049

SCSL-2003-08-PT-049 1038

SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

FREETOWN – SIERRA LEONE

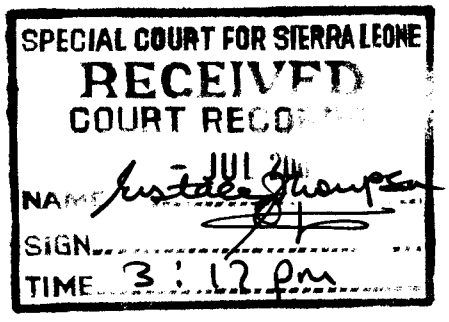
(1038 – 1417)

IN THE TRIAL CHAMBER

Before: Judge Bankole Thompson
Judge Pierre Boutet
Judge Benjamin Mutanga Itoe

Registrar: Mr. Robin Vincent

Date filed: 7 July 2003



THE PROSECUTOR

Against

SAM HINGA NORMAN

CASE NO. SCSL – 2003 – 08 – PT

PROSECUTION RESPONSE TO THE FOURTH DEFENCE PRELIMINARY MOTION ON LACK OF JURISDICTION (CHILD RECRUITMENT)

Office of the Prosecutor:
Mr. Desmond de Silva, QC, Deputy Prosecutor
Mr. Luc Côté, Chief of Prosecutions
Mr. Walter Marcus-Jones, Senior Appellate Counsel
Mr. Abdul Tejan-Cole, Appellate Counsel
Mr. Tom Perriello, Appellate Advisor
Ms. Mora Johnson, Legal intern

Defence Counsel:

Mr. James Blyden Jenkins-Johnson
Mr. Sulaiman Banja Tejan-Sie II

1039

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

SAM HINGA NORMAN

CASE NO. SCSL – 2003 – 08 – PT

PROSECUTION RESPONSE TO THE FOURTH DEFENCE PRELIMINARY MOTION ON LACK OF JURISDICTION (CHILD RECRUITMENT)

INTRODUCTION

1. The Prosecution files this response to the Defence preliminary motion entitled "Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment" (hereinafter referred to as "the **Fourth Preliminary Motion**") filed on behalf of the Accused Sam Hinga Norman ("the **Accused**") on 26th June 2003.[1]

2. The Fourth Preliminary Motion argues essentially that the Special Court lacks the jurisdiction to try the Accused for the crimes under Article 4 (c) of the Statute prohibiting the recruitment of children under 15 into armed forces or groups or using them to participate actively in hostilities. The Defence argues that recruitment of child soldiers was not part of customary international law at the times relevant to the indictment and thus the provision violates the principle of *nullum crimen sine lege.*

[1] Registry Page ("RP") 688-693.

ARGUMENT

A. Prohibition on the use of Child Soldiers is customary international law

3. The Prosecution argues that the prohibition on the use of child soldiers under the age of 15 was part of customary international law as of 30 November 1996.

4. International custom exists as a source of international law when a norm emerges as being obligatory or binding through state practice and *opinio juris*.[2] State practice and *opinio juris* may be discerned from treaties, decisions of international and national courts, national legislation, declarations, resolutions, practice of international organisations, policy statements, official manuals on legal questions (e.g. manuals of military law), executive decisions and practices, orders to the armed forces, and comments by government, etc.

5. The Prosecution submits that the prohibition of the recruitment of child soldiers under international law is both widely recognized and unequivocal. The condemnation of this practice is well-established under the treaty-law, international resolutions, State practice,[3] and academic literature.[4] The Prosecution submits that the Geneva

---

[2] North Sea Continental Shelf Cases, Judgment, ICJ Reports (1969) and Article 38 of the ICJ Statute.

[3] According to a recent Child Soldiers Global Report the vast majority of countries around the world possess domestic legislation that restricts the voluntary and/or compulsory military service to those at least over the age of 15 years, though in most instances the age is around 18 years. See Child Soldiers Global Report, Coalition to Stop the Use of Child Soldiers, May 2001. Available at: <http://www.globalmarch.org/worstformsreport/world/childsoldiers.html> (citing Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Chad, Chile, China, Colombia, Comoros, Congo, Cote d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Fiji, Finland, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea-Bissau, Honduras, Hungary, Ireland, Israel, Italy, Jordan, Kenya, Republic of Korea, Kuwait , Latvia, Liberia, Lithuania, Luxembourg, Malawi, Mali, Mauritania, Mauritius, Mexico, Moldova, Mongolia, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Poland, Portugal, Qatar, Russian Federation, Senegal, Singapore, Slovakia, South Africa, Swaziland, Sweden, Switzerland, Tanzania, Thailand, Togo, Tunisia, Turley, Turkmenistan, United Kingdom, United States, Venezeula, Yugoslavia, and Zimbabwe). Section 16(2) of the Republic of Sierra Leone Military Forces Act 1961 also states that volunteers under the "apparent age of 17 ½ years" may not be enlisted without the consent of their parent or legal guardian.

[4] The Defence does not contest this point as it concedes in paragraph 7 of the Motion that the Protocol II and the Convention on the Rights of the Child "may have created an obligation on the part of States to refrain from recruiting child soldiers..." There is also significant literature published by highly respected NGOs to support the argument that child recruitment is such a grave act that its practice is limited to only the most desperate and unstable situation. Statement by the International Committee of the Red Cross before the United Nations, General Assembly, 53rd session, Third Committee. October 21, 1998. Human Rights Watch Campaign to Stop the Use of Child

Conventions established the protection of children under 15 as an undisputed norm under international humanitarian law.[5] The Prosecution submits further that the sheer number of states that made the practice of child recruitment illegal under their domestic law demonstrates that the practice is widely viewed as unacceptable and a violation of international obligations. It is similarly indisputable that the language used in the international conventions addressing the subject of child recruitment is both consistent and categorical in its prohibition of the recruitment of children under the age of fifteen into the armed forces.[6]

Soldiers, *available at http://www.hrw.org/campaigns/crp/index.htm.* Amnesty International Campaign on Child Soldiers, *available at http://web.amnesty.org/web/content.nsf/pages/gbroptionalprotocol.*

[5] The *Geneva Convention (Relative to the Protection of Civilian Persons in Time of War)* 1949 which Sierra Leone ratified on 10 June 1965. Its object and purpose is the protection of civilians and other non-combatants from the consequences of war. Children, including children under the age of 15, are singled out in many provisions along with other groups of particularly vulnerable persons for protection from the ravages of war. Article 14 provides for safety zones "to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers..." Article 17 provides for the evacuation from besieged areas of "wounded, sick, infirm, and aged persons, children and maternity cases..." Article 24 requires States parties to take necessary measures to protect, educate and if possible, evacuate to neutral countries orphaned or displaced children under 15. Article 50 provides for the "proper working of all institutions devoted to the care and education of children" in occupied territories. Clearly, enlistment of children under 15 would violate these international humanitarian laws.

[6] *Protocol Additional to the Geneva Conventions* of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Sierra Leone ratified both on 21 October 1986. Article 77(2) of Protocol I states "The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest." Article 4 (3) (c) of Protocol II which is applicable to non-international armed conflicts, states "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."

Article 38 (1-4) of the *Convention on the Rights of the Child* (U.N.T.S. Vol. 1577, p 3, entry into force 2 September 1990), states, inter alia: "States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years to not take a direct part in hostilities. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces....In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."

The *African Charter on the Rights and Welfare of the Child* adopted by the Organisation of African Unity in 1990 states in Article 22(2) that "States parties to the present Charter shall take all necessary measures to ensure that no child shall take direct part in hostilities and refrain in particular from recruiting any child." A "child" is defined in the Charter as anyone below 18 years of age without exception.

The *Rome Statute of the International Criminal Court* gives the court jurisdiction over the war crime of "Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" (Article 8(e)(vii)). The Statute was adopted by a vote of 122 states in favour in Rome on 17 July 1998. The Statute entered into force on July 2, 2002. Currently, 139 states have signed the Rome Statute; 90 have ratified.

6. Further evidence of the existence of this customary international norm is the fact that it was codified in the Rome Statute establishing the International Criminal Court. Contrary to the Defence's assertion that the Rome Statute criminalizes the recruitment of child-soldiers, the Prosecution argues that the Rome Statute did not create a new offence but instead codified an existing customary international law.[7] The Prosecution states that the pre-existing customary prohibition against the recruitment of children was codified as a war crime in the Rome Statute as follows: "Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities."[8] On 17 July 1998, when the Rome Statute was adopted, 122 States voted in favour of adopting the Statute. Currently, 139 states, including Sierra Leone, have signed the Statute and 90 have ratified it.

7. The Defence supports its argument in paragraph 9 of its Fourth Preliminary Motion by stating that the United States and India have not ratified the Rome Statute, which classifies recruitment of children under fifteen as a war crime. Both of these countries, however, prohibit child recruitment and treat children as a protected group in their domestic law. The United States, for example, prohibits the enlistment of any

---

The ILO *Worst Forms of Child Labour Convention* (No. 182) adopted in 1999 commits every state to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency. The term child applies to all persons under the age of 18 years and defines the worst forms of labour as including "forced or compulsory recruitment for use of children in armed conflict."

The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (U.N. Doc A/54/RES/263) unanimously adopted by the General Assembly in 2000 and ratified by Sierra Leone prohibits the conscription of children under 18 into armed forces and raises the minimum age of recruitment from 15 to 18.

The recognition of the criminalization of child recruitment in the Statute of the International Criminal Court has also been lauded in numerous subsequent regional declarations. These include: the Montevideo Declaration on the Use of Children as Soldiers, issued during the Latin American and Caribbean Conference on the Use of Child Soldiers; the Berlin Declaration on the Use of Children as Soldiers, issued during the European Conference on the Use of Children as Soldiers; the Kathmandu Declaration on the Use of children as Soldiers, issued during the Asia-Pacific Conference on the Use of Children as Soldiers; and the Amman Declaration on the Use of Children as Soldiers, issued during the Amman Conference on the Use of Children as Soldiers. African recognition of this prohibition has also been substantial. See inter alia the Cape Town Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, the Maputo Declaration on the Use of Children as Soldiers, the OAU Decision on the African Conference on the Use of Children as Soldiers.

[7] Well before the temporal jurisdiction of this Court, the international community regularly characterized child recruitment in terms of criminal prosecution. The long-standing nature of this prohibition was recognized by the President of the UN Security Council in a statement by the President of the Security Council, June 29, 1998 (S/PRST/1998/18). See also Security Council Resolutions 1083 (1996), 1071 (1996), 1231 (1991), 1261 (1999) and 1314 (2000) and General Assembly Resolution 48/157 of 20 December 1993.

[8] Articles 8(2)(b) (xxvi) and 8(2)(e)(vii).

person under the age of 17, and anyone who is not 18 must have a parent's permission.[9] Moreover, any use of a child in a military context would be grounds for criminal charges such as kidnapping, endangering the welfare of a minor, as well as various constitutional and tort claims.

8. In answer to paragraph 8 of the Defence Fourth Preliminary Motion that it is by no means clear that the Optional Protocol to the Convention on the Rights of the Child (CRC) expresses a principle of customary international law in this regard, the Prosecution argues that the CRC and the Optional Protocol reflect customary international law. The Prosecution submits that rapidity with which the Convention and the Protocol were signed supports its assertion. The Convention has been ratified by 191 of the 193 participating nations. The Prosecution submits that no other specialized United Nations human rights treaty has entered into force so quickly and been ratified by so many states in such a short period of time. The Prosecution also notes that the Defence is wrong in stating in paragraph 8 of the Fourth Preliminary Motion that only 52 States have signed the Optional Protocol. One hundred and eleven (111) States have signed the Protocol and fifty three (53) have ratified the same.

9. The Prosecution argues that the Defence is wrong in its assertion in paragraph 7 of its Fourth Preliminary Motion that "(H)ad the recruitment of child soldiers by groups 'distinct from the armed forces of a state' been criminalized in either Protocol II or the Convention there would have been no need for Article 4.2 of the Optional Protocol." As stated in the preamble to the Optional Protocol, the *raison d'etre* of the Optional Protocol was not to criminalize the recruitment of child soldiers but to raise the age of recruitment from 15 to 18.[10] Thus, even from the language of the Protocol,

---

[9] 10 USCS§505 (2003)-"(a) The Secretary concerned may accept original enlistments in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard, as the case may be, of qualified, effective, and able-bodied persons who are not seen less than seventeen years of age nor more than thirty-five year of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control."

[10] The Preamble states that "Considering therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict, … Convinced that an optional protocol to the Convention that raises the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the

it is clear that the recruitment of child soldiers by any armed group was an offence under international law even before the Protocol came into existence.

10. In further answer to paragraph 7 of the Fourth Defence Preliminary Motion, the Defence suggests that international law previously criminalized the recruitment of child soldiers into national armies, but not the enlistment or conscription of children by "groups distinct from the armed forces of a state" prior to the Optional Protocol. The Prosecution submits that the Defence statement is unsubstantiated. The effect of this distinction would mean that it would be lawful to permit rebel groups to conscript and enlistment under the age of 15 years but not national armies.[11]

11. Furthermore, the Prosecution submits that the Defence statement cannot be reconciled with the decision of the Appeals Chamber for the ICTY in *Prosecutor v. Dusko Tadic*, or under international common law. In *Tadic*, the Appeals Chamber for the ICTY rejected the contention that individual criminal responsibility did not attach when breaches were committed in internal armed conflict and, thus, were not within the scope of the International Tribunal's jurisdiction. This decision is apposite for two reasons. First, the Appeals Chamber found that "*a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches*". (emphasis added).[12] Therefore, the prohibition of an act or omission under customary law is sufficient to satisfy the principle of *nullum crimen sine lege*.[13]

---

implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children".

[11] *Prosecutor v. Dusko Tadic,* IT-94-1, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" para. 97 (October 2, 1995), the Appeals Chamber stated that "It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight."

[12] *Prosecutor v. Dusko Tadic,* IT-94-1, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" para. 128 (October 2, 1995), citing THE TRIAL OF MAJOR WAR CRIMINALS PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY, Part 22, at 445, 467 (1950).

[13] Similarly, Theodor Meron, currently the President of the Appeals Chamber shared by the ICTY and ICTR, has written, "it has not been seriously questioned that some acts of individuals that are *prohibited* by international law constitute *criminal* offenses, even when there is no accompanying provision for the establishment of the jurisdiction

Second, relying on the analysis of the Nuremberg Tribunal, the Appeals Chamber in *Tadic* outlined the factors establishing individual criminal responsibility under international law: (1) "the clear and unequivocal recognition of the [issue][14] in international law"; (2) "state practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations"; and (3) "punishment of violations by national courts and military tribunals."[15] The Prosecution submits that in the case of the recruitment of child soldiers, these conditions are met, and "individuals must be held criminally responsible", because as the Nuremberg Tribunal stated "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[16]

12. The Prosecution argues that the Defence is incorrect in suggesting that the absence of a penal sanction for violation of the provision of a treaty does not criminalise the same. The Prosecution therefore argues that the provisions of a treaty without reference to penal prosecution or individual liability can create a crime and impose criminal liability.[17] Further, the Convention on the Rights of the Child requires states parties to take "all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities."[18] The Optional Protocol to the CRC also provides that each State Party shall take all necessary legal,

---

of particular courts or a scale of penalties." Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L.554, 562 (1995) (Emphasis added).

[14] In *Tadic*, the International Criminal Tribunal for the Former Yugoslavia was considering whether individual criminal responsibility applied to violations of the laws of war in international and internal armed conflict. The Tribunal's analysis concluded that individual criminal responsibility was applicable to both. See *Tadic*, *supra* note 11, at paras. 128-134, 137.

[15] *Tadic*, supra note 11 at para. 128, citing THE TRIAL OF MAJOR WAR CRIMINALS PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY, *supra* note 11 at 445-47, 467.

[16] *Id.*, citing THE TRIAL OF MAJOR WAR CRIMINALS PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG, GERMANY, *supra* note 11 at 447.

[17] *Prosecutor v. Tadic*, "Decision on the Defence Motion on Jurisdiction" 10 August 1995 para. 70 states that the individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability. Similarly, Theodor Meron, has written, "it has not been seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offenses, even when there is no accompanying provision for the establishment of the jurisdiction of particular courts or a scale of penalties." See Meron, note 12 at p. 562.

[18] *Convention on the Rights of the Child*, Article 38(3).

administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction.[19] The Prosecution submits that criminal sanction is envisioned for the offence of enlistment of children in violation of the Convention and the Protocol.[20]

13. The Prosecution urges the Trial Chamber to interpret the Statute in accordance with Article 31 of the Vienna Convention on the Law of Treaties: "in good faith, in accordance with the ordinary meaning of the terms in their context and in the light of its object and purpose." The Prosecution states that pursuant to Article 4 of the Statute, the Court has "the power to prosecute persons who committed the following serious violations of international humanitarian law: … (c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities." The Prosecution states that the primary object and purpose of the Court is to try all persons who bear the greatest responsibility for all the crimes contained in the statute. The Prosecution therefore submits that the Special Court possesses jurisdiction to apply the express provision in Article 4(c) of its Statute[21] and submits that this provision was a pre-existing offence under customary international law at all times material to the temporal jurisdiction of the Special Court for Sierra Leone.[22]

B. Principle of *nullum crimen sine lege*

14. The Prosecution submits that the principle of *nullem crimen sine lege* does not apply in the present case as the offence charged under Count 8 of the Indictment and

---

[19] i.d., Article 6.

[20] Further, the Prosecution states that Article 6 of Protocol II to the Geneva Conventions provides for the prosecution and punishment of criminal offences related to armed conflict and that criminal punishment for breach of this Protocol was clearly envisaged.

[21] Antonio Cassese, *International Criminal Law* (2003) [hereinafter "Cassese"] at 50-52 notes that violations of international humanitarian law are criminalized when "a breach is termed a war crime by the Statute of an international tribunal. In this case, even if the breach has never been brought before a national or international tribunal, it may justifiably be regarded as a war crime – or, at least, as a war crime falling under the jurisdiction of that international tribunal."

[22] The Secretary-General in paragraph 12 of his report stated:" ... In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime". Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, U.N. Doc S/2000/915

contained in Article 4(c) of the Statute is customary international law and was at the time the alleged offence was committed.

15. The Prosecution relies on the case of *Prosecutor v. Hadzihasanovic et al.*[23] in which it was stated at paragraph 62 that

> "(T)his Trial Chamber understands the principle of *nullem crimen sine lege,* a constitutive element of the principle of legality, in relation to the factual criminality of a particular conduct. In interpreting the principle of *nullem crimen sine lege,* it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance. This interpretation of the principle is supported by the subsequent declaratory formulation of the principle of *nullem crimen sine lege* in Article 22 of the ICC Statute: "A person shall not be criminally responsible under this Statute unless the *conduct* in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."

Relying on its earlier submissions, the Prosecution submits that the conduct for which the Accused is charged was "foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable." Consequently, the Accused cannot rely on the principle of *nullem crimen sine lege.*

16. The Prosecution further argues that the crime charged in Count 8 of the Indictment is criminal according to the general principles of law recognised by the community of nations. Article 15 (2) of the International Covenant on Civil and Political Rights (ICCPR) allows prosecutions for acts "criminal according to the general principles of law recognising by the community of nations." Thus, international criminality flows directly from widely accepted domestic criminality.[24]

17. The Prosecution additionally disputes the Defence interpretation of the principle of *nullem crimen sine lege.* The rationale of *nullum crimen sine lege* is to guard against

---

[23] "Decision on Joint Challenge to Jurisdiction", IT-01-47-PT, T. Ch., 12 November 2002.

[24] *Prosecutor v Zejnil Delali*] et al Trial Judgment 16 November 1998 para. 311 -318 the Trial Chamber held that the accused could be charged with offences under Common Article 3 despite there being no express reference to penal sanction because, inter alia, Article 15(2) of the ICCPR allows prosecution for acts "criminal according to the general principles of law recognised by the community of nations." The European Court of Justice in *CR v. United Kingdom* [1995] Eur. Ct. HR, 20190/92 upheld a House of Lords decision that a man could be convicted for attempting to rape his wife despite an exception for marital rape because such an interpretation of the law was consistent with "the fundamental objectives of the [European Convention], the very essence of which is respect for human dignity and human freedom."

excessive and arbitrary state power which might punish acts retroactively even though they were not considered criminal at the time.[25] The Prosecution argues that the principle of *nullem crimen sine lege* is not in any case applied rigidly, particularly when the acts in question are universally regarded as abhorrent and deeply shock the conscience of humanity.

18. The Prosecution further submits that *nullum crimen sine lege* does not serve to exculpate all those who committed atrocities under international law which existed at the material time.[26] It submits that the primary purpose of international humanitarian law is to regulate the means and methods of warfare and to protect persons not actively participating in armed conflict from harm.[27] One of the fundamental principles underlying international humanitarian law is the principle of criminal responsibility for violations of such law.

CONCLUSION

The Prosecution urges the Court to dismiss the Defence Fourth Preliminary Motion.

Freetown, 7 July 2003.

For the Prosecution,

Desmond de Silva, QC Deputy Prosecutor	Luc Côté Chief of Prosecutions
Walter Marcus-Jones Senior Appellate Counsel	Abdul Tejan-Cole Appellate Counsel

[25] See Cassese note 20 at 142.
[26] *US v Alstoetter* (The Justice case) 3 CCL No. 10 Trials 954 – 983-84 Trials of War Criminals Before Nuremberg Tribunal Under Control Council Law No. 10 1946-1949 the Tribunal denied defence claims that the principle of nullum crimen sine lege applied and added that the rules do not apply "to a treaty, a custom or a common law decision of an international tribunal."
[27] *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998 para 184.

PROSECUTION INDEX OF AUTHORITIES

Conventions

1. *Statute of the International Court of Justice* (as signed 1945)
2. *Convention on the Rights of the Child* (U.N.T.S. Vol. 1577, at 3)
3. *Convention on the Rights of the Child,* list of States Parties and Signatories
4. *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* 16 March 2001 (U.N. Doc A/54/RES/263)
5. *Optional Protocol on the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, list of States Parties and Signatories
6. *Geneva Convention (Relative to the Protection of Civilian Persons in Time of War)* 12 August 1949, Articles 14, 17, 24 and 50
7. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* 8 June 1977
8. *African Charter on the Rights and Welfare of the Child,* Organization on African Unity, Addis Ababa, 1990, Articles 2 and 22.
9. *Rome Statute of the International Criminal Court,* A/CONF.183/9, Articles 2-8
10. International Labour Organization *Worst Forms of Child Labour Convention* (No. 182) ("Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour"), entry into force 19 November 2000

Cases

11. *North Sea Continental Shelf* cases, 1969 WL 1 (I.C.J.), paras 70-82
12. *Prosecutor v. Tadic, Decision on the Defence Motion on Jurisdiction,* ICTY-94-1, Trial Chamber, 10 August 1995
13. *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction,* ICTY-94-1, Appeals Chamber, 2 October 1995
14. *Prosecutor v. Hadzihasanovic et al., Decision on Joint Challenge to Jurisdiction*, Case No. IT-01-47-PT, T. Ch., 12 November 2002, paras 55-66
15. *Prosecutor v. Anto Furundzija,* Case No. IT-95-17/1-T, Judgment, 10 December 1998
16. *Prosecutor v. Delalic (Celebci)* IT-96-21-T, Judgment, 16 November 1998

17. *CR v. United Kingdom,* European Court of Human Rights, [1995] ECHR 20190/92, Judgment of 22 November, 1995

18. *US v Alstoetter* (The Justice case) 3 CCL No. 10 Trials 954

Reports, Statements, Declarations, Resolutions

19. General Assembly resolution 48/157 entitled "Protection of Children Affected by Armed Conflict." U.N. Doc A/RES/48/157 (20 December 1993)

20. Statements of the President of the Security Council dated 29 June 1998 (S/PRST/1998/18)

21. Security Council Resolution 1083 (1996) (U.N. Doc S/RES/1083)

22. Security Council Resolution 1071 (1996) (U.N. Doc S/RES/1071)

23. Security Council Resolution 1231 (1999) (U.N. Doc S/RES/1231)

24. Security Council Resolution 1261 (1999) (U.N. Doc S/RES/1261)

25. Security Council Resolution 1314 (2000) (U.N. Doc S/RES/1314)

26. Organization of African Unity, *Decision on the African Conference on the Use of Children as Soldiers* CM/Dec. 482, April 1999, Articles 2 and 22

27. *Maputo Declaration on the Use of Children as Soldiers*, African Conference on the Use of Children As Soldiers, Maputo, Mozambique, 19-22 April 1999

28. *The Capetown Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa*, Adopted by the participants in the Symposium on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, Cape Town, 30 April 1997

Learned Writers

29. Antonio Cassese, *International Criminal Law* (2003: Oxford University Press) pp 50-53, 142-143.

30. Theodor Meron, "International Criminalization of Internal Atrocities" 89 American Journal of International Law 554 (July 1995)

Domestic Documents

31. United States Code Service §505-(a) (2003)

32. Sierra Leone Military Forces Act, 1961, Section 16(2)

PROSECUTION INDEX OF AUTHORITIES

ANNEX 1.

Statute of the International Court of Justice (as signed 1945)

1052

STATUTE
OF THE
INTERNATIONAL COURT OF JUSTICE

TABLE OF CONTENTS:

Chapter II. Competence of the Court.

1053

Article 34

(1) Only states may be parties in cases before the Court.

(2) The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative.

(3) Whenever the construction of the constituent instrument of a public international organization or of an international convention adopted thereunder is in question in a case before the Court, the Registrar shall so notify the public international organization concerned and shall communicate to it copies of all the written proceedings.

Article 35

(1) The Court shall be open to the states parties to the present Statute.

(2) The conditions under which the Court shall be open to other states shall, subject to the special provisions contained in treaties in force, be laid down by the Security Council, but in no case shall such conditions place the parties in position of inequality before the Court

(3) When a state which is not a Member of the United Nations is a party to a case, the Court shall fix the amount which the party is to contribute towards the expenses of the Court. This provision shall not apply if such state is bearing a share of the expenses of the Court.

Article 36

(1) The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

(2) The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature of extent of the reparation to be made for the breach of an international obligation.

(3) The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time

1054

(4) Such declarations shall be deposited with the Secretary-General of the

United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

(5) Declarations made under Article 36 of the Statute of the Permanent

Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

(6) In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Article 37

Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice.

Article 38

(1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

(2) This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 2.

Convention on the Rights of the Child (U.N.T.S. Vol. 1577, at 3)

1056

Convention on the Rights of the Child

U.N.T.S., Vol 1577, p. 3

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989

***entry into force* 2 September 1990**

Preamble

The States Parties to the present Convention,

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

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the

welfare of children, '

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal

guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who

have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care,

through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with

regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29 ***<u>General comment on its implementation</u>***

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language

and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and

educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other

appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on

the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

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

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

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

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

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

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms

and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

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

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

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

Article 50

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

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

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

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 3.

Convention on the Rights of the Child, list of States Parties and Signatories

1075

Convention on the Rights of the Child

New York, 20 November 1989

Entry into force:	2 September 1990, in accordance with article 49 (1).
Registration:	2 September 1990, No. 27531.
Status:	Signatories: 140 ,Parties: 192.
Text:	United Nations, *Treaty Series*, vol. 1577, p. 3; depositary notifications C.N.147.1993.TREATIES-5 of 15 May 1993 [amendments to article 43 (2)][1]; and C.N.322.1995.TREATIES-7 of 7 November 1995 [amendment to article 43 (2)].

Note: The Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, was adopted by resolution 44/25[2] of 20 November 1989 at the Forty-fourth session of the General Assembly of the United Nations. The Convention is open for signature by all States at the Headquarters of the United Nations in New York.

PARTICIPANTS

Participant	Signature	Ratification, Acceptance (A), Accession (a), Succession (d)
Afghanistan	27 Sep 1990	28 Mar 1994
Albania	26 Jan 1990	27 Feb 1992
Algeria	26 Jan 1990	16 Apr 1993
Andorra	2 Oct 1995	2 Jan 1996
Angola	14 Feb 1990	5 Dec 1990
Antigua and Barbuda	12 Mar 1991	5 Oct 1993
Argentina	29 Jun 1990	4 Dec 1990
Armenia		23 Jun 1993 a
Australia	22 Aug 1990	17 Dec 1990
Austria	26 Aug	6 Aug 1992

	1990	
Azerbaijan		13 Aug 1992 a
Bahamas	30 Oct 1990	20 Feb 1991
Bahrain		13 Feb 1992 a
Bangladesh	26 Jan 1990	3 Aug 1990
Barbados	19 Apr 1990	9 Oct 1990
Belarus	26 Jan 1990	1 Oct 1990
Belgium	26 Jan 1990	16 Dec 1991
Belize	2 Mar 1990	2 May 1990
Benin	25 Apr 1990	3 Aug 1990
Bhutan	4 Jun 1990	1 Aug 1990
Bolivia	8 Mar 1990	26 Jun 1990
Bosnia and Herzegovina[3]		1 Sep 1993 d
Botswana		14 Mar 1995 a
Brazil	26 Jan 1990	24 Sep 1990
Brunei Darussalam		27 Dec 1995 a
Bulgaria	31 May 1990	3 Jun 1991
Burkina Faso	26 Jan 1990	31 Aug 1990
Burundi	8 May 1990	19 Oct 1990
Cambodia		15 Oct 1992 a
Cameroon	25 Sep 1990	11 Jan 1993
Canada	28 May 1990	13 Dec 1991
Cape Verde		4 Jun 1992 a
Central African Republic	30 Jul 1990	23 Apr 1992
Chad	30 Sep 1990	2 Oct 1990
Chile	26 Jan 1990	13 Aug 1990

China[4,5]	29 Aug 1990	2 Mar 1992
Colombia	26 Jan 1990	28 Jan 1991
Comoros	30 Sep 1990	22 Jun 1993
Congo		14 Oct 1993 a
Cook Islands		6 Jun 1997 a
Costa Rica	26 Jan 1990	21 Aug 1990
Côte d'Ivoire	26 Jan 1990	4 Feb 1991
Croatia[3]		12 Oct 1992 d
Cuba	26 Jan 1990	21 Aug 1991
Cyprus	5 Oct 1990	7 Feb 1991
Czech Republic[6]		22 Feb 1993 d
Democratic People's Republic of Korea	23 Aug 1990	21 Sep 1990
Democratic Republic of the Congo	20 Mar 1990	27 Sep 1990
Denmark	26 Jan 1990	19 Jul 1991
Djibouti	30 Sep 1990	6 Dec 1990
Dominica	26 Jan 1990	13 Mar 1991
Dominican Republic	8 Aug 1990	11 Jun 1991
Ecuador	26 Jan 1990	23 Mar 1990
Egypt	5 Feb 1990	6 Jul 1990
El Salvador	26 Jan 1990	10 Jul 1990
Equatorial Guinea		15 Jun 1992 a
Eritrea	20 Dec 1993	3 Aug 1994
Estonia		21 Oct 1991 a
Ethiopia		14 May 1991 a
Fiji	2 Jul 1993	13 Aug 1993
Finland	26 Jan 1990	20 Jun 1991

France	26 Jan 1990	7 Aug 1990
Gabon	26 Jan 1990	9 Feb 1994
Gambia	5 Feb 1990	8 Aug 1990
Georgia		2 Jun 1994 a
Germany[7]	26 Jan 1990	6 Mar 1992
Ghana	29 Jan 1990	5 Feb 1990
Greece	26 Jan 1990	11 May 1993
Grenada	21 Feb 1990	5 Nov 1990
Guatemala	26 Jan 1990	6 Jun 1990
Guinea		13 Jul 1990 a
Guinea-Bissau	26 Jan 1990	20 Aug 1990
Guyana	30 Sep 1990	14 Jan 1991
Haiti	26 Jan 1990	8 Jun 1995
Holy See	20 Apr 1990	20 Apr 1990
Honduras	31 May 1990	10 Aug 1990
Hungary	14 Mar 1990	7 Oct 1991
Iceland	26 Jan 1990	28 Oct 1992
India		11 Dec 1992 a
Indonesia	26 Jan 1990	5 Sep 1990
Iran (Islamic Republic of)	5 Sep 1991	13 Jul 1994
Iraq		15 Jun 1994 a
Ireland	30 Sep 1990	28 Sep 1992
Israel	3 Jul 1990	3 Oct 1991
Italy	26 Jan 1990	5 Sep 1991

Jamaica	26 Jan 1990	14 May 1991
Japan	21 Sep 1990	22 Apr 1994
Jordan	29 Aug 1990	24 May 1991
Kazakhstan	16 Feb 1994	12 Aug 1994
Kenya	26 Jan 1990	30 Jul 1990
Kiribati		11 Dec 1995 a
Kuwait	7 Jun 1990	21 Oct 1991
Kyrgyzstan		7 Oct 1994 a
Lao People's Democratic Republic		8 May 1991 a
Latvia		14 Apr 1992 a
Lebanon	26 Jan 1990	14 May 1991
Lesotho	21 Aug 1990	10 Mar 1992
Liberia	26 Apr 1990	4 Jun 1993
Libyan Arab Jamahiriya		15 Apr 1993 a
Liechtenstein	30 Sep 1990	22 Dec 1995
Lithuania		31 Jan 1992 a
Luxembourg	21 Mar 1990	7 Mar 1994
Madagascar	19 Apr 1990	19 Mar 1991
Malawi		2 Jan 1991 a
Malaysia		17 Feb 1995 a
Maldives	21 Aug 1990	11 Feb 1991
Mali	26 Jan 1990	20 Sep 1990
Malta	26 Jan 1990	30 Sep 1990
Marshall Islands	14 Apr 1993	4 Oct 1993
Mauritania	26 Jan	16 May 1991

	1990	
Mauritius		26 Jul 1990 a
Mexico	26 Jan 1990	21 Sep 1990
Micronesia (Federated States of)		5 May 1993 a
Monaco		21 Jun 1993 a
Mongolia	26 Jan 1990	5 Jul 1990
Morocco	26 Jan 1990	21 Jun 1993
Mozambique	30 Sep 1990	26 Apr 1994
Myanmar		15 Jul 1991 a
Namibia	26 Sep 1990	30 Sep 1990
Nauru		27 Jul 1994 a
Nepal	26 Jan 1990	14 Sep 1990
Netherlands[8]	26 Jan 1990	6 Feb 1995 A
New Zealand[9]	1 Oct 1990	6 Apr 1993
Nicaragua	6 Feb 1990	5 Oct 1990
Niger	26 Jan 1990	30 Sep 1990
Nigeria	26 Jan 1990	19 Apr 1991
Niue		20 Dec 1995 a
Norway	26 Jan 1990	8 Jan 1991
Oman		9 Dec 1996 a
Pakistan	20 Sep 1990	12 Nov 1990
Palau		4 Aug 1995 a
Panama	26 Jan 1990	12 Dec 1990
Papua New Guinea	30 Sep 1990	2 Mar 1993
Paraguay	4 Apr 1990	25 Sep 1990
Peru	26 Jan 1990	4 Sep 1990

1081

Philippines	26 Jan 1990	21 Aug 1990
Poland	26 Jan 1990	7 Jun 1991
Portugal[5]	26 Jan 1990	21 Sep 1990
Qatar	8 Dec 1992	3 Apr 1995
Republic of Korea	25 Sep 1990	20 Nov 1991
Republic of Moldova		26 Jan 1993 a
Romania	26 Jan 1990	28 Sep 1990
Russian Federation	26 Jan 1990	16 Aug 1990
Rwanda	26 Jan 1990	24 Jan 1991
Saint Kitts and Nevis	26 Jan 1990	24 Jul 1990
Saint Lucia	30 Sep 1990	16 Jun 1993
Saint Vincent and the Grenadines	20 Sep 1993	26 Oct 1993
Samoa	30 Sep 1990	29 Nov 1994
San Marino		25 Nov 1991 a
Sao Tome and Principe		14 May 1991 a
Saudi Arabia		26 Jan 1996 a
Senegal	26 Jan 1990	31 Jul 1990
Serbia and Montenegro[3]		12 Mar 2001 d
Seychelles		7 Sep 1990 a
Sierra Leone	13 Feb 1990	18 Jun 1990
Singapore		5 Oct 1995 a
Slovakia[6]		28 May 1993 d
Slovenia[3]		6 Jul 1992 d
Solomon Islands		10 Apr 1995 a
Somalia	9 May 2002	
South Africa	29 Jan 1993	16 Jun 1995

Spain	26 Jan 1990	6 Dec 1990
Sri Lanka	26 Jan 1990	12 Jul 1991
Sudan	24 Jul 1990	3 Aug 1990
Suriname	26 Jan 1990	1 Mar 1993
Swaziland	22 Aug 1990	7 Sep 1995
Sweden	26 Jan 1990	29 Jun 1990
Switzerland	1 May 1991	24 Feb 1997
Syrian Arab Republic	18 Sep 1990	15 Jul 1993
Tajikistan		26 Oct 1993 a
Thailand		27 Mar 1992 a
The Former Yugoslav Republic of Macedonia[3,10]		2 Dec 1993 d
Timor-Leste		16 Apr 2003 a
Togo	26 Jan 1990	1 Aug 1990
Tonga		6 Nov 1995 a
Trinidad and Tobago	30 Sep 1990	5 Dec 1991
Tunisia	26 Feb 1990	30 Jan 1992
Turkey	14 Sep 1990	4 Apr 1995
Turkmenistan		20 Sep 1993 a
Tuvalu		22 Sep 1995 a
Uganda	17 Aug 1990	17 Aug 1990
Ukraine	21 Feb 1990	28 Aug 1991
United Arab Emirates		3 Jan 1997 a
United Kingdom of Great Britain and Northern Ireland[4,11]	19 Apr 1990	16 Dec 1991
United Republic of Tanzania	1 Jun 1990	10 Jun 1991
United States of America	16 Feb	

	1995	
Uruguay	26 Jan 1990	20 Nov 1990
Uzbekistan		29 Jun 1994 a
Vanuatu	30 Sep 1990	7 Jul 1993
Venezuela	26 Jan 1990	13 Sep 1990
Viet Nam	26 Jan 1990	28 Feb 1990
Yemen[12]	13 Feb 1990	1 May 1991
Zambia	30 Sep 1990	6 Dec 1991
Zimbabwe	8 Mar 1990	11 Sep 1990

PROSECUTION INDEX OF AUTHORITIES

ANNEX 4.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 16 March 2001 (U.N. Doc A/54/RES/263)

1085

A

UNITED
NATIONS

General Assembly

Distr.
GENERAL

A/RES/54/263*
16 March 2001

Fifty-fourth session
Agenda item 116 (*a*)

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[*without reference to a Main Committee (A/54/L.84)*]

54/263. Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography

The General Assembly,

Recalling all its previous resolutions on the rights of the child, in particular its resolution 54/149 of 17 December 1999, in which it strongly supported the work of the open-ended inter-sessional working groups and urged them to finalize their work before the tenth anniversary of the entry into force of the Convention on the Rights of the Child,[1]

Expressing its appreciation to the Commission on Human Rights for having finalized the texts of the two optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography,

Conscious of the tenth anniversaries, in the year 2000, of the World Summit for Children and the entry into force of the Convention on the Rights of the Child and of the symbolic and practical importance of the adoption of the two optional protocols to the Convention on the Rights of the Child before the special session of the General Assembly for the follow-up to the World Summit for Children, to be convened in 2001,

Adhering to the principle that the best interests of the child are to be a primary consideration in all actions concerning children,

Reaffirming its commitment to strive for the promotion and protection of the rights of the child in all avenues of life,

Recognizing that the adoption and implementation of the two optional protocols will make a substantial contribution to the promotion and protection of the rights of the child,

---

* Reissued for technical reasons.

