statute provide for the following core principles:

   (i) "This Statute shall apply equally to all persons without any distinction based on official capacity;"

   (ii) "...it is official capacity as a Head of State or Government, a member of Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence;" and

   (iii) "Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

44. Third, the consistent case law of the Chamber on the applicability law before the Court has held that, according to article 21 of the Statute, those other sources of law provided for in paragraphs (1),(b) and (1)(c) of article 21 of the Statute, can only be resorted to when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria of interpretation provided in articles 31 and 32 of the Vienna Convention on the Law of the Treaty and article 21(3) of the Statute.

45. Fourth, as the Chamber has recently highlighted in its 5 February 2006 "Decision on Application under Rule 103", by referring the Darfur situation to the Court, pursuant to article 13(b) of the Statute, the Security Council of the United Nations has also accepted that the investigation into the said situation, as well as any prosecution arising therefrom, will take place in accordance with the statutory framework provided for in the Statute, the Elements of Crimes and the Rules as a whole. (footnotes omitted)
3. On 4 March 2009 and 12 July 2010, respectively, the Chamber issued warrants of arrest against Omar Al-Bashir which are yet to be executed.¹

4. On 6 March 2009 and on 21 July 2010, respectively, the Registry sent, at the Chamber’s request, the “Request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir”,¹ and the “Supplementary request to all States Parties to the Rome Statute for the arrest and surrender of Omar Hassan Ahmad Al Bashir” (the “Cooperation Requests”), asking for cooperation from all States Parties in the arrest and surrender of Omar Al-Bashir pursuant to, inter alia, articles 89(1) and 91 of the Rome Statute (the “Statute”). The Republic of Malawi has been a State Party to the Statute since 1st December 2002 and was therefore notified of the Cooperation Requests.

5. On 18 October 2011, the Registry filed its “Report on the visit of Omar Al Bashir to Malawi” (the “Report”),² whereby the Registrar informed the Chamber that:

(i) various media had reported that Al Bashir had visited the Republic of Malawi on 14 October 2011 and had “attended a summit of the Common Market for Eastern and Southern Africa (COMESA) in Malawi’s capital Lilongwe that took place from 4 to 15 October”;

(ii) she had sent a note verbale to the Embassy of the Republic of Malawi in Brussels on 13 October 2011 (“Note Verbale”),³ reminding the Republic of Malawi of its legal obligations under the Statute and asking for its cooperation for the arrest and surrender of Al Bashir “in the event that the latter would enter Malawi’s territory”; and

(iii) no reply had been received so far.

6. In her Note Verbale, the Registrar: (a) reminded the Republic of Malawi that the obligation to arrest and surrender persons subject to an arrest warrant issued by the Court applied “to all persons subject to an arrest warrant including President Al Bashir”;⁴ (b) warned the Republic of Malawi that, pursuant to article 87(7) of the Statute, “where a State Party fails to comply with a request for cooperation by the Court contrary to the provisions of the Statute, the Court may make a finding of non-cooperation and refer the matter to the UN Security Council”;⁵ and (c) invited the competent authorities of the Republic of Malawi to consult with the Court in case of any difficulty with respect to the execution of the Cooperation Requests, as provided for in article 97 of the Statute. No consultation was ever undertaken by the competent authorities of the Republic of Malawi, nor did they raise any problem with regard to the execution of the Cooperation Requests or provide any relevant information to the Court in that respect.

7. On 19 October 2011, the Chamber issued its “Decision requesting observations about Omar Al-Bashir’s recent visit to Malawi”,⁶ ordering the Registrar to transmit a copy of the Report to the competent authorities of the Republic of Malawi and inviting those authorities to submit, in conformity

¹ ICC-02/05-01/09-136-Conf, Anx 4.
² Ibid.
³ Ibid.
⁵ Ibid.
with regulation 109(3) of the Regulations of the Court (the “Regulations”), any observations on the Report, in particular with regard to the alleged failure by the Republic of Malawi to comply with the Cooperation Requests.

8. On 11 November 2011, the Registry filed publicly its “Transmission of the observations from the Republic of Malawi”, together with two confidential annexes. In confidential annex 2 (the “Observations from the Republic of Malawi”), the Republic of Malawi submitted the following observations with regard to its failure to comply with the Cooperation Requests issued by the Court:

The Ministry [of Foreign Affairs] wishes to confirm that His Excellency President Omar Hassan Ahmad Al Bashir, the President of the Republic of Sudan attended a COMESA Summit that was held at Lilongwe in the Republic of Malawi from 14th – 15th October 2011. The Ministry wishes to state that in view of the fact that His Excellency Al Bashir is a sitting Head of State, Malawi accorded him all the immunities and privileges guaranteed to every visiting Head of State and Government; these privileges and immunities include freedom from arrest and prosecution within the territories of Malawi.

