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# INTERNATIONAL CRIMINAL COURT: Declarations amounting to prohibited reservations to the Rome Statute

## INTRODUCTION

Although Article 120 of the Rome Statute provides that no reservations may be made to the Statute, unilateral declarations which specify or clarify the meaning of certain provisions are not prohibited.<sup>1</sup> Amnesty International is seriously concerned that some declarations made upon ratification by some states amount to disguised reservations. In this report Amnesty International examines declarations made by six states parties and concludes that a number of them amount to reservations.

The legal analysis sets out in detail the organization's concerns and calls on all states, in becoming party to the Rome Statute, not to make any kind of unilateral statement which could defeat the object and purpose of the Statute or in any way undermine its text. In addition, states parties which have made declarations inconsistent with the Rome Statute should withdraw them. The International Criminal Court (Court) should not be limited in the exercise of its competence by the declarations made by states parties and should give its own interpretation of the Rome Statute in full independence.

## I. RESERVATIONS AND DECLARATIONS

There are two main types of unilateral statements that states may make when they ratify or accede to treaties: reservation and declarations. As discussed below, each of these statements have different intentions and legal consequences. The label attached to them does not determine what type of statement they are; it is an objective test, and the statement will be interpreted in the light of the meaning it bears.

**Reservations** Under modern treaty law, there is general agreement that a unilateral statement made by a state or an international organization when signing,

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<sup>1</sup> U.N. Doc. A/CONF.183/9 17 July 1998, in accordance with the *procès-verbaux* 10 November 1998, as amended, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002. The Rome Statute *entered into force* on 1 July 2002 and 100 states are parties to it.

ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a state when making a notification of succession to a treaty, will be defined as a reservation regardless of how it is phrased or named where the state or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state or to that international organization.<sup>2</sup>

When the Charter of the United Nations was adopted in 1945 the view that no reservations were permitted to multilateral treaties in the absence of unanimous consent of the other state parties had considerable, but far from unanimous, support.<sup>3</sup> This strict view – encouraged by the International Law Commission 1951 Report on Reservations to Multilateral Treaties – preserved the integrity of treaties but often collided with the goal of broad participation of states which, due to constitutional or other legal obstacles, could not become parties unless certain reservations were permitted. As a result, this unanimity rule was progressively eroded by an increasing number of states which desired more widespread participation in treaties.<sup>4</sup>

In the Advisory Opinion on the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, given in 1951, the International Court of Justice held that, in the absence of a prohibition on reservations in a multilateral treaty, it was presumed that reservations were permitted unless they would defeat the object and purpose of the treaty.<sup>5</sup>

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<sup>2</sup> Report of the International Law Commission on the Work of its Fifty-First Session, 3 May-23 July 1999 (A/54/10) (1999 ILC Report), Chapter VI, 1 (1) ([www.un.org/law/ilc/reports/1999/english/99repfra.htm](http://www.un.org/law/ilc/reports/1999/english/99repfra.htm)).

<sup>3</sup> Egon Schwelb, *The Amending Procedure of Constitutionalizations of International Organizations*, 31 Brit. Y.B. Int'l L. 94 (1954) (“It is submitted that the Charter, although it contains no express provision to this effect, does not admit of reservations by unilateral declaration. No reservation was made on signature or ratification of the Charter by any Government...”). Although the UN Charter is a unique constitutional instrument of an intergovernmental organization, many scholars at the time argued that, in the absence of an express provision permitting reservations to any multilateral treaty, they were prohibited.

<sup>4</sup> Catherine Redgwell, *The Law of Reservations in Respect of Multilateral Conventions*, in Chinkin *et al.*, eds., *Human Rights as General Norms and State's Right to Opt Out* (London: J.P. Gardner, B.I.I.C.L. 1997). Antonio Cassese, *International Law* 173 (Oxford: Oxford University Press 2<sup>nd</sup> ed. 2004). On the Latin American system, which adopted a flexible approach at the expense of depth of obligation as early as 1928, see L.A. Podestá Costa & José María Ruda, 2 *Derecho Internacional Público* 45 (Buenos Aires: TEA 1985).

<sup>5</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, 1951 I.C.J. Rep. 22-24 (A summary of the decision is available at

The International Court of Justice then concluded:

“[T]he object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and the purpose of the Convention that must furnish the criterion to determine the attitude of the State which makes the reservation and of the State which objects.”<sup>6</sup>

A few months later, that view was endorsed by the General Assembly, which encouraged all states to be guided by the Advisory Opinion of the International Court of Justice in regard to the Genocide Convention.<sup>7</sup>

In 1969, the Vienna Convention on the Law of Treaties codified the structure of modern reservations law, inspired by the flexible approach contained in the judgment of the International Court of Justice, stating that:

“[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- a. The reservation is prohibited by the treaty;
- b. The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

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[www.icj-cij.org/icjwww/idecisions/isummaries/ippcgsummary510528.htm](http://www.icj-cij.org/icjwww/idecisions/isummaries/ippcgsummary510528.htm)). The same approach is adopted, for example, by several human rights treaties: Article 51 (2) of the Convention on the Rights of the Child provides: “A reservation incompatible with the object and purpose of the present Convention shall not be permitted”; *see also* Article 28 (2) of the Convention on the Elimination of All Forms of Discrimination against Women. At regional level, Article XIX of the Inter-American Convention on Forced Disappearances states: “The states may express reservations with respect to this Convention when adopting, signing, ratifying or acceding to it, unless such reservations are incompatible with the object and purpose of the Convention and as long as they refer to one or more specific provisions”. In the same sense, see Article 21 of the Inter-American Convention to Prevent and Punish Torture and Article 18 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

<sup>6</sup> Reservations Advisory Opinion, *supra*, note 4. Jennings and Watts explain that: “Although the Opinion was limited to the case of the Genocide Convention and was based on the special characteristics of that Convention, it must be considered as having a distinct bearing upon the general rules of customary international law relating to reservations”, Robert Jennings & Arthur Watts, 1 *Oppenheim’s International Law* 1245 (London/New York: Longman 9<sup>th</sup> ed. 1997).

<sup>7</sup> GA Res.598 (VI) (1952).

c. In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.”<sup>8</sup>

**Declarations** Nevertheless, if a statement makes an interpretation of a provision without altering or modifying the provision, it is not in fact a reservation but is rather a declaration (sometimes called an interpretive declaration or an understanding). The International Law Commission has found that an “interpretative declaration” means:

“[A] unilateral statement, however phrased or named, made by a State or by an international organization whereby that State or that organization purports to specify or clarify the meaning or scope attributed by the declarant to a treaty or to certain of its provisions.”<sup>9</sup>

In this way, an interpretative declaration can be considered as a useful tool in the interpretation of the meaning of a treaty, as long as it does not constitute a disguised reservation. In view of the fact that interpretative declarations are as widely used as reservations,<sup>10</sup> there are other factors that need to be considered when trying to determine whether a statement is a reservation or a declaration.

The International Law Commission has defined a “statement purporting to limit the obligations of their author” as a reservation:

“[a] unilateral statement formulated by a State or an international organization at the time when that State or that organization expresses its consent to be bound by a treaty by which its author purports to limit the obligations imposed on it by the treaty constitutes a reservation.”<sup>11</sup>

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<sup>8</sup> Vienna Convention on the Law of Treaties, Article 19; 1155 U.N.T.S. 331, *adopted* 22 May 1969, *entered into force* 27 January 1980, in accordance with article 84 (1).

<sup>9</sup> 1999 ILC Report, *supra*, note 2, at 1 (2).

<sup>10</sup> Anthony Aust, *Modern Treaty Law and Practice* 101 (Cambridge: Cambridge University Press 2004). Leila Lankarani, *La Lutte contre la Corruption*, in Hervé Ascencio, Emmanuel Decaux et Alain Pellet, *Droit International Pénal* 608 (Paris: Pedone 2000). («L’effectivité des moyens prévus par les textes conventionnels dépendra, d’ un part, de l’ abstention ou de l’usage modéré des Etats en matière de réserves –dont le principe est admis pour la plupart des incriminations - du fonctionnement, d’ autre part, des organes de suivi ou de monitoring envisagés par la plupart des textes et, enfin, de la participation large des Etats à ces instruments qui sont des traités ouverts »).

<sup>11</sup> 1999 ILC Report, *supra*, note 2, at 1(1) (5).

It has likewise defined a “statement purporting to discharge an obligation by equivalent means” as a reservation:

“[a] unilateral statement formulated by a State or an international organization when that State or that organization expresses its consent to be bound by a treaty by which that State or that organization purports to discharge an obligation pursuant to the treaty in a manner different from but equivalent to that imposed by the treaty constitutes a reservation.”<sup>12</sup>

However, it is often not easy to distinguish reservations from declarations because the distinction lies more in the legal effects the statement produces rather than the label under which a state or organization makes them. The fact that a state when ratifying a treaty labels a statement as a declaration (or an understanding, or any similar term) is not conclusive. If the true meaning of the statement is to alter, limit or modify the scope of a state or organization’s treaty obligations, it must be considered as a reservation. Conversely, true interpretative declarations or understandings have no legal consequences.<sup>13</sup>

## **II. BACKGROUND TO THE PROHIBITION OF RESERVATIONS IN THE ROME STATUTE**

When the United Nations International Law Commission elaborated its Draft Statute for the International Criminal Court in 1994, the Draft Statute contained no provision on final clauses and consequently no provision on the issue of reservations. However, it remarked that “reservations to the Statute and its accompanying Treaty should either not be permitted or should be limited in scope”.<sup>14</sup>

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<sup>12</sup> 1999 ILC Report, *supra*, note 2, at 1 (1) (6).