[1] Resolution 44/25, annex.

1. *Adopts and opens for signature, ratification and accession* the two optional protocols to the Convention on the Rights of the Child[1] on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography, the texts of which are annexed to the present resolution;

2. *Invites* all States that have signed, ratified or acceded to the Convention on the Rights of the Child to sign and ratify or accede to the annexed optional protocols as soon as possible in order to facilitate their early entry into force;

3. *Decides* that the two optional protocols to the Convention on the Rights of the Child will be opened for signature at the special session of the General Assembly, entitled AWomen 2000: gender equality, development and peace for the twenty-first century≅, to be convened from 5 to 9 June 2000 in New York, and thereafter at United Nations Headquarters, at the special session of the General Assembly, entitled AWorld Summit for Social Development and beyond: achieving social development for all in a globalizing world≅, to be convened from 26 to 30 June 2000 in Geneva, and at the Millennium Summit of the United Nations, to be convened from 6 to 8 September 2000 in New York;

4. *Requests* the Secretary-General to include information on the status of the two optional protocols in his report to the General Assembly on the status of the Convention on the Rights of the Child.

97th plenary meeting
25 May 2000

ANNEX I

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

The States Parties to the present Protocol,

Encouraged by the overwhelming support for the Convention on the Rights of the Child[1], demonstrating the widespread commitment that exists to strive for the promotion and protection of the rights of the child,

Reaffirming that the rights of children require special protection, and calling for continuous improvement of the situation of children without distinction, as well as for their development and education in conditions of peace and security,

Disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development,

Condemning the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places generally having a significant presence of children, such as schools and hospitals,

Noting the adoption of the Statute of the International Criminal Court[2] and, in particular, its inclusion as a war crime of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflicts,

---

[2] A/CONF.183/9.

Considering, therefore, that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict,

Noting that article 1 of the Convention on the Rights of the Child specifies that, for the purposes of that Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier,

Convinced that an optional protocol to the Convention raising the age of possible recruitment of persons into armed forces and their participation in hostilities will contribute effectively to the implementation of the principle that the best interests of the child are to be a primary consideration in all actions concerning children,

Noting that the twenty-sixth international Conference of the Red Cross and Red Crescent in December 1995 recommended, *inter alia*, that parties to conflict take every feasible step to ensure that children under the age of 18 years do not take part in hostilities,

Welcoming the unanimous adoption, in June 1999, of International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which prohibits, *inter alia*, forced or compulsory recruitment of children for use in armed conflict,

Condemning with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State, and recognizing the responsibility of those who recruit, train and use children in this regard,

Recalling the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law,

Stressing that this Protocol is without prejudice to the purposes and principles contained in the Charter of the United Nations, including Article 51, and relevant norms of humanitarian law,

Bearing in mind that conditions of peace and security based on full respect of the purposes and principles contained in the Charter and observance of applicable human rights instruments are indispensable for the full protection of children, in particular during armed conflicts and foreign occupation,

Recognizing the special needs of those children who are particularly vulnerable to recruitment or use in hostilities contrary to this Protocol owing to their economic or social status or gender,

Mindful of the necessity of taking into consideration the economic, social and political root causes of the involvement of children in armed conflicts,

Convinced of the need to strengthen international cooperation in the implementation of this Protocol, as well as the physical and psychosocial rehabilitation and social reintegration of children who are victims of armed conflict,

Encouraging the participation of the community and, in particular, children and child victims in the dissemination of informational and educational programmes concerning the implementation of the Protocol,

Have agreed as follows:

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

Article 2

States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

Article 3

1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child,[1] taking account of the principles contained in that article and recognizing that under the Convention persons under 18 are entitled to special protection.

2. Each State Party shall deposit a binding declaration upon ratification of or accession to this Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards that it has adopted to ensure that such recruitment is not forced or coerced.

3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 shall maintain safeguards to ensure, as a minimum, that:

(*a*) Such recruitment is genuinely voluntary;

(*b*) Such recruitment is done with the informed consent of the person=s parents or legal guardians;

(*c*) Such persons are fully informed of the duties involved in such military service;

(*d*) Such persons provide reliable proof of age prior to acceptance into national military service.

4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.

5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Article 4

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

3. The application of the present article under this Protocol shall not affect the legal status of any party to an armed conflict.

Article 5

Nothing in the present Protocol shall be construed as precluding provisions in the law of a State Party or in international instruments and international humanitarian law that are more conducive to the realization of the rights of the child.

Article 6

1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of this Protocol within its jurisdiction.

2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.

3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to this Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to these persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

Article 7

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary to the Protocol and in the rehabilitation and social reintegration of persons who are victims of acts contrary to this Protocol, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with concerned States Parties and relevant international organizations.

2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes, or, *inter alia*, through a voluntary fund established in accordance with the rules of the General Assembly.

Article 8

1. Each State Party shall submit, within two years following the entry into force of the Protocol for that State Party, a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.

2. Following the submission of the comprehensive report, each State Party shall include in the reports they submit to the Committee on the Rights of the Child, in accordance with article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.

3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of this Protocol.

Article 9

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.

2. The present Protocol is subject to ratification and is open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.

3. The Secretary-General, in his capacity as depositary of the Convention and the Protocol, shall inform all States Parties to the Convention and all States that have signed the Convention of each instrument of declaration pursuant to article 13.

Article 10

1. The present Protocol shall enter into force three months after the deposit of the tenth instrument of ratification or accession.

2. For each State ratifying the present Protocol or acceding to it after its entry into force, the present Protocol shall enter into force one month after the date of the deposit of its own instrument of ratification or accession.

Article 11

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. If, however, on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.

2. Such a denunciation shall not have the effect of releasing the State Party from its obligations under the present Protocol in regard to any act that occurs prior to the date on which the denunciation becomes effective. Nor shall such a denunciation prejudice in any way the continued consideration of any matter that is already under consideration by the Committee prior to the date on which the denunciation becomes effective.

Article 12

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

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 13

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

2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States that have signed the Convention.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 5.

Optional Protocol on the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, list of States Parties and Signatories

 1092

Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

New York, 25 May 2000

Entry into force:	12 February 2002, in accordance with article 10 (1).
Registration:	12 February 2002, No. 27531.
Status:	Signatories: 111 ,Parties: 53.
Text:	Doc.A/54/RES/263; and C.N.1031.2000.TREATIES-82 of 14 November 2000 [Rectification of the original of the Protocol (Arabic, Chinese, English, French, Russian and Spanish authentic texts)]; 865.2001.TREATIES-10 of 13 September 2001 [Rectification of the original of the Protocol (Chinese, English, French, Russian and Spanish authentic texts)].

Note: The Optional Protocol was adopted by resolution A/RES/54/263 of 25 May 2000 at the fifty-fourth session of the General Assembly of the United Nations. In accordance with its article 9 (1), the Optional Protocol will be open for signature by any State that is a party to the Convention or has signed it.

PARTICIPANTS

Participant	Signature	Ratification, Accession (a)
Andorra	7 Sep 2000	30 Apr 2001
Argentina	15 Jun 2000	10 Sep 2002
Australia	21 Oct 2002	
Austria	6 Sep 2000	1 Feb 2002
Azerbaijan	8 Sep 2000	3 Jul 2002
Bangladesh	6 Sep 2000	6 Sep 2000
Belgium[1]	6 Sep 2000	6 May 2002
Belize	6 Sep 2000	
Benin	22 Feb 2001	
Bosnia and Herzegovina	7 Sep 2000	

1093

Brazil	6 Sep 2000	
Bulgaria	8 Jun 2001	12 Feb 2002
Burkina Faso	16 Nov 2001	
Burundi	13 Nov 2001	
Cambodia	27 Jun 2000	
Cameroon	5 Oct 2001	
Canada	5 Jun 2000	7 Jul 2000
Cape Verde		10 May 2002 a
Chad	3 May 2002	
Chile	15 Nov 2001	
China	15 Mar 2001	
Colombia	6 Sep 2000	
Costa Rica	7 Sep 2000	24 Jan 2003
Croatia	8 May 2002	1 Nov 2002
Cuba	13 Oct 2000	
Czech Republic	6 Sep 2000	30 Nov 2001
Democratic Republic of the Congo	8 Sep 2000	11 Nov 2001
Denmark[2]	7 Sep 2000	27 Aug 2002
Dominica		20 Sep 2002 a
Dominican Republic	9 May 2002	
Ecuador	6 Sep 2000	
El Salvador	18 Sep 2000	18 Apr 2002
Finland	7 Sep 2000	10 Apr 2002
France	6 Sep 2000	5 Feb 2003
Gabon	8 Sep 2000	
Gambia	21 Dec 2000	
Germany	6 Sep 2000	
Greece	7 Sep 2000	
Guatemala	7 Sep 2000	9 May 2002
Guinea-Bissau	8 Sep 2000	
Haiti	15 Aug 2002	
Holy See	10 Oct 2000	24 Oct 2001

1094

Honduras		14 Aug 2002 a
Hungary	11 Mar 2002	
Iceland	7 Sep 2000	1 Oct 2001
Indonesia	24 Sep 2001	
Ireland	7 Sep 2000	18 Nov 2002
Israel	14 Nov 2001	
Italy	6 Sep 2000	9 May 2002
Jamaica	8 Sep 2000	9 May 2002
Japan	10 May 2002	
Jordan	6 Sep 2000	
Kazakhstan	6 Sep 2000	10 Apr 2003
Kenya	8 Sep 2000	28 Jan 2002
Latvia	1 Feb 2002	
Lebanon	11 Feb 2002	
Lesotho	6 Sep 2000	
Liechtenstein	8 Sep 2000	
Lithuania	13 Feb 2002	20 Feb 2003
Luxembourg	8 Sep 2000	
Madagascar	7 Sep 2000	
Malawi	7 Sep 2000	
Maldives	10 May 2002	
Mali	8 Sep 2000	16 May 2002
Malta	7 Sep 2000	9 May 2002
Mauritius	11 Nov 2001	
Mexico	7 Sep 2000	15 Mar 2002
Micronesia (Federated States of)	8 May 2002	
Monaco	26 Jun 2000	13 Nov 2001
Mongolia	12 Nov 2001	
Morocco	8 Sep 2000	22 May 2002
Namibia	8 Sep 2000	16 Apr 2002

1095

Nauru	8 Sep 2000	
Nepal	8 Sep 2000	
Netherlands	7 Sep 2000	
New Zealand[3]	7 Sep 2000	12 Nov 2001
Nigeria	8 Sep 2000	
Norway	13 Jun 2000	
Pakistan	26 Sep 2001	
Panama	31 Oct 2000	8 Aug 2001
Paraguay	13 Sep 2000	27 Sep 2002
Peru	1 Nov 2000	8 May 2002
Philippines	8 Sep 2000	
Poland	13 Feb 2002	
Portugal	6 Sep 2000	
Qatar		25 Jul 2002 a
Republic of Korea	6 Sep 2000	
Republic of Moldova	8 Feb 2002	
Romania	6 Sep 2000	10 Nov 2001
Russian Federation	15 Feb 2001	
Rwanda		23 Apr 2002 a
San Marino	5 Jun 2000	
Senegal	8 Sep 2000	
Serbia and Montenegro	8 Oct 2001	31 Jan 2003
Seychelles	23 Jan 2001	
Sierra Leone	8 Sep 2000	15 May 2002
Singapore	7 Sep 2000	
Slovakia	30 Nov 2001	
Slovenia	8 Sep 2000	
South Africa	8 Feb 2002	
Spain	6 Sep 2000	8 Mar 2002
Sri Lanka	21 Aug 2000	8 Sep 2000
Sudan	9 May 2002	
Suriname	10 May	

 1096

	2002	
Sweden	8 Jun 2000	20 Feb 2003
Switzerland	7 Sep 2000	26 Jun 2002
Tajikistan		5 Aug 2002 a
The Former Yugoslav Republic of Macedonia	17 Jul 2001	
Togo	15 Nov 2001	
Tunisia	22 Apr 2002	2 Jan 2003
Turkey	8 Sep 2000	
Uganda		6 May 2002 a
Ukraine	7 Sep 2000	
United Kingdom of Great Britain and Northern Ireland	7 Sep 2000	24 Jun 2003
United States of America	5 Jul 2000	23 Dec 2002
Uruguay	7 Sep 2000	
Venezuela	7 Sep 2000	
Viet Nam	8 Sep 2000	20 Dec 2001

PROSECUTION INDEX OF AUTHORITIES

ANNEX 6.

Geneva Convention (Relative to the Protection of Civilian Persons in Time of War) 12 August 1949, Articles 14, 17, 24 and 50

1098

fulltext

< <<

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

Preamble

The undersigned Plenipotentiaries of the Governments represented at the Diplomatic Conference held at Geneva from April 21 to August 12, 1949, for the purpose of establishing a Convention for the Protection of Civilian Persons in Time of War, have agreed as follows:

Part I. General Provisions

Article 1. The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.

Art. 2. In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Art. 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following
provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment

1099

Part II. General Protection of Populations Against Certain Consequences of War

Art. 13. The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

Art. 14. In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

The Protecting Powers and the International Committee of the Red Cross are invited to lend their good offices in order to facilitate the institution and recognition of these hospital and safety zones and localities.

Art. 15. Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without
distinction:

(a) wounded and sick combatants or non-combatants;
(b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

Art. 16. The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.

As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

Art. 17. The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

Art. 18. Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be

1/100

respected and protected by the Parties to the conflict.

States which are Parties to a conflict shall provide all civilian hospitals with certificates showing that they are civilian hospitals and that the buildings which they occupy are not used for any purpose which would deprive these hospitals of protection in accordance with Article 19.

Civilian hospitals shall be marked by means of the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, but only if so authorized by the State.

The Parties to the conflict shall, in so far as military considerations permit, take the necessary steps to make the distinctive emblems indicating civilian hospitals clearly visible to the enemy land, air and naval forces in order to obviate the possibility of any hostile action.

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

Art. 19. The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

Art. 20. Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases shall be respected and protected.

In occupied territory and in zones of military operations, the above personnel shall be recognizable by means of an identity card certifying their status, bearing the photograph of the holder and embossed with the stamp of the responsible authority, and also by means of a stamped, water-resistant armlet which they shall wear on the left arm while carrying out their duties. This armlet shall be issued by the State and shall bear the emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Other personnel who are engaged in the operation and administration of civilian hospitals shall be entitled to respect and protection and to wear the armlet, as provided in and under the conditions prescribed in this Article, while they are employed on such duties. The identity card shall state the duties on which they are employed.

The management of each hospital shall at all times hold at the disposal of the competent national or occupying authorities an up-to-date list of such personnel.

1101

Art. 21. Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Art.22. Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned.

They may be marked with the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949.

Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited.

Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

Art. 23. Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons
for fearing:

(a) that the consignments may be diverted from their destination,
(b) that the control may not be effective, or
(c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

Art.24. The Parties to the conflict shall take the necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources, and that their maintenance, the exercise of

their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

The Parties to the conflict shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards for the observance of the principles stated in the first paragraph.

They shall, furthermore, endeavour to arrange for all children under twelve to be identified by the wearing of identity discs, or by some other means.

Art. 25. All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them. This correspondence shall be forwarded speedily and without undue delay.

If, as a result of circumstances, it becomes difficult or impossible to exchange family correspondence by the ordinary post, the Parties to the conflict concerned shall apply to a neutral intermediary, such as the Central Agency provided for in Article 140, and shall decide in consultation with it how to ensure the fulfilment of their obligations under the best possible conditions, in particular with the cooperation of the National Red Cross (Red Crescent, Red Lion and Sun) Societies.

If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

Art. 26. Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

1103

Section III. Occupied territories

Art. 47. Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

Art. 48. Protected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35, and decisions thereon shall be taken according to the procedure which the Occupying Power shall establish in accordance with the said Article.

Art. 49. Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

Art. 50. The Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

The Occupying Power shall take all necessary steps to facilitate the identification of children and the registration of their parentage. It may not, in any case, change their personal status, nor enlist them in formations or organizations subordinate to it.

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from

1104

their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

A special section of the Bureau set up in accordance with Article 136 shall be responsible for taking all necessary steps to identify children whose identity is in doubt. Particulars of their parents or other near relatives should always be recorded if available.

The Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war which may have been adopted prior to the occupation in favour of children under fifteen years, expectant mothers, and mothers of children under seven years.

Art. 51. The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour.

The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article.

In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character.

Art. 52. No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.

All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited.

Art. 53. Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

Art. 54. The Occupying Power may not alter the status of public officials or judges in the

occupied territories, or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This prohibition does not prejudice the application of the second paragraph of Article 51. It does not affect the right of the Occupying Power to remove public officials from their posts.

Art. 55. To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population; it should, in particular, bring in the necessary foodstuffs, medical stores and other articles if the resources of the occupied territory are inadequate.

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

The Protecting Power shall, at any time, be at liberty to verify the state of the food and medical supplies in occupied territories, except where temporary restrictions are made necessary by imperative military requirements.

Art. 56. To the fullest extent of the means available to it, the Occupying Power has the duty of ensuring and maintaining, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics. Medical personnel of all categories shall be allowed to carry out their duties.

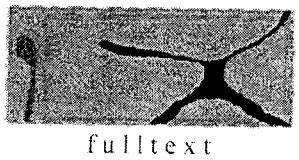
If new hospitals are set up in occupied territory and if the competent organs of the occupied State are not operating there, the occupying authorities shall, if necessary, grant them the recognition provided for in Article 18. In similar circumstances, the occupying authorities shall also grant recognition to hospital personnel and transport vehicles under the provisions of Articles 20 and 21.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 7.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977

1107



fulltext

< <<

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

PREAMBLE.

The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, 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,

Have agreed on the following:

PART I. GENERAL PROVISIONS

Art 1. General principles and scope of application

1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.

2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.

1108

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Art 2. Definitions

For the purposes of this Protocol
(a) "First Convention", "Second Convention", "Third Convention" and "Fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949; the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949; "the Conventions" means the four Geneva Conventions of 12 August 1949 for the protection of war victims;

(b) "Rules of international law applicable in armed conflict" means the rules applicable in armed conflict set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict;

(c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;

(d) "Substitute" means an organization acting in place of a Protecting Power in accordance with Article 5.

Art 3. Beginning and end of application

Without prejudice to the provisions which are applicable at all times:

(a) the Conventions and this Protocol shall apply from the beginning of any situation referred to in Article 1 of this Protocol.

(b) the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place

1109

thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release repatriation or re-establishment.

Art 4. Legal status of the Parties to the conflict

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Art 5. Appointment of Protecting Powers and of their substitute

1. It is the duty of the Parties to a conflict from the beginning of that conflict to secure the supervision and implementation of the Conventions and of this Protocol by the application of the system of Protecting Powers, including inter alia the designation and acceptance of those Powers, in accordance with the following paragraphs. Protecting Powers shall have the duty of safeguarding the interests of the Parties to the conflict.

2. From the beginning of a situation referred to in Article 1, each Party to the conflict shall without delay designate a Protecting Power for the purpose of applying the Conventions and this Protocol and shall, likewise without delay and for the same purpose, permit the activities or a Protecting Power which has been accepted by it as such after designation by the adverse Party.

3. If a Protecting Power has not been designated or accepted from the beginning of a situation referred to in Article 1, the International Committee of the Red Cross, without prejudice to the right of any other impartial humanitarian organization to do likewise, shall offer its good offices to the Parties to the conflict with a view to the designation without delay of a Protecting Power to which the Parties to the conflict consent. For that purpose it may inter alia ask each Party to provide it with a list of at least five States which that Party considers acceptable to act as Protecting Power on its behalf in relation to an adverse Party and ask each adverse Party to provide a list or at least five States which it would accept as the Protecting Power of the first Party; these lists shall be communicated to the Committee within two weeks after the receipt or the request; it shall compare them and seek the agreement of any proposed State named on both lists.

4. If, despite the foregoing, there is no Protecting Power, the Parties to the conflict shall accept without delay an offer which may be made by the International Committee of the Red Cross or by any other organization which offers all guarantees of impartiality and efficacy, after due consultations with the said Parties and taking into account the result of these consultations, to act as a substitute. The functioning of such a substitute is subject to the consent of the Parties to the conflict; every effort shall be made by the Parties to the conflict to facilitate the operations of the substitute in the performance of its tasks under the Conventions and this Protocol.

5. In accordance with Article 4, the designation and acceptance of Protecting Powers for the purpose of applying the Conventions and this Protocol shall not affect the legal status of the Parties to the conflict or of any territory, including occupied territory.

1110

6. The maintenance of diplomatic relations between Parties to the conflict or the entrusting of the protection of a Party's interests and those of its nationals to a third State in accordance with the rules of international law relating to diplomatic relations is no obstacle to the designation of Protecting Powers for the purpose of applying the Conventions and this Protocol.

7. Any subsequent mention in this Protocol of a Protecting Power includes also a substitute.

Art 6. Qualified persons

1. The High Contracting Parties shall, also in peacetime, endeavour, with the assistance of the national Red Cross (Red Crescent, Red Lion and Sun) Societies, to train qualified personnel to facilitate the application of the Conventions and of this Protocol, and in particular the activities of the Protecting Powers.

2. The recruitment and training of such personnel are within domestic jurisdiction.

3. The International Committee of the Red Cross shall hold at the disposal of the High Contracting Parties the lists of persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.

4. The conditions governing the employment of such personnel outside the national territory shall, in each case, be the subject of special agreements between the Parties concerned.

Article 7 - Meetings

The depositary of this Protocol shall convene a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon, the approval of the majority of the said Parties, to consider general problems concerning the application of the Conventions and of the Protocol.

Part. II WOUNDED, SICK AND SHIPWRECKED

Section I : General Protection

Art 8. Terminology

For the purposes of this Protocol:
a) "Wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;

b) "Shipwrecked" means persons, whether military or civilian, who are in peril at sea or in

other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol;

c) "Medical personnel" means those persons assigned, by a Party to the conflict, exclusively to the medical purposes enumerated under e) or to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or
temporary. The term includes:

i) medical personnel of a Party to the conflict, whether military or civilian, including those described in the First and Second Conventions, and those assigned to civil defence organizations;

ii) medical personnel of national Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognized and authorized by a Party to the conflict;

iii) medical personnel or medical units or medical transports described in Article 9, paragraph 2.

d) "Religious personnel" means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

i) to the armed forces of a Party to the conflict;
ii) to medical units or medical transports of a Party to the conflict;
iii) to medical units or medical transports described in Article 9, Paragraph 2; or
iv) to civil defence organizations of a Party to the conflict.

The attachment of religious personnel may be either permanent or temporary, and the relevant provisions mentioned under k) apply to them;

e) "Medical units" means establishments and other units, whether military or civilian, organized for medical purposes, namely the search for, collection, transportation, diagnosis or treatment - including first-aid treatment - of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary;

f) "Medical transportation" means the conveyance by land, water or air of the wounded, sick, shipwrecked, medical personnel, religious personnel, medical equipment or medical supplies protected by the Conventions and by this Protocol;

g) "Medical transports" means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict;

h) "Medical vehicles" means any medical transports by land;

1112

i) "Medical ships and craft" means any medical transports by water;

j) "Medical aircraft" means any medical transports by air;

k) "Permanent medical personnel", "permanent medical units" and "permanent medical transports" mean those assigned exclusively to medical purposes for an indeterminate period. "Temporary medical personnel" "temporary medical-units" and "temporary medical transports" mean those devoted exclusively to medical purposes for limited periods during the whole of such periods. Unless otherwise specified, the terms "medical personnel", "medical units" and "medical transports" cover both permanent and temporary categories;

l) "Distinctive emblem" means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment or supplies;

m) "Distinctive signal" means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to this Protocol.

Art 9. Field of application

1. This Part, the provisions of which are intended to ameliorate the condition of the wounded, sick and shipwrecked, shall apply to all those affected by a situation referred to in Article 1, without any adverse distinction founded on race, colour, sex, language, religion or belief political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

2. The relevant provisions of Articles 27 and 32 of the First Convention shall apply to permanent medical units and transports (other than hospital ships, to which Article 25 of the Second Convention applies) and their personnel made available to a Party to the conflict for humanitarian
purposes:
(a) by a neutral or other State which is not a Party to that conflict;
(b) by a recognized and authorized aid society of such a State;
(c) by an impartial international humanitarian organization.

Art 10 Protection and care

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Article 11 - Protection of persons

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.

2. It is, in particular, prohibited to carry out on such persons, even with their consent:
(a) physical mutilations;
(b) medical or scientific experiments;
(c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.

3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.

4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.

5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.

6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Art 12 Protection of medical units

1. Medical units shall be respected and protected at all times and shall not be the object of attack.

2. Paragraph 1 shall apply to civilian medical units, provided that they:
(a) belong to one of the Parties to the conflict;
(b) are recognized and authorized by the competent authority of one of the Parties to the conflict; or
(c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First Convention.

1114

3. The Parties to the conflict are invited to notify each other of the location of their fixed medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.

4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

Art 13. Discontinuance of protection of civilian medical units

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:

(a) that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
(b) that the unit is guarded by a picket or by sentries or by an escort;
(c) that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
(d) that members of the armed forces or other combatants are in the unit for medical reasons.

Art 14 - Limitations on requisition of civilian medical units

1. The Occupying Power has the duty to ensure that the medical needs of the civilian population in occupied territory continue to be satisfied.

2. The Occupying Power shall not, therefore, requisition civilian medical units, their equipment, their materiel or the services of their personnel, so long as these resources are necessary for the provision of adequate medical services for the civilian population and for the continuing medical care of any wounded and sick already under treatment.

3. Provided that the general rule in paragraph 2 continues to be observed, the Occupying Power may requisition the said resources, subject to the following particular conditions:
(a) that the resources are necessary for the adequate and immediate medical treatment of the wounded and sick members of the armed forces of the Occupying Power or of prisoners of war;
(b) that the requisition continues only while such necessity exists; and
(c) that immediate arrangements are made to ensure that the medical needs of the civilian population, as well as those of any wounded and sick under treatment who are affected by the requisition, continue to be satisfied.

Art 15. Protection of civilian medical and religious personnel

1115

1. Civilian medical personnel shall be respected and protected.

2. If needed, all available help shall be afforded to civilian medical personnel in an area where civilian medical services are disrupted by reason of combat activity.

3. The Occupying Power shall afford civilian medical personnel in occupied territories every assistance to enable them to perform, to the best of their ability, their humanitarian functions. The Occupying Power may not require that, in the performance of those functions, such personnel shall give priority to the treatment of any person except on medical grounds. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

4. Civilian medical personnel shall have access to any place where their services are essential, subject to such supervisory and safety measures as the relevant Party to the conflict may deem necessary.

5. Civilian religious personnel shall be respected and protected. The provisions of the Conventions and of this Protocol concerning the protection and identification of medical personnel shall apply equally to such persons.

Art 16. General protection of medical duties

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the Conventions or of this Protocol, or to refrain from performing acts or from carrying out work required by those rules and provisions.

3. No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

Art 17. Role of the civilian population and of aid societies

1. The civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them. The civilian population and aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies, shall be permitted, even on their own initiative, to collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas. No one shall be harmed, prosecuted, convicted or punished for such humanitarian acts.

2. The Parties to the conflict may appeal to the civilian population and the aid societies

1116

referred to in paragraph 1 to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location; they shall grant both protection and the necessary facilities to those who respond to this appeal. If the adverse Party gains or regains control of the area, that Party also shall afford the same protection and facilities for as long as they are needed.

Art 18. Identification

1. Each Party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable.

2. Each Party to the conflict shall also endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.

3. In occupied territory and in areas where fighting is taking place or is likely to take place, civilian medical personnel and civilian religious personnel should be recognizable by the distinctive emblem and an identity card certifying their status.

4. With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention.

5. In addition to the distinctive emblem, a Party to the conflict may, as provided in Chapter III of Annex I to this Protocol, authorize the use of distinctive signals to identify medical units and transports. Exceptionally, in the special cases covered in that Chapter, medical transports may use distinctive signals without displaying the distinctive emblem.

6. The application of the provisions of paragraphs 1 to 5 of this article is governed by Chapters I to III of Annex I to this Protocol. Signals designated in Chapter III of the Annex for the exclusive use of medical units and transports shall not, except as provided therein, be used for any purpose other than to identify the medical units and transports specified in that Chapter.

7. This article does not authorize any wider use of the distinctive emblem in peacetime than is prescribed in Article 44 of the First Convention.

8. The provisions of the Conventions and of this Protocol relating to supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals.

Art 19. Neutral and other States not Parties to the conflict

Neutral and other States not Parties to the conflict shall apply the relevant provisions of this Protocol to persons protected by this Part who may be received or interned within their territory, and to any dead of the Parties to that conflict whom they may find.

Art 20. - Prohibition of reprisals

1117

Reprisals against the persons and objects protected by this Part are prohibited.

SECTION II. MEDICAL TRANSPORTATION

Art 21. Medical vehicles

Medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol.

Art 22. Hospital ships and coastal rescue craft

1. The provisions of the Conventions relating to:
(a) vessels described in Articles 22, 24, 25 and 27 of the Second Convention,
(b) their lifeboats and small craft,
(c) their personnel and crews, and
(d) the wounded; sick and shipwrecked on board.

shall also apply where these vessels carry civilian wounded, sick and shipwrecked who do not belong to any of the categories mentioned in Article 13 of the Second Convention. Such civilians shall not, however, be subject to surrender to any Party which is not their own, or to capture at sea. If they find themselves in the power of a Party to the conflict other than their own they shall be covered by the Fourth Convention and by this Protocol.

2. The protection provided by the Conventions to vessels described in Article 25 of the Second Convention shall extend to hospital ships made available for humanitarian purposes to a Party to the conflict:
(a) by a neutral or other State which is not a Party to that conflict; or
(b) by an impartial international humanitarian organization,

provided that, in either case, the requirements set out in that Article are complied with.

3. Small craft described in Article 27 of the Second Convention shall be protected, even if the notification envisaged by that Article has not been made. The Parties to the conflict are, nevertheless, invited to inform each other of any details of such craft which will facilitate their identification and recognition.

Art 23. Other medical ships and craft

1. Medical ships and craft other than those referred to in Article 22 of this Protocol and Article 38 of the Second Convention shall, whether at sea or in other waters, be respected and protected in the same way as mobile medical units under the Conventions and this Protocol. Since this protection can only be effective if they can be identified and recognized as medical ships or craft, such vessels should be marked with the distinctive emblem and as far as possible comply with the second paragraph of Article 43 of the Second Convention.

2. The ships and craft referred to in paragraph 1 shall remain subject to the laws of war. Any warship on the surface able immediately to enforce its command may order them to

1118

stop, order them off, or make them take a certain course, and they shall obey every such command. Such ships and craft may not in any other way be diverted from their medical mission so long as they are needed for the wounded, sick and shipwrecked on board.

3. The protection provided in paragraph 1 shall cease only under the conditions set out in Articles 34 and 35 of the Second Convention. A clear refusal to obey a command given in accordance with paragraph 2 shall be an act harmful to the enemy under Article 34 of the Second Convention.

4. A Party to the conflict may notify any adverse Party as far in advance of sailing as possible of the name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons, and may provide any other information which would facilitate identification and recognition. The adverse Party shall acknowledge receipt of such information.

5. The provisions of Article 37 of the Second Convention shall apply to medical and religious personnel in such ships and craft.

6. The provisions of the Second Convention shall apply to the wounded, sick and shipwrecked belonging to the categories referred to in Article 13 of the Second Convention and in Article 44 of this Protocol who may be on board such medical ships and craft. Wounded, sick and shipwrecked civilians who do not belong to any or the categories mentioned in Article 13 of the Second Convention shall not be subject, at sea, either to surrender to any Party which is not their own, or to removal from such ships or craft; if they find themselves in the power of a Party to the conflict other than their own, they shall be covered by the Fourth Convention and by this Protocol.

Art 24. Protection of medical Aircraft

Medical aircraft shall be respected and protected, subject to the provisions of this Part.

Art 25. Medical aircraft in areas not controlled by an adverse Party

In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.

Art 26. Medical aircraft in contact or similar zones

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at

their own risk, they shall nevertheless be respected after they have been recognized as such.

2. "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

Art 27. Medical aircraft in areas controlled by an adverse Party

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party.

2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

Art 28. Restrictions on operations of medical aircraft

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.

2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8 (6). The carrying on board of the personal effects of the occupants or of equipment intended solely to facilitate navigation, communication or identification shall not be considered as prohibited,

3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.

4. While carrying out the flights referred to in Articles 26 and 27, medical aircraft shall not, except by prior agreement with the adverse Party, be used to search for the wounded, sick and shipwrecked.

Art 29. Notifications and agreements concerning medical aircraft

1120

1. Notifications under Article 25, or requests for prior agreement under Articles 26, 27, 28, paragraph 4, or 31 shall state the proposed number of medical aircraft, their flight plans and means of identification, and shall be understood to mean that every flight will be carried out in compliance with Article 28.

2. A Party which receives a notification given under Article 25 shall at once acknowledge receipt of such notification. 3. A Party which receives a request for prior agreement under Articles 25, 27, 28, paragraph 4, or 31 shall, as rapidly as possible, notify the requesting Party:
(a) that the request is agreed to;
(b) that the request is denied; or
(c) of reasonable alternative proposals to the request. It may also propose prohibition or restriction of other flights in the area during the time involved. If the Party which submitted the request accepts the alternative proposals, it shall notify the other Party of such acceptance.

4. The Parties shall take the necessary measures to ensure that notifications and agreements can be made rapidly.

5. The Parties shall also take the necessary measures to disseminate rapidly the substance of any such notifications and agreements to the military units concerned and shall instruct those units regarding the means of identification that will be used by the medical aircraft in question.

Art 30. Landing and inspection of medical aircraft

1. Medical aircraft flying over areas which are physically controlled by an adverse Party, or over areas the physical control of which is not clearly established, may be ordered to land or to alight on water, as appropriate, to permit inspection in accordance with the following paragraphs. Medical aircraft shall obey any such order.

2. If such an aircraft lands or alights on water, whether ordered to do so or for other reasons, it may be subjected to inspection solely to determine the matters referred to in paragraphs 3 and 4. Any such inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. That Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or by the removal.

3. If the inspection discloses that the aircraft:
(a) is a medical aircraft within the meaning of Article 8 (10),
(b) is not in violation of the conditions prescribed in Article 28, and
(c) has not flown without or in breach of a prior agreement where such agreement is required,

the aircraft and those of its occupants who belong to the adverse Party or to a neutral or other State not a Party to the conflict shall be authorized to continue the flight without delay.

4. If the inspection discloses that the aircraft:

1121

(a) is not a medical aircraft within the meaning of Article 8 (10),
(b) is in violation or the conditions prescribed in Article 28, or
(c) has flown without or in breach of a prior agreement where such agreement is required,

the aircraft may be seized. Its occupants shall be treated in conformity with the relevant provisions of the Conventions and of this Protocol. Any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

Art 31. Neutral or other States not Parties to the conflict

1. Except by prior agreement, medical aircraft shall not fly over or land in the territory of a neutral or other State not a Party to the conflict. However, with such an agreement, they shall be respected throughout their flight and also for the duration of any calls in the territory. Nevertheless they shall obey any summons to land or to alight on water, as appropriate.

2. Should a medical aircraft, in the absence of an agreement or in deviation from the terms of an agreement, fly over the territory of a neutral or other State not a Party to the conflict, either through navigational error or because of an emergency affecting the safety of the flight, it shall make every effort to give notice of the flight and to identify itself. As soon as such medical aircraft is recognized, that State shall make all reasonable efforts to give the order to land or to alight on water referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

3. If a medical aircraft, either by agreement or in the circumstances mentioned in paragraph 2, lands or alights on water in the territory of a neutral or other State not Party to the conflict, whether ordered to do so or for other reasons, the aircraft shall be subject to inspection for the purposes of determining whether it is in fact a medical aircraft. The inspection shall be commenced without delay and shall be conducted expeditiously. The inspecting Party shall not require the wounded and sick of the Party operating the aircraft to be removed from it unless their removal is essential for the inspection. The inspecting Party shall in any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or the removal. If the inspection discloses that the aircraft is in fact a medical aircraft, the aircraft with its occupants, other than those who must be detained in accordance with the rules of international law applicable in armed conflict, shall be allowed to resume its flight, and reasonable facilities shall be given for the continuation of the flight. If the inspection discloses that the aircraft is not a medical aircraft, it shall be seized and the occupants treated in accordance with paragraph 4.