The Ministry wishes to inform the esteemed Registry of the ICC that Malawi accorded His Excellency President Al Bashir these privileges and immunities in line with the established principles of public international law, and in accordance with the Immunities and Privileges Act of Malawi.

The Ministry further wishes to state that Sudan, of which His Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, inter alia, treaties the immunity of the Heads of State and Government, is not applicable.

The Ministry also wishes to inform the esteemed Registry of the Court that Malawi, as a member of the African Union, fully aligns itself with the position adopted by the African Union with respect to the incident of the sitting Heads of State and Government of countries that are not parties to the Rome Statute.

The Ministry accordingly wishes to inform the esteemed Registry of ICC that in view of the foregoing, Malawi could not arrest His Excellency, President Omar Hassan Ahmad Al Bashir when he visited the country to attend the COMESA Summit.

Applicable Law and Discussion


Preliminary Issue

10. As a preliminary matter, the Chamber notes that, although they received a warning by the Registry prior to the visit of Omar Al Bashir, the authorities of the Republic of Malawi decided neither to respond to the Court nor to arrest the suspect. This indicates to the Chamber that the Republic of Malawi did not respect its obligation, enshrined in article 86 of the Statute, to fully cooperate with the Court.

11. The Republic of Malawi did not respect the sole authority of this Court to decide whether immunities are applicable in a particular case. This is established by article 119(1) of the Statute, which provides that “[A]ny dispute concerning the judicial functions of the Court shall be settled by the decision of the Court”. Moreover, rule 195(1) states:

When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court.
12. Therefore the Chamber concludes that, in this respect, the Republic of Malawi did not cooperate with the Court in order to resolve the issue. The Republic of Malawi should have brought the matter to the attention of the Chamber, together with any available information, in order for the Chamber to make its determination.

**Issue Presented to the Court**

13. That said, due to the significance of the issues before the Court the Chamber will decide the issue of Malawi’s non-cooperation on the merits. The Chamber considers that the arguments raised by the Republic of Malawi to justify its refusal to execute the Cooperation Requests may be summarized as follows:

- Al Bashir is a sitting Head of State not Party to the Rome Statute and therefore Malawi accorded him immunity from arrest and prosecution in line with “established principles of public international law” and in accordance with the “Immunities and Privileges Act of Malawi” (the “First Argument”);

- The Republic of Malawi, being a member of the African Union, decided to fully align itself with “the position adopted by the African Union with respect to the indictment of sitting Heads of State and Government of countries that are not parties to the Rome Statute” (the “Second Argument”).

14. With respect to the Second Argument, the Chamber notes that the Republic of Malawi does not provide the Chamber with any specific document which articulates the “position adopted by the African Union”. The Chamber, however, understands this argument as challenging the existence of

---

16. The Chamber is of the view that the First Argument presented by the Republic of Malawi raises the following issue: under the Statute, namely whether sitting Heads of States not parties to the Statute enjoy immunity with respect to the enforcement of a warrant of arrest issued by the Court, by national authorities.

17. The Chamber considers that, although not expressly referred to in the Observations from the Republic of Malawi, article 98(1) of the Statute is the applicable article in this respect. This article reads as follows:

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

18. The Chamber notes the Observations from the Republic of Malawi where they say that “Sudan, of which His Excellency President Al Bashir is Head of State, is not a party to the Rome Statute and, in the considered opinion of the Malawi authorities, Article 27 of the Statute which, inter alia, waives the immunity of the Heads of State and Government, is not applicable”. The remarks suggest that Malawi conceives, and the Chamber agrees, that a waiver of immunity would obviously not be necessary with respect to a third State which has ratified the Statute. Indeed, acceptance of article 27(2) of the Statute, implies waiver of immunities for the purposes of article 98(1) of the Statute with respect to proceedings conducted by the Court. However, for the reasons set out below, the Chamber rejects the argument presented by the Republic of Malawi, with respect to States not parties to the Statute, that international law affords immunity to Heads of States in respect of proceedings before international courts.

Irrelevance of Internal Law

19. The Chamber notes that the First Argument raised in the Observations from the Republic of Malawi seems to have two parts: the first part refers to established principles of international law and the second part refers to the national law of the Republic of Malawi.