<sup>13</sup> D.W. Bowett, *Reservations to Non Restricted Multilateral Treaties*, 48 Brit. Y.B. Int’l L.67 (1976-1977).

<sup>14</sup> Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. Doc. A/49/10, p.147. For the ILC Draft Statute for an International Criminal Court, p.43.

The 1995 “Siracusa Draft” prepared by several legal experts as an alternative text contained a limited right to make reservations, restricted to the Prosecutor’s power to conduct on-site investigations in the territory of a state party, either with or without its consent. The 1996 Siracusa updated text limited the right to make reservations to the extent allowed by the Vienna Convention on the Law of Treaties, by existing international obligations and by any crime defined by that draft.

Neither the Ad Hoc Committee on the Establishment of an International Criminal Court (1995)<sup>15</sup> nor the Preparatory Committee for the Establishment of an International Criminal Court (1996-1998)<sup>16</sup> paid much attention to the matter, until the submission of the Secretariat’s proposed final clauses in December 1997, which stated that “no reservations may be made to this Statute”.<sup>17</sup> This view, shared by many states and non-governmental organizations,<sup>18</sup> was criticized by the United States,

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<sup>15</sup> The Ad Hoc Committee was established by U.N. G.A. Res.49/53, 9 December 1994. For a report of its activities, see Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50<sup>th</sup> Sess., Supp.No.22, U.N. Doc.A/50/22 (1995).

<sup>16</sup> The Preparatory Committee was established by UN G.A. Res.50/46, 11 December 1995. The reports of its activities have been compiled in M. Cherif Bassiouni, *International Criminal Court Compilation of United Nations Documents and Draft ICC Statute Before the Diplomatic Conference* (Rome: No Peace Without Justice 1998).

<sup>17</sup> U.N. Doc. A/AC.249/1998/L.11 (1998).

<sup>18</sup> See Amnesty International, *The International Criminal Court: Making the Right Choices – Part IV: Establishing and financing the court and final clauses*, AI Index: IOR 40/004/1998, 1 March 1998, III.B (Prohibition of reservations) (“The Statute should expressly state that no reservations are permitted.”) and *The International Criminal Court: 16 Fundamental Principles for a Just, Fair and Effective International Criminal Court*, AI Index IOR 40/012/1998, May 1998 (both available at [www.amnesty.org](http://www.amnesty.org)); Human Rights Watch, *Justice in the Balance*, June 1998 (“While reservations may encourage broader ratification of the statute, near-universal ratification is neither desirable, in and of itself, nor is it essential to the effective functioning of the Court. What is essential is that the Court meet certain benchmarks of fairness and independence, and that the obligations of states parties vis-à-vis the Court be clear. Human Rights Watch therefore supports the prohibition on reservations, as proposed in Option 1”). Lawyers Committee for Human Rights (now Human Rights First), *International Criminal Court Briefing Series*, Vol. I, No.7, 16 (1998) (“Reservations would not only lead to confusion as to the exact extent of the obligations undertaken by states but could, depending on their scope, defeat the very object and purpose of the ICC treaty. As constant controversies generated by reservations to human rights treaties have shown, similar uncertainty and dilution of the ICC statute must be avoided”).



France, Russia and some Arab States, among others.<sup>19</sup> Consequently, the final report of the Preparatory Committee to the Conference contained essentially three options: (1) complete prohibition of reservations; (2) permitting reservations to a list of admissible articles; or (3) no provision on reservations – thus implicitly applying the Vienna Convention on the Law of Treaties.<sup>20</sup> A fourth option was later added, authorizing states parties to make reservations, with the exception of reservations to certain articles or parts of the Statute.<sup>21</sup> All of these options were discussed at the Rome Conference in a group chaired by the Samoan Ambassador, Tuiloma Neroni Slade. There being no agreement in that group, the Bureau of the Committee of the Whole proposed, then as Article 109, the complete exclusion of reservations. The text eventually adopted by the Rome Conference reads as follows:

“No reservations may be made to this Statute.”<sup>22</sup>

As two of the delegates most closely involved with the drafting of this provision explained:

“Those States which tended to support a strong position on obligatory jurisdiction over core crimes (and who thus opposed either an opt-in or an opt-out regime) tended to support a prohibition of reservations. Those who feared that there might be some (not necessarily central) questions in the definitions of

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<sup>19</sup> Alain Pellet, *Entry into Force and Amendment of the Statute*, in Antonio Cassese, Paolo Gaeta & John R.W.D. Jones, eds., 1 *The Rome Statute of the International Criminal Court: A Commentary* 156 (Oxford: Oxford University Press 2002).

<sup>20</sup> U.N. Doc. A/AC.249/1998/CRP.4.

<sup>21</sup> See the exhaustive analysis of the history and meaning of Article 120 in Gerhard Hafner, *Article 120*, in Otto Triffterer, ed., *Commentary on the Rome Statute: Observers' Notes, Article by Article* 1251 (Baden-Baden: Nomos Verlagsgesellschaft 1999) (second edition forthcoming 2006).

<sup>22</sup> Rome Statute, Art. 120. Some other human rights treaties also expressly prohibit reservations, including: European Convention for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment, Article 21 (E.T.S. 126, *entered into force* Feb. 1, 1989); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Article 9 (*adopted* 30 April 1956, *entered into force* 30 April 1957); and Protocol to the American Convention on Human Rights to Abolish the Death Penalty, Article 2 (*adopted* on 8 June 1990, OAS, T.S. No. 73).

crimes that could cause them acute political problems domestically tended to support a right to make reservations.”<sup>23</sup>

The exclusion of reservations is consistent with the nature of the Rome Statute, which is a constitutional treaty establishing an intergovernmental organization and, like the Charter of the United Nations, establishes a fundamental new component of the framework of international law – sometimes called the Charter’s missing link. Under the Vienna Convention on the Law of Treaties, if a treaty establishing an intergovernmental organization is silent on reservations, the normal rules regarding reservations do not apply and “a reservation requires the acceptance of the competent organ of that organization”.<sup>24</sup> The Rome Statute is also a normative treaty guaranteeing the rights of third parties, including victims, their families, witnesses, suspects and accused. As such, reservations would weaken the Court’s deterrent effect and educational value, encourage partial acceptance of the obligations under the Rome Statute, undermine the moral authority of the Statute and deprive it of uniform application.<sup>25</sup>

### III. RESERVATIONS AND DECLARATIONS IN THE ROME STATUTE

The categorical inadmissibility of reservations laid down in Article 120 of the Rome Statute applies to the Statute as a whole and also applies to future amendments,

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<sup>23</sup> Tuiloma N. Slade and Roger S. Clark, *Preamble and Final Clauses*, in Roy S. Lee, ed., *The International Criminal Court: The Making of the Rome Statute – Issues – Negotiations – Results* 432 (The Hague/London/Boston: Kluwer Law International 1999).

<sup>24</sup> Vienna Convention on the Law of Treaties, Art. 20 (3).

<sup>25</sup> Amnesty International, *supra*, note 18; U.N. Doc. A/CN.4/477/Add.1 at 26 (Alain Pellet, Special Rapporteur of the International Law Commission on the study of reservations). See also, with regard to human rights treaties, the *Report of the sixth meeting of persons chairing the human rights treaty bodies*: (“The chairpersons welcome the ongoing efforts of the Secretary-General and the United Nations High Commissioner for Human Rights to promote universal ratification of international human rights instruments and, in particular, the preparations for the holding of regional conferences to promote ratification and the drafting of a major study on the matter. They recommend that States which are considering ratification avoid making it subject to wide reservations. The chairpersons deplore the recent increase in the number and breadth of reservations made upon ratification of certain instruments and observe that the practice undermines the spirit and the letter of these legal texts”), UN Doc. A/50/505, 4 October 1995, para.17.

including the potential definition of the crime of aggression or other crimes to be considered at the Review Conference.<sup>26</sup> Such inadmissibility, which preserves the integrity of the Rome Statute, is tempered by the transitional provision – an exception to the rule – contained in Article 124.<sup>27</sup> As Professor Alain Pellet commented, Article 124 – whereby a state party may make a declaration declining to accept the jurisdiction of the Court with respect to the category of war crimes for a limited period of time – “can be analysed as a downright reservation.”<sup>28</sup> Another leading scholarly authority has concluded that: “The exclusion of reservations preserves the integrity of the text, which is infringed only by the transitional provision of article 124”<sup>29</sup>.

Of course, it should not be concluded from the general prohibition contained in Article 120 that the Rome Statute is entirely inflexible. There are also several other provisions that permit states to have somewhat different obligations under the Statute.<sup>30</sup> In addition, as with other treaties adopted since the Vienna Convention on

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<sup>26</sup> Hafner, *supra*, note 21, at 1257.

<sup>27</sup> Article 124 states:

“Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time. The provisions of this article shall be reviewed at the Review Conference convened in accordance with article 123, paragraph 1”.

As of November 4, 2005 only two out of the 100 states party to the Rome Statute, France and Colombia, had made such a reservation. The scope of declarations under Article 124 is not as wide as it appears. No acceptance of the jurisdiction of the Court is required by the state whose nationals have committed a crime in the territory of a state party. Indeed, nationals of non-states parties are subject to the Court’s jurisdiction when they commit crimes in a territory of a state party without any requirement of an acceptance of the Court’s jurisdiction.

<sup>28</sup> Pellet, *supra*, note 19, at 157.