4. The wounded, sick and shipwrecked disembarked, otherwise than temporarily, from a medical aircraft with the consent of the local authorities in the territory of a neutral or other State not a Party to the conflict shall, unless agreed otherwise between that State and the Parties to the conflict, be detained by that State where so required by the rules of international law applicable in armed conflict, in such a manner that they cannot again take part in the hostilities. The cost of hospital treatment and internment shall be borne by the State to which those persons belong.

-1122

5. Neutral or other States not Parties to the conflict shall apply any conditions and restrictions on the passage of medical aircraft over, or on the landing of medical aircraft in, their territory equally to all Parties to the conflict.

Section III Missing and Dead Persons

Art 32. General principle

In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

Art 33. Missing persons

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.

2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:
(a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
(b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

3. Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

4. The Parties to the conflict shall endeavour to agree on arrangements for teams to search for, identify and recover the dead from battlefield areas, including arrangements, if appropriate, for such teams to be accompanied by personnel of the adverse Party while carrying out these missions in areas controlled by the adverse Party. Personnel of such teams shall be respected and protected while exclusively carrying out these duties.

Art 34. Remains of deceased

1. The remains of persons who have died for reasons related to occupation or in

1123

detention resulting from occupation or hostilities and those or persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected, maintained and marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:
(a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access;
(b) to protect and maintain such gravesites permanently;
(c) to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country or such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

4. A High Contracting Party in whose territory the grave sites referred to in this Article are situated shall be permitted to exhume the remains only:
(a) in accordance with paragraphs 2 (c) and 3, or
(b) where exhumation is a matter or overriding public necessity, including cases of medical and investigative necessity, in which case the High Contracting Party shall at all times respect the remains, and shall give notice to the home country or its intention to exhume the remains together with details of the intended place of reinterment.

Part III. Methods and Means of Warfare Combatant and Prisoners-Of-War

Section I. Methods and Means of Warfare

Art 35. Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

1124

Art 36. New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

Art 37. Prohibition of Perfidy

1. It is prohibited to kill, injure or capture an adversary y resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:
(a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
(b) the feigning of an incapacitation by wounds or sickness;
(c) the feigning of civilian, non-combatant status; and
(d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

2. Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Art 38. Recognized emblems

1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.

2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

Art 39. Emblems of nationality

1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.

2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.

1125

3. Nothing in this Article or in Article 37, paragraph 1 (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags in the conduct of armed conflict at sea.

Art 40. Quarter

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

Art 41. Safeguard of an enemy hors de combat

1. A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack.

2. A person is hors de combat if:
(a) he is in the power of an adverse Party;
(b) he clearly expresses an intention to surrender; or
(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

3. When persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation as provided for in Part III, Section I, of the Third Convention, they shall be released and all feasible precautions shall be taken to ensure their safety.

Article 42 - Occupants of aircraft

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.

2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.

3. Airborne troops are not protected by this Article.

Section II. Combatants and Prisoners of War

Art 43. Armed forces

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its

1126

subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.

Art 44. Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.

3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and
(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities .

6. This Article is without prejudice to the right of any person to be a prisoner of war

1127

pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Art 45. Protection of persons who have taken part in hostilities

1. A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal.

2. If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.

3. Any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol. In occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention.

Art 46. Spies

1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information

1128

shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.

4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

Art 47. Mercenaries

1. A mercenary shall not have the right to be a combatant or a prisoner of war.

2. A mercenary is any person who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Part IV. Civilian Population

Section I. General Protection Against Effects of Hostilities

Chapter I. Basic rule and field of application

Art 48. Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Art 49. Definition of attacks and scope of application

1129

1. "Attacks" means acts of violence against the adversary, whether in offence or in defence.

2. The provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.

3. The provisions of this section apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.

4. The provisions of this section are additional to the rules concerning humanitarian protection contained in the Fourth Convention, particularly in part II thereof, and in other international agreements binding upon the High Contracting Parties, as well as to other rules of international law relating to the protection of civilians and civilian objects on land, at sea or in the air against the effects of hostilities.

Chapter II. Civilians and civilian population

Art 50. Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Art 51. - Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
(a) those which are not directed at a specific military objective;
(b) those which employ a method or means of combat which cannot be directed at a

1130

specific military objective; or
(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:
(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

Chapter III. Civilian objects

Art 52. General Protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Art 53. Protection of cultural objects and of places of worship

1131

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:
(a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
(b) to use such objects in support of the military effort;
(c) to make such objects the object of reprisals.

Art 54. Protection of objects indispensable to the survival of the civilian population

1. Starvation of civilians as a method of warfare is prohibited.

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

3. The prohibitions in paragraph 2 shall not apply to such of the objects covered by it as are used by an adverse Party:
(a) as sustenance solely for the members of its armed forces; or
(b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

4. These objects shall not be made the object of reprisals.

5. In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Art 55. Protection of the natural environment

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

2. Attacks against the natural environment by way of reprisals are prohibited.

Art 56. Protection of works and installations containing dangerous forces

1. Works or installations containing dangerous forces, namely dams, dykes and nuclear

1132

electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

2. The special protection against attack provided by paragraph 1 shall cease:
(a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
(b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
(c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection Ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

5. The Parties to the conflict shall endeavour to avoid locating any military objectives in the vicinity of the works or installations mentioned in paragraph 1. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

6. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

7. In order to facilitate the identification of the objects protected by this article, the Parties to the conflict may mark them with a special sign consisting of a group of three bright orange circles placed on the same axis, as specified in Article 16 of Annex I to this Protocol [Article 17 of Amended Annex]. The absence of such marking in no way relieves any Party to the conflict of its obligations under this Article.

Chapter IV. Precautionary measures

Art 57. Precautions in attack

1. In the conduct of military operations, constant care shall be taken to spare the civilian

population, civilians and civilian objects.

2. With respect to attacks, the following precautions shall be taken:
(a) those who plan or decide upon an attack shall:
(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
(ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects;
(iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

(c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

5. No provision of this article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.

Art 58. Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

(a) without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
(b) avoid locating military objectives within or near densely populated areas;
(c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.

Chapter V. Localities and zones under special protection

1134

Art 59. Non-defended localities

1. It is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities.
2. The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party.
Such a locality shall fulfil the following conditions:
(a) all combatants, as well as mobile weapons and mobile military equipment must have been evacuated;
(b) no hostile use shall be made of fixed military installations or establishments;
(c) no acts of hostility shall be committed by the authorities or by the population; and
(d) no activities in support of military operations shall be undertaken.

3. The presence, in this locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2.

4. The declaration made under paragraph 2 shall be addressed to the adverse Party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The Party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled, in which event it shall immediately so inform the Party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfilled, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

5. The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

6. The Party which is in control of a locality governed by such an agreement shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

7. A locality loses its status as a non-defended locality when its ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5. In such an eventuality, the locality shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Art 60. Demilitarized zones

1. It is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement.

1135

2. The agreement shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.

3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:

(a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
(b) no hostile use shall be made of fixed military installations or establishments;
(c) no acts of hostility shall be committed by the authorities or by the population; and
(d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the condition laid down in subparagraph (d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.

5. The Party which is in control of such a zone shall mark it, so far as possible, by such signs as may be agreed upon with the other Party, which shall be displayed where they are clearly visible, especially on its perimeter and limits and on highways.

6. If the fighting draws near to a demilitarized zone, and if the Parties to the conflict have so agreed, none of them may use the zone for purposes related to the conduct of military operations or unilaterally revoke its status.

7. If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6, the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Chapter VI. Civil defence

Art 61. - Definitions and scope

For the purpose of this Protocol:

(1) "Civil defence" means the performance of some or all of the undermentioned humanitarian tasks intended to protect the civilian population against the dangers, and to help it to recover from the immediate effects, of hostilities or disasters and also to provide the conditions necessary for its survival. These tasks are:

(a) warning;

1136

(b) evacuation;
(c) management of shelters;
(d) management of blackout measures;
(e) rescue;
(f) medical services, including first aid, and religious assistance;
(g) fire-fighting;
(h) detection and marking of danger areas;
(i) decontamination and similar protective measures;
(j) provision of emergency accommodation and supplies;
(k) emergency assistance in the restoration and maintenance of order in distressed areas;
(l) emergency repair of indispensable public utilities;
(m) emergency disposal of the dead;
(n) assistance in the preservation of objects essential for survival;
(o) complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organization;

(2) "Civil defence organizations" means those establishments and other units which are organized or authorized by the competent authorities of a Party to the conflict to perform any of the tasks mentioned under (1), and which are assigned and devoted exclusively to such tasks; (3) "Personnel" of civil defence organizations means those persons assigned by a Party to the conflict exclusively to the performance of the tasks mentioned under (1), including personnel assigned by the competent authority of that Party exclusively to the administration of these organizations;

(4) "Matériel" of civil defence organizations means equipment, supplies and transports used by these organizations for the performance of the tasks mentioned under (1).

Art 62. General protection

1. Civilian civil defence organizations and their personnel shall be respected and protected, subject to the provisions of this Protocol, particularly the provisions of this section. They shall be entitled to perform their civil defence tasks except in case of imperative military necessity.

2. The provisions of paragraph 1 shall also apply to civilians who, although not members of civilian civil defence organizations, respond to an appeal from the competent authorities and perform civil defence tasks under their control.

3. Buildings and matériel used for civil defence purposes and shelters provided for the civilian population are covered by Article 52. Objects used for civil defence purposes may not be destroyed or diverted from their proper use except by the Party to which they belong.

Art 63. Civil defence in occupied territories

1. In occupied territories, civilian civil defence organizations shall receive from the authorities the facilities necessary for the performance of their tasks. In no Circumstances shall their personnel be compelled to perform activities which would

interfere with the proper performance of these tasks. The Occupying Power shall not change the structure or personnel of such organizations in any way which might jeopardize the efficient performance of their mission. These organizations shall not be required to give priority to the nationals or interests of that Power.

2. The Occupying Power shall not compel, coerce or induce civilian civil defence organizations to perform their tasks in any manner prejudicial to the interests of the civilian population.

3. The Occupying Power may disarm civil defence personnel for reasons of security.

4. The Occupying Power shall neither divert from their proper use nor requisition buildings or matériel belonging to or used by civil defence organizations if such diversion or requisition would be harmful to the civilian population.

5. Provided that the general rule in paragraph 4 continues to be observed, the Occupying Power may requisition or divert these resources, subject to the following particular conditions:
(a) that the buildings or matériel are necessary for other needs of the civilian population; and
(b) that the requisition or diversion continues only while such necessity exists.

6. The Occupying Power shall neither divert nor requisition shelters provided for the use of the civilian population or needed by such population.

Art 64. Civilian civil defence organizations of neutral or other States not Parties to the conflict and international co-ordinating organizations

1. Articles 62, 63, 65 and 66 shall also apply to the personnel and matériel of civilian civil defence organizations of neutral or other States not Parties to the conflict which perform civil defence tasks mentioned in Article 61 in the territory of a Party to the conflict, with the consent and under the control of that Party. Notification of such assistance shall be given as soon as possible to any adverse Party concerned. In no circumstances shall this activity be deemed to be an interference in the conflict. This activity should, however, be performed with due regard to the security interests of the Parties to the conflict concerned.

2. The Parties to the conflict receiving the assistance referred to in paragraph 1 and the High Contracting Parties granting it should facilitate international co-ordination of such civil defence actions when appropriate. In such cases the relevant international organizations are covered by the provisions of this Chapter.

3. In occupied territories, the Occupying Power may only exclude or restrict the activities of civilian civil defence organizations of neutral or other States not Parties to the conflict and of international co-ordinating organizations if it can ensure the adequate performance of civil defence tasks from its own resources or those of the occupied territory.

Art 65. Cessation of protection

1138

1. The protection to which civilian civil defence organizations, their personnel, buildings, shelters and matériel are entitled shall not cease unless they commit or are used to commit, outside their proper tasks, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:
(a) that civil defence tasks are carried out under the direction or control of military authorities;
(b) that civilian civil defence personnel co-operate with military personnel in the performance of civil defence tasks, or that some military personnel are attached to civilian civil defence organizations;
(c) that the performance of civil defence tasks may incidentally benefit military victims, particularly those who are hors de combat.

3. It shall also not be considered as an act harmful to the enemy that civilian civil defence personnel bear light individual weapons for the purpose of maintaining order or for self-defence. However, in areas where land fighting is taking place or is likely to take place, the Parties to the conflict shall undertake the appropriate measures to limit these weapons to handguns, such as pistols or revolvers, in order to assist in distinguishing between civil defence personnel and combatants. Although civil defence personnel bear other light individual weapons in such areas, they shall nevertheless be respected and protected as soon as they have been recognized as such.

4. The formation of civilian civil defence organizations along military lines, and compulsory service in them, shall also not deprive them of the protection conferred by this Chapter.

Art 66. Identification

1. Each Party to the conflict shall endeavour to ensure that its civil defence organizations, their personnel, buildings and matériel are identifiable while they are exclusively devoted to the performance of civil defence tasks. Shelters provided for the civilian population should be similarly identifiable.

2. Each Party to the conflict shall also endeavour to adopt and implement methods and procedures which will make it possible to recognize civilian shelters as well as civil defence personnel, buildings and matériel on which the international distinctive sign of civil defence is displayed.

3. In occupied territories and in areas where fighting is taking place or is likely to take place, civilian civil defence personnel should be recognizable by the international distinctive sign of civil defence and by an identity card certifying their status.

4. The international distinctive sign of civil defence is an equilateral blue triangle on an orange ground when used for the protection of civil defence organizations, their personnel, buildings and matériel and for civilian shelters.

5. In addition to the distinctive sign, Parties to the conflict may agree upon the use of

1139

distinctive signals for civil defence identification purposes.

6. The application of the provisions of paragraphs 1 to 4 is governed by Chapter V of Annex I to this Protocol.

7. In time of peace, the sign described in paragraph 4 may, with the consent of the competent national authorities, be used for civil defence identification purposes.

8. The High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof.

9. The identification of civil defence medical and religious personnel, medical units and medical transports is also governed by Article 18.

Art 67. Members of the armed forces and military units assigned to civil defence organizations

1. Members of the armed forces and military units assigned to civil defence organizations shall be respected and protected, provided that:
(a) such personnel and such units are permanently assigned and exclusively devoted to the performance of any of the tasks mentioned in Article 61;
(b) if so assigned, such personnel do not perform any other military duties during the conflict;
(c) such personnel are clearly distinguishable from the other members of the armed forces by prominently displaying the international distinctive sign of civil defence, which shall be as large as appropriate, and such personnel are provided with the identity card referred to in Chapter V of Annex I to this Protocol certifying their status;
(d) such personnel and such units are equipped only with light individual weapons for the purpose of maintaining order or for self-defence. The provisions of Article 65, paragraph 3 shall also apply in this case;
(e) such personnel do not participate directly in hostilities, and do not commit, or are not used to commit, outside their civil defence tasks, acts harmful to the adverse Party
(f) such personnel and such units perform their civil defence tasks only within the national territory of their Party.

The non-observance of the conditions stated in (e) above by any member of the armed forces who is bound by the conditions prescribed in (a) and (b) above is prohibited.

2. Military personnel serving within civil defence organizations shall, if they fall into the power of an adverse Party, be prisoners of war. In occupied territory they may, but only in the interest of the civilian population of that territory, be employed on civil defence tasks in so far as the need arises, provided however that, if such work is dangerous, they volunteer for such tasks.

3. The buildings and major items of equipment and transports of military units assigned to civil defence organizations shall be clearly marked with the international distinctive sign of civil defence. This distinctive sign shall be as large as appropriate.

4. The matériel and buildings of military units permanently assigned to civil defence

1140

organizations and exclusively devoted to the performance of civil defence tasks shall, if they fall into the hands of an adverse Party, remain subject to the laws of war. They may not be diverted from their civil defence purpose so long as they are required for the performance of civil defence tasks, except in case of imperative military necessity, unless previous arrangements have been made for adequate provision for the needs of the civilian population.

Section II. Relief in Favour of the Civilian Population

Art 68. Field of application

The provisions of this Section apply to the civilian population as defined in this Protocol and are supplementary to Articles 23, 55, 59, 60, 61 and 62 and other relevant provisions of the Fourth Convention.

Art 69. Basic needs in occupied territories

1. In addition to the duties specified in Article 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.

2. Relief actions for the benefit of the civilian population of occupied territories are governed by Articles 59, 60, 61, 62, 108, 109, 110 and 111 of the Fourth Convention, and by Article 71 of this Protocol, and shall be implemented without delay.

Art 70. Relief actions

1. If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions. Offers of such relief shall not be regarded as interference in the armed conflict or as unfriendly acts. In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

2. The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.

3. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
(a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
(b) may make such permission conditional on the distribution of this assistance being

1141

made under the local supervision of a Protecting Power;
(c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

4. The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.

5. The Parties to the conflict and each High Contracting Party concerned shall encourage and facilitate effective international co-ordination of the relief actions referred to in paragraph 1.

Art 71. Personnel participating in relief actions

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.

2. Such personnel shall be respected and protected.

3. Each Party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel referred to in paragraph 1 in carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

4. Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any of the personnel who do not respect these conditions may be terminated.

Section III. Treatment of Persons in the Power of a Party to the Conflict

Chapter I. Field of application and protection of persons and objects

Art 72. Field of application

The provisions of this Section are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention, particularly Parts I and III thereof, as well as to other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.

Art 73. Refugees and stateless persons

Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refuge or State of residence shall be

1162

protected persons within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction.

Art 74. Reunion of dispersed families

The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task in accordance with the provisions of the Conventions and of this Protocol and in conformity with their respective security regulations.

Art 75. Fundamental guarantees

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:
(a) violence to the life, health, or physical or mental well-being of persons, in particular:
(i) murder;
(ii) torture of all kinds, whether physical or mental;
(iii) corporal punishment; and
(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form or indecent assault;
(c) the taking of hostages;
(d) collective punishments; and
(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:
(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

1143

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt;
(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
(a) persons who are accused or such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

Chapter II. Measures in favour of women and children

Art 76. Protection of women

1. Women shall be the object of special respect and shall be protected in particular

against rape, forced prostitution and any other form of indecent assault.

2. Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority.

3. To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

Art 77. Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

5 . The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed.

Art 78. Evacuation of children

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

1145

2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.

3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:
(a) surname(s) of the child;
(b) the child's first name(s);
(c) the child's sex;
(d) the place and date of birth (or, if that date is not known, the approximate age);
(e) the father's full name;
(f) the mother's full name and her maiden name;
(g) the child's next-of-kin;
(h) the child's nationality;
(i) the child's native language, and any other languages he speaks;
(j) the address of the child's family;
(k) any identification number for the child;
(l) the child's state of health;
(m) the child's blood group;
(n) any distinguishing features;
(o) the date on which and the place where the child was found;
(p) the date on which and the place from which the child left the country;
(q) the child's religion, if any;
(r) the child's present address in the receiving country;
(s) should the child die before his return, the date, place and circumstances of death and place of interment.

Chapter III. Journalists

Art 79. Measures or protection for journalists

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.

2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in Article 4 (A) (4) of the Third Convention.

3. They may obtain an identity card similar to the model in Annex II of this Protocol. This card, which shall be issued by the government of the State of which the Journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

Part V. Execution of the Conventions and of its Protocols

1146

Section I. General Provisions

Art 80. Measures for execution

1. The High Contracting Parties and the Parties to the conflict shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol.

2. The High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution.

Art 81. Activities of the Red Cross and other humanitarian organizations

1. The Parties to the conflict shall grant to the International Committee of the Red Cross all facilities, within their power so as to enable it to carry out the humanitarian functions assigned to it by the Conventions and this Protocol in order to ensure protection and assistance to the victims of conflicts; the International Committee of the Red Cross may also carry out any other humanitarian activities in favour of these victims, subject to the consent of the Parties to the conflict concerned.

2. The Parties to the conflict shall grant to their respective Red Cross (Red Crescent, Red Lion and Sun) organizations the facilities necessary for carrying out their humanitarian activities in favour of the victims of the conflict, in accordance with the provisions of the Conventions and this Protocol and the fundamental principles of the Red Cross as formulated by the International Conferences of the Red Cross.

3. The High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the assistance which Red Cross (Red Crescent, Red Lion and Sun) organizations and the League of Red Cross Societies extend to the victims of conflicts in accordance with the provisions of the Conventions and this Protocol and with the fundamental principles of the red Cross as formulated by the International Conferences of the Red Cross.

4. The High Contracting Parties and the Parties to the conflict shall, as far as possible, make facilities similar to those mentioned in paragraphs 2 and 3 available to the other humanitarian organizations referred to in the Conventions and this Protocol which are duly authorized by the respective Parties to the conflict and which perform their humanitarian activities in accordance with the provisions of the Conventions and this Protocol.

Art 82. Legal advisers in armed forces

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

1147

Art 83. Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

2. Any military or civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Art 84. Rules of application

The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.

Section II. Repression of Breaches of the Conventions and of this Protocol

Article 85 - Repression of breaches of this Protocol

1. The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol.

2. Acts described as grave breaches in the Conventions are grave breaches of this Protocol if committed against persons in the power of an adverse Party protected by Articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol.

3. In addition to the grave breaches defined in Article 11, the following acts shall be regarded as grave breaches of this Protocol, when committed wilfully, in violation of the relevant provisions of this Protocol, and causing death or serious injury to body or health:
(a) making the civilian population or individual civilians the object of attack;
(b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
(c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a)(iii);
(d) making non-defended localities and demilitarized zones the object of attack;
(e) making a person the object of attack in the knowledge that he is hors de combat;
(f) the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs recognized by the Conventions or this Protocol.

1148

4. In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol:
(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention;
(b) unjustifiable delay in the repatriation of prisoners of war or civilians;
(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination;
(d) making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives;
(e) depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and regular trial.

5. Without prejudice to the application of the Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes.

Art 86. Failure to act

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Art 87. Duty of commanders

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

1149

3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Art 88. Mutual assistance in criminal matters

1. The High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol.

2. Subject to the rights and obligations established in the Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

3. The law of the High Contracting Party requested shall apply in all cases. The provisions of the preceding paragraphs shall not, however, affect the obligations arising from the provisions of any other treaty of a bilateral or multilateral nature which governs or will govern the whole or part of the subject of mutual assistance in criminal matters.

Art 89. Co-operation

In situations of serious violations or the Conventions or of this Protocol, the High Contracting Parties undertake to act jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

Art 90. International Fact-Finding Commission

1. (a) An International Fact-Finding Commission (hereinafter referred to as "the Commission") consisting of 15 members of high moral standing and acknowledged impartiality shall be established;
(b) When not less than 20 High Contracting Parties have agreed to accept the competence of the Commission pursuant to paragraph 2, the depositary shall then, and at intervals of five years thereafter, convene a meeting of representatives of those High Contracting Parties for the purpose of electing the members of the Commission. At the meeting, the representatives shall elect the members of the Commission by secret ballot from a list of persons to which each of those High Contracting Parties may nominate one person;
(c) The members of the Commission shall serve in their personal capacity and shall hold office until the election of new members at the ensuing meeting;
(d) At the election, the High Contracting Parties shall ensure that the persons to be elected to the Commission individually possess the qualifications required and that, in the Commission as a whole, equitable geographical representation is assured;
(e) In the case of a casual vacancy, the Commission itself shall fill the vacancy, having due regard to the provisions of the preceding subparagraphs;

1150

(f) The depositary shall make available to the Commission the necessary administrative facilities for the performance of its functions.

2. (a) The High Contracting Parties may at the time of signing, ratifying or acceding to the Protocol, or at any other subsequent time, declare that they recognize ipso facto and without special agreement, in relation to any other High Contracting Party accepting the same obligation, the competence of the Commission to inquire into allegations by such other Party, as authorized by this Article;
(b) The declarations referred to above shall be deposited with the depositary, which shall transmit copies thereof to the High Contracting Parties;
(c) The Commission shall be competent to:
(i) inquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol;
(ii) facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol;
(d) In other situations, the Commission shall institute an inquiry at the request of a Party to the conflict only with the consent of the other Party or Parties concerned;
(e) Subject to the foregoing provisions or this paragraph, the provisions of Article 52 of the First Convention, Article 53 of the Second Convention, Article 132 or the Third Convention and Article 149 of the Fourth Convention shall continue to apply to any alleged violation of the Conventions and shall extend to any alleged violation of this Protocol.

3. (a) Unless otherwise agreed by the Parties concerned, all inquiries shall be undertaken by a Chamber consisting of seven members appointed as follows:
(i) five members of the Commission, not nationals of any Party to the conflict, appointed by the President of the Commission on the basis of equitable representation of the geographical areas, after consultation with the Parties to the conflict;
(ii) two ad hoc members, not nationals of any Party to the conflict, one to be appointed by each side;
(b) Upon receipt of the request for an inquiry, the President of the Commission shall specify an appropriate time-limit for setting up a Chamber. If any ad hoc member has not been appointed within the time-limit, the President shall immediately appoint such additional member or members of the Commission as may be necessary to complete the membership of the Chamber.

4. (a) The Chamber set up under paragraph 3 to undertake an inquiry shall invite the Parties to the conflict to assist it and to present evidence. The Chamber may also seek such other evidence as it deems appropriate and may carry out an investigation of the situation in loco;
(b) All evidence shall be fully disclosed to the Parties, which shall have the right to comment on it to the Commission;
(c) Each Party shall have the right to challenge such evidence.

5. (a) The Commission shall submit to the Parties a report on the findings of fact of the Chamber, with such recommendations as it may deem appropriate;
(b) If the Chamber is unable to secure sufficient evidence for factual and impartial findings, the Commission shall state the reasons for that inability;
(c) The Commission shall not report its findings publicly, unless all the Parties to the conflict have requested the Commission to do so.

1151

6. The Commission shall establish its own rules, including rules for the presidency or the Commission and the presidency of the Chamber. Those rules shall ensure that the functions of the President of the Commission are exercised at all times and that, in the case of an inquiry, they are exercised by a person who is not a national of a Party to the conflict.

7. The administrative expenses of the Commission shall be met by contributions from the High Contracting Parties which made declarations under paragraph 2, and by voluntary contributions. The Party or Parties to the conflict requesting an inquiry shall advance the necessary funds for expenses incurred by a Chamber and shall be reimbursed by the Party or Parties against which the allegations are made to the extent of 50 per cent of the costs of the Chamber. Where there are counter-allegations before the Chamber each side shall advance 50 per cent of the necessary funds.

Art 91. Responsibility

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Part IV. Final Resolutions

Art 92. Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period or twelve months.

Art 93. Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be deposited with the Swiss Federal Council, depositary of the Conventions.

Art 94. Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Art 95.- Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.

2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

 1151A

Art 96. Treaty relations upon entry into force or this Protocol

1. When the Parties to the Conventions are also Parties to this Protocol, the Conventions shall apply as supplemented by this Protocol.

2. When one of the Parties to the conflict is not bound by this Protocol, the Parties to the Protocol shall remain bound by it in their mutual relations. They shall furthermore be bound by this Protocol in relation to each of the Parties which are not bound by it, if the latter accepts and applies the provisions thereof.

3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:
(a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
(b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
(c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

Art 97. Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary, which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.

2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories or this Protocol.

Art 98. Revision of Annex I

1. Not later than four years after the entry into force of this Protocol and thereafter at intervals of not less than four years, the International Committee of the Red Cross shall consult the High Contracting Parties concerning Annex I to this Protocol and, if it considers it necessary, may propose a meeting of technical experts to review Annex I and to propose such amendments to it as may appear to be desirable. Unless, within six months of the communication of a proposal for such a meeting to the High Contracting Parties, one third of them object, the International Committee of the Red Cross shall convene the meeting, inviting also observers of appropriate international organizations. Such a meeting shall also be convened by the International Committee of the Red Cross at any time at the request of one third of the High Contracting Parties.

2. The depositary shall convene a conference of the High Contracting Parties and the Parties to the Conventions to consider amendments proposed by the meeting of technical experts if, after that meeting, the International Committee of the Red Cross or one third of the High Contracting Parties so request.

1152

3. Amendments to Annex I may be adopted at such a conference by a two-thirds majority of the High Contracting Parties present and voting.

4. The depositary shall communicate any amendment so adopted to the High Contracting Parties and to the Parties to the Conventions. The amendment shall be considered to have been accepted at the end of a period of one year after it has been so communicated, unless within that period a declaration of non-acceptance of the amendment has been communicated to the depositary by not less than one third of the High Contracting Parties.

5. An amendment considered to have been accepted in accordance with paragraph 4 shall enter into force three months after its acceptance for all High Contracting Parties other than those which have made a declaration of non-acceptance in accordance with that paragraph. Any Party making such a declaration may at any time withdraw it and the amendment shall then enter into force for that Party three months thereafter.

6. The depositary shall notify the High Contracting Parties and the Parties to the Conventions of the entry into force of any amendment, of the Parties bound thereby, of the date of its entry into force in relation to each Party, of declarations of non-acceptance made in accordance with paragraph 4, and of withdrawals of such declarations.

Article 99 - Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect one year after receipt of the instrument of denunciation. If, however, on the expiry of that year the denouncing Party is engaged in one of the situations referred to in Article I, the denunciation shall not take effect before the end of the armed conflict or occupation and not, in any case, before operations connected with the final release, repatriation or re-establishment of the persons protected by the Convention or this Protocol have been terminated.

2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

3. The denunciation shall have effect only in respect of the denouncing Party.

4. Any denunciation under paragraph 1 shall not affect the obligations already incurred, by reason of the armed conflict, under this Protocol by such denouncing Party in respect of any act committed before this denunciation becomes effective.

Article 100 - Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:
(a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 93 and 94;
(b) the date of entry into force of this Protocol under Article 95;
(c) communications and declarations received under Articles 84, 90 and 97;

1153

(d) declarations received under Article 96, paragraph 3, which shall be communicated by the quickest methods; and
(e) denunciations under Article 99.

Art 101. Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.

2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

Art 102. Authentic texts

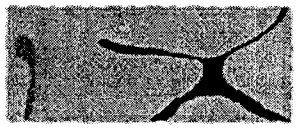
The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

ANNEX I AS AMENDED ON 30 NOVEMBER 1993: REGULATIONS CONCERNING IDENTIFICATION
(This Annex replaces the former Annex I)

[Former] Annex I. Regulations Concerning Identification (for explanations, see the introduction:)

Annex II. Identity Card for Journalists on Dangerous Professional Missions

1154



fulltext

< <<

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

Preamble

The High Contracting Parties, Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,

Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,

Emphasizing the need to ensure a better protection for the victims of those armed conflicts,

Recalling that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates or the public conscience,

Have agreed on the following:

Part I. Scope of this Protocol

Art 1. Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Art 2. Personal field of application

1155

1. This Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as "adverse distinction") to all persons affected by an armed conflict as defined in Article 1.

2. At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.

Art 3. Non-intervention

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

Part II. Humane Treatment
Art 4 Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:
(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any or the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:
(a) they shall receive an education, including religious and moral education, in keeping

1156

with the wishes of their parents, or in the absence of parents, of those responsible for their care;
(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;
(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Art 5. Persons whose liberty has been restricted

1. In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained;
(a) the wounded and the sick shall be treated in accordance with Article 7;
(b) the persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;
(c) they shall be allowed to receive individual or collective relief;
(d) they shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;
(e) they shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons:
(a) except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women;
(b) they shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary;
(c) places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety;
(d) they shall have the benefit of medical examinations;
(e) their physical or mental health and integrity shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

1157

3. Persons who are not covered by paragraph 1 but whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely in accordance with Article 4 and with paragraphs 1 (a), (c) and (d), and 2 (b) of this Article.

4. If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.

Art 6. Penal prosecutions

1. This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.
In particular:
(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Part III. Wounded, Sick and Shipwrecked

Art 7. Protection and care

1158

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.

2. In all circumstances they shall be treated humanely and shall receive to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.

Art 8. Search

Whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them.

Art 9. Protection of medical and religious personnel

1. Medical and religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties. They shall not be compelled to carry out tasks which are not compatible with their humanitarian mission.

2. In the performance of their duties medical personnel may not be required to give priority to any person except on medical grounds.

Art 10. General protection of medical duties

1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.

3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.

4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

Art 11. Protection of medical units and transports

1. Medical units and transports shall be respected and protected at all times and shall not

1159

be the object of attack.

2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

Art 12. The distinctive emblem

Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

Part IV. Civilian Population

Art 13. Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

Art 14. Protection of objects indispensable to the survival of the civilian population

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Art 15. Protection of works and installations containing dangerous forces

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

Art 16. Protection of cultural objects and of places of worship

1160

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Art 17. Prohibition of forced movement of civilians

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Art 18. Relief societies and relief actions

1. Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

2. If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Part V. Final Provisions

Art 19. Dissemination

This Protocol shall be disseminated as widely as possible.

Art 20. Signature

This Protocol shall be open for signature by the Parties to the Conventions six months after the signing of the Final Act and will remain open for a period of twelve months.

Art 21. Ratification

This Protocol shall be ratified as soon as possible. The instruments of ratification shall be

deposited with the Swiss Federal Council, depositary of the Conventions. 1161

Art 22. Accession

This Protocol shall be open for accession by any Party to the Conventions which has not signed it. The instruments of accession shall be deposited with the depositary.

Art 23. Entry into force

1. This Protocol shall enter into force six months after two instruments of ratification or accession have been deposited.

2. For each Party to the Conventions thereafter ratifying or acceding to this Protocol, it shall enter into force six months after the deposit by such Party of its instrument of ratification or accession.

Art 24. Amendment

1. Any High Contracting Party may propose amendments to this Protocol. The text of any proposed amendment shall be communicated to the depositary which shall decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider the proposed amendment.

2. The depositary shall invite to that conference all the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol.

Art 25. Denunciation

1. In case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect six months after receipt of the instrument of denunciation. If, however, on the expiry of six months, the denouncing Party is engaged in the situation referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict. Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.

2. The denunciation shall be notified in writing to the depositary, which shall transmit it to all the High Contracting Parties.

Art 26. Notifications

The depositary shall inform the High Contracting Parties as well as the Parties to the Conventions, whether or not they are signatories of this Protocol, of:
(a) signatures affixed to this Protocol and the deposit of instruments of ratification and accession under Articles 21 and 22;
(b) the date of entry into force of this Protocol under Article 23; and

(c) communications and declarations received under Article 24.

1162

Art 27. Registration

1. After its entry into force, this Protocol shall be transmitted by the depositary to the Secretariat of the United Nations for registration and publication, in accordance with Article 102 of the Charter of the United Nations.

2. The depositary shall also inform the Secretariat of the United Nations of all ratifications, accessions and denunciations received by it with respect to this Protocol.

Art 28. - Authentic texts

The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic shall be deposited with the depositary, which shall transmit certified true copies thereof to all the Parties to the Conventions.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 8.

African Charter on the Rights and Welfare of the Child, Organization on African Unity, Addis Ababa, 1990, Articles 2 and 22.

1164

Organization of African Unity, Addis Ababa, 1990
The African Charter on the Rights and Welfare of the Child

Article II: Definition of a Child
For the purposes of this Charter, a child means every human being below the age of 18 years.
Article XXII: Armed Conflicts

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.
2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situation of internal armed conflicts, tension and strife.

COALITION TO STOP THE USE OF CHILD SOLDIERS, PO BOX 22696, LONDON N4 3ZJ. UK. TEL: (44)(0) 20 7274 0230

PROSECUTION INDEX OF AUTHORITIES

ANNEX 9.

Rome Statute of the International Criminal Court, A/CONF.183/9, Articles 2-8

1166

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*

PREAMBLE

The States Parties to this Statute,

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

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

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

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

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

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

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

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

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

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

Have agreed as follows

PART 1. ESTABLISHMENT OF THE COURT

Article 1

1167

The Court

An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2
Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3
Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").

2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.

3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4
Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Article 5
Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6

1/68

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article 7
Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

1169

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Article 8
War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, "war crimes" means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

1170

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;

(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;

1171

(xii) Declaring that no quarter will be given;

(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;

(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;

(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;

(xvi) Pillaging a town or place, even when taken by assault;

(xvii) Employing poison or poisoned weapons;

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

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

(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;

(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;

(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

1172

(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

(iii) Taking of hostages;

(iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(v) Pillaging a town or place, even when taken by assault;

(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;

(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;

(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively

1173

demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9
Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11
Jurisdiction ratione temporis

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12
Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 10.

International Labour Organization *Worst Forms of Child Labour Convention* (No. 182) ("Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour"), entry into force 19 November 2000

1175

C182 Worst Forms of Child Labour Convention, 1999

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Note: Date of coming into force: 19:11:2000)
Convention:C182
Place:Geneva
Session of the Conference:87
Date of adoption:17:06:1999
Subject classification: Elimination of Child Labour
Subject classification: Children and Young Persons
See the ratifications for this Convention

Display the document in: French Spanish
Status: Up-to-date instrument This instrument is one of the fundamental conventions.

The General Conference of the International Labour Organization,

Having been convened at Geneva by the Governing Body of the International Labour Office, and having met in its 87th Session on 1 June 1999, and

Considering the need to adopt new instruments for the prohibition and elimination of the worst forms of child labour, as the main priority for national and international action, including international cooperation and assistance, to complement the Convention and the Recommendation concerning Minimum Age for Admission to Employment, 1973, which remain fundamental instruments on child labour, and

Considering that the effective elimination of the worst forms of child labour requires immediate and comprehensive action, taking into account the importance of free basic education and the need to remove the children concerned from all such work and to provide for their rehabilitation and social integration while addressing the needs of their families, and

Recalling the resolution concerning the elimination of child labour adopted by the International Labour Conference at its 83rd Session in 1996, and

Recognizing that child labour is to a great extent caused by poverty and that the long-term solution lies in sustained economic growth leading to social progress, in particular poverty alleviation and universal education, and

Recalling the Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, and

Recalling the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, and

Recalling that some of the worst forms of child labour are covered by other international instruments, in particular the Forced Labour Convention, 1930, and the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, and

Having decided upon the adoption of certain proposals with regard to child labour, which is the fourth item on the agenda of the session, and

Having determined that these proposals shall take the form of an international Convention;

adopts this seventeenth day of June of the year one thousand nine hundred and ninety-nine the following Convention, which may be cited as the Worst Forms of Child Labour Convention, 1999.