20. The Chamber will not consider the second part of the First Argument as article 98(1) of the Statute only refers to international law and thereby excludes any possibility for the requested State to rely on its national law, in order not to comply with a cooperation request sent by the Court. This is furthermore in line with established principles of international law as embodied in article 27 of the 23 May 1969 Vienna Convention on the Law of Treaties which states:

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

21. Therefore, to the extent the Republic of Malawi refers to its internal law in order to justify its failure to comply with the Cooperation Requests, such an argument is rejected by the Chamber in limine.

Immunity of Heads of States in International Proceedings

22. The Chamber will now assess whether, under international law, either former or sitting heads of States enjoy immunity in respect of proceedings before international courts.

23. The Chamber notes that as early as March 1919, in the aftermath of the First World War, the Commission on the Responsibility of the Authors of
War and on Enforcement of Penalties\textsuperscript{14} recommended the establishment of a High Tribunal rejecting the idea of immunities even for Heads of States:

In these circumstances, the Commission desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of States. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a State. But this privilege, where it is recognized, is one of practical experience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

24. In the aftermath of the Second World War, two international tribunals were established, respectively in Nuremberg and in Tokyo. Article 7 of the Charter of the International Military Tribunal\textsuperscript{15} states as follows:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

25. The International Military Tribunal sitting in Nuremberg reaffirmed such a principle in its judgment issued on 1\textsuperscript{st} October 1946:\textsuperscript{16}

The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.

\textsuperscript{14} American Journal of International Law, 1920 (14), at 116.

\textsuperscript{15} Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Signed at London on 8 August 1945, United Nations – Treaty Series, 1951, n° 251, at 279.

\textsuperscript{16} The Trial of German Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg, Part 22 (22\textsuperscript{nd} August, 1946 to 1\textsuperscript{st} October, 1946), at 447.

26. Article 6 of the Charter of the International Military Tribunal for the Far East, sitting in Tokyo, established on 19 January 1946 by the Supreme Commander for the Allied Powers, states as follows:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

27. In its judgment, the International Military Tribunal sitting in Tokyo\textsuperscript{17} convicted defendant Hiroshi Oshima, the Japanese Ambassador in Berlin, despite his assertion that he was protected by his diplomatic immunity:

OSHIMA’s special defence is that in connection with his activities in Germany he is protected by diplomatic immunity and is exempt from prosecution. Diplomatic privilege does not import immunity from legal liability, but only exemption from trial by the Courts of the State to which an Ambassador is accredited. In any event this immunity has no relation to crimes against international law charged before a tribunal having jurisdiction. The Tribunal rejects this special defence\textsuperscript{18}.

28. In 1950, the United Nations General Assembly adopted\textsuperscript{19} the “Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal”. Principle III states:

The fact that a person who committed an act which constitutes a crime under international law acted as head of State or responsible Government official does not relieve him from responsibility under international law.


No. ICC-02/05-01/09 14/22 12 December 2011
29. Article 7(2) of the International Tribunal for the Former Yugoslavia\(^\text{19}\) Statute likewise states:

\[
\text{The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.}
\]

30. In several occasions, especially after the transfer of Slobodan Milosevic, the International Tribunal for the Former Yugoslavia ("ICTY") stated that article 7(2) was declaratory of customary international law:

\[
\text{Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and article 6(2) of the Statute of the International Criminal Tribunal for Rwanda [...], are indisputably declaratory of customary international law.}^{20}
\]

31. Article 6(2) of the International Tribunal for Rwanda ("ICTR") Statute\(^\text{21}\) is identical to article 7(2) of the ICTY Statute.

32. In its Draft Code of Crimes against the Peace and Security of Mankind\(^\text{22}\), the International Law Commission adopted the same principle. Article 7 of this Draft Code, entitled "Official position and Responsibility" indeed states:

\[
\]

\[
\text{ICTY, the Prosecutor v. Anton Furundzija, case no. IT-95-171-T, Judgement, 10 December 1998, para. 142; see also ICTY, the Prosecutor v. Slobodan Milosevic, Case no. IT-98-37-P; Decision on Preliminary Objection, 8 November 2001, para. 28.}
\]

\[
\]

\[
\]

The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as Head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.