<sup>29</sup> Hafner, *supra*, note 21, at 1255.

<sup>30</sup> Article 12 (3) permits a non-state party to make a declaration accepting the exercise of the jurisdiction by the Court with respect to a particular crime. Ambiguities about the scope of this provision have been addressed in Rule 44 of the Rules of Procedure and Evidence, which provides that the declaration “has as a consequence the acceptance of jurisdiction with respect to the crimes referred to in article 5 of relevance to the situation and the provisions of Part 9 [International cooperation and judicial assistance], and any rules thereunder concerning States Parties, shall apply”. In addition, states

the Law of Treaties, declarations and understandings are not *per se* inconsistent with the Rome Statute provided that they do not attempt to alter it and merely clarify the meaning or scope attributed by the declarant to certain of its provisions.<sup>31</sup>

As Amnesty International declared prior to the adoption of Article 120, reservations could undermine the Court's inherent jurisdiction over the core crimes of genocide, crimes against humanity and serious violations of humanitarian law (as well as aggression) by allowing states to redefine crimes, to add defences not consistent with international law, or to avoid their obligation to cooperate with the Court.<sup>32</sup> As some examples below illustrate, that concern was not misplaced.

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parties may declare that they agree to enforce sentence of imprisonment imposed by the Court and then are subject to the obligations in Part 10 (Enforcement).

States may declare pursuant to Article 93 (3), requiring states to provide assistance not listed in Article 93 (1) (a) through (k) "which is not prohibited by the law of the requested State", that a requested measure of assistance "is prohibited in the requested State on the basis of an existing fundamental legal principle of general application" and, if after consultation with the Court the matter cannot be resolved, the Court shall modify the request as necessary. In addition, there are a number of provisions that may modify the scope of the state's obligations based on pre-existing treaty obligations, including: Article 90 (6) and (7), dealing with a competing extradition requests for person whose surrender has been requested by the Court, and Article 98 (2), concerning pre-existing status of forces agreements.

Two administrative declarations are possible under the Rome Statute. Article 87 (1) (a) permits a state party at the time of ratification to designate a channel other than the diplomatic channel and subsequently to make such a designation pursuant to the Rules of Procedure and Evidence (now governed by Rule 177). Article 87 (2) permits a state party with more than one official language at the time of ratification to indicate that requests for cooperation and any supporting documents can be drafted in any one of its official languages and subsequently to make such an indication pursuant to the Rules of Procedure and Evidence (now governed by Rule 178).

<sup>31</sup> Hafner, *supra*, note 21 at 1259 -1260.

<sup>32</sup> Amnesty International, *supra*, note 18, III, B (Prohibition of reservations). The organization stated:

"The statute should expressly prohibit any reservations, as in Article B of the Secretariat's Draft Text (Zutphen text, Art. 92), which states: "No reservations may be made to this Statute." Such a provision would be appropriate for a permanent international criminal court to ensure that all states parties assume the same obligations and that these obligations are readily known to all states and to the general public. It could lead to an unwieldy system in which the prosecutor and court would have to review reservations of all relevant states to determine the extent of the obligations each of those states had accepted."

Despite the general prohibition on reservations contained in Article 120, some states parties have made declarations which seek to exclude or modify the legal effects of certain provisions of the Rome Statute or to limit the scope of the Statute on a unilateral basis. Most of these states are also parties to the 1969 Vienna Convention on the Law of Treaties, which reflects customary international law, and establishes that every treaty in force is binding upon the parties to it and must be performed by them in good faith<sup>33</sup> while simultaneously limiting the right to make reservations. Thus, as it has been remarked, “a State cannot avoid its unilateral statement constituting a reservation just by calling it something else: it is the substance of the statement that matters”.<sup>34</sup>

For this reason, Sweden objected to a declaration made by Uruguay upon ratification of the Rome Statute, stating:

“[T]hat the designation assigned to a statement whereby the legal effect of certain provisions of a treaty is excluded or modified does not determine its status as a reservation to the treaty. The Government of Sweden considers that the declaration made by Uruguay to the Statute in substance constitutes a reservation”.<sup>35</sup>

Whether a unilateral statement amounts to a reservation therefore depends not on its phrasing or naming, but on its true legal effect.

#### **IV. OBJECTIONS TO RESERVATIONS**

As the Special Rapporteur of the International Law Commission on Reservations has explained, an objection means:

“[A] unilateral statement, however phrased or named, made by a State or an international organization in response to a reservation to a treaty formulated by another State or international organization, whereby the

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<sup>33</sup> Vienna Convention, Article 26 (*Pacta sunt servanda*).

<sup>34</sup> Jennings & Watts, *supra*, note 5, at 1241.

<sup>35</sup> See [untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp](http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp)

State or organization purports to prevent the application of the provisions of the treaty to which the reservation relates between the author of the reservation and the State or organization which formulated the objection, to the extent of the reservation, or to prevent the treaty from entering into force in the relations between the author of the reservation and the author of the objection.”<sup>36</sup>

However, since reservations are not permitted under the Rome Statute, strictly speaking there is no need for objections to unilateral statements amounting to reservations. The limited number of objections to the statement by Uruguay and the absence of objections to such statements by Australia, Colombia, France, Malta and the United Kingdom should not be seen as an implicit consent.

#### **A. The legal effects of the lack of objections to a declaration amounting to a reservation to human rights treaties and the Rome Statute**

Unlike the Vienna Convention on the Law of Treaties, which contains a whole chapter on reservations, the Rome Statute encompasses only one article on this matter. These provisions are in relation to the formulation, acceptance, objection and legal effects of reservations. However, the general provisions contained in the Vienna Convention are not adequate to solve the problem of declarations that amount to reservations to the Rome Statute, a treaty that is both a human rights treaty and a constitutional treaty establishing an international organization.

As the Human Rights Committee explained:

“[The Vienna Convention] provisions on the role of State objections in relation to reservations are inappropriate to address the problem of reservations to human rights treaties. Such treaties and the Covenant [on Civil and Political Rights] specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights.”<sup>37</sup>

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<sup>36</sup> Definition of objections to reservations. International Law Commission, Fifty-fifth session, Eighth Report on Reservations to Treaties, by Mr. Alain Pellet, Special Rapporteur, A/CN.4/535/add.1 (2003), p.13.

<sup>37</sup> General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 04/11/94, CCPR/C/21/Rev.1/Add.6, para.17. *See also* Ryan Goodman, *Human Rights Treaties, Invalid Reservations, and State Consent*, 96 Am. J. Int'l L. 531, p.533 (2002).

The Inter-American Court of Human Rights in its *Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention on Human Rights* has also clarified and limited the scope of the Vienna Convention with respect to human rights instruments:

“The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction”.<sup>38</sup>

In light of this view, the fact that states parties to the Rome Statute do not make objections to certain declarations that may seek to alter the provisions of the Statute should not be taken as evidence that these statements are compatible with the object and purpose of the Statute, nor that states have implicitly consented to the changes desired by the state making the declaration.

As has also been explained, the objection mechanism of the Vienna Convention is inadequate in the case of human rights treaties because

“[o]bjections have been occasional, made by some States but not others, and on grounds not always specified; when an objection is made, it often does not specify a legal consequence, or sometimes even indicates that the objecting party nonetheless does not regard [a treaty] as not in effect as between the parties concerned. In short, the pattern is so unclear that it is

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<sup>38</sup> *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights, 24 September 1982, para.29 (available at [www.corteidh.or.cr/seriea\\_ing/index.html](http://www.corteidh.or.cr/seriea_ing/index.html)).

not safe to assume that a non-objecting State thinks that a particular reservation is acceptable”<sup>39</sup>

## **B. Objections to declarations which amount to reservations to the Rome Statute**

When the President of Uruguay originally submitted the Rome Statute for adoption to the National Assembly in 2002, the Statute included six interpretative declarations.<sup>40</sup> All were rejected by the National Assembly. Following an intense debate, a few months later a general agreement was reached on a consensus text of only one declaration, which was included as an interpretative declaration as part of the text of the instrument of ratification of the Rome Statute. It reads as follows:

“As a State party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic [...]”<sup>41</sup>

In Amnesty International’s opinion, this statement – although labeled as an interpretive declaration – amounts to a reservation because it purports to subordinate Uruguay’s obligations under the Rome Statute to the provisions of its constitution.

This unilateral statement attracted the attention of some European states parties, which made objections to it.<sup>42</sup>

Finland, for example, recalled that:

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<sup>39</sup> General Comment No.24, *supra*, note 37, para.17. See also Ian Brownlie, *Principles of Public International Law* 612 (Oxford: Oxford University Press 5<sup>th</sup> ed., 1998).

<sup>40</sup> The six interpretive declarations stated, among other things, that amnesties and pardons should not be interpreted as unwillingness or inability of the state to investigate or prosecute genuinely; Uruguay could decline to investigate and prosecute crimes under international law in the “interest of justice” and immunities protected certain officials from prosecution for crimes under international law. The text of the bill in Spanish is on file with Amnesty International.

<sup>41</sup> See [untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp](http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp)

<sup>42</sup> Denmark, Finland, Germany, Ireland, Norway, Sweden, The Netherlands and the United Kingdom objected to it on similar arguments. See also the declaration of Uruguay of 21 July 2003, in reply to the above mentioned declarations, discussed below.