Article 1

Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2

For the purposes of this Convention, the term *child* shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term *the worst forms of child labour* comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Article 4

1. The types of work referred to under Article 3(d) shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, taking into consideration relevant international standards, in particular Paragraphs 3 and 4 of the Worst Forms of Child Labour Recommendation, 1999.

2. The competent authority, after consultation with the organizations of employers and workers concerned, shall identify where the types of work so determined exist.

3. The list of the types of work determined under paragraph 1 of this Article shall be periodically examined and revised as necessary, in consultation with the organizations of employers and workers concerned.

Article 5

Each Member shall, after consultation with employers' and workers' organizations, establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to this Convention.

Article 6

1. Each Member shall design and implement programmes of action to eliminate as a priority the worst forms of child labour.

2. Such programmes of action shall be designed and implemented in consultation with relevant government institutions and employers' and workers' organizations, taking into consideration the views of other concerned groups as appropriate.

Article 7

1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.

2. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:

(a) prevent the engagement of children in the worst forms of child labour;

(b) provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;

(c) ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;

(d) identify and reach out to children at special risk; and

(e) take account of the special situation of girls.

3. Each Member shall designate the competent authority responsible for the implementation of the provisions giving effect to this Convention.

Article 8

Members shall take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education.

Article 9

The formal ratifications of this Convention shall be communicated to the Director-General

1178

of the International Labour Office for registration.

Article 10

1. This Convention shall be binding only upon those Members of the International Labour Organization whose ratifications have been registered with the Director-General of the International Labour Office.

2. It shall come into force 12 months after the date on which the ratifications of two Members have been registered with the Director-General.

3. Thereafter, this Convention shall come into force for any Member 12 months after the date on which its ratification has been registered.

Article 11

1. A Member which has ratified this Convention may denounce it after the expiration of ten years from the date on which the Convention first comes into force, by an act communicated to the Director-General of the International Labour Office for registration. Such denunciation shall not take effect until one year after the date on which it is registered.

2. Each Member which has ratified this Convention and which does not, within the year following the expiration of the period of ten years mentioned in the preceding paragraph, exercise the right of denunciation provided for in this Article, will be bound for another period of ten years and, thereafter, may denounce this Convention at the expiration of each period of ten years under the terms provided for in this Article.

Article 12

1. The Director-General of the International Labour Office shall notify all Members of the International Labour Organization of the registration of all ratifications and acts of denunciation communicated by the Members of the Organization.

2. When notifying the Members of the Organization of the registration of the second ratification, the Director-General shall draw the attention of the Members of the Organization to the date upon which the Convention shall come into force.

Article 13

The Director-General of the International Labour Office shall communicate to the Secretary-General of the United Nations, for registration in accordance with article 102 of the Charter of the United Nations, full particulars of all ratifications and acts of denunciation registered by the Director-General in accordance with the provisions of the preceding Articles.

Article 14

At such times as it may consider necessary, the Governing Body of the International

1179

Labour Office shall present to the General Conference a report on the working of this Convention and shall examine the desirability of placing on the agenda of the Conference the question of its revision in whole or in part.

Article 15

1. Should the Conference adopt a new Convention revising this Convention in whole or in part, then, unless the new Convention otherwise provides --

(a) the ratification by a Member of the new revising Convention shall ipso jure involve the immediate denunciation of this Convention, notwithstanding the provisions of Article 11 above, if and when the new revising Convention shall have come into force;

(b) as from the date when the new revising Convention comes into force, this Convention shall cease to be open to ratification by the Members.

2. This Convention shall in any case remain in force in its actual form and content for those Members which have ratified it but have not ratified the revising Convention.

Article 16

The English and French versions of the text of this Convention are equally authoritative.

Cross references

Conventions: C029 Forced Labour Convention, 1930
Conventions: C138 Minimum Age Convention, 1973
Recommendations:R035 Forced Labour (Indirect Compulsion) Recommendation, 1930
Recommendations:R036 Forced Labour (Regulation) Recommendation, 1930
Recommendations:R146 Minimum Age Recommendation, 1973
Supplemented: R190 Complemented by the Worst Forms of Child Labour Recommendation, 1999
Constitution: 22:article 22 of the Constitution of the International Labour Organisation

---

PROSECUTION INDEX OF AUTHORITIES

ANNEX 11.

North Sea Continental Shelf cases, 1969 WL 1 (I.C.J.), paras 70-82

1181

NORTH SEA CONTINENTAL SHELF

(Federal Republic of Germany / Denmark; Federal Republic of Germany / Netherlands)

International Court of Justice
February 20, 1969
General List: Nos. 51 & 52

JUDGMENT OF 20 FEBRUARY 1969
Declarations:
Judge Sir Muhammad Zafrulla Khan
Judge Bengzon
Separate Opinions:
President Bustamante y Rivero
Judge Jessup
Judge Padilla Nervo
Judge Ammoun
Dissenting Opinions:
Vice-President Koretsky
Judge Tanaka
Judge Morelli
Judge Lachs
Judge ad hoc Sorensen

*3 **Continental shelf** areas in the **North Sea**-Delimitation as between adjacent States-Advantages and disadvantages of the equidistance method-Theory of just and equitable apportionment-Incompatibility of this theory with the principle of the natural appurtenance of the **shelf** to the coastal State-Task of the Court relates to delimitation not apportionment.
The equidistance principle as embodied in Article 6 of the 1958 Geneva **Continental Shelf** Convention-Non-opposability of that provision to the Federal Republic of Germany, either contractually or on the basis of conduct or estoppel.

Equidistance and the principle of natural appurtenance-Notion of closest proximity-Critique of that notion as not being entailed by the principle of appurtenance-Fundamental character of the principle of the **continental shelf** as being the natural prolongation of the land territory.
Legal history of delimitation-Truman Proclamation-International Law Commission-1958 Geneva Conference-Acceptance of equidistance as a purely conventional rule not reflecting or crystallizing a rule of customary international law-Effect in this respect of reservations article of Geneva Convention-Subsequent State practice insufficient to convert the conventional rule into a rule of customary international law-The opinio juris sive necessitatis, how manifested.

Statement of what are the applicable principles and rules of law-Delimitation by agreement, in accordance with equitable principles, taking account of all relevant circumstances, and so as to give effect to the principle of natural prolongation-Freedom of the Parties as to choice of method-Various factors relevant to the negotiation.
*4 Present: President BUSTAMANTE Y RIVERO; Vice-President KORETSKY; Judges Sir Gerald FITZMAURICE, TANAKA, JESSUP, MORELLI, Sir Muhammad ZAFRULLA KHAN, PADILLA NERVO, FORSTER, GROS, AMMOUN, BENGZON, PETRIN, LACHS, ONYEAMA; Judges ad hoc MOSLER, SORENSEN; Registrar AQUARONE.

In the **North Sea Continental Shelf** cases,
between
the Federal Republic of Germany,
represented by

70. The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice,-and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective **continental shelf** areas in the **North Sea**.

71. In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

72. It would in the first place be necessary that the provision concerned ***42** should, at all events potentially, be of a fundamentally normcreating character such as could be regarded as forming the basis of a general rule of law. Considered in abstracto the equidistance principle might be said to fulfil this requirement. Yet in the particular form in which it is embodied in Article 6 of the Geneva Convention, and having regard to the relationship of that Article to other provisions of the Convention, this must be open to some doubt. In the first place, Article 6 is so framed as to put second the obligation to make use of the equidistance method, causing it to come after a primary obligation to effect delimitation by agreement. Such a primary obligation constitutes an unusual preface to what is claimed to be a potential general rule of law. Without attempting to enter into, still less pronounce upon any question of jus cogens, it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties,-but this is not normally the subject of any express provision, as it is in Article 6 of the Geneva Convention. Secondly the part played by the notion of special circumstances relative to the principle of equidistance as embodied in Article 6, and the very considerable, still unresolved controversies as to the exact meaning and scope of this notion, must raise further doubts as to the potentially norm- creating character of the rule. Finally, the faculty of making reservations to Article 6, while it might not of itself prevent the equidistance principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention: for so long as this faculty continues to exist, and is not the subject of any revision brought about in consequence of a request made under Article 13 of the Convention-of which there is at present no official indication-it is the Convention itself which would, for the reasons already indicated, seem to deny to the provisions of Article 6 the same norm-creating character as, for instance, Articles 1 and 2 possess.

73. With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.

***43** 74. As regards the time element, the Court notes that it is over ten years since the Convention was signed, but that it is even now less than five since it came into force in June 1964, and that when the present proceedings were brought it was less than three years, while less than one had elapsed at the time when the respective negotiations between the Federal Republic and the other two Parties for a complete delimitation broke down on the question of the application of the equidistance principle. Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was

1183

originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; -and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

*

75. The Court must now consider whether State practice in the matter of **continental shelf** delimitation has, subsequent to the Geneva Convention, been of such a kind as to satisfy this requirement. Leaving aside cases which, for various reasons, the Court does not consider to be reliable guides as precedents, such as delimitations effected between the present Parties themselves, or not relating to international boundaries, some fifteen cases have been cited in the course of the present proceedings, occurring mostly since the signature of the 1958 Geneva Convention, in which **continental shelf** boundaries have been delimited according to the equidistance principle-in the majority of the cases by agreement, in a few others unilaterally-or else the delimitation was foreshadowed but has not yet been carried out. Amongst these fifteen are the four **North Sea** delimitations United Kingdom/Norway-Denmark- Netherlands, and Norway/Denmark already mentioned in paragraph 4 of this Judgment. But even if these various cases constituted more than a very small proportion of those potentially calling for delimitation in the world as a whole, the Court would not think it necessary to enumerate or evaluate them separately, since there are, a priori, several grounds which deprive them of weight as precedents in the present context.

76. To begin with, over half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle. As regards those States, on the other hand, which were not, and have not become parties to the Convention, the basis of ***44** their action can only be problematical and must remain entirely speculative. Clearly, they were not applying the Convention. But from that no inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law. There is not a shred of evidence that they did and, as has been seen (paragraphs 22 and 23), there is no lack of other reasons for using the equidistance method, so that acting, or agreeing to act in a certain way, does not of itself demonstrate anything of a juridical nature.

77. The essential point in this connection-and it seems necessary to stress it-is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the opinio juris; -for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.

78. In this respect the Court follows the view adopted by the Permanent Court of International Justice in the Lotus case, as stated in the following passage, the principle of which is, by analogy, applicable almost word for word, mutatis mutandis, to the present case (P.C.I.J., Series A, No. 10, 1927, at p. 28):

'Even if the rarity of the judicial decisions to be found ... were sufficient to prove ... the circumstance alleged ..., it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom. The alleged fact does not allow one to infer that States have been conscious of having such a duty; on the other hand, ... there are other circumstances calculated to show that the contrary is true.'

Applying this dictum to the present case, the position is simply that in certain cases-not a great

1184

number-the States concerned agreed to draw or did draw the boundaries concerned according to the principle of equidistance. There is no evidence that they so acted because they felt ***45*** legally compelled to draw them in this way by reason of a rule of customary law obliging them to do so-especially considering that they might have been motivated by other obvious factors.

79. Finally, it appears that in almost all of the cases cited, the delimitations concerned were median-line delimitations between opposite States, not lateral delimitations between adjacent States. For reasons which have already been given (paragraph 57) the Court regards the case of median-line delimitations between opposite States as different in various respects, and as being sufficiently distinct not to constitute a precedent for the delimitation of lateral boundaries. In only one situation discussed by the Parties does there appear to have been a geographical configuration which to some extent resembles the present one, in the sense that a number of States on the same coastline are grouped around a sharp curve or bend of it. No complete delimitation in this area has however yet been carried out. But the Court is not concerned to deny to this case, or any other of those cited, all evidential value in favour of the thesis of Denmark and the Netherlands. It simply considers that they are inconclusive, and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice, manifested in such circumstances, as would justify the inference that delimitation according to the principle of equidistance amounts to a mandatory rule of customary international law,-more particularly where lateral delimitations are concerned.

80. There are of course plenty of cases (and a considerable number were cited) of delimitations of waters, as opposed to seabed, being carried out on the basis of equidistance-mostly of internal waters (lakes, rivers, etc.), and mostly median-line cases. The nearest analogy is that of adjacent territorial waters, but as already explained (paragraph 59) the Court does not consider this case to be analogous to that of the **continental shelf.**

*

81. The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of **continental shelf** areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up-to-date has equally been insufficient for the purpose.

*

82. The immediately foregoing conclusion, coupled with that reached earlier (paragraph 56) to the effect that the equidistance principle could not be regarded as being a rule of law on any a priori basis of logical ***46*** necessity deriving from the fundamental theory of the **continental shelf,** leads to the final conclusion on this part of the case that the use of the equidistance method is not obligatory for the delimitation of the areas concerned in the present proceedings. In these circumstances, it becomes unnecessary for the Court to determine whether or not the configuration of the German **North Sea** coast constitutes a 'special circumstance' for the purposes either of Article 6 of the Geneva Convention or of any rule of customary international law,-since once the use of the equidistance method of delimitation is determined not to be obligatory in any event, it ceases to be legally necessary to prove the existence of special circumstances in order to justify not using that method.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 12.

Prosecutor v. Tadic, *Decision on the Defence Motion on Jurisdiction,* ICTY-94-1, Trial Chamber, 10 August 1995

1186

Before: Judge McDonald, Presiding

Judge Stephen

Judge Vohrah

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision: 10 August 1995

PROSECUTOR

v.

DUSKO TADIC A/K/A "DULE"

DECISION ON THE DEFENCE MOTION ON JURISDICTION

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Brenda Hollis
Mr. Alan Tieger
Mr. William Fenrick
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. A.M.M. Orie
Mr. Milan Vujin
Mr. Krstan Simic

DECISION

On 23 June 1995 the Defence filed a preliminary motion, pursuant to Rule 73 (A) (i) of the Rules of Procedure and Evidence ("the Rules") which provides for objections based on lack of jurisdiction, seeking dismissal of all of the charges against the accused. The Defence motion challenges the powers of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal") to try the accused under three heads: the alleged improper establishment of the International Tribunal; the improper grant of primacy to the International Tribunal; and challenges to the subject-matter jurisdiction of the International Tribunal. The Prosecutor contends that none of these points is valid and that the International Tribunal has jurisdiction over the accused as charged. The Government of the United States of America has submitted a brief as *amicus curiae*.

1187

The argument of the parties on this motion was heard on 25 and 26 July and judgement on the motion was reserved, to be delivered this day.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties and the written submission of the *amicus curiae,*

HEREBY ISSUES ITS DECISION.

REASONS FOR DECISION

I. The Establishment of the International Tribunal

A. Legitimacy of creation

1. The attack on the competence of the International Tribunal in this case is based on a number of grounds, some of which may be subsumed under one general heading: that the action of the Security Council in establishing the International Tribunal and in adopting the Statute under which it functions is beyond power; hence the International Tribunal is not duly established by law and cannot try the accused.

2. It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what the creation of the International Tribunal did; that there existed and exists now no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong.

3. Essential to these submissions is, of course, the concept that this Trial Chamber has the capacity to review and rule upon the legality of the acts of the Security Council in establishing the International Tribunal. This the Defence asserts, doing so by way of attack upon the jurisdiction of the International Tribunal.

4. There are, clearly enough, matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged. These are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather of the lawfulness of its creation, involving scrutiny of the powers of the Security Council and of the manner of their exercise; perhaps, too, of the appropriateness of its response to the situation in the former Yugoslavia.

1188

5. The Trial Chamber has heard out the Defence in its submissions involving judicial review of the actions of the Security Council. However, this International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.

6. The force of criminal law draws its efficacy, in part, from the fact that it reflects a consensus on what is demanded of human behaviour. But it is of equal importance that a body that judges the criminality of this behaviour should be viewed as legitimate. This is the first time that the international community has created a court with criminal jurisdiction. The establishment of the International Tribunal has now spawned the creation of an ad hoc Tribunal for Rwanda. Each of these ad hoc Tribunals represents an important step towards the establishment of a permanent international criminal tribunal. In this context, the Trial Chamber considers that it would be inappropriate to dismiss without comment the accused's contentions that the establishment of the International Tribunal by the Security Council was beyond power and an ill-founded political action, not reasonably aimed at restoring and maintaining peace, and that the International Tribunal is not duly established by law.

7. Any discussion of this matter must begin with the Charter of the United Nations. Article 24 (1) provides that the Members of the United Nations:

> confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

The powers of the Security Council to discharge its primary responsibility for the maintenance of international peace and security are set out in Chapters VI, VII, VIII and XII of the Charter. The International Tribunal was established under Chapter VII. The Security Council has broad discretion in exercising its authority under Chapter VII and there are few limits on the exercise of that power. As indicated by the *travaux préparatoires*:

> Wide freedom of judgment is left as regards the moment [the Security Council] may choose to intervene and the means to be applied, with sole reserve that it should act 'in accordance with the purposes and principles of the [United Nations].'
>
> (*See* Statement of the Rapporteur of Committee III/3, Doc. 134, III/3/3, 11 U.N.C.I.O. Docs. 785 (1945).)

The broad discretion given to the Security Council in the exercise of its Chapter VII authority itself suggests that decisions taken under this head are not reviewable.

8. For the Defence it is said that it is a basic human right of an accused to have a fair and public hearing by a competent, independent and impartial tribunal established by law. The Defence asserts that this right is protected by a panoply of principles of fundamental justice recognized by human rights law. There can be no doubt that the International Tribunal should seek to provide just such a trial; indeed, in enacting its Statute, care has been taken by the Security Council to ensure that this in fact occurs and the Judges of the International Tribunal, in framing its Rules, have also paid scrupulous regard to the requirements of a fair trial. For example, Article 21 of the Statute of the International Tribunal

guarantees the accused the right to a fair trial and Article 20 obligates the Trial Chambers to ensure that trials are, in fact, fair. There are several other provisions to the same effect. However, it is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal.

9. The Defence seeks to extend the competence of the International Tribunal to review the actions of the Security Council by reference to the Rules of the International Tribunal. It refers first to Rule 73 (A)(i), which provides that preliminary motions by the accused can include: "objections based on lack of jurisdiction". That Rule relates to challenges to jurisdiction and is no authority for engaging in an investigation, not into jurisdiction, but into the legality of the action of the Security Council in establishing the International Tribunal. The Defence also points to Rule 91, *False Testimony Under Solemn Declaration*, as an example of the exercise by the International Tribunal of powers that are not explicitly provided for in its Statute. There is, however, no analogy to be drawn between the inherent authority of a Chamber to control its own proceedings and any suggested power to review the authority of the Security Council. Therefore, even were it conceivable that the Rules adopted by the Judges could extend the competence of the International Tribunal, the Rules referred to by the Defence do not support such an enlargement.

10. The Defence relies on, or at least refers to, what has been said by the International Court of Justice ("the Court") in three cases: Certain Expenses of the United Nations, 1962 I.C.J. 151, 168 (Advisory Opinion of 20 July) (the "*Expenses Advisory Opinion*"), Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 45 (Advisory Opinion of 21 June) (the "*Namibia Advisory Opinion*") and Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 176 (Provisional Measures Order of 14 April) (the "*Lockerbie* decision"). In the first of these, the *Expenses Advisory Opinion*, the Court specifically stated that, unlike the legal system of some States, there exists no procedure for determining the validity of acts of organs of the United Nations. It referred to proposals at the time of drafting of the Charter that such a power should be given to the Court and to the rejection of those proposals.

11. In the second of these cases, the *Namibia Advisory Opinion*, the Court dealt very specifically with this matter, stating that: "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".

12. Finally, in the *Lockerbie* decision, Judge Weeramantry, in his dissenting opinion, but in this respect not in dissent from other members of the Court, said that "it is not for this Court to sit in review on a given resolution of the Security Council" and, that in relation to the exercise by the Security Council of its powers under Chapter VII:

> the determination under Article 39 of the existence of any threat to the peace . . . is one entirely within the discretion of the Council. . . . the Council and no other is the judge of the existence of the state of affairs which brings Chapter VII into operation. . . . Once [such a determination is] taken the door is opened to the various decisions the Council may make under that Chapter.

13. These opinions of the Court clearly provide no basis for the International Tribunal to review the

1190

actions of the Security Council, indeed, they are authorities to the contrary.

14. In support of its submission that this Trial Chamber should review the actions of the Security Council, the Defence contends that the decisions of the Security Council are not "sacrosanct". Certainly, commentators have suggested that there are limits to the authority of the Security Council. It has been posited that such limits may be based on Article 24 (2), which provides that the Security Council:

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

One commentator interprets this provision to mean that the Security Council "cannot, in principle, act arbitrarily and unfettered by any restraints." (D. W. Bowett, *The Law of International Institutions* 33 (1982).) Another commentator has taken the position that although the Security Council has broad discretion in the field of international peace and security, it cannot "act arbitrarily or use the existence of a threat to the peace as a basis for action which . . . is for collateral and independent purposes, such as the overthrow of a government or the partition of a State." (Ian Brownlie, The Decisions of Political Organs of the United Nations and the Rule of Law, *in Essays in Honour of Wang Tieya* 95 (1992).)

15. Support for the view that the Security Council cannot act arbitrarily or for an ulterior purpose is found in the nature of the Charter as a treaty delegating certain powers to the United Nations. In fact, such a limitation is almost a corollary of the principle that the organs of the United Nations must act in accordance with the powers delegated them. It is a matter of logic that if the Security Council acted arbitrarily or for an ulterior purpose it would be acting outside the purview of the powers delegated to it in the Charter.

16. Although it is not for this Trial Chamber to judge the reasonableness of the acts of the Security Council, it is without doubt that, with respect to the former Yugoslavia, the Security Council did not act arbitrarily. To the contrary, the Security Council's establishment of the International Tribunal represents its informed judgement, after great deliberation, that violations of international humanitarian law were occurring in the former Yugoslavia and that such violations created a threat to the peace. One commentator has noted the "careful, incremental approach" of the Security Council to the situation in the former Yugoslavia and described the establishment of the International Tribunal as a protracted, four-step process involving: "(1) condemnation; (2) publication; (3) investigation; and (4) punishment." (James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 Am. J. Int'l L. 639, 640-42 (1993).) First, with its resolution 764, adopted on 13 July 1992, the Security Council stressed that "persons who commit or order the commission of grave breaches of the [1949 Geneva] Conventions are *individually responsible* in respect of such breaches". Second, the Security Council publicized this condemnation by adopting, on 12 August 1992, resolution 771, which called upon States and other bodies to submit "substantiated information" to the Secretary-General, who would report to the Security Council "recommending additional measures that might be appropriate". Third, by resolution 780 of 6 October 1992, the Security Council established the Commission of Experts to investigate these violations of international humanitarian law. The Security Council in due course received the report of the Commission of Experts, which concluded that grave breaches of the 1949 Geneva Conventions and other violations of international humanitarian law had been committed in the territory of the former Yugoslavia, including wilful killing, "ethnic cleansing," mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrests. (*See* Interim Report of the Commission of Experts, U.N. Doc. S/25274 (26 January 1993).) Finally, on 22 February 1993, by resolution 808, the Security Council decided that an international tribunal should be established and

directed the Secretary-General to submit specific proposals for the implementation of that decision. On 25 May 1993, in resolution 827, the Security Council adopted the draft Statute and thus established the International Tribunal.

17. None of the hypothetical cases which commentators have suggested as examples of limits on the powers of the Security Council, whether imposed by the terms of the Charter or general principles of international law and, in particular, *jus cogens*, have any relevance to the present case. Moreover, even if there be such limits, that is not to say that any judicial body, let alone this International Tribunal, can exercise powers of judicial review to determine whether, in relation to an exercise by the Security Council of powers under Chapter VII, those limits have been exceeded.

18. One may add that in the present case any submission to the contrary becomes particularly unattractive when, in the notorious circumstances of the former Yugoslavia, the Security Council has done no more than take the step of "ameliorating a threat to international peace and security by providing for the prosecution of individuals who violate well-established international law. . . . [something] best addressed by a judicial remedy". (O'Brien, *supra*, at 643.)

19. It is not irrelevant that what the Security Council has enacted under Chapter VII is the creation of a tribunal whose jurisdiction is expressly confined to the prosecution of breaches of international humanitarian law that are beyond any doubt part of customary law, not the establishment of some eccentric and novel code of conduct or some wholly irrational criterion, such as the possession of white hair, as was instanced in argument by the Defence. Arguments based upon *reductio ad absurdum* may be useful to destroy a fallacious proposition but will seldom provide a firm foundation for the creation of a valid one.

20. In argument the spectre was raised of interference by the Security Council in the proceedings of the International Tribunal, for instance, by the abolition of the International Tribunal, in midstream as it were, for wholly political reasons. No doubt this would be within the power of the Security Council, but so too is like action in a national context. National legislatures, with greater or lesser ease, depending upon their powers under their respective constitutions or governing laws, may abolish courts previously created but this in no way detracts from the status of those courts as entities established by law.

21. The Security Council established the International Tribunal as an enforcement measure under Chapter VII of the United Nations Charter after finding that the violations of international humanitarian law in the former Yugoslavia constituted a threat to the peace. In making this finding, the Security Council acted under Article 39 of the Charter, which provides:

> The Security Council shall determine the existence of any threat to peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

22. When, in resolution 827, the Security Council stated that it was "convinced" that, in the "particular circumstances of the former Yugoslavia", the establishment of the International Tribunal would contribute to the restoration and maintenance of peace, the course it took was novel only in the means adopted but not in the object sought to be attained. The Security Council has on a number of occasions addressed humanitarian law issues in the context of threats to the peace, has called upon States to comply with obligations imposed by humanitarian law and has on occasion taken steps to ensure such compliance. It has done so, for example, in relation to Southern Rhodesia in 1965 and 1966, South Africa in 1977, Lebanon on a number of occasions in the 1980's, Iran and Iraq in 1987, Iraq again in

1192

1991, Haiti and Somalia in 1993 and, of course, Rwanda in 1994. In the last of these, the establishment of the Rwanda Tribunal by the Security Council followed its finding that the conflict there involved violations of humanitarian law and was a threat to the peace.

23. The making of a judgement as to whether there was such an emergency in the former Yugoslavia as would justify the setting up of the International Tribunal under Chapter VII is eminently one for the Security Council and only for it; it is certainly not a justiciable issue but one involving considerations of high policy and of a political nature. As to whether the particular measure of establishing the International Tribunal is, in fact, likely to be conducive to the restoration of peace and security is, again, pre-eminently a matter for the Security Council and for it alone and no judicial body, certainly not this Trial Chamber, can or should review that step.

24. The concept of non-justiciability, in a national context, has been described as follows:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
>
> (*Baker v. Carr*, 369 U.S. 186, 217 (1962).)

The validity of the decision of the Security Council to establish the International Tribunal rests on its finding that the events in the former Yugoslavia constituted a threat to the peace. This finding is necessarily fact-based and raises political, non-justiciable issues. As noted by Judge Weeramantry, such a decision "entails a factual and political judgement and not a legal one". (The *Lockerbie* decision at 176.) A commentator has agreed, saying that "a threat to international peace and security is not a fixed standard which can be easily and automatically applied". (David L. Johnson, *Note, Sanctions and South Africa*, 19 Harv. Int l L. J. 887, 901 (1978).) The factual and political nature of an Article 39 determination by the Security Council makes it inherently inappropriate for any review by this Trial Chamber.

25. The Defence contends that there has been a lack of consistency in the actions of the Security Council. Certainly the International Tribunal is the first of its kind to be created. However, the fact that the Security Council has not taken a similar step in other, earlier cases cannot in itself be of any relevance in determining the legality of its action in this case.

26. Article 41 of the Charter provides:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

1193

The Article, on its face, does not limit the discretion of the Security Council to take measures not involving the use of armed force.

27. That it was not originally envisaged that an ad hoc judicial tribunal might be created under Chapter VII, even if that be factually correct, is nothing to the point. Chapter VII confers very wide powers upon the Security Council and no good reason has been advanced why Article 41 should be read as excluding the step, very appropriate in the circumstances, of creating the International Tribunal to deal with the notorious situation existing in the former Yugoslavia. This is a situation clearly suited to adjudication by a tribunal and punishment of those found guilty of crimes that violate international humanitarian law. This is not, as the Defence puts it, a question of the Security Council doing anything it likes; it is a seemingly entirely appropriate reaction to a situation in which international peace is clearly endangered.

28. The Defence argues that the establishment of the International Tribunal is not a measure contemplated by Article 41 because the examples included in that Article focus on economic and political measures, not judicial measures. As the Defence concedes, however, the list in that Article is not exhaustive. Once again, the decision of the Security Council in this regard is fraught with fact-based, policy determinations that make this issue non-justiciable.

29. Further, the Defence contends that the International Tribunal is not an appropriate measure under Article 41 because it has failed to restore peace in the former Yugoslavia. However, the accused is but the first and, as yet, the only accused to be brought before the International Tribunal, and it is wholly premature at this initial stage of its functioning to attempt to assess the effectiveness of the International Tribunal as a measure to restore peace, even were it the function of the International Tribunal to do so.

30. The Security Council discussions on the situation in the former Yugoslavia suggest two ways in which the International Tribunal would help in the restoring and maintaining of peace. First, several States expressed the view that the creation of the International Tribunal would deter further violations of international humanitarian law. (*See* Provisional Verbatim Record, U.N. SCOR, 48th Sess., 3175th mtg. at 8, 22, U.N. Doc. S/PV.3175 (22 February 1993); Provisional Verbatim Record, U.N. SCOR, 48th Sess., 3217th mtg. at 12, 19, U.N. Doc. S/PV.3217 (25 May 1993).)

31. Second, States took the position that the establishment of the International Tribunal would assist in the restoration of peace in the region. At the Security Council meeting on resolution 808, Hungary, in supporting the establishment of the International Tribunal, explained how the International Tribunal would be helpful in this regard:

> The way the international community deals with questions relating to the events in the former Yugoslavia will leave a profound mark on the future of that part of Europe, and beyond. It will make either easier or more painful, or even impossible, the healing of the psychological wounds the conflict has inflicted upon peoples who for centuries have lived together in harmony and good-neighbourliness, regardless of what we may hear today from certain parties to the conflict. We cannot forget that the peoples, the ethnic communities and the national minorities of Central and Eastern Europe are watching us and following our work with close attention.
>
> (Provisional Verbatim Record of 22 February 1993, *supra*, at 19-20.)

Slovenia also indicated its conviction that:

> [T]he establishment of such a tribunal is a necessary and very important step, given the fact that

1194

> those responsible for such crimes would be judged by an impartial judicial body as well as the fact that it could also contribute positively to the finding of solutions for the restoration of peace in the above-mentioned regions.
>
> (Letter from the Permanent Representative of Slovenia to the United Nations, to the Secretary-General, U.N. Doc. S/25652 (22 April 1993).)

Similarly, a commentator who has written extensively about the International Tribunal has stated:

> [I]t is important to try individuals responsible for crimes if there is to be any real hope of defusing ethnic tensions in this region. Blame should not rest on an entire nation but should be assigned to individual perpetrators of crimes and responsible leaders.
>
> (Theodor Meron, *Case for War Crimes Trials in Yugoslavia*, 72 Foreign Affairs 122, 134 (1993).)

The Trial Chamber agrees that due to the nature of the conflict, an adjudicatory body is a particularly appropriate measure to achieve lasting peace in the former Yugoslavia. In any case, the ultimate success or failure of the International Tribunal is certainly not an issue for this Trial Chamber.

32. Then it is said that international law requires that criminal courts be independent and impartial and that no court created by a political body such as the Security Council can have those characteristics. Of course, criminal courts worldwide are the creations of legislatures, eminently political bodies. The Court, in the *Effect of Awards* case, specifically held that a political organ of the United Nations - in that case, the General Assembly - could and had created "an independent and truly judicial body". (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. 47, 53 (Advisory Opinion of 13 July) ("*Effect of Awards*").) The question whether a court is independent and impartial depends not upon the body that creates it but upon its constitution, its judges and the way in which they function. The International Tribunal has, as its Statute and Rules attest, been constituted so as to ensure a fair trial to an accused and it is to be hoped that the way its Judges administer their jurisdiction will leave no room for complaints about lack of impartiality or want of independence.

33. The fact that the Security Council has established an ad hoc tribunal is also said to reveal invalidity because it is said to deny to the accused the right conferred by Article 14 of the International Convention on the Protection of Civil and Political Rights ("ICCPR") to be tried by a tribunal "established by law". However, on analysis this introduces no new concept; it is but another way of expressing the general complaint that the creation of the International Tribunal was beyond the power of the Security Council.

34. It is noteworthy that, in the context of the International Covenant and its entitlement in Article 14 to trial by a "tribunal established by law", this phrase requires only that the tribunal be legally constituted. At the time Article 14 was being drafted, it was sought unsuccessfully to amend it to require that tribunals should be "pre-established". As Professor David Harris puts it in his article *The Right to a Fair Trial in Criminal Proceedings as a Human Right,* 16 I.C.L.Q. 353, 356 (1967):

> An amendment which sought to change the wording of the United Nations text to read 'pre-established' and so cover all ad hoc or special tribunals was firmly and successfully opposed, however, on the ground that this would make normal judicial reorganization difficult. Mention was also made of the Nuremberg and Tokyo Tribunals which were ad hoc and yet which, it is generally agreed, gave the accused a fair trial in a procedural sense in most respects. . . . the

1195

important consideration is whether a court observes certain other requirements once it begins to function, however it might be created.

35. It is also argued that Article 29 of Chapter VI of the Charter does not contemplate the creation by the Security Council of an international judicial body when it refers to the creation of subsidiary organs. The reasoning behind this submission is no more than an assertion that a judicial body cannot be an additional organ of some other body; yet Article 29 is expressed in the broadest terms and nothing appears to limit its scope to non-judicial organs. In any event, it is not under Chapter VI of the Charter that the Security Council has established this Tribunal; as the Statute of the International Tribunal declares in its opening paragraph, it is as a measure under Chapter VII that the Security Council has created this International Tribunal. Moreover, in the *Effect of Awards* case mentioned above, the Court specifically decided that the General Assembly had the power to create an administrative tribunal. (*Effect of Awards* case at 56-61.) If the General Assembly has the authority to create a subsidiary judicial body, then surely the Security Council can create such a body in the exercise of its wide discretion to act under Chapter VII.

36. Nor has any basis been established for denying to the Security Council the power of indirect imposition of criminal liability upon individuals through the creation of a tribunal having criminal jurisdiction. On the contrary, given that the Security Council found that the threat to the peace posed by the conflict in the former Yugoslavia arose because of large scale violations of international humanitarian law committed by individuals, it was both appropriate and necessary for the Security Council, through the International Tribunal, to act on individuals in order to address the threat to the peace. In this regard it is important that when, in its resolutions 731 and 748, the Security Council required the Libyan Government to surrender the two Libyan nationals who were accused of the Lockerbie bombing and imposed mandatory commercial and diplomatic sanctions to obtain Libya's compliance with its decision, it was, in substance, acting upon individuals, seeking the extradition and trial of those Libyan nationals.

37. Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter. In particular, that was achieved, in the case of action by the Security Council under Chapter VII, by Article 2(7) of the Charter and its reference to the application of enforcement measures under Chapter VII. The same observation applies to the contention that there is some vice involved in the conferring of primacy upon this Tribunal. That is no more than a means by which the Security Council seeks to give effect to the powers conferred upon it by Chapter VII. In any event, it is by no means clear that an individual defendant has standing to raise this point.

38. The submission that there should have been involvement of the General Assembly in the creation of the International Tribunal can only have any meaning if what is suggested is the creation of a tribunal by means of an amendment of the Charter. If, however, the International Tribunal can, as seems clear, be created under Chapter VII, the suggestion of an amendment of the Charter is as unnecessary, as it is impractical as a measure appropriate by way of a response to the current situation in the former Yugoslavia.

39. It was claimed on behalf of the accused that he was disadvantaged by his removal from the jurisdiction of German courts to that of the International Tribunal since that denied him the opportunity

under the optional Protocol to the ICCPR to have recourse to the Human Rights Committee to complain about the trial accorded him. No doubt this is so, since that right does not appear to apply to proceedings before international tribunals, but that is nothing to the point in any challenge to the jurisdiction of this Trial Chamber; it can only be remedied, if remedy is required, by a further Protocol to the ICCPR. A similar comment applies in the case of the European Convention on Human Rights, to which the Defence also refers.

40. The foregoing disposes of the various submissions of the Defence so far as they relate to the legality of the creation of the International Tribunal, submissions to which the Trial Chamber felt it proper to refer since the Defence raised them but, many of which, as stated above, it does not regard as properly open for consideration by this Trial Chamber since they go, not so much to its jurisdiction, as to the unreviewable lawfulness of the actions of the Security Council.

B. Primacy of the International Tribunal

41. The Trial Chamber deals next with the Defence argument that the primacy jurisdiction conferred upon the International Tribunal by Article 9 (2) finds no basis in international law because the national courts of Bosnia and Herzegovina or, alternatively, of the entity known as the Bosnian Serb Republic, have primary jurisdiction to try the accused. This argument in effect again challenges the legality of the action of the Security Council in establishing the International Tribunal: the answer to this has already been provided above. The Trial Chamber is not entitled to engage in an exercise involving the review of a resolution passed by the Security Council. In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from that State. (*See* Israel v. Eichmann, 36 I.L.R. 5, 62 (1961).) In this regard, it is pertinent to note that the challenge to the primacy of the International Tribunal has been made against the express intent of the two States most closely affected by the indictment against the accused - Bosnia and Herzegovia and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction. As to the entity known as the Bosnian Serb Republic, similarly, the accused as an individual, has no *locus standi*, for the reasons given above, to raise the issue of this entity's sovereignty rights should it have been endowed with all the attributes of statehood.

42. Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community.