33. The International Court of Justice ("ICJ") held, in the "Arrest Warrant Case",\(^\text{23}\) that although customary international law provided for immunity with regard to national courts, for certain officials such as the incumbent Minister of Foreign Affairs, and a fortiori for Heads of State and Government, even in the case of a suspected commission of war crimes or crimes against humanity, such immunities could not be opposed by a criminal prosecution of an international court:

\[
\text{Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council Resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in article 27, paragraph 2, that "immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."}^{24}
\]

34. The ICJ in the "Arrest Warrant Case" is concerned solely with immunity across national jurisdictions. The ICJ majority referenced the international tribunal provisions addressing immunity, including article 27 of the Statute, and concluded that these provisions "do not enable it to conclude that any such an exception exists in customary international law in regard to national courts."\(^\text{25}\) The ICJ majority discussion of customary international law immunity is therefore distinct from the present circumstances, as here an

\[
\text{\textsuperscript{19} Arrest warrants of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 14 February 2002, ICJ Reports 2002.}
\]

\[
\text{\textsuperscript{20} Ibid., at para. 61.}
\]

\[
\text{\textsuperscript{21} Ibid., at para. 58 (emphasis added).}
\]
International court is seeking arrest for international crimes. This distinction is meaningful because, as argued by Antonio Cassese, the rationale for foreign state officials being entitled to raise personal immunity before national courts is that otherwise national authorities might use prosecutions to unduly impede or limit a foreign state’s ability to engage in international action.\textsuperscript{26} Cassese emphasised that this danger does not arise with international courts and tribunals, which are “totally independent of states and subject to strict rules of impartiality”.\textsuperscript{27}

35. Following the ICJ ruling in the “Arrest Warrant Case”, the Appeals Chamber of the Special Court for Sierra Leone, applying article 6(2) of its Statute\textsuperscript{28} which is identical to article 6(2) of the ICTR Statute and article 7(2) of the ICTY Statute, held that “the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court”.\textsuperscript{29} As explained by that Court:

\begin{quote}
A reason for the distinction, in this regard, between national courts and international courts, though not immediately evident, would appear due to the fact that the principle that one sovereign state does not adjudicate on the conduct of another state; the principle of state immunity derives from the equality of sovereign states and therefore has no relevance to international criminal tribunals which are not organs of a state but derive their mandate from the international community.
\end{quote}

36. Therefore, the Chamber finds that the principle in international law is that immunity of either former or sitting Heads of State can not be invoked to oppose a prosecution by an international court. This is equally applicable to former or sitting Heads of States not Parties to the Statute whenever the Court may exercise jurisdiction. In this particular case, the Chamber notes that it is exercising jurisdiction following a referral by the United Nations Security Council made under Chapter VII of the United Nations Charter, in accordance with article 13(6) of the Statute.

**Immunity of Heads of State With Respect to Requests for Arrest and Surrender**

37. The Chamber notes that there is an inherent tension between articles 27(2) and 98(1) of the Statute and the role immunity plays when the Court seeks cooperation regarding the arrest of a Head of State. The Chamber considers that Malawi, and by extension the African Union, are not entitled to rely on article 98(1) of the Statute to justify refusing to comply with the Cooperation Requests.

38. First, as described above, immunity for Heads of State before international courts has been rejected time and time again dating all the way back to World War I.\textsuperscript{30}

39. Second, there has been an increase in Head of State prosecutions by international courts in the last decade. Only one international prosecution of a Head of State had been initiated when the judgment in the “Arrest Warrant Case” was rendered; this trial (Slobodan Milosevic) began only two days before this judgment was issued and its existence is not even referenced by the ICJ majority. Subsequent to 14 February 2002, international prosecutions against Charles Taylor, Muammar Gaddafi, Laurent Gbagbo and the present case show that initiating international prosecutions against Heads of State have gained widespread recognition as accepted practice.

\textsuperscript{26} A. Cassese, *International Criminal Law* (Oxford University Press, 2\textsuperscript{nd} ed., 2008), at 312.

\textsuperscript{27} Ibid.


\textsuperscript{29} Special Court for Sierra Leone, Appeals Chamber, The Prosecutor v. Charles Ghankay Taylor, Case Number SCSL-2003-1-AR72(E), Decision on Immunity from Jurisdiction, 31 May 2004, para 51-52.

\textsuperscript{30} Supra, paras 23-35.
40. Third, the Statute now has reached 120 States Parties in its 9 plus years of existence, all of whom have accepted having any immunity they had under international law stripped from their top officials. All of these states have renounced any claim to immunity by ratifying the language of article 27(2): “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising jurisdiction over such a person.”. Even some States which have not joined the Court have twice allowed for situations to be referred to the Court by United Nations Security Council Resolutions, undoubtedly in the knowledge that these referrals might involve prosecution of Heads of State who might ordinarily have immunity from domestic prosecution.  