“[A] statement, without further specification, has to be considered in substance as a reservation which raises doubts as to the commitment of Uruguay to the object and purpose of the Statute. The Government of Finland would like to recall Article 120 of the Rome Statute and the general principle relating to internal law and observance of treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The Government of Finland therefore objects to the above-mentioned reservation made by the Eastern Republic of Uruguay to the Rome Statute of the International Criminal Court...”<sup>43</sup>

Germany stated:

“The Government of the Federal Republic of Germany considers that the Interpretative Declaration with regard to the compatibility of the rules of the Statute with the provisions of the Constitution of Uruguay is in fact a reservation that seeks to limit the scope of the Statute on a unilateral basis. As it is provided in article 120 of the Statute that no reservation may be made to the Statute, this reservation should not be made.”

Reacting to the above mentioned objections, Uruguay declared:

“It is noted for all necessary effects that the Rome Statute has unequivocally preserved the normal functioning of national jurisdictions and that the jurisdiction of the International Criminal Court is exercised only in the absence of the exercise of national jurisdiction. Accordingly, it is very clear that the above-mentioned Act imposes no limits or conditions on the application of the Statute, fully authorizing the functioning of the national legal system without detriment to the Statute. The interpretative declaration made by Uruguay upon ratifying the Statute does not, therefore, constitute a reservation of any kind.”

This attempt by Uruguay to justify its interpretative declaration does not explain the language it uses, which seeks to limit the applicability of the Rome Statute based on Uruguay’s internal law. Amnesty International welcomes the objections made to this declaration as a prohibited reservation. As the European Court of Human Rights has stated, objections to declarations lend convincing support to the observation

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<sup>43</sup> See, *supra*, note 41.

concerning the awareness of the dubious effects of certain reservations.<sup>44</sup> However, the failure of other states parties to the Rome Statute to object to this declaration does not mean that it is valid among them. Nor, under the general prohibition contained in Article 120, does it have any legal effect. Amnesty International calls upon Uruguay to withdraw this interpretative declaration, which the organization, agreeing with some states parties, considers as amounting to a disguised reservation.

#### **IV. DECLARATIONS CONCERNING AMNESTIES, PARDONS AND OTHER SIMILAR MEASURES OF IMPUNITY**

In contrast to the reaction to the declaration made by Uruguay, declarations made by Colombia and Malta, which appear to seek to alter their obligations under the Rome Statute by giving legal effects to amnesties and pardons, have not been commented on by other states parties.

##### **A. The declarations made by Colombia**

Colombia is a country with a four decade-old armed conflict in which there have been countless violations and abuses of human rights as well as grave breaches and serious violations of international humanitarian law by the security forces, members of paramilitary forces and guerrillas.<sup>45</sup> It is Amnesty International's view that the situation in Colombia is one of several that could potentially be the subject of an investigation by the Office of the Prosecutor.

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<sup>44</sup> *Loizidou v. Turkey (Preliminary Objections)*, Judgment, Eur. Ct. Hum. Rts., 23 March 1995, para.95. See also case of *Belilos v. Switzerland*, Judgment (merits and just satisfaction) of April 29<sup>th</sup>, 1988, in which the European Court of Human Rights ruled that the "interpretative declaration" made by Switzerland to Article 6 (1) of the European Convention on Human Rights was indeed a reservation ("In short, the declaration in question... must be held to be invalid. At the same time, it is beyond doubt that Switzerland is, and regards itself as, bound by the Convention irrespective of the validity of the declaration"). On the regime of reservations under the European Convention on Human Rights see Konstantin Korkelia, *New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights*, 13 Eur. J. Int'l L. 442 (2002).

<sup>45</sup> See, for instance, Amnesty International, *Colombia: Letter for the attention of Mr. Manuel Marulanda, Revolutionary Armed Forces of Colombia People's Army*, AI Index number: AMR 23/124/2002, 8 November 2002; Amnesty International, *Colombia: Extrajudicial killings, "disappearances", death threats and other political violence in the Department of Sucre*, AI Index: AMR 23/30/96, 1996.

Upon ratification of the Rome Statute, Colombia made eight interpretative declarations and a declaration invoking Article 124, declaring that it did not accept the jurisdiction of the Court over war crimes committed by its nationals or on its territory for a seven-year period.<sup>46</sup>

Among these declarations there is one in particular which appears to be an attempt to limit the Court's jurisdiction in a potential case before it.

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<sup>46</sup> The full set of declarations (the first paragraph contains three separate declarations) reads as follows:

- “1. None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia. Colombia declares that the provisions of the Statute must be applied and interpreted in a manner consistent with the provisions of international humanitarian law and, consequently, that nothing in the Statute affects the rights and obligations embodied in the norms of international humanitarian law, especially those set forth in article 3 common to the four Geneva Conventions and in Protocols I and II Additional thereto. Likewise, in the event that a Colombian national has to be investigated and prosecuted by the International Criminal Court, the Rome Statute must be interpreted and applied, where appropriate, in accordance with the principles and norms of international humanitarian law and international human rights law.
2. With respect to articles 61 (2) (b) and 67 (1) (d), Colombia declares that it will always be in the interests of justice that Colombian nationals be fully guaranteed the right of defence, especially the right to be assisted by counsel during the phases of investigation and prosecution by the International Criminal Court.
3. Concerning article 17 (3), Colombia declares that the use of the word "otherwise" with respect to the determination of the State's ability to investigate or prosecute a case refers to the obvious absence of objective conditions necessary to conduct the trial.
4. Bearing in mind that the scope of the Rome Statute is limited exclusively to the exercise of complementary jurisdiction by the International Criminal Court and to the cooperation of national authorities with it, Colombia declares that none of the provisions of the Rome Statute alters the domestic law applied by the Colombian judicial authorities in exercise of their domestic jurisdiction within the territory of the Republic of Colombia.
5. Availing itself of the option provided in article 124 of the Statute and subject to the conditions established therein, the Government of Colombia declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in article 8 when a crime is alleged to have been committed by Colombian nationals or on Colombian territory.
6. In accordance with article 87 (1) (a) and the first paragraph of article 87 (2), the Government of Colombia declares that requests for cooperation or assistance shall be transmitted through the diplomatic channel and shall either be in or be accompanied by a translation into the Spanish language”.

The declaration reads as follows:

“None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.”

Since the Court does not have jurisdiction over political crimes, but only over crimes under international law, including genocide, crimes against humanity and war crimes, it may not be immediately apparent why Colombia made a declaration that the Rome Statute did not affect its powers to enact amnesty laws or pardons for political crimes.<sup>47</sup>

One possible explanation for this unilateral statement is the recent Justice and Peace Law, Law 975 of 25 July 2005.<sup>48</sup> This law grants political status to the members of paramilitary forces by defining all their activities, which necessarily include the perpetration of crimes against humanity and war crimes, as sedition, which is classified as a political offence under Colombian law.<sup>49</sup> Colombia’s 1991 Constitution forbids the extradition of those guilty of political offences.<sup>50</sup>

Labelling crimes against humanity or war crimes as “political crimes” is inconsistent with international conventional and customary law.<sup>51</sup> In addition, a clear

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<sup>47</sup> According to the Colombian Constitution, the Congress has the power to enact laws on amnesties and pardons for political crimes (Article 150 (17)); and the President may issue pardons for political crimes (Article 201 (2)).

<sup>48</sup> Official Gazette No.45.980, 25 July 2005, available in Spanish at: [www.secretariassenado.gov.co/compendio\\_legislativo.HTM](http://www.secretariassenado.gov.co/compendio_legislativo.HTM).

<sup>49</sup> New Article 468, Penal Code (as amended by Article 72, Law 975) (“*También incurrirá en el delito de sedición quienes conformen o hagan parte de grupos guerrilleros o de autodefensa cuyo accionar interfiera con el normal funcionamiento del orden constitucional y legal. En éste caso, la pena será la misma prevista para el delito de rebelión*”).

<sup>50</sup> Of course, the constitutional bar on extradition of nationals between states cannot prevent their surrender to the International Criminal Court. See Article 102 of the Rome Statute.

<sup>51</sup> M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 566 (Dobbs Ferry: New York: Oceana Publications, Inc. 1996).

distinction between political crimes and crimes under international law was set out by the Inter-American Commission on Human Rights on its report on the demobilization process in Colombia. The Commission found that:

“Some states affected by internal armed conflicts and their consequences have issued amnesty laws when implementing mechanisms for achieving peace and national reconciliation. Nonetheless, the granting of amnesties and pardons should be limited to punishable conduct in the nature of political crimes or common crimes linked to political crimes insofar as, having a direct and close relationship with the political criminal conduct, they do not constitute serious violations under international law. Those responsible for committing such crimes should not benefit unduly from grounds of exclusion from punishment, such as the prescription of the crime and prescription of the punishment, the granting of territorial or diplomatic asylum, the refusal to extradite a person for the commission of crimes punished by international law, or the granting of amnesties or pardons.”<sup>52</sup>

The Office in Colombia of the United Nations High Commissioner for Human Rights has expressed its concerns about the assimilation of crimes under international law as “political crimes” and the ability to grant amnesties that such an assimilation provides:

“To consider paramilitarism as a political crime could favor the impunity of individuals, possibly including public servants, who have participated or assisted in the creation of paramilitary groups or in their illegal activities. Under the Colombian Constitution, amnesty and pardon can be granted for political crimes, thus leading to them being forgotten or forgiven”.<sup>53</sup>

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<sup>52</sup> Organization of American States, Report on the Demobilization Process in Colombia, OEA/Ser.L/V/II.120 Doc.60, 13 December 2004. Original: Spanish. Available at: [www.cidh.oas.org/countryrep/Colombia04eng/toc.htm](http://www.cidh.oas.org/countryrep/Colombia04eng/toc.htm).