43. As to the invocation of *jus de non evocando*, which has been dealt with above, nothing more need be said except that the Defence has in no way established that the principle is so universal in application that it amounts to a peremptory norm of international law which cannot be breached in any event. Therefore the Trial Chamber proposes to speak no more of it.

1197

44. One final word before leaving this topic. The crimes with which the accused is charged form part of customary international law and existed well before the establishment of the International Tribunal. If the Security Council in its informed wisdom, acting well within its powers pursuant to Article 39 and 41 under Chapter VII of the Charter, creates the International Tribunal to share the burden of bringing perpetrators of universal crimes to justice, the Trial Chamber can see no invasion into a State's jurisdiction because, as it has been rightly argued on behalf of the Prosecutor, they were never crimes within the exclusive jurisdiction of any individual State. In any event, Article 2 (7) of the Charter, as has been noted above, prohibiting intervention by the United Nations in matters essentially within a State's domestic jurisdiction, is qualified in that "this principle shall not prejudice the application of enforcement measures under Chapter VII".

II. Subject-Matter Jurisdiction

45. The Trial Chamber must turn now to what are truly matters of jurisdiction. The Defence contends that the charges laid against the accused do not fall within the subject-matter jurisdiction of this Tribunal and it is necessary accordingly to examine the limits of that jurisdiction.

A. Article 2 : Grave Breaches of the Geneva Convention of 1949

46. The Statute of the International Tribunal confers jurisdiction by Articles 1 to 8 and supplements, and in one respect qualifies, that jurisdiction in Articles 9 and 10. However it is essentially Articles 1, 2, 3 and 5 with which this motion is concerned.

47. Article 1 does no more than confer power to prosecute for serious violations of international humanitarian law and confines that power, spatially, to breaches committed in the territory of the former Yugoslavia and, temporally, to the period since 1991. It further requires that the power thus conferred be exercised in accordance with the provisions of the Statute.

48. Article 2 confers subject-matter jurisdiction to prosecute in respect of grave breaches of the Geneva Conventions and identifies those breaches by the phrase, "namely the following acts against persons or property protected under the provisions of the relevant Geneva Conventions." There then follows an enumeration of acts, culled from the four Conventions and, with very slight variations, repeating and in effect consolidating, the terms of the grave breaches provisions to be found in varying form in each of those Conventions.

49. The Article has been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of "persons or property protected." In the present case it is not contended that the alleged victims in the several charges were not protected persons; in any event that will be a matter for evidence in due course.

50. What is contended is that for Article 2 to have any application there must exist a state of international conflict and that none in fact existed at any relevant time or place. However, the requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.

51. The Report of the Secretary-General, (U.N. Doc. S/25704 (3 May 1993)) (the "Report") makes it clear, in paragraph 34, that it was intended that the rules of international law that were to be applied

should be "beyond any doubt part of customary law", so that problems of non-adherence of particular States to any international Convention should not arise. Hence, no doubt, the specific reference to the law of the Geneva Conventions in Article 2 since, as the Report states in paragraph 35, that law applicable in armed conflict has beyond doubt become part of customary law. But there is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things. It simply confers subject matter jurisdiction to prosecute what, if one were concerned with the Conventions, would indeed be grave breaches of those Conventions, but which are, in the present context, simple enactments of the Statute.

52. When what is in issue is what the Geneva Conventions contemplate in the case of grave breaches, namely their prosecution before a national court and not before an international tribunal, it is natural enough that there should be a requirement of internationality; a nation might well view with concern, as an unacceptable infringement of sovereignty, the action of a foreign court in trying an accused for grave breaches committed in a conflict internal to that nation. Such considerations do not apply to the International Tribunal, any more than do the references in the Conventions to High Contracting Parties and much else in the Conventions; all these are simply inapplicable to the International Tribunal. They do not apply because the International Tribunal is not in fact, applying conventional international law but, rather, customary international law, as the Secretary-General makes clear in his Report, and is doing so by virtue of the mandate conferred upon it by the Security Council. In the case of what are commonly referred to as "grave breaches", this conventional law has become customary law, though some of it may well have been conventional law before being written into the predecessors of the present Geneva Conventions.

53. It follows that the element of internationality forms no jurisdictional criterion of the offences created by Article 2 of the Statute of the International Tribunal. If it did, there are clear indications in the great volume of material before the Trial Chamber that the acts alleged in the indictment were in fact committed in the course of an international armed conflict. However, little of this material is such that judicial notice can be taken of it and none of it is in the form of, nor has it been tendered as, evidence. In these circumstances the Trial Chamber makes no finding regarding the nature of the armed conflict in question.

54. As a submission alternative to its principal submission that there was here an international armed conflict, the Prosecutor contended that certain agreements entered into were, in any event, such that they operated, pursuant to common Article 3 of the 1949 Geneva Conventions ("common Article 3"), "to bring into force, by means of special agreements", those provisions of the Conventions relating to serious breaches.

55. Those agreements, entered into under the auspices of the International Committee of the Red Cross on 22 and 23 May and on 1 October 1992, were accompanied by a programme of action agreed upon on 27 August 1992.

56. That these agreements had the effect contended for by the Prosecutor was contested by the Defence. In view of the conclusion of the Trial Chamber that Article 2 of our Statute expressly and directly confers jurisdiction to prosecute in respect of the commission of the acts enumerated in that Article, it is also unnecessary to express any conclusion regarding this alternative submission.

B. Article 3: Violations of the Laws or Customs of War

57. The Defence contends that the accused may not be tried for violations of laws or customs of war under Article 3 of the Statute because that article is based on the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the regulations thereto of 18 October 1907 ("Hague Convention"), and the 1977 Protocol I, which apply only to an international conflict, and that none, in fact, existed at any relevant time or place. The Prosecutor responds by asserting that the term "laws or customs of war" in Article 3 applies to both international and internal conflict and that the International Tribunal may apply the minimum standards of common Article 3 which are applicable to both international and internal armed conflicts. Since the Prosecutor seemingly does not seek to import Protocol I into Article 3 of the Statute, the Trial Chamber does not address that issue.

58. Having considered the position of the parties, the Trial Chamber finds that the character of the conflict, whether international or internal, does not affect the subject-matter jurisdiction of the International Tribunal under Article 3 to try persons who are charged with violations of laws or customs of war.

59. The interpretation of the scope of Article 2 of the Statute is applicable to the view of the Trial Chamber of its subject matter jurisdiction under Article 3. Contrary to the position of the Defence, nothing in the words of Article 3 expressly requires the existence of an international conflict. Indeed, with respect to Article 3, unlike Article 2, there is no mention of any convention. Article 3 simply provides that the International Tribunal "shall have the power to prosecute persons violating the laws or customs of war". A list of prohibitory acts are then set forth in the Article. It is clear that the list is illustrative and not exhaustive, for the list is preceded with the phrase, "such violations shall include, but not be limited to . . ."

60. The competence of the International Tribunal extends to serious violations of international humanitarian law that are a part of customary law. International humanitarian law includes international rules designed to solve humanitarian problems arising from international or non-international armed conflicts. (*See Commentary on the Additional Protocols of 8 June 1977*, at p. XXVII (ICRC 1987).) Even though the acts enumerated in Article 3 are from the Hague Convention, the term "laws or customs of war" should not be limited to international conflicts. Laws or customs of war include prohibitions of acts committed both in international and internal armed conflicts. Indeed, common Article 3 is clear evidence that customary international law limits the conduct of hostilities in internal armed conflicts. However, unlike contracting parties to treaties, the International Tribunal is not called upon to apply conventional law but instead is mandated to apply customary international law. Therefore, the element of internationality forms no jurisdictional criterion even if the Hague Convention was originally envisaged by the Contracting Parties to apply to international conflicts.

61. Violations of the laws or customs of war are commonly referred to as "war crimes". They can be defined as crimes committed by any person in violation of recognized obligations under rules derived from conventional or customary law applicable to the parties to the conflict. (*See* L.C. Green, *The Contemporary Law of Armed Conflict* 276 (1993), ("war crimes are violations of the laws and customs of the law of armed conflict and are punishable whether committed by combatants or civilians, including the nationals of neutral states"). *See also*, C.H. Bassiouni, *A Draft International Criminal Code And Draft Statute For An International Criminal Tribunal* 130 (1987) ("[w]ar crimes consist of conduct (acts or omissions) which is prohibited by the rules of international law applicable in armed conflict, conventions to which the parties to the conflict are Parties, and the recognized principles and rules of international law of armed conflict").)

62. In Article 6 (b) of the Charter of the International Military Tribunal at Nuremberg, war crimes are defined as:

> [V]iolations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destructions of cities, towns, or villages, or devastation not justified by military necessity.

63. Although the Statute of the International Military Tribunal limited its competence to the international armed conflict of World War II, historically laws or customs of war have not been limited by the nature of the conflict they regulate. The Lieber Code, broadly recognized as the most famous early example of a national manual outlining the laws of war for the use of armed forces, and one of the first attempts to codify the laws of land warfare, was drafted to regulate the conduct of the United States armed forces during the American Civil War. *(The Lieber Code, Instructions for the Government of Armies of the United States in the Field by Order of the Secretary of War*, General Orders No. 100, Washington, D.C. (24 April 1863), *reprinted in* L. Friedman (ed.) I *A Documentary History* 158 (1972).) This Code, based on what Lieber regarded as the generally accepted law of his day, was used as the model for other manuals and greatly inspired later developments of the laws of war. Indeed, the drafters of the first proposal for a codification of the "laws or customs of war on land" in The Hague, relied heavily on the "Declaration of Brussels of 1874", which in turn, was strongly influenced by the Lieber Code. (*See* F. Kalshoven, *Constraints on the Waging of War* 13 (1987).) It is also an established principle of customary international law that the laws of war might become applicable to non-international armed conflicts of a certain intensity through the doctrine of "recognition of belligerency". (*See*, for example, *1956 United States Army Field Manual*, which stipulated that "the customary law of war becomes applicable to civil war upon recognition of the rebels as belligerents", para. 11a.) Further, even in internal conflict situations where the recognition of belligerency was explicitly withheld, it has been recognized that some fundamental rules of the law of war would nevertheless apply, regardless of non-recognition of belligerency. *(See* A. Cassese "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflict", in *Current Problems of International Law* 313 (Cassese, ed. 1975).) Additionally, under the International Law Commission's *Draft Code on Crimes Against The Peace and Security of Mankind*, the notion of "exceptionally serious war crimes", is defined to include certain conduct and no differentiation is made with respect to whether committed in the course of an international or non-international armed conflict. Members of the Security Council are also of the opinion that the term "laws or customs" is not limited to international armed conflicts. *(See* Statements of U.S., U.K. and French representatives to the Security Council following the adoption of resolution 827, U.N. Doc. S/PV.3217, 15 (May 25, 1993).)

64. The Trial Chamber concludes that Article 3 of the Statute provides a non-exhaustive list of acts which fit within the rubric of "laws or customs of war". The offences that it may consider are not limited to those contained in the Hague Convention and may arise during an armed conflict regardless of whether it is international or internal.

65. The Prosecutor affirmatively contends that the minimum standards contained in common Article 3 are incorporated in Article 3 of the Statute. The Trial Chamber finds that it has subject-matter jurisdiction under Article 3 because violations of laws or customs of war are a part of customary international law over which it has competence regardless of whether the conflict is international or national. However, the Trial Chamber considers that it is necessary to respond to the specific assertion by the Prosecutor that laws or customs of war include the obligations imposed by common Article 3. The Trial Chamber finds that common Article 3 imposes obligations that are within the subject-matter jurisdiction of Article 3 of the Statute because those obligations are a part of customary international law. Further, the Trial Chamber finds that violations of these prohibitions can be enforced against individuals. Imposing criminal responsibility upon individuals for these violations does not violate the

principle of *nullum crimen sine lege.*

66. Common Article 3 prohibits the following acts when committed against persons taking no active part in the hostilities:

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

67. For the reasons discussed herein, the acts proscribed by common Article 3 constitute criminal offences under international law. The fact that common Article 3 is part of customary international law was definitively decided by the International Court of Justice in the *Nicaragua* case (Military and Paramilitary Activities (Nicar. v. U.S.)), 1986 I.C.J. 4 (Merits Judgement of 27 June 1986) in which the Court, applying customary international law, determined that the rules contained in common Article 3 constitute a "minimum yardstick" applicable in both international and non-international armed conflicts, thus finding that these prohibitions are part of customary international law. As early as 1958 the view was already held that common Article 3:

> . . . merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question, long before the Convention was signed. . . . no government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.
>
> *(Commentary on the Geneva Conventions of 12 August 1949: [No.] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 36 (Pictet ed., 1958).)

A more recent commentator notes that ". . . the norms stated in Article 3(1)(a)-(c) are of such an elementary, ethical character, and echo so many provisions in other humanitarian and human rights treaties, that they must be regarded as embodying minimum standards of customary law also applicable to non-international armed conflicts." (Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* 35 (1991).) The customary status of common Article 3 is further supported by statements made by representatives to the Security Council following the adoption of resolution 827 adopting the Statute of the International Tribunal. The United States representative explicitly stated that she considered Article 3 of the Statute to include common Article 3 of the 1949 Geneva Conventions, and representatives from the United Kingdom and France made similar statements. (UN Doc. S/PV.3217 (25 May 1993), paras. 11, 15 and 19.)

68. The fact that acts proscribed by common Article 3 constitute criminal offences under international law is also evident from the fact that the acts within common Article 3 are criminal in nature. They are similar in content to acts prohibited by the grave breaches provisions, which clearly entail individual

1202

criminal liability. In addition, the type of acts listed in common Article 3 have been found in the past to result in individual criminal liability. For example, Article 44 of the Lieber Code *supra* provided for the prohibition, criminal responsibility and punishment of persons committing acts which are of the type that would today fall within common Article 3. In addition, there have been national trials for individuals charged with violations similar to common Article 3. *(See* Jordan Paust, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 Vanderbilt Journal of Transnational Law 1, 25 (1978).)

69. The customary international law doctrine of recognition of belligerency allows for the application to internal conflicts of the laws applicable to international armed conflict, thus ensuring that even in a non-international conflict individuals can be held criminally responsible for violations of the laws and customs of war. Additionally, some national military manuals and laws emphasise the criminal nature of acts within common Article 3. For example, the United States Army regards violations of common Article 3 as encompassed by the notion of war crimes, thus empowering it to prosecute captured military personnel for war crimes if they were accused of breaches of common Article 3. The German Military Manual describes violations of common Article 3 as "grave breaches of international humanitarian law," implying that violations of common Article 3 could form the basis for individual criminal responsibility. *(See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 Am. J. Int'l. L. 554, 564-65 (1995).) Further, the criminal nature of the acts within common Article 3 is evident from the language of common Article 3 itself, which is clearly prohibitory and addresses fundamental offences such as murder and torture which are prohibited in all States:

> Therefore, no person who has committed such acts . . . could claim in good faith that he/she did not understand that the acts were prohibited. And the principle *nullum crimen* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed.
>
> *(Id.* at 566.)

70. The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability. This is evident from the use of the Fourth Hague Convention and the 1929 Geneva Prisoners of War Convention as the basis for prosecutions and convictions at Nuremberg, despite the fact that neither convention contain any reference to penal prosecution or individual liability for breaches.

71. A further indication that the acts proscribed by common Article 3 constitute criminal offences under international law is that, assuming *arguendo* that there is no clear obligation to punish or extradite violators of non-grave breach provisions of the Geneva Conventions, such as common Article 3, all States have the right to punish those violators. Therefore, individuals can be prosecuted for the violations of the acts listed and thus prosecution by the International Tribunal based on primacy does not violate the *ex post facto* prohibition. In addition, in the *Nicaragua* case, the Court recognised the applicability of common Article 1 of the Geneva Conventions to non-international armed conflicts. The requirement in common Article 1 that all Contracting Parties must respect and ensure respect for the Conventions may entail resort to penal measures.

72. In his Report, the Secretary-General states that "the application of the principle *nullum crimen sine lege* requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law". (UN Doc. S/25704, para. 34.) Article 15(1) of the ICCPR contains the prohibition against *nullum crimen sine lege*, and provides in relevant part that "[n]o one shall be held guilty of any criminal offence on account of an act or omission which did not constitute a

1203

criminal offence, under national or international law, at the time when it was committed". As is demonstrated from the above, common Article 3 is beyond doubt part of customary international law, therefore the principle of *nullum crimen sine lege* is not violated by incorporating the prohibitory norms of common Article 3 in Article 3 of the Statute of the International Tribunal.

73. Additional support for the finding that there is no violation of the principle of *nullum crimen sine lege* is that by incorporating the prohibitory norms of common Article 3 into its national law, the former Yugoslavia has criminalized these offences. (*See* Art. 125 of the Criminal Code of the former Yugoslavia, which provides that the prohibition of war crimes against the civilian population applies to situations of "war, armed conflict or occupation," irrespective of the nature of the conflict, thus implying that situations of non-international armed conflict could be covered.)

74. For these reasons, the Trial Chamber finds that the character of the conflict, whether international or internal, does not affect the subject-matter jurisdiction of the Tribunal under Article 3. The term "laws or customs of war", applies to international and internal armed conflicts. The minimum standards of common Article 3 apply to the conflict in the former Yugoslavia and the accused's prosecution for those offences does not violate the principle of *nullum crimen sine lege.*

C. Article 5: Crimes Against Humanity

75. Crimes against humanity have been described by the Secretary-General in his Report (at paragraph 48) as those inhumane acts of a very serious nature committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The Statute then defines the jurisdiction of the International Tribunal over crimes against humanity in Article 5 of the Statute as follows:

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

76. There is no question but that crimes against humanity form part of customary international law. They found expression in Article 6(c) of the Nuremberg Charter of 8 August 1945, Article II(1)(c) of Law No. 10 of the Control Council for Germany of 20 December 1945 and Article 5(c) of the Tokyo Charter of 26 April 1946, three major documents promulgated in the aftermath of World War II.

77. The Defence claims that "the Tribunal only has jurisdiction under Article 5 of the Statute if it involves crimes that have been committed in the execution of or in connection with an international armed conflict." It purports to find authority for this proposition requiring the existence of an armed conflict of an international nature in the Nuremberg Charter which, in its definition of crimes against

humanity, spoke of inhumane acts committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal . . ." and in the affirmation given to the principles of international law recognised by the Charter of the Nuremberg Tribunal and Judgement of the Tribunal in General Assembly resolution 95(1) of 1948. The Defence further contends that the broadening of the scope of Article 5 to crimes when committed in armed conflicts of an internal character offends the *nullum crimen* principle.

78. The Trial Chamber does not agree. The nexus in the Nuremberg Charter between crimes against humanity and the other two categories, crimes against peace and war crimes, was peculiar to the context of the Nuremberg Tribunal established specifically "for the just and prompt trial and punishment of the major war criminals of the European Axis countries." (*Nuremburg Charter*, Article 1). As some of the crimes perpetrated by Nazi Germany were of such a heinous nature as to shock the conscience of mankind, it was decided to include crimes against humanity in order to enable the International Military Tribunal to try the major war criminals for the barbarous acts committed against German Jews, amongst others, who, as German nationals, were outside the protection of the laws of warfare which only prohibited violations involving the adversary or enemy populations. (*See* Antonio Cassese, *International Law in a Divided World* para. 169 (1986).)

79. That no nexus is required in customary international law between crimes against humanity and crimes against peace or war crimes is strongly evidenced by subsequent case law. The military tribunal established under Control Council Law No. 10 stated in the *Einsatzgruppen* case that:

> Crimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty . . . The International Military Tribunal, operating under the London Charter, declared that the Charter's provisions limited the Tribunal to consider only those crimes against humanity which were committed in the execution of or in connection with crimes against peace and war crimes. The Allied Control Council, in its Law No. 10, removed this limitation so that the present Tribunal has jurisdiction to try all crimes against humanity as long known and understood under the general principles of criminal law.
>
> (4 Trials of War Criminals 499).

80. Further, the Special Rapporteur of the International Law Commission had this to say:

> First linked to a state of belligerency . . . the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes . . . Crimes against humanity may be committed in time of war or in time of peace; war crimes can only be committed in time of war.
>
> (Seventh Report on the Draft Code of Crimes Against the Peace and Security of Mankind, [1989] 2 Yearbook of ILC, U.N. Doc., A/N/CN. 4/SER. A/1986/Add. 1).

81. Finally, this view that crimes against humanity are autonomous is confirmed by the opus classicus on international law, Oppenheim's International Law, where special reference is made to the fact that crimes against humanity "are now generally regarded as a self-contained category, without the need for any formal link with war crimes . . ." (R. Jennings and A. Watts, 1 *Oppenheim's International Law* 966 (1992)).

1205

82. Even were it arguable that a nexus is required between crimes against humanity and war crimes, the element of internationality certainly forms no jurisidictional criterion because, as has been shown above, war crimes are prohibited under customary international law in armed conflicts both of an international and internal nature.

83. In conclusion, the Trial Chamber emphasises that the definition of Article 5 is in fact more restrictive than the general definition of crimes against humanity recognised by customary international law. The inclusion of the nexus with armed conflict in the article imposes a limitation on the jurisdiction of the International Tribunal and certainly can in no way offend the *nullum crimen* principle so as to bar the International Tribunal from trying the crimes enumerated therein. Because the language of Article 5 is clear, the crimes against humanity to be tried in the International Tribunal must have a nexus with an armed conflict, be it international or internal.

DISPOSITION

The foregoing deals with the several objections to jurisdiction proper raised by the Defence as well as with the other objections not properly relating to jurisdiction but which instead put in issue the lawful creation and competence of the International Tribunal.

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Defence, and

PURSUANT TO RULE 72

HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal

HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal.

-
-
-
-
-
-
-
-
-
-
-
-
-
-
-
-
-
-
-
-

1206

-
-
-
-
-
-
-
-
-
-
-
-
-
-
-
-
-
-
-

Gabrielle
Kirk
McDonald

Presiding
Judge

Dated this tenth day of August 1995
At The Hague
The Netherlands

PROSECUTION INDEX OF AUTHORITIES

ANNEX 13.

Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY-94-1, Appeals Chamber, 2 October 1995

1208

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
2 October 1995

PROSECUTOR

v.

DUSKO TADIC a/k/a "DULE"

DECISION ON THE DEFENCE MOTION FOR INTERLOCUTORY APPEAL ON JURISDICTION

The Office of the Prosecutor:

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

Counsel for the Accused:

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

I. INTRODUCTION

A. The Judgement Under Appeal

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (hereinafter "International Tribunal") is seized of an appeal lodged by Appellant the Defence against a judgement rendered by the Trial Chamber II on 10 August 1995. By that judgement, Appellant's motion challenging the jurisdiction of the International Tribunal was denied.

2. Before the Trial Chamber, Appellant had launched a three-pronged attack:

a) illegal foundation of the International Tribunal;
b) wrongful primacy of the International Tribunal over national courts;
c) lack of jurisdiction *ratione materiae.*

The judgement under appeal denied the relief sought by Appellant; in its essential provisions, it reads as follows:

> "THE TRIAL CHAMBER [. . .]HEREBY DISMISSES the motion insofar as it relates to primacy jurisdiction and subject-matter jurisdiction under Articles 2, 3 and 5 and otherwise decides it to be incompetent insofar as it challenges the establishment of the International Tribunal
> HEREBY DENIES the relief sought by the Defence in its Motion on the Jurisdiction of the Tribunal." (Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995 (Case No. IT-94-1-T), at 33 (hereinafter *Decision at Trial*).)

Appellant now alleges error of law on the part of the Trial Chamber.

3. As can readily be seen from the operative part of the judgement, the Trial Chamber took a different approach to the first ground of contestation, on which it refused to rule, from the route it followed with respect to the last two grounds, which it dismissed. This distinction ought to be observed and will be referred to below.
From the development of the proceedings, however, it now appears that the question of jurisdiction has acquired, before this Chamber, a two-tier dimension:

a) the jurisdiction of the Appeals Chamber to hear this appeal;
b) the jurisdiction of the International Tribunal to hear this case on the merits.

Before anything more is said on the merits, consideration must be given to the preliminary question: whether the Appeals Chamber is endowed with the jurisdiction to hear this appeal at all.

B. Jurisdiction Of The Appeals Chamber

4. Article 25 of the Statute of the International Tribunal (Statute of the International Tribunal (originally published as annex to *the Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993)* (U.N. Doc. S/25704) and adopted pursuant to Security Council resolution 827 (25 May 1993) (hereinafter *Statute of the International Tribunal*)) adopted by the United Nations Security Council opens up the possibility of appellate proceedings within the International Tribunal. This provision stands in conformity with the International Covenant on Civil and Political Rights which insists upon a right of appeal (International Covenant on Civil and Political Rights, 19 December 1966, art. 14, para. 5, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) (hereinafter *ICCPR*)).

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

1210

(hereinafter *Rules of Procedure*)).

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

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

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

> "I would submit, firstly, that clearly within the four corners of the Statute the Judges must be free to comment, to supplement, to make rules not inconsistent and, to the extent I mentioned yesterday, it would also entitle the Judges to question the Statute and to assure themselves that they can do justice in the international context operating under the Statute. There is no question about that.
>
> Rule 72 goes no further, in my submission, than providing a useful vehicle for achieving - really it is a provision which achieves justice because but for it, one could go through, as Mr. Orie mentioned in a different context, admittedly, yesterday, one could have the unfortunate position of having months of trial, of the Tribunal hearing witnesses only to find out at the appeal stage that, in fact, there should not have been a trial at all because of some lack of jurisdiction for whatever reason.
>
> So it is really a rule of fairness for both sides in a way, but particularly in favour of the accused in order that somebody should not be put to the terrible inconvenience of having to sit through a trial which should not take place. So, it is really like many of the rules that Your Honours and your colleagues made with regard to rules of evidence and procedure. It is to an extent supplementing the Statute, but that is what was intended when the Security Council gave to the Judges the power to make rules. They did it knowing that there were spaces in the Statute that would need to be filled by having rules of procedure and evidence.
>
> [. . .]
>
> So, it is really a rule of convenience and, if I may say so, a sensible rule in the interests of justice, in the interests of both sides and in the interests of the Tribunal as a whole." (Transcript of the Hearing of the Interlocutory Appeal on Jurisdiction, 8 September 1995, at 4 (hereinafter *Appeal Transcript*).)

The question has, however, been put whether the three grounds relied upon by Appellant really go to the jurisdiction of the International Tribunal, in which case only, could they form the basis of an interlocutory appeal. More specifically, can the legality of the foundation of the International Tribunal and its primacy be used as the building bricks of such an appeal?

In his Brief in appeal, at page 2, the Prosecutor has argued in support of a negative answer, based on the distinction between the validity of the creation of the International Tribunal and its jurisdiction. The second aspect alone would be appealable whilst the legality and primacy of the International Tribunal could not be challenged in appeal. (Response to the Motion of the Defence on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 7 July 1995 (Case No. IT-94-1-T), at 4 (hereinafter *Prosecutor Trial Brief*).)

1211

6. This narrow interpretation of the concept of jurisdiction, which has been advocated by the Prosecutor and one *amicus curiae*, falls foul of a modern vision of the administration of justice. Such a fundamental matter as the jurisdiction of the International Tribunal should not be kept for decision at the end of a potentially lengthy, emotional and expensive trial. All the grounds of contestation relied upon by Appellant result, in final analysis, in an assessment of the legal capability of the International Tribunal to try his case. What is this, if not in the end a question of jurisdiction? And what body is legally authorized to pass on that issue, if not the Appeals Chamber of the International Tribunal? Indeed - this is by no means conclusive, but interesting nevertheless: were not those questions to be dealt with *in limine litis*, they could obviously be raised on an appeal on the merits. Would the higher interest of justice be served by a decision in favour of the accused, after the latter had undergone what would then have to be branded as an unwarranted trial. After all, in a court of law, common sense ought to be honoured not only when facts are weighed, but equally when laws are surveyed and the proper rule is selected. In the present case, the jurisdiction of this Chamber to hear and dispose of Appellant's interlocutory appeal is indisputable.

C. Grounds Of Appeal

7. The Appeals Chamber has accordingly heard the parties on all points raised in the written pleadings. It has also read the *amicus curiae* briefs submitted by *Juristes sans Frontières* and the Government of the United States of America, to whom it expresses its gratitude.

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

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

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

II. UNLAWFUL ESTABLISHMENT OF THE INTERNATIONAL TRIBUNAL

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

A. Meaning Of Jurisdiction

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

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

There is a *petitio principii* underlying this affirmation and it fails to explain the criteria by which it the

1212

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

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

> "jurisdiction' is a dignity which a man hath by a power to do justice in causes of complaint made before him." (Stroud's Judicial Dictionary, 1379 (5th ed. 1986).)

The same concept is found even in current dictionary definitions:

> "[Jurisdiction] is the power of a court to decide a matter in controversy and presupposes the existence of a duly constituted court with control over the subject matter and the parties." Black's Law Dictionary, 712 (6th ed. 1990) (citing Pinner v. Pinner, 33 N.C. App. 204, 234 S.E.2d 633).)

11. A narrow concept of jurisdiction may, perhaps, be warranted in a national context but not in international law. International law, because it lacks a centralized structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralized or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided). This is incompatible with a narrow concept of jurisdiction, which presupposes a certain division of labour. Of course, the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardize its "judicial character", as shall be discussed later on. Such limitations cannot, however, be presumed and, in any case, they cannot be deduced from the concept of jurisdiction itself.

12. In sum, if the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter. The plea based on the invalidity of constitution of the International Tribunal goes to the very essence of jurisdiction as a power to exercise the judicial function within any ambit. It is more radical than, in the sense that it goes beyond and subsumes, all the other pleas concerning the scope of jurisdiction. This issue is a preliminary to and conditions all other aspects of jurisdiction.

B. Admissibility Of Plea Based On The Invalidity Of The Establishment Of The International Tribunal

13. Before the Trial Chamber, the Prosecutor maintained that:

> (1) the International Tribunal lacks authority to review its establishment by the Security Council (Prosecutor Trial Brief, at 10-12); and that in any case
> (2) the question whether the Security Council in establishing the International Tribunal complied with the United Nations Charter raises "political questions" which are "non-justiciable" (id. at 12-14).

The Trial Chamber approved this line of argument.

This position comprises two arguments: one relating to the power of the International Tribunal to consider such a plea; and another relating to the classification of the subject-matter of the plea as a "political question" and, as such, "non-justiciable", i.e.", regardless of whether or not it falls within its jurisdiction.

1. Does The International Tribunal Have Jurisdiction?

14. In its decision, the Trial Chamber declares:

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

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

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

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

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

> "[T]he view has been put forward that the Administrative Tribunal is a subsidiary, subordinate, or secondary organ; and that, accordingly, the Tribunal's judgements cannot bind the General Assembly which established it.
>
> [. . .]
>
> The question cannot be determined on the basis of the description of the relationship between the General Assembly and the Tribunal, that is, by considering whether the Tribunal is to be regarded as a subsidiary, a subordinate, or a secondary organ, or on the basis of the fact that it was

established by the General Assembly. It depends on the intention of the General Assembly in establishing the Tribunal and on the nature of the functions conferred upon it by its Statute. An examination of the language of the Statute of the Administrative Tribunal has shown that the General Assembly intended to establish a judicial body." (Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, 1954 I.C.J. Reports 47, at 60-1 (Advisory Opinion of 13 July) (hereinafter *Effect of Awards*).)

17. Earlier, the Court had derived the judicial nature of the United Nations Administrative Tribunal ("UNAT") from the use of certain terms and language in the Statute and its possession of certain attributes. Prominent among these attributes of the judicial function figures the power provided for in Article 2, paragraph 3, of the Statute of UNAT:

"In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal." (Id. at 51-2, *quoting* Statute of the United Nations Administrative Tribunal, art. 2, para. 3.)

18. This power, known as the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its "jurisdiction to determine its own jurisdiction." It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done (see, e.g., Statute of the International Court of Justice, Art. 36, para. 6). But in the words of the International Court of Justice:

"[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [. . .] but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation." (Nottebohm Case (Liech. v. Guat.), 1953 I.C.J. Reports 7, 119 (21 March).)

This is not merely a power in the hands of the tribunal. In international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence." (Judge Cordova, dissenting opinion, advisory opinion on Judgements of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October)(Cordova, J., dissenting).)

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

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

"[T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers,

1215

> involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council." (Decision at Trial, at para. 5; *see also* paras. 7, 8, 9, 17, 24, *passim.*)

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

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

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

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. Reports 16, at para. 89 (Advisory Opinion of 21 June) (hereafter the *Namibia Advisory Opinion*).)

All these dicta, however, address the hypothesis of the Court exercising such judicial review as a matter of "primary" jurisdiction. They do not address at all the hypothesis of examination of the legality of the decisions of other organs as a matter of "incidental" jurisdiction, in order to ascertain and be able to exercise its "primary" jurisdiction over the matter before it. Indeed, in the *Namibia Advisory Opinion*, immediately after the dictum reproduced above and quoted by the Trial Chamber (concerning its "primary" jurisdiction), the International Court of Justice proceeded to exercise the very same "incidental" jurisdiction discussed here:

> "[T]he question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion. However, in the exercise of its judicial function and since objections have been advanced the Court, in the course of its reasoning, will consider these objections before determining any legal consequences arising from those resolutions." (Id. at para. 89.)

The same sort of examination was undertaken by the International Court of Justice, *inter alia,* in its advisory opinion on the *Effect of Awards Case*:

> "[T]he legal power of the General Assembly to establish a tribunal competent to render judgements binding on the United Nations has been challenged. Accordingly, it is necessary to consider whether the General Assembly has been given this power by the Charter." (Effect of Awards, at 56.)

Obviously, the wider the discretion of the Security Council under the Charter of the United Nations, the narrower the scope for the International Tribunal to review its actions, even as a matter of incidental jurisdiction. Nevertheless, this does not mean that the power disappears altogether, particularly in cases where there might be a manifest contradiction with the Principles and Purposes of the Charter.

22. In conclusion, the Appeals Chamber finds that the International Tribunal has jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council.

2. Is The Question At Issue Political And As Such Non-Justiciable?

23. The Trial Chamber accepted this argument and classification. (See Decision at Trial, at para. 24.)

24. The doctrines of "political questions" and "non-justiciable disputes" are remnants of the reservations of "sovereignty", "national honour", etc. in very old arbitration treaties. They have receded from the horizon of contemporary international law, except for the occasional invocation of the "political question" argument before the International Court of Justice in advisory proceedings and, very rarely, in contentious proceedings as well.

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

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

This dictum applies almost literally to the present case.

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

C. The Issue Of Constitutionality

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

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

> "It is said that, to be duly established by law, the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council. Called in aid of this general proposition are a number of considerations: that before the creation of the International Tribunal in 1993 it was

never envisaged that such an ad hoc criminal tribunal might be set up; that the General Assembly, whose participation would at least have guaranteed full representation of the international community, was not involved in its creation; that it was never intended by the Charter that the Security Council should, under Chapter VII, establish a judicial body, let alone a criminal tribunal; that the Security Council had been inconsistent in creating this Tribunal while not taking a similar step in the case of other areas of conflict in which violations of international humanitarian law may have occurred; that the establishment of the International Tribunal had neither promoted, nor was capable of promoting, international peace, as the current situation in the former Yugoslavia demonstrates; that the Security Council could not, in any event, create criminal liability on the part of individuals and that this is what its creation of the International Tribunal did; that there existed and exists no such international emergency as would justify the action of the Security Council; that no political organ such as the Security Council is capable of establishing an independent and impartial tribunal; that there is an inherent defect in the creation, after the event, of ad hoc tribunals to try particular types of offences and, finally, that to give the International Tribunal primacy over national courts is, in any event and in itself, inherently wrong." (Decision at Trial, at para. 2.)

These arguments raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determining what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. Put in the interrogative, they can be formulated as follows:

1. was there really a threat to the peace justifying the invocation of Chapter VII as a legal basis for the establishment of the International Tribunal?
2. assuming such a threat existed, was the Security Council authorized, with a view to restoring or maintaining peace, to take any measures at its own discretion, or was it bound to choose among those expressly provided for in Articles 41 and 42 (and possibly Article 40 as well)?
3. in the latter case, how can the establishment of an international criminal tribunal be justified, as it does not figure among the ones mentioned in those Articles, and is of a different nature?

1. The Power Of The Security Council To Invoke Chapter VII

28. Article 39 opens Chapter VII of the Charter of the United Nations and determines the conditions of application of this Chapter. It provides:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, 26 June 1945, Art. 39.)

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

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

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

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

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

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

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

The first is that an armed conflict (or a series of armed conflicts) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words "breach of the peace" (between the parties or, at the very least, would be a as a "threat to the peace" of others).

But even if it were considered merely as an "internal armed conflict", it would still constitute a "threat to the peace" according to the settled practice of the Security Council and the common understanding of the United Nations membership in general. Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a "threat to the peace" and dealt with under Chapter VII, with the encouragement or even at the behest of the General Assembly, such as the Congo crisis at the beginning of the 1960s and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the "subsequent practice" of the membership of the United Nations at large, that the "threat to the peace" of Article 39 may include, as one of its species, internal armed conflicts.

The second reason, which is more particular to the case at hand, is that Appellant has amended his position from that contained in the Brief submitted to the Trial Chamber. Appellant no longer contests the Security Council's power to determine whether the situation in the former Yugoslavia constituted a

threat to the peace, nor the determination itself. He further acknowledges that the Security Council "has the power to address to such threats [. . .] by appropriate measures." [Defence] Brief to Support the Notice of (Interlocutory) Appeal, 25 August 1995 (Case No. IT-94-1-AR72), at para. 5.4 (hereinafter *Defence Appeal Brief*).) But he continues to contest the legality and appropriateness of the measures chosen by the Security Council to that end.

2. The Range of Measures Envisaged Under Chapter VII

31. Once the Security Council determines that a particular situation poses a threat to the peace or that there exists a breach of the peace or an act of aggression, it enjoys a wide margin of discretion in choosing the course of action: as noted above (see para. 29) it can either continue, in spite of its determination, to act via recommendations, i.e., as if it were still within Chapter VI ("*Pacific Settlement of Disputes*") or it can exercise its exceptional powers under Chapter VII. In the words of Article 39, it would then "decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (United Nations Charter, art. 39.)