41. Fourth, all the States referenced above have ratified this Statute and/or entrusted this Court with exercising “its jurisdiction over persons for the most serious crimes of international concern”. It is facially inconsistent for Malawi to entrust the Court with this mandate and then refuse to surrender a Head of State prosecuted for orchestrating genocide, war crimes and crimes against humanity. To interpret article 98(1) in such a way so as to justify not surrendering Omar Al Bashir on immunity grounds would disable the Court and international criminal justice in ways completely contrary to the purpose of the Statute Malawi has ratified.

42. The Chamber considers that the international community’s commitment to rejecting immunity in circumstances where international courts seek arrest for international crimes has reached a critical mass. If it ever was appropriate to say so, it is certainly no longer appropriate to say that customary international law immunity applies in the present context.

43. For the above reasons and the jurisprudence cited earlier in this decision, the Chamber finds that customary international law creates an exception to Head of State immunity when international courts seek a Head of State’s arrest for the commission of international crimes. There is no conflict between Malawi’s obligations towards the Court and its obligations under customary international law; therefore, article 98(1) of the Statute does not apply.

Consequences of the Chamber’s findings for States Parties

44. Furthermore, the Chamber is of the view that the unavailability of immunities with respect to prosecutions by international courts applies to any act of cooperation by States which forms an integral part of those prosecutions.

45. Indeed, the cooperation regime between the Court and States Parties, as established in Part IX of the Statute, can not in any way be equated with the inter-state cooperation regime which exists between sovereign States. This is evidenced by the Statute itself which refers in article 91 of the Statute to the “distinct nature of the Court”, and in article 102 of the Statute which makes a clear distinction between “surrender”, meaning the delivering up of a person by a State to the Court, and “extradition”, meaning the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

46. Indeed, it is the view of the Chamber that when cooperating with this Court and therefore acting on its behalf, States Parties are instruments for the enforcement of the jus cogens of the international community whose exercise
has been entrusted to this Court when States have failed to prosecute those responsible for the crimes within its jurisdiction.

47. The Chamber therefore finds, in accordance with article 87(7) of the Statute that the Republic of Malawi has failed to comply with the Cooperation Requests contrary to the provisions of the Statute and has thereby prevented the Court from exercising its functions and powers under this Statute. The Chamber decides to refer the matter both to the United Nations Security Council and to the Assembly of States Parties.

FOR THESE REASONS, THE CHAMBER

FINDS, in accordance with articles 86, 87(7) and 89 of the Statute, that the Republic of Malawi: (i) failed to comply with its obligations to consult with the Chamber by not bringing the issue of Omar Al Bashir’s immunity to the Chamber for its determination and (ii) failed to cooperate with the Court by failing to arrest and surrender Omar Al Bashir to the Court, thus preventing the Court from exercising its functions and powers under the Statute; and

ORDEES the Registrar to transmit the present decision to the Security Council through the Secretary General of the United Nations and, to the Assembly of States Parties to the Statute.

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

Judge Sanji Mmasenono Monageng
Presiding Judge

Judge Sylvia Steiner
Judge Cuno Tarfusser

Dated this Monday, 12 December 2011
At The Hague, The Netherlands
International Criminal Court

Prosecutor v. Thomas Lubanga Dyilo
Judgment pursuant to Article 74 of the Statute (summary)

Trial Chamber I, 14 March 2012
TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Plattman

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYilo

Summary of the “Judgment pursuant to Article 74 of the Statute”

Decision/Order/Judgment to be notified in accordance with Regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor
Mr. Luis Moreno Ocampo
Ms Fatou Bensouda

Legal Representatives of the Victims
Mr Luc Walkeyn
Ms Carine Baptita Buyangandu
Mr Joseph Keta Orwinyo
Mr Paul Kabongo Tshibangu

Unrepresented Victims

The Office of Public Counsel for the Victims
Ms Paolina Massida

States Representatives

REGISTRY
Registrar
Ms Silvana Arbia

Victims and Witnesses Unit
Detention Section

Victims Participation and Reparations Section
Other

No. ICC-01/04-01/06

14 March 2012
Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of Prosecutor v. Thomas Lubanga Dyilo ("Lubanga case"), issues the following Summary of the "Judgment pursuant to Article 74 of the Statute":

A. Introduction

1. This is the summary of the Chamber's Judgment under Article 74 of the Rome Statute as to whether the Prosecutor has proved the guilt of the accused.