<sup>53</sup> Unofficial translation of the press release of the United Nations High Commissioner for Human Rights office in Bogotá, 27 June 2005. Available in Spanish at [www.hchr.org.co/publico/comunicados/2005/comunicados2005.php3?cod=35&cat=58](http://www.hchr.org.co/publico/comunicados/2005/comunicados2005.php3?cod=35&cat=58).

Be that as it may, it appears that the Colombian government is seeking to ensure that the Prosecutor of the Court does not interfere with its decision to grant impunity to human rights violators by presenting their crimes as political in nature and, therefore, outside of the Prosecutor's competence. However, as these crimes constitute war crimes and crimes against humanity, labeling them as political crimes will not exempt them from international criminal responsibility.

The fundamental principle of the Rome Statute is that the jurisdiction of the Court is complementary to the duty – not the power or faculty – of every state to exercise its criminal jurisdiction over those responsible for crimes under international law.<sup>54</sup> Only when a state is unable or unwilling genuinely to carry out investigations or prosecutions may the Court exercise its concurrent jurisdiction.<sup>55</sup> Therefore, the declaration made on amnesties and pardons, complemented with legislation (Law 975 and Law 782) which leads to *de facto* impunity for those responsible for crimes under international law, contravenes Colombia's duties under international law, particularly under the Rome Statute.<sup>56</sup>

Regarding amnesties, statutes of limitations and defences, in 2001 the Inter-American Court on Human Rights concluded that:

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<sup>54</sup> Rome Statute, Preamble, Para. 6.

<sup>55</sup> Article 17, Rome Statute.

<sup>56</sup> Law 782 has been implemented through Decree 128 of 2003. As Amnesty International stated:

“Most paramilitaries and guerrillas who have demobilized under the present government, either individually or collectively, have done so on the basis of Decree 128, promulgated on 22 January 2003, and which regulates Law 782. Article 13 of Decree 128 grants legal and economic benefits to members of armed groups who have demobilized. These benefits include "pardons, conditional suspension of the execution of a sentence, a cessation of procedure, a resolution of preclusion of the investigation or a resolution of dismissal. Article 21 excludes from these benefits those "who are being processed or have been condemned for crimes which according to the Constitution, the law or international treaties signed and ratified by Colombia cannot receive such benefits. "Such crimes are defined in Law 782 as "[...] atrocious acts of ferocity or barbarism, terrorism, kidnapping, genocide, and murder committed outside combat..." [B]ut given the endemic nature of impunity in Colombia, most paramilitary members – and guerrillas for that matter – are not formally under judicial investigation for violations of human rights or international humanitarian law, and are even less likely to have been tried or convicted for such offences”. Amnesty International, Colombia: The Paramilitaries in Medellín: Demobilization or Legalization?, AI Index: AMR 23/019/2005, September 2005, available at [web.amnesty.org/library/index/engamr230192005](http://web.amnesty.org/library/index/engamr230192005).

“all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”.<sup>57</sup>

The Special Court for Sierra Leone, set up by a special agreement between the United Nations and Sierra Leonean authorities in 2002, ruled on the legal effects of the provision of the Lomé Agreement that granted absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives that:

“Article IX of the Lomé Agreement cannot constitute a legal bar to the exercise of jurisdiction over international crimes by an international court or a state asserting universal jurisdiction. Equally, it does not constitute a legal bar to the establishment of an international court to try crimes against humanity”<sup>58</sup>

A state party to the Rome Statute which permits amnesties and pardons as obstacles to investigations and prosecutions would shield the person concerned from criminal responsibility for crimes within the Court’s jurisdiction. Article 17 of the

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<sup>57</sup> Inter-American Court of Human Rights, *Barrios Altos* Case, Judgment, March 14, 2001, para.41. See also in the same sense: *Gómez-Paquiyaqui Brothers* case, Judgment of July 8, 2004 (only available in Spanish), para.232; *Trujillo Oroza v. Bolivia* case (Reparations), Judgment of 27 February 2002, para.106.

<sup>58</sup> *Prosecutor v. Gbao*, Decision on Preliminary Motion on the Invalidity of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court, Special Court for Sierra Leone, Appeals Chamber, 25 May 2004, para.II (8). See also *Prosecutor v. Kallon*, Challenge to Jurisdiction: Lomé Accord Amnesty, Appeals Chamber, 13 March 2004 (“Whatever effect the amnesty granted in the Lomé Agreement may have on a prosecution for such crimes as are contained in Articles 2 to 4 [crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, and other serious violations of international humanitarian law] in the national courts of Sierra Leone, it is ineffective in removing the universal jurisdiction to prosecute persons accused of such crimes that other states have by reason of the nature of the crimes. It is also ineffective in depriving an international court such as the Special Court of jurisdiction”).

Rome Statute provides that the Court shall deem a case inadmissible when the case is being investigated or prosecuted by a state which has jurisdiction over it, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”. Consequently, in a case where a state party permits amnesties and pardons as obstacles to investigation or prosecution, the complementarity provisions of the Statute would trigger the Court’s jurisdiction.<sup>59</sup>

Amnesty International considers that the unilateral statement made by Colombia on amnesties for so-called “political crimes” does not seek to specify or clarify the meaning of any provision of the Rome Statute. On the contrary, it seeks to limit the scope of the Court’s jurisdiction by making crimes committed in Colombia the subject of inadequate domestic proceedings in order to shield the persons concerned from criminal responsibility.

### **B. The declaration made by Malta**

Like Colombia, Malta made a declaration on pardons, which reads as follows:

“[N]o person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.

[T]he prerogative of mercy will only be exercised in Malta in conformity with its obligations under International law including those arising from the Rome Statute of the International Criminal Court.”

Although the second paragraph quoted above seems in principle not to be inconsistent with international law – there is no bar under international law, for example, on mercy for ordinary offenses – the first paragraph is not in accordance with Malta’s duties under international law, since it may provide for legal effects in Malta for pardons for crimes under international law, whether granted by Malta or by other jurisdictions.

In many jurisdictions, a pardon does not only imply a reduction or commutation of a sentence of conviction, but an annulment of the conviction itself, which restores the person to his or her pre-trial legal status. In effect, the pardon

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<sup>59</sup> See letter to the Colombian Ambassador accredited before the International Criminal Court, Guillermo Fernandez de Soto, from the Prosecutor Luis Moreno Ocampo on 2 March 2005. The letter was published by several Colombian newspapers. English translation filed with AI.



absolves the convicted person or the person under investigation of the crime.<sup>60</sup> To the extent that this provision is intended to grant a pardon with full legal effect in Malta, if such a pardon were granted for crimes under international law such as genocide, crimes against humanity or war crimes prior to a final decision on the merits of the case in another jurisdiction, such a pardon would be contrary to international law. In particular, it would be inconsistent with Malta's obligation under the Preamble of the Rome Statute to exercise its jurisdiction over such crimes.

The Preamble of the Rome Statute recalls the scope of Malta's obligation by stating that:

“It is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”<sup>61</sup>

The International Criminal Tribunal for the former Yugoslavia has answered the question of whether national pardons can be granted for international crimes, stating with regard to the crime of torture that:

“[I]t would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio* and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law... What is even more important is that perpetrators of torture acting upon or

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<sup>60</sup> For example, in 1989 a general pardon was granted in Argentina to round 300 armed forces and guerrilla members suspected of human rights violations and abuses, some of them even before any investigation or prosecution had commenced. Later, the Human Rights Committee concluded that:

“The Committee is concerned that amnesties and pardons have impeded investigations into allegations of crimes committed by the armed forces and agents of national security services and have been applied even in cases where there exists significant evidence of such gross human rights violations as unlawful disappearances and detention of persons, including children. The Committee expresses concern that pardons and general amnesties may promote an atmosphere of impunity for perpetrators of human rights violations belonging to the security forces. The Committee voices its position that respect for human rights may be weakened by impunity for perpetrators of human rights violations”. Comments on Argentina, U.N. Doc. CCPR/C/79/Add.46 (1995), para.D (10).

<sup>61</sup> Rome Statute, Preamble, Para. 6., Special Court for Sierra Leone, *supra*, note 58, para.II (10) (“Under international law, states are under a duty to prosecute crimes whose prohibition has the status of *jus cogens*”).

benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle”<sup>62</sup>.

The same reasoning applies with equal force to other crimes under international law.

Amnesty International has likewise stated that:

“[A]mnesties and other similar measures which prevent the perpetrators of gross human rights violations from being brought before the courts, tried and sentenced are incompatible with state obligations under international human rights law. On the one hand, such amnesties are incompatible with the obligation to investigate, bring to justice and punish those responsible for gross human rights violations. On the other hand, they are also incompatible with the state obligation to guarantee the right of all persons to an effective remedy and to be heard by an independent and impartial tribunal for the determination of their rights”<sup>63</sup>.

In consequence, unilateral statements such as the one made by Malta on pardons – to the extent that they are granted before a final decision on the merits is taken and without specifying such a pardon refers solely to ordinary offences and not to crimes under international law – may lead to a wrong interpretation of the statement’s scope. It is a necessary corollary of this that based on the provisions set out in the Rome Statute, Malta is under the duty to investigate and, if sufficient and admissible evidence is collected, to prosecute those individuals within its territory that have

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<sup>62</sup> *Prosecutor v. Furundzija*, Judgment, Case No.: IT-95-17/1-T, ICTY, Trial Chamber, December 10, 1998, para.155. In the same sense has been the judgment rendered by the Full Panel of the *Sala en lo Penal de la Audiencia Nacional de España* [the Argentine Junta case], of 4 November, 1998, as it held that the amnesty laws enacted in Argentina do not have extraterritorial effects, and, thus, they cannot prevent the trial in Spain of a person subject to the amnesty (*Considerando octavo*).