A question arises in this respect as to whether the choice of the Security Council is limited to the measures provided for in Articles 41 and 42 of the Charter (as the language of Article 39 suggests), or whether it has even larger discretion in the form of general powers to maintain and restore international peace and security under Chapter VII at large. In the latter case, one of course does not have to locate every measure decided by the Security Council under Chapter VII within the confines of Articles 41 and 42, or possibly Article 40. In any case, under both interpretations, the Security Council has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken. The language of Article 39 is quite clear as to the channelling of the very broad and exceptional powers of the Security Council under Chapter VII through Articles 41 and 42. These two Articles leave to the Security Council such a wide choice as not to warrant searching, on functional or other grounds, for even wider and more general powers than those already expressly provided for in the Charter.

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

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

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

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

Appellant has attacked the legality of this decision at different stages before the Trial Chamber as well

1220

as before this Chamber on at least three grounds:

> a) that the establishment of such a tribunal was never contemplated by the framers of the Charter as one of the measures to be taken under Chapter VII; as witnessed by the fact that it figures nowhere in the provisions of that Chapter, and more particularly in Articles 41 and 42 which detail these measures;
>
> b) that the Security Council is constitutionally or inherently incapable of creating a judicial organ, as it is conceived in the Charter as an executive organ, hence not possessed of judicial powers which can be exercised through a subsidiary organ;
>
> c) that the establishment of the International Tribunal has neither promoted, nor was capable of promoting, international peace, as demonstrated by the current situation in the former Yugoslavia.

(a) What Article of Chapter VII Serves As A Basis For The Establishment Of A Tribunal?

33. The establishment of an international criminal tribunal is not expressly mentioned among the enforcement measures provided for in Chapter VII, and more particularly in Articles 41 and 42.

Obviously, the establishment of the International Tribunal is not a measure under Article 42, as these are measures of a military nature, implying the use of armed force. Nor can it be considered a "provisional measure" under Article 40. These measures, as their denomination indicates, are intended to act as a "holding operation", producing a "stand-still" or a "cooling-off" effect, "without prejudice to the rights, claims or position of the parties concerned." (United Nations Charter, art. 40.) They are akin to emergency police action rather than to the activity of a judicial organ dispensing justice according to law. Moreover, not being enforcement action, according to the language of Article 40 itself ("before making the recommendations or deciding upon the measures provided for in Article 39"), such provisional measures are subject to the Charter limitation of Article 2, paragraph 7, and the question of their mandatory or recommendatory character is subject to great controversy; all of which renders inappropriate the classification of the International Tribunal under these measures.

34. *Prima facie*, the International Tribunal matches perfectly the description in Article 41 of "measures not involving the use of force." Appellant, however, has argued before both the Trial Chamber and this Appeals Chamber, that:"

> ...[I]t is clear that the establishment of a war crimes tribunal was not intended. The examples mentioned in this article focus upon economic and political measures and do not in any way suggest judicial measures." (Brief to Support the Motion [of the Defence] on the Jurisdiction of the Tribunal before the Trial Chamber of the International Tribunal, 23 June 1995 (Case No. IT-94-1-T), at para. 3.2.1 (hereinafter *Defence Trial Brief*).)

It has also been argued that the measures contemplated under Article 41 are all measures to be undertaken by Member States, which is not the case with the establishment of the International Tribunal.

35. The first argument does not stand by its own language. Article 41 reads as follows:"

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the

severance of diplomatic relations." (United Nations Charter, art. 41.)

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

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

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

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

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

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

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

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

38. The establishment of the International Tribunal by the Security Council does not signify, however, that the Security Council has delegated to it some of its own functions or the exercise of some of its own powers. Nor does it mean, in reverse, that the Security Council was usurping for itself part of a judicial function which does not belong to it but to other organs of the United Nations according to the Charter. The Security Council has resorted to the establishment of a judicial organ in the form of an international criminal tribunal as an instrument for the exercise of its own principal function of maintenance of peace

1222

and security, i.e., as a measure contributing to the restoration and maintenance of peace in the former Yugoslavia.

The General Assembly did not need to have military and police functions and powers in order to be able to establish the United Nations Emergency Force in the Middle East ("UNEF") in 1956. Nor did the General Assembly have to be a judicial organ possessed of judicial functions and powers in order to be able to establish UNAT. In its advisory opinion in the *Effect of Awards,* the International Court of Justice, in addressing practically the same objection, declared:

> "[T]he Charter does not confer judicial functions on the General Assembly [. . .] By establishing the Administrative Tribunal, the General Assembly was not delegating the performance of its own functions: it was exercising a power which it had under the Charter to regulate staff relations." (Effect of Awards, at 61.)

(c) Was The Establishment Of The International Tribunal An Appropriate Measure?

39. The third argument is directed against the discretionary power of the Security Council in evaluating the appropriateness of the chosen measure and its effectiveness in achieving its objective, the restoration of peace.

Article 39 leaves the choice of means and their evaluation to the Security Council, which enjoys wide discretionary powers in this regard; and it could not have been otherwise, as such a choice involves political evaluation of highly complex and dynamic situations.

It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures *ex post facto* by their success or failure to achieve their ends (in the present case, the restoration of peace in the former Yugoslavia, in quest of which the establishment of the International Tribunal is but one of many measures adopted by the Security Council).

40. For the aforementioned reasons, the Appeals Chamber considers that the International Tribunal has been lawfully established as a measure under Chapter VII of the Charter.

4. Was The Establishment Of The International Tribunal Contrary To The General Principle Whereby Courts Must Be "Established By Law"?

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

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

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

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [. . .]"(European Convention for the Protection of Human

1223

> Rights and Fundamental Freedoms, 4 November 1950, art. 6, para. 1, 213 U.N.T.S. 222, (hereinafter ECHR))

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

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

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

42. For the reasons outlined below, Appellant has not satisfied this Chamber that the requirements laid down in these three conventions must apply not only in the context of national legal systems but also with respect to proceedings conducted before an international court. This Chamber is, however, satisfied that the principle that a tribunal must be established by law, as explained below, is a general principle of law imposing an international obligation which only applies to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law. This does not mean, however, that, by contrast, an international criminal court could be set up at the mere whim of a group of governments. Such a court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be "established by law."

43. Indeed, there are three possible interpretations of the term "established by law." First, as Appellant argues, "established by law" could mean established by a legislature. Appellant claims that the International Tribunal is the product of a "mere executive order" and not of a "decision making process under democratic control, necessary to create a judicial organisation in a democratic society." Therefore Appellant maintains that the International Tribunal not been "established by law." (Defence Appeal Brief, at para. 5.4.)

The case law applying the words "established by law" in the European Convention on Human Rights has favoured this interpretation of the expression. This case law bears out the view that the relevant provision is intended to ensure that tribunals in a democratic society must not depend on the discretion of the executive; rather they should be regulated by law emanating from Parliament. (See Zand v. Austria, App. No. 7360/76, 15 Eur. Comm'n H.R. Dec. & Rep. 70, at 80 (1979); Piersack v. Belgium, App. No. 8692/79, 47 Eur. Ct. H.R. (ser. B) at 12 (1981); Crociani, Palmiotti, Tanassi and D'Ovidio v. Italy, App. Nos. 8603/79, 8722/79, 8723/79 & 8729/79 (joined) 22 Eur. Comm'n H.R. Dec. & Rep. 147, at 219 (1981).)

Or, put another way, the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature.

It is clear that the legislative, executive and judicial division of powers which is largely followed in most

1224

municipal systems does not apply to the international setting nor, more specifically, to the setting of an international organization such as the United Nations. Among the principal organs of the United Nations the divisions between judicial, executive and legislative functions are not clear cut. Regarding the judicial function, the International Court of Justice is clearly the "principal judicial organ" (*see* United Nations Charter, art. 92). There is, however, no legislature, in the technical sense of the term, in the United Nations system and, more generally, no Parliament in the world community. That is to say, there exists no corporate organ formally empowered to enact laws directly binding on international legal subjects.

It is clearly impossible to classify the organs of the United Nations into the above-discussed divisions which exist in the national law of States. Indeed, Appellant has agreed that the constitutional structure of the United Nations does not follow the division of powers often found in national constitutions. Consequently the separation of powers element of the requirement that a tribunal be "established by law" finds no application in an international law setting. The aforementioned principle can only impose an obligation on States concerning the functioning of their own national systems.

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

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

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

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

This interpretation of the guarantee that a tribunal be "established by law" is borne out by an analysis of the International Covenant on Civil and Political Rights. As noted by the Trial Chamber, at the time Article 14 of the International Covenant on Civil and Political Rights was being drafted, it was sought, unsuccessfully, to amend it to require that tribunals should be "pre-established" by law and not merely "established by law" (Decision at Trial, at para. 34). Two similar proposals to this effect were made (one

1225

by the representative of Lebanon and one by the representative of Chile); if adopted, their effect would have been to prevent all *ad hoc* tribunals. In response, the delegate from the Philippines noted the disadvantages of using the language of "pre-established by law":

> "If [the Chilean or Lebanese proposal was approved], a country would never be able to reorganize its tribunals. Similarly it could be claimed that the Nürnberg tribunal was not in existence at the time the war criminals had committed their crimes." (*See* E/CN.4/SR 109. United Nations Economic and Social Council, Commission on Human Rights, 5th Sess., Sum. Rec. 8 June 1949, U.N. Doc. 6.)

As noted by the Trial Chamber in its Decision, there is wide agreement that, in most respects, the International Military Tribunals at Nuremberg and Tokyo gave the accused a fair trial in a procedural sense (Decision at Trial, at para. 34). The important consideration in determining whether a tribunal has been "established by law" is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.

This concern about *ad hoc* tribunals that function in such a way as not to afford the individual before them basic fair trial guarantees also underlies United Nations Human Rights Committee's interpretation of the phrase "established by law" contained in Article 14, paragraph 1, of the International Covenant on Civil and Political Rights. While the Human Rights Committee has not determined that "extraordinary" tribunals or "special" courts are incompatible with the requirement that tribunals be established by law, it has taken the position that the provision is intended to ensure that any court, be it "extraordinary" or not, should genuinely afford the accused the full guarantees of fair trial set out in Article 14 of the International Covenant on Civil and Political Rights. (See General Comment on Article 14, H.R. Comm. 43rd Sess., Supp. No. 40, at para. 4, U.N. Doc. A/43/40 (1988), Cariboni v. Uruguay H.R.Comm. 159/83. 39th Sess. Supp. No. 40 U.N. Doc. A/39/40.) A similar approach has been taken by the Inter-American Commission. (*See*, e.g., Inter-Am C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am C.H.R., Annual Report 1973, OEA/Ser. P, AG/doc. 409/174, 5 March 1974, at 2-4.) The practice of the Human Rights Committee with respect to State reporting obligations indicates its tendency to scrutinise closely "special" or "extraordinary" criminal courts in order to ascertain whether they ensure compliance with the fair trial requirements of Article 14.

46. An examination of the Statute of the International Tribunal, and of the Rules of Procedure and Evidence adopted pursuant to that Statute leads to the conclusion that it has been established in accordance with the rule of law. The fair trial guarantees in Article 14 of the International Covenant on Civil and Political Rights have been adopted almost verbatim in Article 21 of the Statute. Other fair trial guarantees appear in the Statute and the Rules of Procedure and Evidence. For example, Article 13, paragraph 1, of the Statute ensures the high moral character, impartiality, integrity and competence of the Judges of the International Tribunal, while various other provisions in the Rules ensure equality of arms and fair trial.

47. In conclusion, the Appeals Chamber finds that the International Tribunal has been established in accordance with the appropriate procedures under the United Nations Charter and provides all the necessary safeguards of a fair trial. It is thus "established by law."

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

III. UNJUSTIFIED PRIMACY OF THE INTERNATIONAL TRIBUNAL OVER COMPETENT

1226

DOMESTIC COURTS

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

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

"Concurrent jurisdiction

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

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

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

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

(a) domestic jurisdiction;

(b) sovereignty of States;

(c) *jus de non evocando.*

The Prosecutor has contested each of the propositions put forward by Appellant. So have two of the *amicus curiae*, one before the Trial Chamber, the other in appeal.

The Trial Chamber has analysed Appellant's submissions and has concluded that they cannot be entertained.

51. Before this Chamber, Appellant has somewhat shifted the focus of his approach to the question of primacy. It seems fair to quote here Appellant's Brief in appeal:

> "The defence submits that the Trial Chamber should have denied it's [sic] competence to exercise primary jurisdiction while the accused was at trial in the Federal Republic of Germany and the German judicial authorities were adequately meeting their obligations under international law." (Defence Appeal Brief, at para. 7.5.)

1227

However, the three points raised in first instance were discussed at length by the Trial Chamber and, even though not specifically called in aid by Appellant here, are nevertheless intimately intermingled when the issue of primacy is considered. The Appeals Chamber therefore proposes to address those three points but not before having dealt with an apparent confusion which has found its way into Appellant's brief.

52. In paragraph 7.4 of his Brief, Appellant states that "the accused was diligently prosecuted by the German judicial authorities"(*id.*, at para 7.4 (Emphasis added)). In paragraph 7.5 Appellant returns to the period "while the accused was at trial." (*id.*, at para 7.5 (Emphasis added.)
These statements are not in agreement with the findings of the Trial Chamber I in its decision on deferral of 8 November 1994:

> "The Prosecutor asserts, and it is not disputed by the Government of the Federal Republic of Germany, nor by the Counsel for Du{ko Tadic, that the said Du{ko Tadic is the subject of an *investigation* instituted by the national courts of the Federal Republic of Germany in respect of the matters listed in paragraph 2 hereof." (Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral to the Competence of the International Tribunal in the Matter of Du{ko Tadic, 8 November 1994 (Case No. IT-94-1-D), at 8 (Emphasis added).)

There is a distinct difference between an investigation and a trial. The argument of Appellant, based erroneously on the existence of an actual trial in Germany, cannot be heard in support of his challenge to jurisdiction when the matter has not yet passed the stage of investigation.

But there is more to it. Appellant insists repeatedly (*see* Defence Appeal Brief, at paras. 7.2 & 7.4) on impartial and independent proceedings diligently pursued and not designed to shield the accused from international criminal responsibility. One recognises at once that this vocabulary is borrowed from Article 10, paragraph 2, of the Statute. This provision has nothing to do with the present case. This is not an instance of an accused being tried anew by this International Tribunal, under the exceptional circumstances described in Article 10 of the Statute. Actually, the proceedings against Appellant were deferred to the International Tribunal on the strength of Article 9 of the Statute which provides that a request for deferral may be made "at any stage of the procedure" (Statute of the International Tribunal, art. 9, para. 2). The Prosecutor has never sought to bring Appellant before the International Tribunal for a new trial for the reason that one or the other of the conditions enumerated in Article 10 would have vitiated his trial in Germany. Deferral of the proceedings against Appellant was requested in accordance with the procedure set down in Rule 9 (iii):

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

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

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

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

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

Appellant.

A. Domestic Jurisdiction

54. Appellant argued in first instance that:

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

Appellant added that:

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

This first point is not contested and the Prosecutor has conceded as much. But it does not, by itself, settle the question of the primacy of the International Tribunal. Appellant also seems so to realise. Appellant therefore explores the matter further and raises the question of State sovereignty.

B. Sovereignty Of States

55. Article 2 of the United Nations Charter provides in paragraph 1: "The Organization is based on the principle of the sovereign equality of all its Members."

In Appellant's view, no State can assume jurisdiction to prosecute crimes committed on the territory of another State, barring a universal interest "justified by a treaty or customary international law or an *opinio juris* on the issue." (Defence Trial Brief, at para. 6.2.)

Based on this proposition, Appellant argues that the same requirements should underpin the establishment of an international tribunal destined to invade an area essentially within the domestic jurisdiction of States. In the present instance, the principle of State sovereignty would have been violated. The Trial Chamber has rejected this plea, holding among other reasons:

> "In any event, the accused not being a State lacks the *locus standi* to raise the issue of primacy, which involves a plea that the sovereignty of a State has been violated, a plea only a sovereign State may raise or waive and a right clearly the accused cannot take over from the State." (Decision at Trial, para. 41.)

The Trial Chamber relied on the judgement of the District Court of Jerusalem in *Israel v. Eichmann:*

> "The right to plead violation of the sovereignty of a State is the exclusive right of that State. Only a sovereign State may raise the plea or waive it, and the accused has no right to take over the rights of that State." (36 **International Law Reports** 5, 62 (1961), affirmed by Supreme Court of Israel, 36 **International Law Reports** 277 (1962).)

Consistently with a long line of cases, a similar principle was upheld more recently in the United States of America in the matter of *United States v. Noriega:*

> "As a general principle of international law, individuals have no standing to challenge violations

> of international treaties in the absence of a protest by the sovereign involved." (746 F. Supp. 1506, 1533 (S.D. Fla. 1990).)

Authoritative as they may be, those pronouncements do not carry, in the field of international law, the weight which they may bring to bear upon national judiciaries. Dating back to a period when sovereignty stood as a sacrosanct and unassailable attribute of statehood, this concept recently has suffered progressive erosion at the hands of the more liberal forces at work in the democratic societies, particularly in the field of human rights.

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

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

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

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

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

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

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

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

1230

> the accused - Bosnia and Herzegovina and the Federal Republic of Germany. The former, on the territory of which the crimes were allegedly committed, and the latter where the accused resided at the time of his arrest, have unconditionally accepted the jurisdiction of the International Tribunal and the accused cannot claim the rights that have been specifically waived by the States concerned. To allow the accused to do so would be to allow him to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction." (Decision at Trial, at para. 41.)

57. This is all the more so in view of the nature of the offences alleged against Appellant, offences which, if proven, do not affect the interests of one State alone but shock the conscience of mankind.

As early as 1950, in the case of General Wagener, the Supreme Military Tribunal of Italy held:

> "These norms [concerning crimes against laws and customs of war], due to their highly ethical and moral content, have a universal character, not a territorial one.
>
> [. . .]
>
> The solidarity among nations, aimed at alleviating in the best possible way the horrors of war, gave rise to the need to dictate rules which do not recognise borders, punishing criminals wherever they may be.
>
> [. . .]
>
> Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lèse-humanité (reati di lesa umanità)* and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed (articles 537 and 604 of the penal code)." (13 March 1950, in **Rivista Penale** 753, 757 (Sup. Mil. Trib., Italy 1950; unofficial translation).1

Twelve years later the Supreme Court of Israel in the *Eichmann* case could draw a similar picture:

> "[T]hese crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilised nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. [. . .]
>
> Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilised nations.
>
> [. . .]

1231

> [T]hey involve the perpetration of an international crime which all the nations of the world are interested in preventing."(Israel v. Eichmann, 36 **International Law Reports** 277, 291-93 (Isr. S. Ct. 1962).)

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

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

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

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

59. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.

The Trial Chamber was fully justified in writing:

> "Before leaving this question relating to the violation of the sovereignty of States, it should be noted that the crimes which the International Tribunal has been called upon to try are not crimes of a purely domestic nature. They are really crimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law, and transcending the interest of any one State. The Trial Chamber agrees that in such circumstances, the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world. There can therefore be no objection to an international tribunal properly constituted trying these crimes on behalf of the international community."(Decision at Trial, at para. 42.)

60. The plea of State sovereignty must therefore be dismissed.

1232

C. *Jus De Non Evocando*

61. Appellant argues that he has a right to be tried by his national courts under his national laws.

No one has questioned that right of Appellant. The problem is elsewhere: is that right exclusive? Does it prevent Appellant from being tried - and having an equally fair trial (see Statute of the International Tribunal, art. 21) - before an international tribunal?

Appellant contends that such an exclusive right has received universal acceptance: yet one cannot find it expressed either in the Universal Declaration of Human Rights or in the International Covenant on Civil and Political Rights, unless one is prepared to stretch to breaking point the interpretation of their provisions.

In support of this stand, Appellant has quoted seven national Constitutions (Article 17 of the Constitution of the Netherlands, Article 101 of the Constitution of Germany (unified), Article 13 of the Constitution of Belgium, Article 25 of the Constitution of Italy, Article 24 of the Constitution of Spain, Article 10 of the Constitution of Surinam and Article 30 of the Constitution of Venezuela). However, on examination, these provisions do not support Appellant's argument. For instance, the Constitution of Belgium (being the first in time) provides:

> "**Art. 13**: No person may be withdrawn from the judge assigned to him by the law, save with his consent." (Blaustein & Flanz, Constitutions of the Countries of the World, (1991).)

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

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

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

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

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

> "Reference was also made to the *jus de non evocando*, a feature of a number of national constitutions. But that principle, if it requires that an accused be tried by the regularly established courts and not by some special tribunal set up for that particular purpose, has no application when what is in issue is the exercise by the Security Council, acting under Chapter VII, of the powers

1233

> conferred upon it by the Charter of the United Nations. Of course, this involves some surrender of sovereignty by the member nations of the United Nations but that is precisely what was achieved by the adoption of the Charter." (Decision at Trial, at para. 37.)

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

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

IV. LACK OF SUBJECT-MATTER JURISDICTION

65. Appellant's third ground of appeal is the claim that the International Tribunal lacks subject-matter jurisdiction over the crimes alleged. The basis for this allegation is Appellant's claim that the subject-matter jurisdiction under Articles 2, 3 and 5 of the Statute of the International Tribunal is limited to crimes committed in the context of an international armed conflict. Before the Trial Chamber, Appellant claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict. On appeal an additional alternative claim is asserted to the effect that there was no armed conflict at all in the region where the crimes were allegedly committed.

Before the Trial Chamber, the Prosecutor responded with alternative arguments that: (a) the conflicts in the former Yugoslavia should be characterized as an international armed conflict; and (b) even if the conflicts were characterized as internal, the International Tribunal has jurisdiction under Articles 3 and 5 to adjudicate the crimes alleged. On appeal, the Prosecutor maintains that, upon adoption of the Statute, the Security Council determined that the conflicts in the former Yugoslavia were international and that, by dint of that determination, the International Tribunal has jurisdiction over this case.

The Trial Chamber denied Appellant's motion, concluding that the notion of international armed conflict was not a jurisdictional criterion of Article 2 and that Articles 3 and 5 each apply to both internal and international armed conflicts. The Trial Chamber concluded therefore that it had jurisdiction, regardless of the nature of the conflict, and that it need not determine whether the conflict is internal or international.

A. Preliminary Issue: The Existence Of An Armed Conflict

66. Appellant now asserts the new position that there did not exist a legally cognizable armed conflict - either internal or international - at the time and place that the alleged offences were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of

1234

fighting. For example, both Conventions I and III apply until protected persons who have fallen into the power of the enemy have been released and repatriated. (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, art. 5, 75 U.N.T.S. 970 (hereinafter *Geneva Convention I*); Convention relative to the Treatment of Prisoners of War, 12 August 1949, art. 5, 75 U.N.T.S. 972 (hereinafter *Geneva Convention III*); *see also* Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, art. 6, 75 U.N.T.S. 973 (hereinafter *Geneva Convention IV*).)

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

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

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

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

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

The same provision specifies in paragraph 2 that:

"[A]t the end of the conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty."(*Id.* at art. 2, para. 2.)

1235

Under this last provision, the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the relatively loose nature of the language "for reasons related to such conflict", suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence but has admitted in oral argument that in the Prijedor region there were detention camps run not by the central authorities of Bosnia-Herzegovina but by Bosnian Serbs (Appeal Transcript; 8 September 1995, at 36-7). In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict.

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

1. Literal Interpretation Of The Statute

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

purpose behind the enactment of the Statute.

2. Teleological Interpretation Of The Statute

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

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

73. The varying nature of the conflicts is evidenced by the agreements reached by various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts, on 27 November 1991 representatives of the Federal Republic of Yugoslavia, the Yugoslavia Peoples' Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I to those Conventions. (See Memorandum of Understanding, 27 November 1991.) Significantly, the parties refrained from making any mention of common Article 3 of the Geneva Conventions, concerning non-international armed conflicts.

By contrast, an agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 of the Geneva Conventions which, in addition to setting forth rules governing internal conflicts, provides in paragraph 3 that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, the representatives of Mr. Alija Izetbegovic (President of the Republic of Bosnia and Herzegovina and the Party of Democratic Action), Mr. Radovan Karadzic (President of the Serbian Democratic Party), and Mr. Miljenko Brkic (President of the Croatian Democratic Community) committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international conflicts. (Agreement No. 1, 22 May 1992, art. 2, paras. 1-6 (hereinafter **Agreement No. 1**).) Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only. The same position was implicitly taken by the International Committee of the Red Cross ("ICRC"), at

whose invitation and under whose auspices the agreement was reached. In this connection it should be noted that, had the ICRC not believed that the conflicts governed by the agreement at issue were **internal**, it would have acted blatantly contrary to a common provision of the four Geneva Conventions (Article 6/6/6/7). This is a provision formally banning any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts. ("No special agreement shall adversely affect the situation of [the protected persons] as defined by the present Convention, nor restrict the rights which it confers upon them." (Geneva Convention I, art. 6; Geneva Convention II, art. 6; Geneva Convention III, art. 6; Geneva Convention IV, art. 7.) If the conflicts were, in fact, viewed as international, for the ICRC to accept that they would be governed only by common Article 3, plus the provisions contained in Article 2, paragraphs 1 to 6, of Agreement No. 1, would have constituted clear disregard of the aforementioned Geneva provisions. On account of the unanimously recognized authority, competence and impartiality of the ICRC, as well as its statutory mission to promote and supervise respect for international humanitarian law, it is inconceivable that, even if there were some doubt as to the nature of the conflict, the ICRC would promote and endorse an agreement contrary to a basic provision of the Geneva Conventions. The conclusion is therefore warranted that the ICRC regarded the conflicts governed by the agreement in question as internal.

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

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

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

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

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

1238

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

> "clearly intended to convey the notion that no judgement as to the international or internal character of the conflict was being exercised." (Report of the Secretary-General, at para. 62, U.N. Doc. S/25704 (3 May 1993) (hereinafter *Report of the Secretary-General*).)

In a similar vein, at the meeting at which the Security Council adopted the Statute, three members indicated their understanding that the jurisdiction of the International Tribunal under Article 3, with respect to laws or customs of war, included any humanitarian law agreement in force in the former Yugoslavia. (See statements by representatives of France, the United States, and the United Kingdom, Provisional Verbatim Record of the 3217th Meeting, at 11, 15, & 19, U.N. Doc. S/PV.3217 (25 May 1993).) As an example of such supplementary agreements, the United States cited the rules on internal armed conflict contained in Article 3 of the Geneva Conventions as well as "the 1977 Additional Protocols to these [Geneva] Conventions [of 1949]." (*Id.* at 15). This reference clearly embraces Additional Protocol II of 1977, relating to internal armed conflict. No other State contradicted this interpretation, which clearly reflects an understanding of the conflict as both internal and international (it should be emphasized that the United States representative, before setting out the American views on the interpretation of the Statute of the International Tribunal, pointed out: "[W]e understand that other members of the [Security] Council share our view regarding the following clarifications related to the Statute."(*id.*)).

76. That the Security Council purposely refrained from classifying the armed conflicts in the former Yugoslavia as either international or internal and, in particular, did not intend to bind the International Tribunal by a classification of the conflicts as international, is borne out by a *reductio ad absurdum* argument. If the Security Council had categorized the conflict as exclusively international and, in addition, had decided to bind the International Tribunal thereby, it would follow that the International Tribunal would have to consider the conflict between Bosnian Serbs and the central authorities of Bosnia-Herzegovina as international. Since it cannot be contended that the Bosnian Serbs constitute a State, arguably the classification just referred to would be based on the implicit assumption that the Bosnian Serbs are acting not as a rebellious entity but as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro). As a consequence, serious infringements of international humanitarian law committed by the government army of Bosnia-Herzegovina against Bosnian Serbian civilians in their power would not be regarded as "grave breaches", because such civilians, having the nationality of Bosnia-Herzegovina, would not be regarded as "protected persons" under Article 4, paragraph 1 of Geneva Convention IV. By contrast, atrocities committed by Bosnian Serbs against Bosnian civilians in their hands would be regarded as "grave breaches", because such civilians would be "protected persons" under the Convention, in that the Bosnian Serbs would be acting as organs or agents of another State, the Federal Republic of Yugoslavia (Serbia-Montenegro) of which the Bosnians would not possess the nationality. This would be, of course, an absurd outcome, in that it would place the Bosnian Serbs at a substantial legal disadvantage *vis-à-vis* the central authorities of Bosnia-Herzegovina. This absurdity bears out the fallacy of the argument advanced by the Prosecutor before the Appeals Chamber.

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council clearly had both aspects of the conflicts in mind when they adopted the Statute of the International Tribunal, and that they intended to empower the International Tribunal to adjudicate violations of humanitarian law that occurred in

either context. To the extent possible under existing international law, the Statute should therefore be construed to give effect to that purpose.

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

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

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

3. Logical And Systematic Interpretation Of The Statute

(a) Article 2

79. Article 2 of the Statute of the International Tribunal provides:

> "The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> (a) wilful killing;
>
> (b) torture or inhuman treatment, including biological experiments;

(c) wilfully causing great suffering or serious injury to body or health;

(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages."

By its explicit terms, and as confirmed in the Report of the Secretary-General, this Article of the Statute is based on the Geneva Conventions of 1949 and, more specifically, the provisions of those Conventions relating to "grave breaches" of the Conventions. Each of the four Geneva Conventions of 1949 contains a "grave breaches" provision, specifying particular breaches of the Convention for which the High Contracting Parties have a duty to prosecute those responsible. In other words, for these specific acts, the Conventions create universal mandatory criminal jurisdiction among contracting States. Although the language of the Conventions might appear to be ambiguous and the question is open to some debate (see, e.g.,[*Amicus Curiae*] Submission of the Government of the United States of America Concerning Certain Arguments Made by Counsel for the Accused in the Case of *The Prosecutor of the Tribunal v. Dusan Tadic*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 (hereinafter, *U.S. Amicus Curiae Brief*), it is widely contended that the grave breaches provisions establish universal mandatory jurisdiction only with respect to those breaches of the Conventions committed in international armed conflicts. Appellant argues that, as the grave breaches enforcement system only applies to international armed conflicts, reference in Article 2 of the Statute to the grave breaches provisions of the Geneva Conventions limits the International Tribunal's jurisdiction under that Article to acts committed in the context of an international armed conflict. The Trial Chamber has held that Article 2:

"[H]as been so drafted as to be self-contained rather than referential, save for the identification of the victims of enumerated acts; that identification and that alone involves going to the Conventions themselves for the definition of 'persons or property protected'."

[. . .]

[T]he requirement of international conflict does not appear on the face of Article 2. Certainly, nothing in the words of the Article expressly require its existence; once one of the specified acts is allegedly committed upon a protected person the power of the International Tribunal to prosecute arises if the spatial and temporal requirements of Article 1 are met.

[. . .]

[T]here is no ground for treating Article 2 as in effect importing into the Statute the whole of the terms of the Conventions, including the reference in common Article 2 of the Geneva Convention [sic] to international conflicts. As stated, Article 2 of the Statute is on its face, self-contained, save in relation to the definition of protected persons and things." (Decision at Trial, at paras. 49-51.)

80. With all due respect, the Trial Chamber's reasoning is based on a misconception of the grave breaches provisions and the extent of their incorporation into the Statute of the International Tribunal.

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

81. The Trial Chamber is right in implying that the enforcement mechanism has of course not been imported into the Statute of the International Tribunal, for the obvious reason that the International Tribunal itself constitutes a mechanism for the prosecution and punishment of the perpetrators of "grave breaches." However, the Trial Chamber has misinterpreted the reference to the Geneva Conventions contained in the sentence of Article 2: "persons or property protected under the provisions of the relevant Geneva Conventions." (Statute of the Tribunal, art. 2.) For the reasons set out above, this reference is clearly intended to indicate that the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as "protected" by the Geneva Conventions under the strict conditions set out by the Conventions themselves. This reference in Article 2 to the notion of "protected persons or property" must perforce cover the persons mentioned in Articles 13, 24, 25 and 26 (protected persons) and 19 and 33 to 35 (protected objects) of Geneva Convention I; in Articles 13, 36, 37 (protected persons) and 22, 24, 25 and 27 (protected objects) of Convention II; in Article 4 of Convention III on prisoners of war; and in Articles 4 and 20 (protected persons) and Articles 18, 19, 21, 22, 33, 53, 57 etc. (protected property) of Convention IV on civilians. Clearly, these provisions of the Geneva Conventions apply to persons or objects protected only to the extent that they are caught up in an international armed conflict. By contrast, those provisions do not include persons or property coming within the purview of common Article 3 of the four Geneva Conventions.

82. The above interpretation is borne out by what could be considered as part of the preparatory works of the Statute of the International Tribunal, namely the Report of the Secretary-General. There, in introducing and explaining the meaning and purport of Article 2 and having regard to the "grave breaches" system of the Geneva Conventions, reference is made to "international armed conflicts" (Report of the Secretary-General at para. 37).

83. We find that our interpretation of Article 2 is the only one warranted by the text of the Statute and the relevant provisions of the Geneva Conventions, as well as by a logical construction of their interplay as dictated by Article 2. However, we are aware that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights - which, as pointed out below (see paras. 97-127), tend to blur in many respects the traditional dichotomy between international wars and civil strife. In this connection the Chamber notes with satisfaction the statement in the *amicus curiae* brief submitted by the Government of the United States, where it is contended that:

> "the 'grave breaches' provisions of Article 2 of the International Tribunal Statute apply to armed conflicts of a non-international character as well as those of an international character." (U.S. *Amicus Curiae* Brief, at 35.)

This statement, unsupported by any authority, does not seem to be warranted as to the interpretation of Article 2 of the Statute. Nevertheless, seen from another viewpoint, there is no gainsaying its

significance: that statement articulates the legal views of one of the permanent members of the Security Council on a delicate legal issue; on this score it provides the first indication of a possible change in *opinio juris* of States. Were other States and international bodies to come to share this view, a change in customary law concerning the scope of the "grave breaches" system might gradually materialize. Other elements pointing in the same direction can be found in the provision of the German Military Manual mentioned below (para. 131), whereby grave breaches of international humanitarian law include some violations of common Article 3. In addition, attention can be drawn to the Agreement of 1 October 1992 entered into by the conflicting parties in Bosnia-Herzegovina. Articles 3 and 4 of this Agreement implicitly provide for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and Additional Protocol I. As the Agreement was clearly concluded within a framework of an internal armed conflict (*see above,* para. 73), it may be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts. One can also mention a recent judgement by a Danish court. On 25 November 1994 the Third Chamber of the Eastern Division of the Danish High Court delivered a judgement on a person accused of crimes committed together with a number of Croatian military police on 5 August 1993 in the Croatian prison camp of Dretelj in Bosnia (The Prosecution v. Refik Saric, unpublished (Den.H. Ct. 1994)). The Court explicitly acted on the basis of the "grave breaches" provisions of the Geneva Conventions, more specifically Articles 129 and 130 of Convention III and Articles 146 and 147 of Convention IV (The Prosecution v. Refik Saric, Transcript, at 1 (25 Nov. 1994)), without however raising the preliminary question of whether the alleged offences had occurred within the framework of an international rather than an internal armed conflict (in the event the Court convicted the accused on the basis of those provisions and the relevant penal provisions of the Danish Penal Code, (see id. at 7-8)). This judgement indicates that some national courts are also taking the view that the "grave breaches" system may operate regardless of whether the armed conflict is international or internal.

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

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

(b) Article 3

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

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

1243

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property."

As explained by the Secretary-General in his Report on the Statute, this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal's interpretation of those Regulations. Appellant argues that the Hague Regulations were adopted to regulate interstate armed conflict, while the conflict in the former Yugoslavia is *in casu* an internal armed conflict; therefore, to the extent that the jurisdiction of the International Tribunal under Article 3 is based on the Hague Regulations, it lacks jurisdiction under Article 3 to adjudicate alleged violations in the former Yugoslavia. Appellant's argument does not bear close scrutiny, for it is based on an unnecessarily narrow reading of the Statute.

(i) The Interpretation of Article 3

87. A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all "violations of the laws or customs of war"; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

To identify the content of the class of offences falling under Article 3, attention should be drawn to an important fact. The expression "violations of the laws or customs of war" is a traditional term of art used in the past, when the concepts of "war" and "laws of warfare" still prevailed, before they were largely replaced by two broader notions: (i) that of "armed conflict", essentially introduced by the 1949 Geneva Conventions; and (ii) the correlative notion of "international law of armed conflict", or the more recent and comprehensive notion of "international humanitarian law", which has emerged as a result of the influence of human rights doctrines on the law of armed conflict. As stated above, it is clear from the Report of the Secretary-General that the old-fashioned expression referred to above was used in Article 3 of the Statute primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto (Report of the Secretary-General, at para. 41). However, as the Report indicates, the Hague Convention, considered *qua* customary law, constitutes an important area of humanitarian international law. (*Id.*) In other words, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law" and that the so-called "Hague Regulations" constitute an important segment of such law. Furthermore, the Secretary-General has also correctly admitted that the Hague Regulations have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in hostilities (prisoners of war), the wounded and the sick) but also the conduct of hostilities; in the words of the Report: "The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions." (Id., at para. 43.) These comments suggest that Article 3 is intended to cover both Geneva and Hague rules law. On the other hand, the Secretary-General's subsequent comments indicate that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions (*id.*, at paras. 43-4). As pointed out above, this list is, however, merely illustrative: indeed, Article 3, before enumerating the violations provides that they "shall include but not be limited to" the list of offences. Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover **all violations** of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).

1244

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

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

The American delegate stated the following:

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

The British delegate stated:

> "[I]t would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions." (*Id.*, at p. 19.)

It should be added that the representative of Hungary stressed:

> "the importance of the fact that the jurisdiction of the International Tribunal covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of the former Yugoslavia." (*Id.*, at p. 20.)

Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law.