B. Charges against the accused

2. On 29 January 2007 the Pre-Trial Chamber issued its Decision on the Confirmation of Charges. The Pre-Trial Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that:

Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xvi) and 25(3)(a) of the Statute from early September 2002 to 2 June 2003.

Additionally, the Pre-Trial Chamber confirmed that there was sufficient evidence to establish substantial grounds to believe that:

Thomas Lubanga Dyilo is responsible, as co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of articles 8(2)(b)(xvi) and 25(3)(a) of the Statute from 2 June to 13 August 2003.

C. Jurisdiction

3. Pursuant to Article 19 of the Statute, the "Court shall satisfy itself that it has jurisdiction in any case brought before it." The Democratic Republic of the Congo ("DRC") became a State party on 11 April 2002 and, pursuant to Article 14 of the Statute, President Kabila referred the situation in the DRC to the Prosecutor in March 2004. Pre-Trial Chamber I concluded that the case falls within the Court's jurisdiction, and the Appeals Chamber confirmed the Pre-Trial Chamber's Decision on the accused's challenge to the jurisdiction of the Court. The personal, temporal, territorial and subject-matter elements that are relevant to the Court's jurisdiction have not altered since the Decision on the Confirmation of the Charges, and the issue has not been raised by the parties or any State before the Trial Chamber.

D. Brief case history

4. The first status conference before the Trial Chamber was held on 4 September 2007, and thereafter there were 54 status conferences prior to the commencement of the trial. The following is a summary of the main procedural events which had a significant impact on the course of the proceedings.

5. The trial was stayed twice as a consequence of disclosure issues. The first stay was imposed by the Chamber on 13 June 2008, and it was lifted on 18 November 2008. A second stay was imposed on 8 July 2010. The presentation of evidence resumed on 25 October 2010.

7. On 3 September 2009, the Chamber adjourned the presentation of evidence pending an interlocutory appeal. The Appeals Chamber issued its judgment on the matter on 8 December 2009 and the evidence resumed on 7 January 2010.

8. The defence presented a bifurcated case. In the first part the defence in essence called into question the testimony of all the prosecution’s child soldier witnesses, a process that included the presentation of rebuttal witnesses by the prosecution. On 10 December 2010, the defence filed an application seeking a permanent stay of the proceedings. The Chamber issued a Decision dismissing the defence application on 23 February 2011.

9. The second part of the defence evidence was introduced thereafter and on 20 May 2011 the presentation of evidence formally closed.

10. The Trial Chamber heard 67 witnesses, and there were 204 days of hearings. The prosecution called 36 witnesses, including 3 experts, and the defence called 24 witnesses. Three victims were called as witnesses following a request from their legal representatives. Additionally, the Chamber called four experts. The prosecution submitted 368 items of evidence, the defence 992, and the legal representatives 13 (1373 in total). In addition to the written submissions, the oral closing arguments of the parties and participants were heard on 25 and 26 August 2011. Since 6 June 2007, when the record of the case was transmitted to the Trial Chamber, the Chamber has delivered 275 written decisions and orders and 347 oral decisions.

11. In accordance with Article 68(3) of the Statute, victims have participated in the case, and in particular they have applied to introduce evidence, they have questioned witnesses and they have advanced written and oral submissions with the leave of the Chamber and with the assistance of their legal representatives. The total number of individual victims authorised to participate in the proceedings is 129 (34 female and 95 male victims).

12. At the request of the accused and in accordance with Article 76(2) of the Statute, the Chamber in an oral Decision ruled that there would be a separate sentencing hearing if the accused is convicted.

E. Factual overview

13. The Trial Chamber heard the testimony of several expert witnesses and it reviewed documentary evidence that relates to the existence of an inter-ethnic conflict in Ituri between 1999 and 2003.

14. Against this background, the Union des Patriotes Congolais (“UPC”) was created on 15 September 2000. Although Thomas Lubanga was one of the UPC’s founding members and its President from the outset, the nature of the group when it was created is a matter of dispute in this case. These topics are analysed in greater detail below when the
Chamber deals with the individual criminal responsibility of the accused.

15. The UPC and its military wing, the Force Patriotique pour la Libération du Congo (“FPLC”), took power in Ituri in September 2002.

F. The Burden and Standard of Proof

16. Under Article 66 of the Statute, the accused is presumed to be innocent until the Prosecutor has proved his guilt. For a conviction, each element of the crime charged must be established “beyond reasonable doubt”.