<sup>63</sup> Amnesty International, International Commission of Jurists and Human Rights Watch, *Argentina: Amicus Curiae Brief on the Incompatibility with International Law of the Full Stop and Due Obedience Laws*, AI Index: AMR 13/012/2001, June 2001; Amnesty International, *Special Court for Sierra Leone: A historic decision to reject amnesty for crimes under international law*, AI Index: AFR 51/006/2004, 18 March 2004.

allegedly committed crimes under international law, including those covered by the Rome Statute,

Malta's declaration, as far as it concerns crimes covered in the Rome Statute, could lead to a determination by the Court that Malta is genuinely unwilling to carry out an investigation or prosecution.

## **V. DECLARATIONS WHICH MAY UNDERMINE COOPERATION WITH THE COURT**

Once the Court has determined that it may exercise jurisdiction in accordance with the principle of complementarity, states parties agree under Article 86 to "cooperate fully with the Court in the investigation and prosecution of crimes within the jurisdiction of the Court". This obligation means that they must ensure that the Prosecutor and the Defence can conduct effective investigations in their jurisdictions, that their courts and other authorities provide full cooperation in obtaining documents, locating and seizing assets of the accused, conducting searches and seizures of evidence, locating and protecting witnesses and arresting and surrendering persons accused of crimes by the Court.<sup>64</sup>

Australia, a state party to the Vienna Convention on the Law of Treaties,<sup>65</sup> made a unilateral statement that would undermine and possibly prevent cooperation with the Court in a particular case touching on Australian national interest. Despite claiming that this statement was "not a reservation", it appears clear that this could undermine Australia's cooperation with the Court. The statement reads as follows:

"The Government of Australia, having considered the Statute, now hereby ratifies the same, for and on behalf of Australia, with the following declaration, the terms of which have full effect in Australian law, and which is not a reservation: Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being

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<sup>64</sup> Rome Statute, Arts. 87-102. *See also* Amnesty International, *International Criminal Court: Checklist for Effective Implementation*, AI Index: IOR 40/011/2000, 1 August 2000, available at <http://web.amnesty.org/library/index/engior400112000?open&of=eng-385>.

<sup>65</sup> Australia acceded to the Vienna Convention on 13 June 1974.

investigated or prosecuted by a State. Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the Court. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes. For this purpose, the procedure under Australian law implementing the Statute of the Court provides that no person can be surrendered to the Court unless the Australian Attorney-General issues a certificate allowing surrender. Australian law also provides that no person can be arrested pursuant to an arrest warrant issued by the Court without a certificate from the Attorney-General. Australia further declares its understanding that the offences in Article 6, 7 and 8 will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law”.

There are a number of serious problems with this unilateral statement, which strongly suggest that it is a prohibited reservation. Firstly, the determination as to whether a statement is a reservation or a declaration is based on objective criteria and must be made by the Court itself. It cannot be made by a state party on a unilateral basis. As explained above, the label attached to a statement does not determine the type of statement it is.

Secondly, Australian implementing legislation incorporates some of these unilateral statements, giving them legal effect in national law. For example, the legislation partly implementing the Rome Statute cooperation obligations provides that a person may not be arrested or surrendered to the Court unless the Attorney General issues a certificate in each case in his or her “absolute discretion”.<sup>66</sup>

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<sup>66</sup> Section 22 of the International Criminal Act 2002 (available at: [scaleplus.law.gov.au/html/comact/11/6513/pdf/0412002.pdf](http://scaleplus.law.gov.au/html/comact/11/6513/pdf/0412002.pdf)) states:

“The Attorney-General must not issue a notice under section 20 [a notice to a magistrate that a request for arrest or surrender has been received from the Court] or 21 [a notice to a magistrate that a request for arrest or surrender has been received from the Court] after receipt of a request for the provisional arrest and surrender, or for the provisional arrest, of a person for a crime unless the Attorney-General has, in his or her absolute discretion signed a certificate that it is appropriate to do so.”

Section 29 of the Act states:

“The Attorney-General must not issue a warrant for the surrender of a person for a crime unless the Attorney-General has, in his or her absolute discretion, signed a certificate that it is appropriate to do so.”

Thirdly, although there is no doubt that national criminal jurisdictions have the primary obligation to investigate and prosecute crimes within the jurisdiction of the Court under the complementarity principle, the Court can exercise its jurisdiction over crimes under international law whenever it determines that a state is unable or unwilling genuinely to do so. According to the Rome Statute, issues of admissibility are to be determined by the Court itself and certainly not by states parties. As set out in Article 17, the Court may determine that a case is admissible where the national decision not to investigate or prosecute was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or where there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; or, finally, where the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Consequently, the declaration that “Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being investigated or prosecuted by a State” is a completely inaccurate statement and is inconsistent with Australia’s duties under the Rome Statute.<sup>67</sup>

Similarly, the sentence stating that “no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes” is contrary to Article 86 of the Rome Statute, which requires states parties to cooperate fully with the Court in its investigations and prosecutions; and also with other provisions of the Statute, such as Article 59, which requires that steps be undertaken without delay in response to a request by the Court to arrest and surrender a person. A state party may, under Article 94 (1) of the Statute, only postpone immediate execution of a request to surrender when it “would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates”, but even then only “for a period of time agreed upon with the Court”, for “no longer than is necessary to complete the relevant investigation or prosecution in the requested State” and if, before deciding to postpone, the requested state has

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<sup>67</sup> A similarly worded provision was passed by the Chilean Congress as a transitional provision to the National Constitution (Transitional Article 21, second and third paragraphs). The amendment of Chile’s Constitution was requested by the Constitutional Court as a condition to recognize the ICC jurisdiction. It is not known as of the date of this paper whether Chile is going to add it to the instrument of ratification.

considered whether surrender could be “immediately provided subject to certain conditions”. The exception in Article 94 (1) simply does not apply to the situation addressed in Australia’s statement, which seeks to prevent the Court from trying someone for genocide, crimes against humanity or war crimes, until Australia has had an opportunity – with no time limit – to complete its own investigations of the same crimes. This part of the statement strikes at the very heart of the Court’s role spelled out in Article 17: to act when the Court – not the state itself – determines that a state is unable or unwilling genuinely to investigate or prosecute a crime under international law.<sup>68</sup>

Fourthly, to the extent that the declaration means that the Attorney General has any discretion to refuse to issue a certificate allowing surrender or arrest, it is also in contradiction with the Rome Statute. States parties have agreed under Article 86 of the Rome Statute that they “shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigations and prosecutions of crimes within the jurisdiction of the Court”. Article 88 reiterates that “States Parties shall ensure that there are procedures available under national law for all of the forms of cooperation”. Obviously, Australia, as any other state, is free to use its national procedures to arrest and surrender persons suspected of committing crimes under international law, but it has agreed to ensure that those procedures will result in full and prompt cooperation when a request for cooperation comes from the Court.<sup>69</sup> Thus, states are obliged to ensure that their implementing legislation removes all bars or obstacles which could delay or impede such cooperation. When the Court transmits a request for the arrest and surrender of a person to any state on the territory of which that person may be found, if the case has been declared admissible by the Court, the requested state shall promptly proceed with the execution of the request.<sup>70</sup> Any additional measure in national legislation which may delay or postpone the full and immediate compliance of the request (in the present case the issuance of two separate certificates by the Attorney General, both issued only in his or her “absolute discretion”, one for the arrest and the other for the surrender), apart from the limited

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<sup>68</sup> As Articles 18 and 19 clearly demonstrate, decisions on admissibility must be solely taken by the Court, not by Australia. Article 19, Rome Statute provides that: “The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17”. See also Rule 58 (4), Rules of Procedure and Evidence, ICC-ASP/1/3.

<sup>69</sup> Rome Statute, Art. 89.

<sup>70</sup> Rome Statute, Art. 89 (1) *in fine*.

circumstances expressly provided for in the Rome Statute, is inconsistent with the legal duties arising out of the Statute and thus should be repealed or amended to bring it into conformity with Australia's legal obligations.<sup>71</sup>

Fifth, the declaration stating that the "understanding that the offences in Articles 6, 7 and 8 will be interpreted and applied in a way in accordance with the way they are implemented in Australian domestic law" is also inspired by the same misconception.<sup>72</sup> As one state objected in relation to another treaty, "these reservations which consist of general references to national law and which do not clearly specify the extent of the derogation from the provisions of the Convention, may create serious doubts about the commitment of the reserving State as to the object and purpose of the Convention and may contribute to undermining the basis of international treaty".<sup>73</sup> In such a sense, Australian implementing legislation must be

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<sup>71</sup> See, for example, Articles 90 (6) and (7), 94, 95 and 97, Rome Statute. Concerns about a similar provision in Kenya's draft implementing legislation giving the Attorney-General discretion to refuse arrest or surrender have led to calls for it to be removed.

<sup>72</sup> See, in a different sense, the reservation made by Australia to the duty to criminalize the dissemination of racist hate and propaganda contained in the International Convention on the Elimination of All Forms of Racial Discrimination:

"The Government of Australia... declares that Australia is not at present in a position specifically to treat as offences all the matters covered by article 4 (a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing criminal law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. It is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4 (a)."