89. In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as "grave breaches" by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered qua treaty law, i.e., agreements which have not turned into customary international law (on this point *see below,* para. 143).

90. The Appeals Chamber would like to add that, in interpreting the meaning and purport of the expressions "violations of the laws or customs of war" or "violations of international humanitarian law",

1245

one must take account of the context of the Statute as a whole. A systematic construction of the Statute emphasises the fact that various provisions, in spelling out the purpose and tasks of the International Tribunal or in defining its functions, refer to "**serious violations**" of international humanitarian law" (*See* Statute of the International Tribunal, Preamble, arts. 1, 9(1), 10(1)-(2), 23(1), 29(1) (Emphasis added.)). It is therefore appropriate to take the expression "violations of the laws or customs of war" to cover serious violations of international humanitarian law.

91. Article 3 thus confers on the International Tribunal jurisdiction over **any** serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.

92. This construction of Article 3 is also corroborated by the object and purpose of the provision. When it decided to establish the International Tribunal, the Security Council did so to put a stop to all serious violations of international humanitarian law occurring in the former Yugoslavia and not only special classes of them, namely "grave breaches" of the Geneva Conventions or violations of the "Hague law." Thus, if correctly interpreted, Article 3 fully realizes the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.

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

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

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

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

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

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions

1246

must be met (see below, para. 143);

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

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the "serious violation" has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.

95. The Appeals Chamber deems it necessary to consider now two of the requirements set out above, namely: (i) the existence of customary international rules governing internal strife: and (ii) the question of whether the violation of such rules may entail individual criminal responsibility. The Appeals Chamber focuses on these two requirements because before the Trial Chamber the Defence argued that they had not been met in the case at issue. This examination is also appropriate because of the paucity of authoritative judicial pronouncements and legal literature on this matter.

(iii) Customary Rules of International Humanitarian Law Governing Internal Armed Conflicts

a. General

96. Whenever armed violence erupted in the international community, in traditional international law the legal response was based on a stark dichotomy: belligerency or insurgency. The former category applied to armed conflicts between sovereign States (unless there was recognition of belligerency in a civil war), while the latter applied to armed violence breaking out in the territory of a sovereign State. Correspondingly, international law treated the two classes of conflict in a markedly different way: interstate wars were regulated by a whole body of international legal rules, governing both the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed violence (civilians, the wounded, the sick, shipwrecked, prisoners of war). By contrast, there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

97. Since the 1930s, however, the aforementioned distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development. First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed

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

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

99. Before pointing to some principles and rules of customary law that have emerged in the international community for the purpose of regulating civil strife, a word of caution on the law-making process in the law of armed conflict is necessary. When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments. In appraising the formation of customary rules or general principles one should therefore be aware that, on account of the inherent nature of this subject-matter, reliance must primarily be placed on such elements as official pronouncements of States, military manuals and judicial decisions.

b. **Principal Rules**

100. The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. As early as the Spanish Civil War (1936-39), State practice revealed a tendency to disregard

the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars. The Spanish Civil War had elements of both an internal and an international armed conflict. Significantly, both the republican Government and third States refused to recognize the insurgents as belligerents. They nonetheless insisted that certain rules concerning international armed conflict applied. Among rules deemed applicable were the prohibition of the intentional bombing of civilians, the rule forbidding attacks on non-military objectives, and the rule regarding required precautions when attacking military objectives. Thus, for example, on 23 March 1938, Prime Minister Chamberlain explained the British protest against the bombing of Barcelona as follows:

> "The rules of international law as to what constitutes a military objective are undefined and pending the conclusion of the examination of this question [. . .] I am not in a position to make any statement on the subject. The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal, and His Majesty's Government's protest was based on information which led them to the conclusion that the bombardment of Barcelona, carried on apparently at random and without special aim at military objectives, was in fact of this nature." (333 House of Commons Debates, col. 1177 (23 March 1938).)

More generally, replying to questions by Member of Parliament Noel-Baker concerning the civil war in Spain, on 21 June 1938 the Prime Minister stated the following:

> "I think we may say that there are, at any rate, three rules of international law or three principles of international law which are as applicable to warfare from the air as they are to war at sea or on land. In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population in the neighbourhood is not bombed." (337 House of Commons Debates, cols. 937-38 (21 June 1938).)

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

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

1249

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

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

103. Common Article 3 contains not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts in the former Yugoslavia, parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities. For example, in the 1967 conflict in Yemen, both the Royalists and the President of the Republic agreed to abide by the essential rules of the Geneva Conventions. Such undertakings reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict.

104. Agreements made pursuant to common Article 3 are not the only vehicle through which international humanitarian law has been brought to bear on internal armed conflicts. In several cases reflecting customary adherence to basic principles in internal conflicts, the warring parties have unilaterally committed to abide by international humanitarian law.

105. As a notable example, we cite the conduct of the Democratic Republic of the Congo in its civil war. In a public statement issued on 21 October 1964, the Prime Minister made the following commitment regarding the conduct of hostilities:

> "For humanitarian reasons, and with a view to reassuring, in so far as necessary, the civilian population which might fear that it is in danger, the Congolese Government wishes to state that the Congolese Air Force will limit its action to military objectives.
>
> In this matter, the Congolese Government desires not only to protect human lives but also to respect the Geneva Convention [sic]. It also expects the rebels - and makes an urgent appeal to them to that effect - to act in the same manner.
>
> As a practical measure, the Congolese Government suggests that International Red Cross observers come to check on the extent to which the Geneva Convention [sic] is being respected, particularly in the matter of the treatment of prisoners and the ban against taking hostages." (Public Statement of Prime Minister of the Democratic Republic of the Congo (21 Oct. 1964), *reprinted* in **American Journal of International Law** (1965) 614, at 616.)

1250

This statement indicates acceptance of rules regarding the conduct of internal hostilities, and, in particular, the principle that civilians must not be attacked. Like State practice in the Spanish Civil War, the Congolese Prime Minister's statement confirms the status of this rule as part of the customary law of internal armed conflicts. Indeed, this statement must not be read as an offer or a promise to undertake obligations previously not binding; rather, it aimed at reaffirming the existence of such obligations and spelled out the notion that the Congolese Government would fully comply with them.

106. A further confirmation can be found in the "Operational Code of Conduct for Nigerian Armed Forces", issued in July 1967 by the Head of the Federal Military Government, Major General Y. Gowon, to regulate the conduct of military operations of the Federal Army against the rebels. In this "Operational Code of Conduct", it was stated that, to repress the rebellion in Biafra, the Federal troops were duty-bound to respect the rules of the Geneva Conventions and in addition were to abide by a set of rules protecting civilians and civilian objects in the theatre of military operations. (See A.H.M. Kirk-Greene, **1 Crisis and Conflict in Nigeria, A Documentary Sourcebook 1966-1969**, 455-57 (1971).) This "Operational Code of Conduct" shows that in a large-scale and protracted civil war the central authorities, while refusing to grant recognition of belligerency, deemed it necessary to apply not only the provisions of the Geneva Conventions designed to protect civilians in the hands of the enemy and captured combatants, but also general rules on the conduct of hostilities that are normally applicable in international conflicts. It should be noted that the code was actually applied by the Nigerian authorities. Thus, for instance, it is reported that on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba, (see New Nigerian, 28 June 1968, at 1). In addition, reportedly on 3 September 1968, a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba. (See Daily Times - Nigeria, 3 September 1968, at 1; Daily Times, - Nigeria, 4 September 1968, at 1.)

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

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

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

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

109. As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable

contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.

110. The application of certain rules of war in both internal and international armed conflicts is corroborated by two General Assembly resolutions on "Respect of human rights in armed conflict." The first one, resolution 2444, was unanimously4 adopted in 1968 by the General Assembly: "[r]ecognizing the necessity of applying basic humanitarian principles in all armed conflicts," the General Assembly "affirm[ed]"

> "the following principles for observance by all governmental and other authorities responsible for action in armed conflict: (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) That it is prohibited to launch attacks against the civilian populations as such; (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." (G.A. Res. 2444, U.N. GAOR., 23rd Session, Supp. No. 18 U.N. Doc. A/7218 (1968).)

It should be noted that, before the adoption of the resolution, the United States representative stated in the Third Committee that the principles proclaimed in the resolution "constituted a reaffirmation of existing international law" (U.N. GAOR, 3rd Comm., 23rd Sess., 1634th Mtg., at 2, U.N. Doc. A/C.3/SR.1634 (1968)). This view was reiterated in 1972, when the United States Department of Defence pointed out that the resolution was "declaratory of existing customary international law" or, in other words, "a correct restatement" of "principles of customary international law." (See 67 **American Journal of International Law** (1973), at 122, 124.)

111. Elaborating on the principles laid down in resolution 2444, in 1970 the General Assembly unanimously5 adopted resolution 2675 on "Basic principles for the protection of civilian populations in armed conflicts." In introducing this resolution, which it co-sponsored, to the Third Committee, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts." (U.N. GAOR, 3rd Comm., 25th Sess., 1785th Mtg., at 281, U.N. Doc. A/C.3/SR.1785 (1970); *see also* U.N. GAOR, 25th Sess., 1922nd Mtg., at 3, U.N. Doc. A/PV.1922 (1970) (statement of the representative of Cuba during the Plenary discussion of resolution 2675).)The resolution stated the following:

> "Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . . the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict:
>
> 1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

1252

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used only by civilian populations should not be the object of military operations.

6. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application." (G.A. Res. 2675, U.N. GAOR., 25th Sess., Supp. No. 28 U.N. Doc. A/8028 (1970).)

112. Together, these resolutions played a twofold role: they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind and, at the same time, were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

113. That international humanitarian law includes principles or general rules protecting civilians from hostilities in the course of internal armed conflicts has also been stated on a number of occasions by groups of States. For instance, with regard to Liberia, the (then) twelve Member States of the European Community, in a declaration of 2 August 1990, stated:

"In particular, the Community and its Member States call upon the parties in the conflict, in conformity with international law and the most basic humanitarian principles, to safeguard from violence the embassies and places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter." (6 European Political Cooperation Documentation Bulletin, at 295 (1990).)

114. A similar, albeit more general, appeal was made by the Security Council in its resolution 788 (in operative paragraph 5 it called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law") (S.C. Res. 788 (19 November 1992)), an appeal reiterated in resolution 972 (S.C. Res. 972 (13 January 1995)) and in resolution 1001 (S.C. Res. 1001 (30 June 1995)).

Appeals to the parties to a civil war to respect the principles of international humanitarian law were also

1253

made by the Security Council in the case of Somalia and Georgia. As for Somalia, mention can be made of resolution 794 in which the Security Council in particular condemned, as a breach of international humanitarian law, "the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population") (S.C. Res. 794 (3 December 1992)) and resolution 814 (S.C. Res. 814 (26 March 1993)). As for Georgia, see Resolution 993, (in which the Security Council reaffirmed "the need for the parties to comply with international humanitarian law") (S.C. Res. 993 (12 May 1993)).

115. Similarly, the now fifteen Member States of the European Union recently insisted on respect for international humanitarian law in the civil war in Chechnya. On 17 January 1995 the Presidency of the European Union issued a declaration stating:

> "The European Union is following the continuing fighting in Chechnya with the greatest concern. The promised cease-fires are not having any effect on the ground. Serious violations of human rights and international humanitarian law are continuing. The European Union strongly deplores the large number of victims and the suffering being inflicted on the civilian population." (Council of the European Union - General Secretariat, Press Release 4215/95 (Presse II-G), at 1 (17 January 1995).)

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

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

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

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

This proposition is confirmed by the views expressed by a number of States. Thus, for example, mention can be made of the stand taken in 1987 by El Salvador (a State party to Protocol II). After having been repeatedly invited by the General Assembly to comply with humanitarian law in the civil war raging on its territory (*see*, e.g., G.A. Res. 41/157 (1986)), the Salvadorian Government declared that, strictly speaking, Protocol II did not apply to that civil war (although an objective evaluation prompted some Governments to conclude that all the conditions for such applications were met, (see, e.g., 43 **Annuaire Suisse de Droit International**, (1987) at 185-87). Nevertheless, the Salvadorian Government undertook to comply with the provisions of the Protocol, for it considered that such provisions "developed and supplemented" common Article 3, "which in turn constitute[d] the minimum protection due to every human being at any time and place"(6) (*See Informe de la Fuerza Armata de El Salvador sobre el*

respeto y la vigencia de las normas del Derecho Internacional Humanitario durante el periodo de Septiembre de 1986 a Agosto de 1987, at 3 (31 August 1987) (forwarded by Ministry of Defence and Security of El Salvador to Special Representative of the United Nations Human Rights Commission (2 October 1987),; (unofficial translation). Similarly, in 1987, Mr. M.J. Matheson, speaking in his capacity as Deputy Legal Adviser of the United States State Department, stated that:

> "[T]he basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence towards persons taking no active part in hostilities, hostage taking, degrading treatment, and punishment without due process" (Humanitarian Law Conference, Remarks of Michael J. Matheson, (2) **American University Journal of International Law and Policy** (1987) 419, at 430-31).

118. That at present there exist general principles governing the conduct of hostilities (the so-called "Hague Law") applicable to international and internal armed conflicts is also borne out by national military manuals. Thus, for instance, the German Military Manual of 1992 provides that:

> Members of the German army, like their Allies, shall comply with the rules of international humanitarian law in the conduct of military operations in all armed conflicts, whatever the nature of such conflicts." (Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch, August 1992, DSK AV207320065, at para. 211 in fine; unofficial translation.)(7)

119. So far we have pointed to the formation of general rules or principles designed to protect **civilians or civilian objects** from the hostilities or, more generally, to protect **those who do not (or no longer) take active part in hostilities**. We shall now briefly show how the gradual extension to internal armed conflict of rules and principles concerning international wars has also occurred as regards **means and methods of warfare**. As the Appeals Chamber has pointed out above (see para. 110), a general principle has evolved limiting the right of the parties to conflicts "to adopt means of injuring the enemy." The same holds true for a more general principle, laid down in the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, and revised in 1994, namely Article 5, paragraph 3, whereby "[w] eapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances." (*Declaration of Minimum Humanitarian Standards, reprinted in, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995).) It should be noted that this Declaration, emanating from a group of distinguished experts in human rights and humanitarian law, has been indirectly endorsed by the Conference on Security and Cooperation in Europe in its Budapest Document of 1994 (Conference on Security and Cooperation in Europe, Budapest Document 1994: Towards Genuine Partnership in a New Era, para. 34 (1994)) and in 1995 by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (*Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session,* Commission on Human Rights, 51st Sess., Agenda Item 19, at 1, U.N. Doc. E/CN.4/1995/L.33 (1995)).

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

120. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts. By way of illustration, we will mention chemical weapons. Recently a number of States

1255

have stated that the use of chemical weapons by the central authorities of a State against its own population is contrary to international law. On 7 September 1988 the [then] twelve Member States of the European Community made a declaration whereby:

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

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

121. A firm position to the same effect was taken by the British authorities: in 1988 the Foreign Office stated that the Iraqi use of chemical weapons against the civilian population of the town of Halabja represented "a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The U.K. condemns unreservedly this and all other uses of chemical weapons." (59 **British Yearbook of International Law** (1988) at 579; *see also* id. at 579-80.) A similar stand was taken by the German authorities. On 27 October 1988 the German Parliament passed a resolution whereby it "resolutely rejected the view that the use of poison gas was allowed on one's own territory and in clashes akin to civil wars, assertedly because it was not expressly prohibited by the Geneva Protocol of 1925"(8) . (50 **Zeitschrift Für Ausländisches Öffentliches Recht Und Völkerrecht** (1990), at 382-83; unofficial translation.) Subsequently the German representative in the General Assembly expressed Germany's alarm "about reports of the use of chemical weapons against the Kurdish population" and referred to "breaches of the Geneva Protocol of 1925 and other norms of international law." (U.N. GAOR, 1st Comm., 43rd Sess., 31st Mtng., at 16, U.N. Doc. A/C.1/43/PV.31 (1988).)

122. A clear position on the matter was also taken by the United States Government. In a "press guidance" statement issued by the State Department on 9 September 1988 it was stated that:

> Questions have been raised as to whether the prohibition in the 1925 Geneva Protocol against [chemical weapon] use 'in war' applies to [chemical weapon] use in internal conflicts. However, it is clear that such use against the civilian population would be contrary to the customary international law that is applicable to internal armed conflicts, as well as other international agreements." (United States, Department of State, Press Guidance (9 September 1988).)

On 13 September 1988, Secretary of State George Schultz, in a hearing before the United States Senate Judiciary Committee strongly condemned as "completely unacceptable" the use of chemical weapons by Iraq. (*Hearing on Refugee Consultation with Witness Secretary of State George Shultz,* 100th Cong., 2d Sess., (13 September 1988) (Statement of Secretary of State Shultz).) On 13 October of the same year,

1256

Ambassador R.W. Murphy, Assistant Secretary for Near Eastern and South Asian Affairs, before the Sub-Committee on Europe and the Middle East of the House of Representatives Foreign Affairs Committee did the same, branding that use as "illegal." (See **Department of State Bulletin** (December 1988) 41, at 43-4.)

123. It is interesting to note that, reportedly, the Iraqi Government "flatly denied the poison gas charges." (New York Times, 16 September 1988, at A 11.) Furthermore, it agreed to respect and abide by the relevant international norms on chemical weapons. In the aforementioned statement, Ambassador Murphy said:

> "On September 17, Iraq reaffirmed its adherence to international law, including the 1925 Geneva Protocol on chemical weapons as well as other international humanitarian law. We welcomed this statement as a positive step and asked for confirmation that Iraq means by this to renounce the use of chemical weapons inside Iraq as well as against foreign enemies. On October 3, the Iraqi Foreign Minister confirmed this directly to Secretary Schultz." (*Id.* at 44.)

This information had already been provided on 20 September 1988 in a press conference by the State Department spokesman Mr Redman. (See State Department Daily Briefing, 20 September 1988, Transcript ID: 390807, p. 8.) It should also be stressed that a number of countries (Turkey, Saudi Arabia, Egypt, Jordan, Bahrain, Kuwait) as well as the Arab League in a meeting of Foreign Ministers at Tunis on 12 September 1988, strongly disagreed with United States' assertions that Iraq had used chemical weapons against its Kurdish nationals. However, this disagreement did not turn on the legality of the use of chemical weapons; rather, those countries accused the United States of "conducting a smear media campaign against Iraq." (See New York Times, 15 September 1988, at A 13; Washington Post, 20 September 1988, at A 21.)

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

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

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

127. Notwithstanding these limitations, it cannot be denied that customary rules have developed to

1257

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

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

128. Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such prohibitions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction. It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. (See The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, at 445, 467 (1950).) The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals (id., at 445-47, 467). Where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (*id.*, at 447.)

129. Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts. As mentioned above, during the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law (see paras. 106 and 125).

131. Breaches of common Article 3 are clearly, and beyond any doubt, regarded as punishable by the Military Manual of Germany (**Humanitäres Völkerrecht in bewaffneten Konflikten** - Handbuch, August 1992, DSK AV2073200065, at para. 1209)(unofficial translation), which includes among the "grave breaches of international humanitarian law", "criminal offences" against persons protected by common Article 3, such as "wilful killing, mutilation, torture or inhumane treatment including biological experiments, wilfully causing great suffering, serious injury to body or health, taking of hostages", as well as "the fact of impeding a fair and regular trial"(9) . (Interestingly, a previous edition of the German Military Manual did not contain any such provision. See Kriegsvölkerrecht - Allgemeine Bestimmungen des Kriegführungsrechts und Landkriegsrecht, ZDv 15-10, March 1961, para. 12; Kriegsvölkerrecht - Allgemeine Bestimmungen des Humanitätsrechts, ZDv 15/5, August 1959, paras. 15-16, 30-2).

1258

Furthermore, the "Interim Law of Armed Conflict Manual" of New Zealand, of 1992, provides that "while non-application [i.e. breaches of common Article 3] would appear to render those responsible liable to trial for 'war crimes', trials would be held under national criminal law, since no 'war' would be in existence" (New Zealand Defence Force Directorate of Legal Services, DM (1992) at 112, Interim Law of Armed Conflict Manual, para. 1807, 8). The relevant provisions of the manual of the United States (Department of the Army, The Law of Land Warfare, Department of the Army Field Manual, FM 27-10, (1956), at paras. 11 & 499) may also lend themselves to the interpretation that "war crimes", **i.e.,** "every violation of the law of war", include infringement of common Article 3. A similar interpretation might be placed on the British Manual of 1958 (War Office, The Law of War on Land, Being Part III of the Manual of Military Law (1958), at para. 626).

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

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

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the

1259

notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity. As pointed out above (*see* para. 132) such violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

136. It is also fitting to point out that the parties to certain of the agreements concerning the conflict in Bosnia-Herzegovina, made under the auspices of the ICRC, clearly undertook to punish those responsible for violations of international humanitarian law. Thus, Article 5, paragraph 2, of the aforementioned Agreement of 22 May 1992 provides that:

> "Each party undertakes, when it is informed, in particular by the ICRC, of any allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence **and to punish those responsible in accordance with the law in force.**" (Agreement No. 1, art. 5, para. 2 (Emphasis added).)

Furthermore, the Agreement of 1st October 1992 provides in Article 3, paragraph 1, that

> "All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Article 50 of the First, Article 51 of the Second, Article 130 of the Third and Article 147 of the Fourth Geneva Convention, as well as in Article 85 of Additional Protocol I, will be unilaterally and unconditionally released." (Agreement No. 2, 1 October 1992, art. 3, para. 1.)

This provision, which is supplemented by Article 4, paragraphs 1 and 2 of the Agreement, implies that all those responsible for offences contrary to the Geneva provisions referred to in that Article must be brought to trial. As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.

(v) **Conclusion**

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

(c) Article 5

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

> "The International Tribunal shall have the power to prosecute persons responsible for the

1260

following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation;

(e) imprisonment;

(f) torture;

(g) rape;

(h) persecutions on political, racial and religious grounds;

(i) other inhumane acts."

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

139. Before the Trial Chamber, Counsel for Defence emphasized that both of these formulations of the crime limited it to those acts committed "in the execution of or in connection with any crime against peace or any war crime." He argued that this limitation persists in contemporary international law and constitutes a requirement that crimes against humanity be committed in the context of an international armed conflict (which assertedly was missing in the instant case). According to Counsel for Defence, jurisdiction under Article 5 over crimes against humanity "committed in armed conflict, whether international or internal in character" constitutes an ex post facto law violating the principle of *nullum crimen sine lege.* Although before the Appeals Chamber the Appellant has forgone this argument (*see* Appeal Transcript, 8 September 1995, at 45), in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5.

140. As the Prosecutor observed before the Trial Chamber, the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal. Although the nexus requirement in the Nuremberg Charter was carried over to the 1948 General Assembly resolution affirming the Nuremberg principles, there is no logical or legal basis for this requirement and it has been abandoned in subsequent State practice with respect to crimes against humanity. Most notably, the nexus requirement was eliminated from the definition of crimes against humanity contained in Article II(1)(c) of Control Council Law No. 10 of 20 December 1945. (Control Council Law No. 10, Control Council for Germany, Official Gazette, 31 January 1946, at p. 50.). The obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict. (Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, art. 1, 78 U.N.T.S. 277, Article 1 (providing that genocide, "whether committed in time of peace or in time of war, is a crime under international

1261

law"); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2Article . I(1)).

141. It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 comports with the principle of *nullum crimen sine lege.*

142. We conclude, therefore, that Article 5 may be invoked as a basis of jurisdiction over crimes committed in either internal or international armed conflicts. In addition, for the reasons stated above, in Section IV A, (paras. 66-70), we conclude that in this case there was an armed conflict. Therefore, the Appellant's challenge to the jurisdiction of the International Tribunal under Article 5 must be dismissed.

C. May The International Tribunal Also Apply International Agreements Binding Upon The Conflicting Parties?

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

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

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

V. DISPOSITION

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

1262

The Appeals Chamber

(1) By 4 votes to 1,

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

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

AGAINST: *Judge* Li

(2) Unanimously

Decides that the aforementioned plea is dismissed.

(3) Unanimously

Decides that the challenge to the primacy of the International Tribunal over national courts is dismissed.

(4) By 4 votes to 1

Decides that the International Tribunal has subject-matter jurisdiction over the current case.

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

AGAINST: *Judge* Sidhwa

ACCORDINGLY, THE DECISION OF THE TRIAL CHAMBER OF 10 AUGUST 1995 STANDS REVISED, THE JURISDICTION OF THE INTERNATIONAL TRIBUNAL IS AFFIRMED AND THE APPEAL IS DISMISSED.

Done in English, this text being authoritative.*

(Signed) Antonio Cassese,
President

Judges Li, Abi-Saab and Sidhwa append separate opinions to the Decision of the Appeals Chamber

Judge Deschênes appends a Declaration.

(Initialled) A. C.

Dated this second day of October 1995
The Hague

PROSECUTION INDEX OF AUTHORITIES

ANNEX 14.

Prosecutor v. Hadzihasanovic et al., Decision on Joint Challenge to Jurisdiction, Case No. IT-01-47-PT, T. Ch., 12 November 2002, paras 55-66

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-01-47-PT
		Date:	12 November 2002
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Wolfgang Schomburg, Presiding**
Judge Florence Ndpele Mwachande Mumba
Judge Carmel Agius

Registrar: **Mr. Hans Holthuis**

Decision of: **12 November 2002**

PROSECUTOR

v.

ENVER HADŽIHASANOVIĆ
MEHMED ALAGIĆ
AMIR KUBURA

DECISION ON JOINT CHALLENGE TO JURISDICTION

The Office of the Prosecutor:

Mr. Ekkehard Withopf

Counsel for the Accused:

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Ms. Vasvija Vidović and Mr. John Jones for Mehmed Alagić
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

52. The Prosecution cites the Statutes of the Sierra Leone and East Timor Tribunals, which are applicable to internal armed conflicts and contain specific provisions for command responsibility.[98] The Prosecution argues that these post-1994 developments show that the international community recognised that command responsibility formed part of customary international law predating the temporal jurisdiction of the ICTY Statute in 1991 and that these Statutes are later enactments of a existing prior customary norm. The Prosecution also cites the UN ILC commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind in this regard.[99]

53. In its Reply, the Prosecution cites "Special Agreements" entered into between the parties, which, it argues, indicates that they did not consider conflict classification a bar to applying grave breaches and certain aspects of Additional Protocol I.[100]

54. In the Prosecution's opinion, a finding against the Prosecution will not end the case as conflict classification is "irrelevant" to the Amended Indictment.[101]

B. General Principles

55. In deciding upon the present issue, namely whether international law at the relevant time did or did not provide for criminal responsibility of superiors for omissions as foreseen in Article 7(3), pursuant to the doctrine of command responsibility, in the context of non-international armed conflict, and therefore, whether charges to that effect fall within the jurisdiction of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, the Trial Chamber is duty-bound to fully respect the principle of *nullum crimen sine lege* in this broader context. The Trial Chamber observes that the question before it is limited *de facto* to superiors serving in armed forces and who are held responsible in this capacity. The Defence in their submissions rely on this principle and argue that this principle stands in the way of holding the Accused in this case responsible under command responsibility for violations of humanitarian law as the conflict in this case is characterised as an "armed conflict", and not as an international armed conflict.

[98] Written Submissions of Prosecution, paras 49-50; Prosecution Reply, para. 9 (submitting that the Sierra Leone argued unsuccessfully for the jurisdiction of the Special Court to begin in 1991).
[99] Written Submissions of Prosecution, para. 26, citing UN ILC Commentary on Article 6 (responsibility of superiors).
[100] Prosecution Reply, para. 3.
[101] Prosecution Response, para. 10.

56. The principle of *nullum crimen sine lege* is a fundamental principle in criminal law and in international human rights law.[102] This principle is enshrined in numerous international conventions including *inter alia*:

- Article 11(2) of the Universal Declaration of Human Rights of 10 December 1948[103];
- Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") of 4 November 1950; [104]
- Article 15 of the International Covenant on Civil and Political Rights ("ICCPR") of 16 December 1966; [105]
- Article 9 of the American Convention on Human Rights of 22 November 1969;[106]
- Article 6(2)(c) of Additional Protocol II to the Geneva Conventions of 8 June 1977;[107]
- and Article 10 of the Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind of 1991.[108]

No doubt the same principle is reflected in nearly all national jurisdictions on a global level. In some jurisdictions, the principle of *nullum crimen sine lege* is even enshrined in the constitution.[109]

57. While the Statute of the International Tribunal does not contain a specific article stating this general principle of law, the Trial Chamber observes that the Secretary-General's Report states that:

> Figt is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally recognized standards are, *in particular*, contained in article 14 of the International Covenant on Civil and Political Rights.[110]

Furthermore, the jurisdictional requirement contained in Article 1 indirectly reflects it:

---

[102] Notably, no derogation is permitted from the principle of *nullum crimen sine lege* in times of war or other public emergency in the ECHR, Art. 15.
[103] G.A. Res 217A (III), U.N. Doc. A/811 (1948).
[104] 213 U.N.T.S. 221; European Treaty Series ("ETS") 005.
[105] 993 U.N.T.S. 171.
[106] 1114 U.N.T.S. 123.
[107] 1977 U.N.J.Y.B. 135.
[108] Draft Articles on the Draft Code of Crimes against the Peace and Security of Mankind (as revised by the International Law Commission through 1991). First Adopted by the U.N. ILC, 4 December 1954, U.N. Doc. A/46/405 (1991), 30 I.L.M. 1554 (1991).
[109] See, e.g., Basic Law (*Grundgesetz*) for the Federal Republic of Germany, which enshrines the principle of *nullum crimen sine lege* in Art. 103 Abs. II GG: "Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde" ("An act may be punished only if it was defined by a law as a criminal offense

> The International Tribunal shall have the power to prosecute persons responsible for *serious violations of international humanitarian law* F...ğ.

In commentaries on the draft Statute of this Tribunal, the principle of *nullum crimen sine lege* was discussed in reference to the substantive offences being considered for inclusion in the Statute, and the amount of specificity required in the Statute.[111] The Secretary-General's Report explicitly comments on this issue:

> in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.[112]

Specifically on the principle of *nullum crimen sine lege*, the Secretary-General said in his report:

> the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to the specific conventions does not arise.[113]

58. Under the jurisprudence of the European Court of Human Rights ("ECtHR"), Article 7 of the ECHR[114] allows for the "gradual clarification" of the rules of criminal liability through judicial interpretation.[115] It is not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided.[116] In the case of *S.W. v. U.K.*, in relation to the principle of *nullum crimen sine lege*, the European Court of Human Rights held:

> However clearly drafted a legal provision may be, in any system of law, including criminal law, *there is an inevitable element of judicial interpretation.* There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances ... Ftğhe progressive development of the criminal law through judicial law-making is a *well entrenched and necessary*

---

before the act was committed."). See also, Constitution of the United States of America, Art. 1, Sect. (9)(3): "No Bill of Attainder or *ex post facto* law shall be passed."

[110] Secretary-General's Report, para. 106. (emphasis added).

[111] See, e.g. S/25504, p.16.

[112] Secretary-General's Report, para. 29.

[113] Ibid, para. 34.

[114] Article 7(1) of the ECHR provides, in part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed." See also, the Statute for the ICC, Art. 22, which provides: 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted. 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

[115] ECtHR, *S.W. v. UK* (1995). The fundamental principles reflected in *S.W. v. UK* has been applied consistently by the European Court. See *Case of Streletz, Kessler and Krenz v. Germany* (2001), para. 49.

[116] ECtHR, *S.W. v. UK* (1995), para. 35, citing *Kokkinakis v. Greece* (1993), para. 52: "an offence must be clearly defined in law ... Fandğ this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable." See also, *Handyside v. UK* (1974).

> *part of legal tradition. Article 7 cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence if the offence and could be reasonably foreseen.*[117]

The European Court of Human Rights found that the term "law" in Article 7(1) of the ECHR includes both written and unwritten law, and "implies qualitative requirements, notably those of accessibility and foreseeability."[118]

59. Article 7(2) of the ECHR states that:

> This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.[119]

60. The Trial Chamber in the *Čelebići* case discussed the principle of *nullum crimen sine lege* in detail. From this analysis, the following observations are particularly relevant:

> 402. The principles *nullum crimen sine lege* and *nulla poena sine lege* are well recognised in the world's major criminal justice systems as being fundamental principles of criminality. Another such fundamental principle is the prohibition against *ex post facto* criminal laws with its derivative rule of non-retroactive application of criminal laws and criminal sanctions. Associated with these principles are the requirement of specificity and the prohibition of ambiguity in criminal legislation. These considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised.
>
> 403. The above principles of legality exist and are recognised in all the world's major criminal justice systems. It is not certain to what extent they have been admitted as part of international legal practice, separate and apart from the existence of the national legal systems. This is essentially because of the different methods of criminalisation of conduct in national and international criminal justice systems.
>
> 404. Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States.
>
> 405. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards. They appear to be distinctive, in the *obvious objective of maintaining a balance between the preservation of justice and fairness towards the accused and taking into account the preservation of world order*. To this end, the affected State or States must take into account the following factors, *inter alia*: the nature of international law; the absence of international legislative policies and standards; the *ad hoc* processes of technical drafting; and the basic assumption that international criminal law norms will be embodied into the national criminal law of the various States.
>
> F...ğ

---

[117] ECtHR, *S.W. v. UK* (1995), para. 36. (emphasis added).

[118] Ibid, para. 35.

[119] According to Harris, O'Boyle and Warbrick, this provision implies that: "Fiğf there is no treaty binding upon the parties to a dispute and if no rule of customary international law based upon state practice applies, recourse may be had to 'general principles of law recognised by civilised nations', i.e. by the states members of the international community, to fill the gap." David J. Harris, Michael O'Boyle and Colin Warbrick, Law of the European Convention on Human Rights (London: Butterworths 1995) p. 282.

> 412. It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended. *The paramount object in the construction of a criminal provision, or any other statute, is to ascertain the legislative intent. The rule of strict construction is not violated by giving the expression its full meaning or the alternative meaning which is more consonant with the legislative intent and best effectuates such intent.*[120]

61. The Appeals Chamber, in the *Aleksovski* Appeal Judgement, found that the principle of legality requires "that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission."[121] It further stated that the "principle does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime."[122]

62. This Trial Chamber understands the principle of *nullum crimen sine lege*, a constitutive element of the principle of legality, in relation to the factual criminality of a particular *conduct*. In interpreting the principle of *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance. This interpretation of the principle is supported by the subsequent declaratory formulation of the principle of *nullum crimen sine lege* in Article 22 of the ICC Statute:

> A person shall not be criminally responsible under this Statute unless *the conduct* in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.[123]

This interpretation is further supported by the relevant practice between States in the field of extradition. In order to determine whether the requirement of double criminality is fulfilled, the test to be applied is not so much whether a certain conduct is qualified in the respective national jurisdiction in the same way, but whether the conduct in itself is criminalised under those jurisdictions.[124] The Trial Chamber is fully aware of the different contexts in which these two

---

[120] *Čelebići* Trial Judgement, relevant parts from paras 402-412. (emphasis added).
[121] *Aleksovski* Appeal Judgement, para. 126.
[122] Ibid, para. 127.
[123] ICC Statute, Art. 22(1). (emphasis added).
[124] See, e.g., *Gesetz über die internationale Rechtshilfe in Strafsachen vom 23. Dezember 1982*, § 3 Abs. 2 (German Law on International Cooperation in Criminal Matters of 23 December 1982, Section 3, Para. 2): "Die Auslieferung zur Verfolgung ist nur zulässig, wenn die Tat nach deutschem Recht im Höchstmaß mit Freiheitsstrafe von mindestens einem Jahr bedroht ist oder wenn sie bei sinngemäßer Umstellung des Sachverhalts nach deutschem Recht mit einer solchen Strafe bedroht wäre." ("Extradition for the purpose of prosecution shall be granted only if the act is punishable under German law by a maximum of at least one year of imprisonment or if, *after analogous conversion of the facts*, the act would, under German law, be punishable by such a penalty.") Emphasis added. See Otto Lagodny in Wolfgang

principles are applied. However, the Trial Chamber observes the similarity of the underlying problem and legal guarantee. In order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance.[125]

63. Apart from the obligation to respect the principle of *nullum crimen sine lege*, the Trial Chamber is bound to interpret the Statute in accordance with Article 31 of the Vienna Convention on the Law of Treaties:

> in good faith, in accordance with the *ordinary meaning of the terms* in their context and in the light of its *object and purpose*. [126]

In order to do so, the Trial Chamber must take into account first the language of the Statute and second the object and purpose of this Statute, as becomes clear from *inter alia* the intention of the drafters of the Statute and of the Security Council. It is for this reason that the Trial Chamber will provide below a detailed overview of the different proposals that formed the basis for the Statute, the report of the Secretary-General, the relevant provisions of the Statute and the discussions in the Security Council at the moment of adoption of the Statute.

64. And as, according to Article 1 of the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law, the Trial Chamber must consider as well the principles and purposes of this part of international law.

Schomburg and Otto Lagodny, *Internationale Rechtshilfe in Strafsachen/International Cooperation in Criminal Matters*, Third Edition (Munich: C. H. Beck, 1998), § 3 Abs. 2, Rdn. 25-29; "Einleitung", Rdn. 64.