G. Intermediaries

17. An issue that occupied the Chamber for a significant part of this trial concerned the use by the prosecution of local intermediaries in the DRC. The Chamber is of the view that the prosecution should not have delegated its investigative responsibilities to the intermediaries as analysed in the judgment, notwithstanding the extensive security difficulties that it faced. A series of witnesses have been called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal intermediaries, cannot safely be relied on.

18. The Chamber spent a considerable period of time investigating the circumstances of a substantial number of individuals whose evidence was, at least in part, inaccurate or dishonest. The prosecution’s negligence in failing to verify and scrutinise this material sufficiently before it was introduced led to significant expenditure on the part of the Court. An additional consequence of the lack of proper oversight of the intermediaries is that they were potentially able to take advantage of the witnesses they contacted. Irrespective of the Chamber’s conclusions regarding the credibility and reliability of the alleged former child soldier witnesses, given their youth and likely exposure to conflict, they were vulnerable to manipulation.

19. The Chamber has withdrawn the right of six dual status witnesses to participate in the proceedings, as a result of the Chamber’s conclusions as to the reliability and accuracy of these witnesses.

20. Likewise, the Chamber has not relied on the testimony of the three victims who testified in Court (a/0225/06, a/0229/06, and a/0270/07), because their accounts are unreliable. Given the material doubts that exist as to the identities of two of these individuals, which inevitably affect the evidence of the third, the Chamber decided to withdraw the permission originally granted to them to participate as victims.

21. The Chamber has concluded that there is a risk that intermediaries P-0143, P-316 and P-321 persuaded, encouraged, or assisted witnesses to give false evidence. These individuals may have committed crimes under Article 70 of the Statute. Pursuant to Rule 165 of the Rules, the responsibility to initiate and conduct investigations in these circumstances lies with the prosecution. Investigations can be initiated on the basis of information communicated by a Chamber or any reliable source. The Chamber communicates the relevant information to the
The German version of this document is not provided. It appears to be a legal text discussing the rights and responsibilities of children under the age of 15. The text mentions the Group of the UNCRC’s response to the allegations of the Commissioner for Children. The document also refers to a recent report of the Commissioner for Children, which is not visible in the image. The text includes references to the UN Convention on the Rights of the Child (UNCRC) and its provisions on the rights of children. The document discusses the legal definition of children and their rights, as well as the responsibilities of states and other entities to protect and promote the rights of children under the age of 15.
28. Multiple witnesses testified credibly and reliably that children under 15 were “voluntarily” or forcibly recruited into the UPC/FPLC and sent to either the headquarters of the UPC/FPLC in Bunia or its military training camps, including at Rwamara, Mandro, and Mongbwalu. Video evidence clearly shows recruits under the age of 15 in the Rwamara camp.

29. The evidence demonstrates that children in the military camps endured harsh training regimes and were subjected to a variety of severe punishments. The evidence also establishes that children, mainly girls, were used by UPC/FPLC commanders to carry out domestic work. The Trial Chamber heard evidence from witnesses that girl soldiers were subjected to sexual violence and rape. Witnesses specifically referred to girls under the age of 15 who were subjected to sexual violence by UPC/FPLC commanders. Sexual violence does not form part of the charges against the accused, and the Chamber has not made any findings of fact on the issue, particularly as to whether responsibility is to be attributed to the accused.

30. The evidence has established beyond reasonable doubt that children under the age of 15 were conscripted and enlisted into the UPC/FPLC forces between 1 September 2002 and 13 August 2003.

31. The testimony of multiple witnesses and the documentary evidence have demonstrated that children under the age of 15 were within the ranks of the UPC/FPLC between 1 September 2002 and 13 August 2003. The evidence proves that children were deployed as soldiers in Bunia, Tchomia, Kasenyi, Bogoro and elsewhere, and they took part in fighting, including at Kobu, Songolo and Mongbwalu. It has been established that the UPC/FPLC used children under the age of 15 as military guards. The evidence reveals that a special “Kadogo Unit” was formed, which was comprised principally of children under the age of 15. The evidence of various witnesses, as well as video footage, demonstrates that commanders in the UPC/FPLC frequently used children under the age of 15 as bodyguards. The accounts of several witnesses, along with the video evidence, clearly prove that children under the age of 15 acted as bodyguards or served within the presidential guard of Mr Lubanga.