<sup>73</sup> Objection of Finland to the reservation made by Guatemala to the Vienna Convention on the Law of Treaties, 16 September 1998. The Netherlands made a similar objection to a Peruvian reservation to this treaty:

"The Government of the Kingdom of the Netherlands notes that the articles 11, 12 and 25 of the Convention are being made subject to a general reservation referring to the contents of existing legislation in Peru. The Government of the Kingdom of the Netherlands is of the view that, in the absence of further clarification, this reservation raises doubts as to the commitment of Peru as to the object and purpose of the Convention and would like to recall that, according to customary international law as codified in the Vienna Convention on the Law of Treaties, a reservation incompatible with the object and purpose of a treaty shall not be permitted".

See also objections made by Denmark, Mexico, The Netherlands and Norway to the reservation made by the USA to the Convention on the Prevention and Punishment of the Crime of Genocide:

in full compliance with its obligations as they are set out in the Rome Statute. If any difference exists between the Rome Statute and domestic Australian legislation, the Statute prevails.<sup>74</sup>

Amnesty International considers that although the Australian unilateral statement has been incorporated into domestic law, it is contrary to some provisions of the Rome Statute and is therefore inconsistent with Australia's obligations under the Statute. Amnesty International considers that this statement amounts to a prohibited reservation and Australia should, therefore, withdraw it..

## **VI. DECLARATIONS WHICH ATTEMPT TO LIMIT OR ALTER THE DEFINITION OF CRIMES**

### **A. Declaration made by France**

France, which during the Rome Conference fought to allow reservations,<sup>75</sup> made eight declarations upon ratification,<sup>76</sup> some of which attempt to limit or alter the definitions

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“Nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States”.

<sup>74</sup> Vienna Convention on the Law of Treaties, Art. 27. See the controversial draft guideline proposed by Alan Pellet as part of a Guide to Practise being considered by the International Law Commission under the title “Reservations relating to the application of domestic law”, which reads: “A reservation by which a State or an international organization purports to exclude or to modify the application of a provision of a treaty in order to preserve the integrity of its domestic law may be formulated only if it is not incompatible with the object and purpose of the treaty.” [A/CN.4/558/Ad.2, para.106]

<sup>75</sup> See *supra*, note 19.

<sup>76</sup> France. I. Interpretative declarations:

1. The provisions of the Statute of the International Criminal Court do not preclude France from exercising its inherent right of self-defence in conformity with Article 51 of the Charter.

2. The provisions of Article 8 of the Statute, in particular paragraph 2 (b) thereof, relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons nor impair the other rules of international law applicable to other weapons necessary to the exercise by France of its inherent right of self-defence, unless nuclear weapons or the other weapons referred to herein become subject in the future to a comprehensive ban and are specified in an annex to the Statute by means of an amendment adopted in accordance with the provisions of Articles 121 and 123.

3. The Government of the French Republic considers that the term 'armed conflict' in Article 8, paragraphs 2 (b) and (c), in and of itself and in its context, refers to a situation of a kind which does



in the Rome Statute. Unfortunately, no state party objected to these declarations as prohibited reservations.

As mentioned above, French efforts resulted in Article 124 of the Rome Statute. France then declared under this article that it would not recognize the Court's jurisdiction for seven years (until 2007) over war crimes when they were alleged to have been committed by its nationals or on its territory, despite concerns voiced by the National Assembly's Commission of Foreign Affairs about the possible effect such a statement could have on other countries who might follow this example.<sup>77</sup> However, only one other state, Colombia, has made such a declaration.

Upon ratification, in addition to the declaration under Article 124, France made seven interpretative declarations to Article 8 (War crimes) of the Rome Statute.

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not include the commission of ordinary crimes, including acts of terrorism, whether collective or isolated.

4. The situation referred to in Article 8, paragraph 2 (b) (xxiii), of the Statute does not preclude France from directing attacks against objectives considered as military objectives under international humanitarian law.

5. The Government of the French Republic declares that the term "military advantage" in Article 8, paragraph 2 (b) (iv), refers to the advantage anticipated from the attack as a whole and not from isolated or specific elements thereof.

6. The Government of the French Republic declares that a specific area may be considered a "military objective" as referred to in Article 8, paragraph 2 (b) as a whole if, by reason of its situation, nature, use, location, total or partial destruction, capture or neutralization, taking into account the circumstances of the moment, it offers a decisive military advantage.

The Government of the French Republic considers that the provisions of Article 8, paragraph 2 (b) (ii) and (v), do not refer to possible collateral damage resulting from attacks directed against military objectives.

7. The Government of the French Republic declares that the risk of damage to the natural environment as a result of the use of methods and means of warfare, as envisaged in Article 8, paragraph 2 (b) (iv), must be weighed objectively on the basis of the information available at the time of its assessment.

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### III. Declaration under Article 124:

Pursuant to Article 124 of the Statute of the International Criminal Court, the French Republic declares that it does not accept the jurisdiction of the Court with respect to the category of crimes referred to in Article 8 when a crime is alleged to have been committed by its nationals or on its territory.

<sup>77</sup> See the debate held at the *Assemblée Nationale, Commission des Affaires Étrangères, Compte Rendu N° 23, Mardi 8 février 2000, Sommaire* (available at [www.assemblee-nationale.com/cr-cafe/99-00/c990023.asp](http://www.assemblee-nationale.com/cr-cafe/99-00/c990023.asp)).

That these other declarations are intended to function as reservations is demonstrated by the fact that all of them are also found within the text of the eighteen statements made, ten months later, under the label of “reservations and declarations” to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).<sup>78</sup>

The temporary declaration formulated under Article 124, although permitted under the terms of the Rome Statute, is particularly worrying considering that France has failed to fulfil its obligations under the Geneva Conventions, Protocol I and the Rome Statute to define war crimes clearly under national law and further makes war crimes subject to a geographical and temporal limitation, thereby making a prosecution for war crimes in French courts difficult or impossible.<sup>79</sup> This dilemma can be seen in French statutory law and its interpretation by the courts in the *Barbie* and *Touvier* cases and particularly with regard to universal jurisdiction over war crimes in the case of *Javor*.<sup>80</sup>

The first declaration made by France – that the Rome Statute does not preclude it from exercising its inherent right to self-defence – does not appear to conflict directly with the Rome Statute, but the scope of that right may be altered when the crime of aggression is defined. As international humanitarian law applies to all parties to a conflict, regardless of whether the initiation of the conflict was contrary to international law, the use of armed force in exercising the right to self-defence may not include the use of any measures that are contrary to international humanitarian law. As the International Committee of the Red Cross has explained:

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<sup>78</sup> On ratification of the Protocol I on 11 April 2001, France entered into several reservations and made declarations, some of which are identical to its declarations to the Rome Statute. See, *inter alia*, its reservation to Article 51 “Protection of the Civilian Population” in respect of France’s rights to self defence and the definition of “military advantage” of the same Article. Available at [www.icrc.org/ihl.nsf/db8c9c8d3ba9d16f41256739003e6371/d8041036b40ebc44c1256a34004897b2?OpenDocument](http://www.icrc.org/ihl.nsf/db8c9c8d3ba9d16f41256739003e6371/d8041036b40ebc44c1256a34004897b2?OpenDocument).

<sup>79</sup> This concern was raised by the Rapporteur of the France’s National Assembly’s Commission, M. Pierre Brana. In his report he expressly mentioned the unsatisfactory provisions in French law and pointed out their inconsistencies with Article 8.

<sup>80</sup> *Re. Javor, N. Parquet 94 052 2002/7, Ordonnance, Tribunal de grande instance, Paris, 6 Mai 1994 (Getti, J.)*. For a discussion of this and others cases and universal jurisdiction over war crimes in France see Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation - Chapter Four - Part A (Algeria to Hungary), War Crimes: State Practice at The National Level*, AI Index: IOR 53/006/2001 (available at [web.amnesty.org/library/index/engior530062001?OpenDocument](http://web.amnesty.org/library/index/engior530062001?OpenDocument)).

“[I]t seems clear that the right of self-defence does not include the use of measures which would be contrary to international humanitarian law, even in a case where aggression has been established and recognized as such by the Security Council. The Geneva Conventions of 1949 and this Protocol must be applied in accordance with their Article 1 “in all circumstances”. Preamble of the Protocol reaffirms that their application must be “without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict”.<sup>81</sup>

The second French declaration, which states that “the provisions of Article 8 of the Statute, in particular paragraph 2 (b) thereof, relate solely to conventional weapons and can neither regulate nor prohibit the possible use of nuclear weapons...”, appears to be contrary to international law and seeks to limit France’s legal obligations under the Rome Statute and international humanitarian law. It is obvious that this declaration does not seek to clarify the meaning or scope attributed to a certain provision but to restrict the Court’s jurisdiction over war crimes.

In the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice concluded that international humanitarian law also applies to the use of nuclear weapons, just as it does to other weapons:

“[I]n the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons...

[T]he Court shares that view. Indeed, nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflict had already come into existence; the Conferences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in

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<sup>81</sup> Commentary by the International Committee of the Red Cross to Article 51, Protocol I, No.1927, available at [www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/5e5142b6ba102b45c12563cd00434741?OpenDocument](http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/5e5142b6ba102b45c12563cd00434741?OpenDocument).

question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”<sup>82</sup>

As has been emphasized by the International Court of Justice, none of the statements made before it by states other than France in the *Advisory Opinion* in any way advocated a freedom to use nuclear weapons with disregard to the rules of international humanitarian law. For example, the United Kingdom stated that:

“So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*”.<sup>83</sup>

The United States of America was of a similar view:

“The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons just as it governs the use of conventional weapons”.<sup>84</sup>

The Russian Federation also considered that international humanitarian law applies to nuclear weapons:

"Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons".<sup>85</sup>

Nothing in the Rome Statute suggests that conduct amounting to a war crime when committed with conventional weapons ceases to be a war crime when committed with nuclear weapons. Amnesty International considers, therefore, that the second French declaration is really a prohibited reservation because it seeks to limit the scope of war crimes.

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<sup>82</sup> *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, I.C.J. Rep., para.85-86 (available at <http://www.icj-cij.org/icjwww/icasess/iunan/iunanframe.htm>).

<sup>83</sup> *Advisory Opinion, supra*, note 82 at 86.

<sup>84</sup> *Advisory Opinion, supra*, note 82, at 86.

<sup>85</sup> *Advisory Opinion, supra*, note 82 at 86.

In this respect, upon ratification of the Rome Statute, New Zealand made the following declaration:

"The Government of New Zealand notes that the majority of the war crimes specified in Article 8 of the Rome Statute, in particular those in Article 8 (2) (b) (i)-(v) and 8 (2) (e) (i)-(iv) (which relate to various kinds of attacks on civilian targets), make no reference to the type of the weapons employed to commit the particular crime. The Government of New Zealand recalls that the fundamental principle that underpins international humanitarian law is to mitigate and circumscribe the cruelty of war for humanitarian reasons and that, rather than being limited to weaponry of an earlier time, this branch of law has evolved, and continues to evolve, to meet contemporary circumstances. Accordingly, it is the view of the Government of New Zealand that it would be inconsistent with principles of international humanitarian law to purport to limit the scope of Article 8, in particular Article 8 (2) (b), to events that involve conventional weapons only."

Given the strong statement it made before the International Court of Justice in the *Advisory Opinion*, why New Zealand did not make an objection to France's declaration is unclear.<sup>86</sup> This statement would seem to suggest that it implicitly considers France's declaration inconsistent with the principles of international humanitarian law, in particular to events that involve conventional weapons only. Sweden likewise made a similar statement without raising any formal objection.<sup>87</sup>

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<sup>86</sup> New Zealand asserted before the ICJ that: "In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons. International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons" (New Zealand, Written Statement, p. 15, para. 63-64., quoted in the *Advisory Opinion*, *supra*, note 82 at 86)

<sup>87</sup> The Swedish statement read:

"In connection with the deposit of its instrument of ratification of the Rome Statute of the International Criminal Court and, with regard to the war crimes specified in Article 8 of the Statute which relate to the methods of warfare, the Government of the Kingdom of Sweden would like to recall the Advisory Opinion given by the International Court of Justice on 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, and in particular paragraphs 85 to 87 thereof, in which the Court finds that there can be no doubt as to the applicability of humanitarian law to nuclear weapons."

The remainder of the declarations made by France are aimed to leave the decision on how to interpret certain element of war crimes in the hands of national authorities. As such, Amnesty International considers that they do not constitute statements which seek to clarify the scope of certain provisions, but instead to restrict the powers of the International Criminal Court.<sup>88</sup>

Amnesty International considers that, despite labelling these declarations as “unilateral statements”, some of the declarations made by France amount to reservations since they “exclude or modify the legal effect of certain provisions of a treaty”. The organization considers that they are contrary to Article 120 of the Rome Statute and, therefore, should not limit the International Criminal Court in the exercise of its competence.

## **B. Declaration made by the United Kingdom**

Amnesty International has similar concerns regarding the declaration made by the United Kingdom. Upon ratification of the Rome Statute, the United Kingdom made the following declaration (in marked contrast to its earlier view in the *Nuclear Weapons* case):

“The United Kingdom understands the term "the established framework of international law", used in article 8 (2) (b) and (e), to include customary international law as established by State practice and *opinio iuris*. In that context the United Kingdom confirms and draws to the attention of the Court its views as expressed, *inter alia*, in its statements made on ratification of relevant instruments of international law, including the Protocol Additional to the Geneva Conventions of 12th August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8th June 1977”.

In order to determine the true meaning of this “declaration” made by the United Kingdom, the long statement it made upon ratification to Protocol I may be of assistance:

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<sup>88</sup> For a commentary on these war crimes see Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* 128 (Cambridge: Cambridge University Press 2003).

“Reservations...

(a) It continues to be the understanding of the United Kingdom that the rules introduced by the Protocol apply exclusively to conventional weapons without prejudice to any other rules of international law applicable to other types of weapons. In particular, the rules so introduced do not have any effect on and do not regulate or prohibit the use of nuclear weapons.

(c) Military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.

(m) [T]he obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles...”<sup>89</sup>

The United Kingdom itself declared that this statement contained a list of reservations: as such, Amnesty International considers that the declaration made by upon ratification of the Rome Statute, in which the United Kingdom “confirms and draws to the attention of the Court” the statements it made upon the ratification of the Protocol Additional to the Geneva Conventions of 1949, is a prohibited reservation by virtue of Article 120.

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<sup>89</sup> See [www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument](http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument)  
These reservations were made three years after the UK made its statement before the ICJ in the *Advisory Opinion* case. See, *Advisory Opinion, supra*, note 82 at 86.

## **VI. CONCLUSION AND RECOMMENDATIONS OF AMNESTY INTERNATIONAL TO STATES PARTIES, THE INTERNATIONAL CRIMINAL COURT AND THE ASSEMBLY OF STATES PARTIES**

### **A. Conclusion**

As explained by the head of the Austrian delegation to the Rome Conference and a former member of the International Law Commission, two hypotheses are possible when considering declarations that amount to reservations. First, a disguised reservation affects the consent to be bound by the Rome Statute and as such destroys the legal effect that consent to the treaty entails. Second, an impermissible unilateral declaration should be considered as not having been made and, therefore does not affect a state's consent to be bound by the treaty.<sup>90</sup>

This second view appears to be reflected more widely in state practice and general understanding, at least with regard to the Rome Statute.

For example, when objecting Uruguay's unilateral statement, Ireland stated that:

“[The] objection does not preclude the entry into force of the Statute between Ireland and the Eastern Republic of Uruguay. The Statute will therefore be effective between the two states, without Uruguay benefiting from its reservation”.<sup>91</sup>

Similarly Norway reinforced the indivisibility of the Rome Statute by asserting that:

“The Government of Norway therefore objects to the reservation made by the Government of Uruguay upon ratification of the Rome Statute of the International Criminal Court. This objection shall not preclude the entry into force of the Statute in its entirety between the Kingdom of Norway and Uruguay. The Statute thus becomes operative between the Kingdom

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<sup>90</sup> Hafner, *supra*, note 21. William Schabas, *Reservations to Human Rights Treaties: Time for Innovation and Reform*, 32 Can. Y.B. Int'l L 71 1994. Bowet, *supra*, note 13 at 75.

<sup>91</sup> Declaration dated 28 July 2003.



of Norway and Uruguay without Uruguay benefiting from the reservation.”

Denmark echoed these statements:

“This objection does not preclude the entry into force of the Statute between Denmark and the Eastern Republic of Uruguay. The Statute will be effective between the two states, without the Eastern Republic of Uruguay benefiting from its reservations”.

The United Kingdom and Germany made similar objections, which appear to indicate that Uruguay will be bound by the terms of the Rome Statute without benefiting from the reservation it has made. The United Kingdom stated that:

“Accordingly, the Government objects to the above-quoted reservation by the Eastern Republic of Uruguay. However, this objection does not preclude the entry into force of the Rome Statute between the United Kingdom and Uruguay”.<sup>92</sup>

Germany stated that:

“The Government of the Federal Republic of Germany therefore objects to the aforementioned "declaration" made by the Government of the Eastern Republic of Uruguay. This objection does not preclude the entry into force of the Statute between the Federal Republic of Germany and the Eastern Republic of Uruguay”.

Further, the Netherlands stated that:

“This objection shall not preclude the entry into force of the Statute between the Kingdom of the Netherlands and Uruguay. The Statute will be effective between the two States, without Uruguay benefiting from its reservation”.

Amnesty International considers that, taking into account the explicit general prohibition contained in Article 120 with regard to states making reservations, the special nature of the Rome Statute – which does not enter into force solely between

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<sup>92</sup> Declaration made on 21 July 2003.

states but also between the “reserving” state and all individuals within its territory and subject to its jurisdiction – provides that illegal reservations are ineffective. The “reserving” state is thus bound by the Statute as a whole, including the reserved provision.

## **B. Recommendations**

Until the International Criminal Court has the opportunity to settle the dispute arising from Article 120, Amnesty International recommends that:

- In becoming parties to the Rome Statute, states should not make any kind of unilateral statement which could defeat the object and purpose of the Statute or in any way undermine its text.
- States parties that have made declarations which are inconsistent with the Rome Statute should withdraw them.
- States parties should object to unilateral statements made in breach of the prohibition on reservations, including disguised reservations or declarations which may defeat the object and purpose of the treaty.
- The Assembly of States Parties should urge states to withdraw any declarations or understandings that amount to reservations and declare that such reservations are without legal effect in order to ensure that those states remain bound by their obligations under the Rome Statute.
- The International Criminal Court should not interpret the lack of objections to any specific unilateral statement intending to defeat the object and purpose of the Rome Statute as acceptance of such a statement by other states parties.
- In all cases, the International Criminal Court should not be limited in the exercise of its competence by declarations made by states parties and should give its own interpretation of the Rome Statute in full independence.