32. In all the circumstances, the evidence has established beyond reasonable doubt that children under the age of 15 were used by the UPC/FPLC to participate actively in hostilities between 1 September 2002 and 13 August 2003.

K. Legal analysis of Articles 25(3)(a) and 30 of the Statute

33. The Chamber has concluded that pursuant to Articles 25(3)(a) and 30 of the Statute, the prosecution must prove in relation to each charge that:

(i) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, will result in the commission of the relevant crime in the ordinary course of events;

(ii) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime;

(iii) the accused meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or he was aware that
by implementing the common plan these consequences “will occur in the ordinary course of events”;

(iv) the accused was aware that he provided an essential contribution to the implementation of the common plan; and

(v) the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.

I. The facts relating to the individual criminal responsibility of Mr Thomas Lubanga

34. The evidence has confirmed that the accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. In the ordinary course of events, this resulted in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities.

35. The Chamber has concluded that from late 2000 onwards Thomas Lubanga acted with his co-perpetrators, who included Floribert Kisembo, Bosco Ntaganda, Chief Kahwa, and commanders Tchalogonza, Bagonza and Kasangaki. Mr Lubanga’s involvement with the soldiers (including young children) who were sent to Uganda for training is of significance. Although these events fall outside the period covered by the charges and are outwith the temporal jurisdiction of the Court, they provide evidence on the activities of this group, and they help establish the existence of the common plan before and throughout the period of the charges.

36. The accused was in conflict with Mr Mbusa Nyamwisi and the Rassemblement Congolais pour la Démocratie (“RCD-ML”) from at least April 2002, and he led a group that sought to bring about political change in Ituri, including the removal of Mr Mbusa Nyamwisi by force, if necessary. The accused remained in control, by delegated authority, whilst he was detained during the summer of 2002 and he sent Chief Kahwa and Mr Beiza to Rwanda to obtain arms. During that period, Floribert Kisembo, Bosco Ntaganda and Chief Kahwa, three of the accused’s principal alleged co-perpetrators, were generally responsible for recruitment and training, which included girls and boys under the age of 15.

37. The accused and at least some of his co-perpetrators were involved in the takeover of Bunia in August 2002. Thomas Lubanga, as the highest authority within the UPC/FPLC, appointed Chief Kahwa, Floribert Kisembo and Bosco Ntaganda to senior positions within the UPC/FPLC. The evidence has established that during this period, the leaders of the UPC/FPLC, including Chief Kahwa, and Bosco Ntaganda, and Hema elders such as Eloy Maftua, were active in mobilisation drives and recruitment campaigns in order to persuade Hema families to send their children to join the UPC/FPLC. Those children recruited before the formal creation of the FPLC were incorporated into that group and a number of military training camps were added to the original facility at Mandro. The Chamber has concluded that between 1 September 2002 and 13 August 2003, a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment
exercise directed at young people, including children under the age of 15, on both voluntary and coercive bases.

38. The Chamber is satisfied beyond reasonable doubt that as a result of the implementation of the common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri, boys and girls under the age of 15 were conscripted and enlisted into the UPC/FPLC between 1 September 2002 and 13 August 2003. Similarly, the Chamber is satisfied beyond reasonable doubt that the UPC/FPLC used children under the age of 15 to participate actively in hostilities including during battles. They were used, during the relevant period, as soldiers and as bodyguards for senior officials including the accused.

39. Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role as regards the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC. He was involved in the planning of military operations, and he played a critical role in providing logistical support, including providing weapons, ammunition, food, uniforms, military rations and other general supplies to the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampana military camp, he encouraged children including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field after their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC staff members who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.

40. The Chamber is satisfied beyond reasonable doubt, as set out above, that Thomas Lubanga acted with the intent and knowledge necessary to establish the charges (the mental element required by Article 30). He was aware of the factual circumstances that established the existence of the armed conflict. Furthermore, he was aware of the nexus between the said circumstances and his own conduct, which resulted in the conscription, enlistment and use of children below the age of 15 to participate actively in hostilities.

M. Conclusion of the Chamber

41. Although Judges Odio Benito and Fulford have written separate and dissenting opinions on particular discrete issues, the Chamber has reached its decision unanimously.

42. The Chamber concludes that the prosecution has proved beyond reasonable doubt that Mr Thomas Lubanga D’Ayilo is guilty of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the
meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the Statute from early September 2002 to 13 August 2003.

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

Judge Adrian Fulford
Judge Elizabeth Odio Benito
Judge René Blattmann

Dated this 14 March 2012
At The Hague, The Netherlands