[125] While the principle of *nullum crimen sine lege* "appears to have the force of an interpretative presumption in common-law systems", civil law systems generally accord it greater significance. Susan Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law," in Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 740. See also M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff Publishers, 1992), p. 91. In Germany, as already mentioned, the principle of *nullum crimen sine lege praevia* is elevated to constitutional rank (Article 103 Abs. II GG). For an authoritative discussion, see Eberhard Schmidt-Aßmann in Theodor Maunz et al., *Grundgesetz: Kommentar* (Munich: C. H. Beck, 1992), Art. 103 Abs. II GG, Rdn. 163-256. For a discussion of the principle of legality in international criminal law, see, for example, Bassiouni, *Crimes Against Humanity in International Criminal Law*, pp. 87-146; and Lamb, "*Nullum crimen, nulla poena sine lege* in International Criminal Law," pp. 733-766. On the principle of legality in American law, see, for example, Paul H. Robinson, *Fundamentals of Criminal Law*, Second Edition (Boston: Little, Brown, 1995), pp. 117-141. On the principle of legality in English law, frequently rendered in terms of "the rule of law," see, for example, Andrew Ashworth, *Principles of Criminal Law*, Third Edition (Oxford: Oxford University Press, 1999), esp. pp. 70-87. On the principle of *nullum crimen sine lege* in German criminal law, see also Claus Roxin, *Strafrecht: Allgemeiner Teil, Band I: Grundlagen, Der Aufbau der Verbrechenslehre*, Third Edition (Munich: C. H. Beck, 1997), § 5 I Rdn. 3; and Hans-Heinrich Jeschek and Thomas Weigend, *Lehrbuch des Strafrechts: Allgemeiner Teil*, Fifth Edition (Berlin: Duncker und Humblot, 1996), § 15 IV.

International humanitarian law has, as its primary purpose, to regulate the means and methods of warfare and to protect persons not actively participating in armed conflict from harm. As the Trial Chamber held in *Furundžija* the general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law.[127] While international humanitarian law is largely derived from treaties and conventions, it also consists of a number of principles that have not been explicitly laid down in legal instruments, but are still considered fundamental to this body of law. Of fundamental importance in this respect is the so-called Martens clause, which can be found in numerous conventions in the field of international humanitarian law, ranging from the Hague Regulations to the Additional Protocols to the Geneva Conventions. According to this clause:

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result form the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[128]

Although this formulation was first used in the context of a convention applicable to international armed conflicts, this clause has since been considered generally applicable to all types of armed conflicts. As such, it can also be found in the preamble to Additional Protocol II.

65. One of these fundamental principles underlying international humanitarian law is the principle of criminal responsibility for violations of such law. Although such responsibility is not always explicitly laid down in international humanitarian conventional instruments, it has been applied by national and international judicial organs in the course of the last century. Other fundamental principles, as will be discussed below, are the principle of responsible command and the principle of command responsibility. Both principles have sometimes been included in conventional instruments, but not always.

66. Finally, the purpose behind the principle of responsible command and the principle of command responsibility is to promote and ensure the compliance with the rules of international humanitarian law. The commander must act responsibly and provide some kind of organisational

---

[126] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331. (emphasis added).
[127] *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998, para. 183: "The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person."
[128] This is the text taken from the Hague Regulations, 7th preambular paragraph.

structure, has to ensure that subordinates observe the rules of armed conflict, and must prevent violations of such norms or, if they already have taken place, ensure that adequate measures are taken.

C. Developments in Relation to the Principle of Command Responsibility

67. In order to assess the arguments of the parties, the Trial Chamber finds it necessary to describe first the development of the doctrine of command responsibility in a chronological order. It will first focus on the development of the concept prior to the establishment of this Tribunal. Then, the Trial Chamber will describe the place this doctrine has in the Statute of the International Tribunal and in its case law. Respecting the principle of *nulllum crimen sine lege*, the Trial Chamber will draw preliminary findings regarding the status of the principle of command responsibility in internal armed conflicts under customary international law since 1991, and therefore at the time the offences charged in the Amended Indictment were allegedly committed, namely between 1 January 1993 and 31 January 1994, after each section. The Trial Chamber reserves, however, its final decision on this issue pending the discussion below. Additionally, it will briefly examine subsequent developments related to command responsibility, as far as these may be considered relevant to the issue in dispute. The Trial Chamber emphasises that discussion of subsequent developments related to command responsibility is not for the purpose of determining the issue before it, but rather for completeness of the discussion.

1. Developments prior to the creation of the International Tribunal

68. The question of where command responsibility may be considered to find its roots is not always answered in the same way. The Prosecution asserts that it finds its origins in the Lieber Code, promulgated by the Union government during the United States Civil War in 1863.[129] The Trial Chamber in the *Čelebi}i* case refers instead to the Hague Conventions of 1907.[130] Although different terminology is employed, the principles detailed therein foreshadow the current construction of the doctrine of command responsibility. Article 3 of Hague Convention IV of 1907 stipulates:

---

[129] Instruction for the Government of the Armies of the United States in the Filed, Promulgated as General Orders No. 100 (24 April 1963) ("Lieber Code"). Art. 71 provides: "Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed."

[130] *Čelebići* Trial Judgement, para. 335. See, e.g., William H. Parks, "Command Responsibility for War Crimes," 62 Mil. L. Rev. 1, 11 (1973): "Hague Convention Four, it is submitted, is a manifestation and codification of that which was custom among the signatory nations, giving early recognition to the duties and responsibilities of the commander."

PROSECUTION INDEX OF AUTHORITIES

ANNEX 15.

Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgment, 10 December 1998

IN THE TRIAL CHAMBER

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

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Judgement of: 10 December 1998

PROSECUTOR

v.

ANTO FURUNDZIJA

JUDGEMENT

The Office of the Prosecutor:
Ms. Brenda Hollis
Ms. Patricia Viseur-Sellers
Ms. Michael Blaxill

Counsel for the Accused:
Mr. Luka Misetic
Mr. Sheldon Davidson

I. INTRODUCTION

The trial of Anto Furundzija, hereafter "accused", a citizen of Bosnia and Herzegovina who was born on 8 July 1969, before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereafter "International Tribunal", commenced on 8 June 1998 and came to a close on 12 November 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor, hereafter "Prosecution", and the Defence for the accused, the Trial Chamber,

HEREBY RENDERS ITS JUDGEMENT.

A. The International Tribunal

1. The International Tribunal is governed by its Statute, adopted by the Security Council of the United Nations on 25 May 1993, hereafter "Statute",[1] and by the Rules of Procedure and Evidence of the

C. Rape and Other Serious Sexual Assaults in International Law

1. International Humanitarian Law

165. Rape in time of war is specifically prohibited by treaty law: the Geneva Conventions of 1949,[189] Additional Protocol I of 1977[190] and Additional Protocol II of 1977.[191] Other serious sexual assaults are expressly or implicitly prohibited in various provisions of the same treaties.[192]

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

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

168. The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code[193] and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the `Martens clause' laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II(1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults.[194] The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in *Yamashita*,[195] along with the ripening of the fundamental prohibition of "outrages upon personal dignity" laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.

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

2. International Human Rights Law

170. No international human rights instrument specifically prohibits rape or other serious sexual assaults. Nevertheless, these offences are implicitly prohibited by the provisions safeguarding physical integrity, which are contained in all of the relevant international treaties.[196]The right to physical integrity is a fundamental one, and is undeniably part of customary international law.

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

3. Rape Under the Statute

172. The prosecution of rape is explicitly provided for in Article 5 of the Statute of the International Tribunal as a crime against humanity. Rape may also amount to a grave breach of the Geneva Conventions, a violation of the laws or customs of war[197] or an act of genocide,[198] if the requisite elements are met, and may be prosecuted accordingly.

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

4. The Definition of Rape

174. The Trial Chamber notes the unchallenged submission of the Prosecution in its Pre-trial Brief that rape is a forcible act: this means that the act is "accomplished by force or threats of force against the victim or a third person, such threats being express or implied and must place the victim in reasonable fear that he, she or a third person will be subjected to violence, detention, duress or psychological oppression".[199] This act is the penetration of the vagina, the anus or mouth by the penis, or of the vagina or anus by other object. In this context, it includes penetration, however slight, of the vulva, anus or oral cavity, by the penis and sexual penetration of the vulva or anus is not limited to the penis.[200]

175. No definition of rape can be found in international law. However, some general indications can be discerned from the provisions of international treaties. In particular, attention must be drawn to the fact that there is prohibition of both rape and "any form of indecent assault" on women in article 27 of Geneva Convention IV, article 76(1) of Additional Protocol I and article 4(2)(e) of Additional Protocol II. The inference is warranted that international law, by specifically prohibiting rape as well as, in general terms, other forms of sexual abuse, regards rape as the most serious manifestation of sexual assault. This is, *inter alia*, confirmed by Article 5 of the International Tribunal's Statute, which explicitly provides for the prosecution of rape while it implicitly covers other less grave forms of serious sexual assault through Article 5(i) as "other inhuman acts".[201]

176. Trial Chamber I of the ICTR has held in Akayesu that to formulate a definition of rape in international law one should start from the assumption that "the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts".[202] According to that Trial Chamber, in international law it is more useful to focus "on the conceptual framework of State sanctioned violence".[203] It then went on to state the following:

> Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or others person acting in an official capacity. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.[204]

This definition has been upheld by Trial Chamber II *quater* of the International Tribunal in *Delalic*.[205]

177. This Trial Chamber notes that no elements other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The Trial Chamber therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity

(*Bestimmtheitgrundsatz*, also referred to by the maxim "*nullum crimen sine lege stricta*"), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws.

178. Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common-law or that of civil-law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world. This presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since "international trials exhibit a number of features that differentiate them from national criminal proceedings",[206] account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.

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

180. In its examination of national laws on rape, the Trial Chamber has found that although the laws of many countries specify that rape can only be committed against a woman,[207] others provide that rape can be committed against a victim of either sex.[208] The laws of several jurisdictions state that the actus reus of rape consists of the penetration, however slight, of the female sexual organ by the male sexual organ.[209] There are also jurisdictions which interpret the actus reus of rape broadly.[210] The provisions of civil law jurisdictions often use wording open for interpretation by the courts.[211] Furthermore, all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim:[212] force is given a broad interpretation and includes rendering the victim helpless.[213] Some jurisdictions indicate that the force or intimidation can be directed at a third person.[214] Aggravating factors commonly include causing the death of the victim, the fact that there were multiple perpetrators, the young age of the victim, and the fact that the victim suffers a condition, which renders him/her especially vulnerable such as mental illness. Rape is almost always punishable with a maximum of life imprisonment, but the terms that are imposed by various jurisdictions vary widely.

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

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

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

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

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

(i) the sexual penetration, however slight:

(a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or

(b) of the mouth of the victim by the penis of the perpetrator;

(ii) by coercion or force or threat of force against the victim or a third person.

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

5. Individual Criminal

PROSECUTION INDEX OF AUTHORITIES

ANNEX 16.

Prosecutor v. Delalic (Celebci) IT-96-21-T, Judgment, 16 November 1998

UNITED
NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-96-21-T
		Date:	16 November 1998
		Original:	English

IN THE TRIAL CHAMBER

Before: **Judge Adolphus G. Karibi-Whyte, Presiding**
Judge Elizabeth Odio Benito
Judge Saad Saood Jan

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **16 November 1998**

PROSECUTOR

v.

ZEJNIL DELALI]
ZDRAVKO MUCI] also known as "PAVO"
HAZIM DELI]
ESAD LAND@O also known as "ZENGA"

JUDGEMENT

The Office of the Prosecutor:

Mr. Grant Niemann
Ms. Teresa McHenry

Counsel for the Accused:

Ms. Edina Re{idovi}, Mr. Eugene O 'Sullivan, for Zejnil Delali}
Ms. Nihada Buturovi}, Mr. Howard Morrison, for Zdravko Muci}
Mr. Salih Karabdi}, Mr. Thomas Moran, for Hazim Deli}
Ms. Cynthia McMurrey, Ms. Nancy Boler, for Esad Land`o

A. The International Tribunal

1. The International Tribunal is governed by its Statute (hereafter "Statute"), which was adopted by the United Nations Security Council on 25 May 1993,[1] and by its Rules of Procedure and Evidence (hereafter the "Rules"), adopted by the Judges on 11 February 1994, as subsequently amended.[2] Under the Statute, the Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[3] Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

B. The Indictment

2. The Indictment against the four accused (hereafter "Indictment") was issued on 19 March 1996 by Richard J. Goldstone, being, at that time, the Prosecutor of the International Tribunal, and was confirmed by Judge Claude Jorda on 21 March 1996.[4] Four of the original forty-nine counts were subsequently withdrawn at trial, at the request of the Prosecution.[5] The Indictment is set forth in full in Annex B to this Judgement. At the time of the alleged commission of the crimes charged therein, the accused were citizens of the former Yugoslavia and residents of Bosnia and Herzegovina.[6]

3. The Indictment is concerned solely with events alleged to have occurred at a detention facility in the village of ^elebi}i (hereafter "^elebi}i prison-camp"), located in the Konjic municipality, in central Bosnia and Herzegovina, during certain months of 1992. The Indictment charges the four accused with grave breaches of the Geneva Conventions of 1949, under Article 2 of the Statute, and

---

[1] S/RES/827 (1993).
[2] The Rules have been successively amended on 5 May 1994, 4 Oct. 1994, 30 Jan. 1995, 3 May 1995, 15 June 1995, 6 Oct. 1995, 18 Jan. 1996, 23 April 1996, 25 June and 5 July 1996, 3 Dec. 1996, 25 July 1997, revised 20 Oct. and 12 Nov. 1997, 9 and 10 July 1998.
[3] Article 1 of the Statute.
[4] Review of the Indictment, Case No. IT-96-21-I, 21 March 1996 (RP D282-D284).
[5] Counts 9 and 10, and counts 40 and 41 of the original Indictment were withdrawn on 21 April 1997 (RP D3254-D3255) and 19 Jan. 1998 (RP D5385-D5386) respectively.

the provisions of common article 3 of the Geneva Conventions under Article 3 of the Statute violates the principle of *nullum crimen sine lege*.

313. Moreover, the second paragraph of article 15 of the ICCPR is of further note, given the nature of the offences charged in the Indictment. It appears that this provision was inserted during the drafting of the Covenant in order to avoid the situation which had been faced by the International Military Tribunals at Nürnberg and Tokyo after the Second World War. These tribunals had applied the norms of the 1929 Geneva Conventions and 1907 Hague Conventions, among others, despite the fact that these instruments contained no reference to the possibility of their criminal sanction. It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.

314. While common article 3 of the Geneva Conventions was formulated to apply to internal armed conflicts, it is also clear from the above discussion that its substantive prohibitions apply equally in situations of international armed conflict. Similarly, and as stated by the Appeals Chamber, the crimes falling under Article 3 of the Statute of the International Tribunal may be committed in either kind of conflict. The Trial Chamber's finding that the conflict in Bosnia and Herzegovina in 1992 was of an international nature does not, therefore, impact upon the application of Article 3. Nor is it necessary for the Trial Chamber to discuss the provisions of article 75 of Additional Protocol I, which apply in international armed conflicts. These provisions are clearly based upon the prohibitions contained in common article 3 and may also constitute customary international law. However, the Trial Chamber finds sufficient basis in the substance of common article 3 to apply Article 3 of the Statute to the acts alleged in the present case.[328]

315. Finally, the Trial Chamber is in no doubt that the prohibition on plunder is also firmly rooted in customary international law. The Regulations attached to the 1907 Hague Convention (IV)

Respecting the Laws and Customs of War on Land (hereafter "Hague Regulations") provide expression to the prohibition and it is reiterated in the Geneva Conventions.[329] The Hague Regulations have long been considered to be customary in nature, as was confirmed by the Nürnberg and Tokyo Tribunals. Moreover, the Report of the Secretary-General makes explicit mention of the Hague Regulations in its Commentary on Article 3 of the Statute, in the following terms:

> The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.
>
> The Nürnberg Tribunal recognized that many of the provisions contained in the Hague Regulations, although innovative at the time of their adoption were, by 1939, recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war. The Nürnberg Tribunal also recognized that war crimes defined in article 6(b) of the Nürnberg Charter were already recognized as war crimes under international law, and covered in the Hague Regulations, for which guilty individuals were punishable.[330]

There is, on this basis, no need to expand further upon the applicability of Article 3 of the Statute in relation to the charge of plunder.

4. Findings

316. In conclusion, the Trial Chamber finds that both the substantive prohibitions in common article 3 of the Geneva Conventions, and the provisions of the Hague Regulations, constitute rules of customary international law which may be applied by the International Tribunal to impose individual criminal responsibility for the offences alleged in the Indictment. As a consequence of the division of labour between Articles 2 and 3 of the Statute thus far articulated by the Appeals Chamber, such violations have been considered as falling within the scope of Article 3.

---

[328] The Trial Chamber is unconvinced by, and finds no reason to discuss, the various additional arguments raised by some members of the Defence, seeking to challenge the applicability of common article 3 of the Geneva Conventions.
[329] Art. 46 of the Regulations states: "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." Art. 47 further states that "Pillage is formally forbidden". Art. 33 of the Fourth Geneva Convention also states that "Pillage is prohibited". *See also*, Art. 15 of Geneva Convention I, Art. 18 of Geneva Convention II and Art. 18 of Geneva Convention III.
[330] Report of the Secretary-General, paras. 41 and 42.

317. Recognising that this would entail an extension of the concept of "grave breaches of the Geneva Conventions" in line with a more teleological interpretation, it is the view of this Trial Chamber that violations of common article 3 of the Geneva Conventions may fall more logically within Article 2 of the Statute. Nonetheless, for the present purposes, the more cautious approach has been followed. The Trial Chamber has determined that an international armed conflict existed in Bosnia and Herzegovina during the time-period relevant to the Indictment and that the victims of the alleged offences were "protected persons", rendering Article 2 applicable. In addition, Article 3 is applicable to each of the crimes charged on the basis that they also constitute violations of the laws or customs of war, substantively prohibited by common article 3 of the Geneva Conventions (with the exception of the charges of plunder and unlawful confinement of civilians).

318. Having thus found that the requirements for the applicability of Articles 2 and 3 of the Statute are satisfied in the present case, the Trial Chamber must turn its attention to the nature of individual criminal responsibility as recognised under Article 7 of the Statute.

F. Individual Criminal Responsibility Under Article 7(1)

1. Introduction

319. The principles of individual criminal responsibility enshrined in Article 7, paragraph 1, of the Statute reflect the basic understanding that individual criminal responsibility for the offences under the jurisdiction of the International Tribunal is not limited to persons who directly commit the crimes in question. Instead, as stated in the Report of the Secretary-General: "all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible".[331]

320. Article 7(1) accordingly provides as follows:

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

PROSECUTION INDEX OF AUTHORITIES

ANNEX 17.

CR v. United Kingdom, European Court of Human Rights, [1995] ECHR 20190/92, Judgment of 22 November, 1995

1286

[1995] ECHR 20190/92

C.R. v. **United Kingdom** (App. no. 20190/92)

EUROPEAN COURT OF HUMAN RIGHTS

[1995] ECHR 20190/92

20 JUNE, 22 NOVEMBER 1995

22 NOVEMBER 1995

PANEL: JUDGE RYSSDAL (PRESIDENT), JUDGES GVLC KL , RUSSO, DE MEYER, MARTENS, BIGI, SIR JOHN FREELAND, JAMBREK, LOHMUS, MR H. PETZOLD, REGISTRAR

CATCHWORDS:
Human Rights - Non-retroactivity of criminal law - Whether offence clearly defined - European Convention on Human Rights, art 7

HEADNOTE:
The applicant married his wife in 1984. In October 1989, following matrimonial difficulties, his wife left the matrimonial home and returned to her parents' house and informed the applicant that she intended to petition for divorce. In November 1989 the applicant attempted to have sexual intercourse with the wife and assaulted her. He was charged with attempted rape and assault and at his trial in July 1990 it was submitted that the charge of rape was one not known to the law by reason of the fact the applicant was the husband of the alleged victim and consent to sexual intercourse had impliedly been given at the time of marriage. Following the trial judge's ruling on the circumstances when such consent might be revoked, including a court order or agreement between the parties or the withdrawal of either party from cohabitation, the applicant pleaded guilty to attempted rape and assault and was sentenced to three years' imprisonment. The applicant appealed to the Court of Appeal on the ground that the trial judge had made a wrong decision in law in ruling that a man might rape his wife when the consent to intercourse which his wife gave on marriage had been revoked neither by a court order nor by agreement between the parties. The appeal was dismissed and the applicant applied to the House of Lords where his appeal was also refused and it was stated that the common law was capable of evolving in light of changing social, economic and cultural developments. The applicant complained under art 7 of the European Convention on Human Rights alleging that his conviction and sentence for the attempted rape of his wife constituted retrospective punishment for an act which had not constituted a criminal offence at the time when it was committed.

Held: The purpose of art 7 was to provide effective safeguards against arbitrary prosecution, conviction and punishment and an offence had to be clearly defined in the law. This requirement was satisfied where the individual could know from the wording of the relevant provision, and if necessary the assistance of the court's interpretation of it, what acts and omissions would make him criminally liable. Moreover, however clearly drafted a legal provision might be in any system of law there would be an inevitable element of judicial interpretation for elucidation of doubtful points and adaptation to changing circumstances. Article 7 of the Convention could not be read as outlawing the gradual clarification of criminal liability through judicial interpretation from case to case, providing that the resultant development would be consistent with the essence of the offence and reasonably foreseeable.

In the instant case, by November 1989 there was significant doubt as to the alleged marital immunity for rape as the law had been subject to progressive development and there were strong indications that still wider interpretation by the courts of the inroads on the immunity

1287

was probable. The agreed facts in the applicant's case had shown an implied agreement between the applicant and his wife to separation and thus withdrawal of the consent to intercourse. The circumstances in his case had been covered by the exceptions to the immunity already stated by the courts. The evolution in the law by judicial interpretation of treating such conduct by a husband as generally within the scope of the offence of rape was consistent with the very essence of the offence, and had reached a stage where the absence of immunity had become a reasonably foreseeable development of the law. The essentially debasing character of rape was so manifest that the result of the national courts' decisions, that the applicant could be convicted of rape irrespective of his relationship with the victim, could not be said to have been at variance with the object and purpose of art 7. Moreover, the abandonment of a husband's immunity against prosecution for rape of his wife would be in conformity with the fundamental objectives of the Convention as a whole, the very essence of which was respect for human dignity and freedom. The national courts' decision that the applicant could not invoke immunity to escape conviction and sentence for attempted rape upon his wife had not, therefore, given rise to a violation of his rights under art 7 of the Convention.

INTRODUCTION:
PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 September 1994, within the three-month period laid down by Article 32 (1) and Article 47 of the Convention. It originated in an application (no. 20190/92) against the **United Kingdom** of Great Britain and Northern Ireland lodged with the Commission under Article 25 by Mr C.R., a British citizen, on 31 March 1992.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby the **United Kingdom** recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 7 of the Convention.

2. In response to the enquiry made in accordance with Rule 33(3)(d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. On 24 September 1994 the President of the Court decided, under Rule 21(6) and in the interests of the proper administration of justice, that a single Chamber should be constituted to consider both the instant case and the case of S.W. v. United Kingdom1.

4. The Chamber to be constituted for this purpose included ex officio Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21(3)(b)). On 24 September 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr F. Gvlc|kl|, Mr R. Macdonald, Mr C. Russo, Mr J. De Meyer, Mr S.K. Martens, Mr F. Bigi and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21(4)). Subsequently, Mr P. Jambrek, substitute judge, replaced Mr Macdonald, who was unable to take part in the further consideration of the case (Rules 22(1) and 24(1)).

5. As President of the Chamber (Rule 21(5)), Mr Ryssdal, acting through the Registrar, consulted the Agent of the **United Kingdom** Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37(1) and 38). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 5 April 1995 and the Government's memorial on 6 April. On 17 May 1995 the Secretary to the Commission informed the Registrar that the Delegate did not wish to reply in writing.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 June 1995. The Court had held a preparatory meeting beforehand.

There appeared before the Court: (a) for the Government: Ms S. Dickson, Foreign and Commonwealth Office, (Agent), Mr A. Moses, QC, (Counsel), Mr R. Heaton, Home Office, Mr J. Toon, Home Office, (Advisers); (b) for the Commission: Mr J. Mucha, (Delegate); (c) for the applicant: Mr R. Hill, Barrister-at-law, (Counsel), Mr A.C. Guthrie, Assistant.

The Court heard addresses by Mr Mucha, Mr Hill and Mr Moses and also replies to questions put by some of its members individually.

FACTS:
AS TO THE FACTS

I. Particular Circumstances of the Case

7. The applicant is a British citizen, born in 1952, and lives in Leicester.

8. The applicant married his wife on 11 August 1984. They had one son, who was born in 1985. On 11 November 1987 the couple were separated for a period of about two weeks before becoming reconciled.

9. On 21 October 1989, as a result of further matrimonial difficulties, his wife left the matrimonial home with their son and returned to live with her parents. She had by this time already consulted solicitors regarding her matrimonial affairs and had left a letter for the applicant in which she informed him that she intended to petition for divorce. However no legal proceedings had been taken by her before the occurrence of the incident which gave rise to criminal proceedings. The applicant had on 23 October 1989 spoken to his wife by telephone indicating that it was his intention also to "see about a divorce".

10. Shortly before 9 p.m. on 12 November 1989, twenty-two days after his wife had returned to live with her parents, and while the parents were out, the applicant forced his way into the parents' house and attempted to have sexual intercourse with the wife against her will.

In the course of that attempt he assaulted her, in particular by squeezing her neck with both hands.

11. The applicant was charged with attempted rape and assault occasioning actual bodily harm. At his trial before the Leicester Crown Court on 30 July 1990 it was submitted that the charge of rape was one which was not known to the law by reason of the fact that the applicant was the husband of the alleged victim. He relied on a statement by Sir Matthew Hale CJ in his History of the Pleas of the Crown published in 1736:

"But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

12. In his judgment ([1991] 1 All ER 747) Mr Justice Owen noted that it was a statement made in general terms at a time when marriage was indissoluble. Hale CJ had been expounding the common law as it seemed to him at that particular time and was doing it in a book and not with reference to a particular set of circumstances presented to him in a prosecution. The bald statement had been reproduced in the first edition of Archbold on Criminal Pleadings, Evidence and Practice (1822, p. 259) in the following terms: "A husband also cannot be guilty of rape upon his wife." Mr Justice Owen further examined a series of court decisions (R. v. Clarence [1888] 22 QBD 23, [1886-90] All ER 113; R. v. Clarke [1949]

2 All ER 448; R. v. Miller [1954] 2 All ER 529; R. v. Reid [1972] 2 All ER 1350; R. v. O'Brien [1974] 3 All ER 663; R. v. Steele [1976] 65 **Cr** App Rep 22; R. v. Roberts [1986] CLR 188; see paragraphs 19-22 below), recognising that a wife's consent to marital intercourse was impliedly given by her at the time of marriage and that the consent could be revoked on certain conditions. He added:

"I am asked to accept that there is a presumption or an implied consent by the wife to sexual intercourse with her husband; with that, I do not find it difficult to agree. However, I find it hard to . . . believe that it ever was the common law that a husband was in effect entitled to beat his wife into submission to sexual intercourse . . . If it was, it is a very sad commentary on the law and a very sad commentary upon the judges in whose breasts the law is said to reside. However, I will nevertheless accept that there is such an implicit consent as to sexual intercourse which requires my consideration as to whether this accused may be convicted for rape."

On the question of what circumstances would suffice in law to revoke the consent, Mr Justice Owen noted that it may be brought to an end, firstly, by a court order or equivalent. Secondly, he observed, it was apparent from the Court of Appeal's judgment in the case of R. v. Steele ([1976] 65 **Cr** App Rep 22) that the implied consent could be withdrawn by agreement between the parties. Such an agreement could clearly be implicit; there was nothing in the case-law to suggest the contrary. Thirdly, he was of the view that the common law recognised that a withdrawal of either party from cohabitation, accompanied by a clear indication that consent to sexual intercourse has been terminated, would amount to a revocation of the implicit consent. He concluded that both the second and third exceptions to the matrimonial immunity against prosecution for rape applied in the case.

Following the judge's ruling, the applicant pleaded guilty to attempted rape and assault occasioning actual bodily harm, and was sentenced to three years' imprisonment.

13. The applicant appealed to the Court of Appeal, Criminal Division, on the ground that Mr Justice Owen had made a wrong decision in law in ruling that a man may rape his wife when the consent to intercourse which his wife gave on entering marriage had been revoked neither by a court order nor by agreement between the parties.

14. On 14 March 1991 the Court of Appeal, Criminal Division (Lord Lane CJ, Sir Stephen Brown P, Watkins, Neill and Russell LJJ), unanimously dismissed the appeal ([1991] 2 All ER 257). Lord Lane noted that the general proposition of Sir Matthew Hale in his History of the Pleas of the Crown (1736) (see paragraph 11 above) that a man could not commit rape upon his wife was generally accepted as a correct statement of the common law at that epoch. Further, Lord Lane made an analysis of previous court decisions, from which it appears that in R. v. Clarence (1888), the first reported case of this nature, some judges of the Court for Crown Cases Reserved had objected to the principle. In the next reported case, R. v. Clarke (1949), the trial court had departed from the principle by holding that the husband's immunity was lost in the event of a court order directing that the wife was no longer bound to cohabit with him. Almost every court decision thereafter had made increasingly important exceptions to the marital immunity (see paragraph 22 below).

The Court of Appeal had accepted in R. v. Steele (1976) that the implied consent to intercourse could be terminated by agreement. This was confirmed by the Court of Appeal in R. v. Roberts (1986), where it held that the lack of a non-molestation clause in a deed of separation, concluded on expiry of a non-molestation order, did not revive the consent to intercourse.

Lord Lane added the following observations:

"Ever since the decision of Byrne J in R. v. Clarke in 1949, courts have been paying lip-

service to Hale CJ's proposition, whilst at the same time increasing the number of exceptions, the number of situations to which it does not apply. This is a legitimate use of the flexibility of the common law which can and should adapt itself to changing social attitudes.

There comes a time when the changes are so great that it is no longer enough to create further exceptions restricting the effect of the proposition, a time when the proposition itself requires examination to see whether its terms are in accord with what is generally regarded today as acceptable behaviour.

. . .

It seems to us that where the common law rule no longer even remotely represents what is the true position of a wife in present-day society, the duty of the court is to take steps to alter the rule if it can legitimately do so in the light of any relevant parliamentary enactment. That in the end comes down to a consideration of the word 'unlawful' in the 1976 Act."

Lord Lane then critically examined the different strands of interpretation of section 1(1)(a) of the 1976 Act in the case-law, including the argument that the term "unlawful" (see paragraph 17 below) excluded intercourse within marriage from the definition of rape. He concluded:

". . . [W]e do not consider that we are inhibited by the 1976 Act from declaring that the husband's immunity as expounded by Hale CJ no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim."

15. The Court of Appeal granted the applicant leave to appeal to the House of Lords, which unanimously upheld the Court of Appeal's judgment on 23 October 1991 ([1991] 4 All ER 481).

Lord Keith of Kinkel, joined by Lord Brandon of Oakbrook, Lord Griffiths, Lord Ackner and Lord Lowry, gave, inter alia, the following reasons:

"For over 150 years after the publication of Hale's work there appeared to have been no reported case in which judicial consideration was given to his proposition. The first such case was R. v. Clarence [1888] 22 QBD 23, [1886-90] All ER 133 . . . It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. Hale's proposition reflected the state of affairs in these respects at the time it was enunciated.

Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife was the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

. . .

The position then is that that part of Hale's proposition which asserts that a wife cannot retract the consent to sexual intercourse which she gives on marriage has been departed from in a series of decided cases. On grounds of principle there is no good reason why the

1291

whole proposition should not be held inapplicable in modern times. The only question is whether section 1(1) of the 1976 Act presents an insuperable obstacle to that sensible course. The argument is that 'unlawful' in that subsection means outside the bond of marriage.

. . . The fact is that it is clearly unlawful to have sexual intercourse with any woman without her consent, and that the use of the word in the subsection adds nothing. In my opinion there are no rational grounds for putting the suggested gloss on the word, and it should be treated as being mere surplusage in this enactment . . .

I am therefore of the opinion that section 1(1) of the 1976 Act presents no obstacle to this House declaring that in modern times the supposed marital exception in rape forms no part of the law of England. The Court of Appeal, Criminal Division, took a similar view [in the present case]. Towards the end of the judgment of that court Lord Lane CJ said . . . :

'The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the parliamentary process. This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.' I respectfully agree."

II. Relevant Domestic Law and Practice

A. The offence of rape

16. The offence of rape, at common law, was traditionally defined as unlawful sexual intercourse with a woman without her consent by force, fear or fraud. By section 1 of the Sexual Offences Act 1956, "it is a felony for a man to rape a woman".

17. Section 1(1) of the Sexual Offences (Amendment) Act 1976 provides, in so far as it is material, as follows:

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if -

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it . . ."

18. On 3 November 1994 the Criminal Justice and Public Order Act 1994 replaced the above provisions by inserting new subsections to section 1 of the Sexual Offences Act 1956, one of the effects of which was to remove the word "unlawful":

"1. (1) It is an offence for a man to rape a woman or another man.

(2) A man commits rape if -

(a) he has sexual intercourse with a person . . . who at the time of the intercourse does not consent to it . . ."

B. Marital immunity

19. Until the proceedings in the applicant's case the English courts, on the few occasions when they were confronted with the issue whether directly or indirectly, had always recognised at least some form of immunity attaching to a husband from any charge of rape or attempted rape by reason of a notional or fictional consent to intercourse deemed to have been given by the wife on marriage. The proposition of Sir Matthew Hale quoted above (see

1292

paragraph 11) has been upheld until recently, for example in the case of R. v. Kowalski ([1987] 86 **Cr** App Rep 339), which concerned the question whether or not a wife had impliedly consented to acts which if performed against her consent would amount to an indecent assault. Mr Justice Ian Kennedy, giving the judgment of the court, stated, obiter: "It is clear, well-settled and ancient law that a man cannot, as actor, be guilty of rape upon his wife." And he went on to say that that principle was:

"dependent upon the implied consent to sexual intercourse which arises from the married state and which continues until that consent is put aside by decree nisi, by a separation order or, in certain circumstances, by a separation agreement."

In another example, Lord Justice O'Connor in the R. v. Roberts case ([1986] CLR 188) held:

"The status of marriage involves that the woman has given her consent to her husband having intercourse with her during the subsistence of the marriage . . . she cannot unilaterally withdraw it."

20. However, on 5 November 1990, Mr Justice Simon Brown held in R. v. C. ([1991] 1 All ER 755) that the whole concept of marital exemption in rape was misconceived:

"Were it not for the deeply unsatisfactory consequence of reaching any other conclusion on the point, I would shrink, if sadly, from adopting this radical view of the true position in law. But adopt it I do. Logically, I regard it as the only defensible stance, certainly now as the law has developed and arrived in the late twentieth century. In my judgment, the position in law today is, as already declared in Scotland, that there is no marital exemption to the law of rape. That is the ruling I give."

On the other hand, on 20 November 1990, in R. v. J. ([1991] 1 All ER 759) Mr Justice Rougier upheld the general common law rule, considering that the effect of section 1(1)(a) of the 1976 Act was that the marital exemption embodied in Hale's proposition was preserved, subject to those exceptions established by cases decided before the Act was passed. He further stated:

". . . there is an important general principle to be considered here, and that is that the law, especially the criminal law, should be clear so that a man may know where he stands in relation to it. I am not being so fanciful as to suppose that this defendant carefully considered the authorities and took Counsel's advice before behaving as alleged, but the basic principle extends a long way beyond the bounds of this case and should operate to prevent a man being convicted by means of decisions of the law ex post facto."

On 15 January 1991, Mr Justice Swinton Thomas in R. v. S. followed Rougier J, though he considered that it was open to judges to define further exceptions.

Both Rougier and Swinton Thomas JJ stated that they regretted that section 1(1)(a) of the 1976 Act precluded them from taking the same line as Simon Brown J in R. v. C.

21. In its Working Paper 116 "Rape within Marriage" completed on 17 September 1990, the Law Commission stated:

"2.8 It is generally accepted that, subject to exceptions (considered . . . below), a husband cannot be convicted of raping his wife . . . Indeed there seems to be no recorded prosecution before 1949 of a husband for raping his wife . . .

. . .

2.11 The immunity has given rise to a substantial body of law about the particular cases in

1293

which the exemption does not apply.

The limits of this law are difficult to state with certainty.

Much of it rests on first instance decisions which have never been comprehensively reviewed at appellate level . . ."

22. The Law Commission identified the following exceptions to a husband's immunity:

- where a court order has been made, in particular:

(a) where an order of the court has been made which provides that a wife should no longer be bound to cohabit with her husband (R. v. Clarke [1949] 33 **Cr** App Rep 216);

(b) where there has been a decree of judicial separation or a decree nisi of divorce on the ground that "between the pronouncement of decree nisi and the obtaining of a decree absolute a marriage subsists as a mere technicality" (R. v. O'Brien [1974] 3 All ER 663);

(c) where a court has issued an injunction restraining the husband from molesting the wife or the husband has given an undertaking to the court that he will not molest her (R. v. Steele [1976] 65 **Cr** App Rep 22);

(d) in the case of R. v. Roberts ([1986] CLR 188), the Court of Appeal found that where a non-molestation order of two months had been made in favour of the wife her deemed consent to intercourse did not revive on expiry of the order;

- where no court order has been made:

(e) Mr Justice Lynskey observed, obiter, in R. v. Miller ([1954] 2 QBD 282) that a wife's consent would be revoked by an agreement to separate, particularly if it contained a non-molestation clause;

(f) Lord Justice Geoffrey Lane stated, obiter, in R. v. Steele that a separation agreement with a non-cohabitation clause would have that effect.

23. The Law Commission noted that it was stated in R. v. Miller and endorsed by the Court of Appeal in R. v. Steele that lodging a petition for divorce would not be sufficient.

It referred also to the ruling by Mr Justice Owen in the present case where an implied agreement to separate was considered sufficient to revoke the immunity and that, even in the absence of agreement, the withdrawal from cohabitation by either party, accompanied by a clear indication that consent to sexual intercourse had been terminated, would operate to exclude the immunity. It found this view difficult to reconcile with the approach in Steele that filing a divorce petition was "clearly" not sufficient. The ruling in the present case appeared substantially to extend what had previously been thought to be the law, although it emphasised that factual separation, and not mere revocation of consent to intercourse, was necessary to remove the immunity.

24. The Law Commission pointed out that its inquiry was unusual in one important respect. It was usual practice, when considering the reform of common law rules, to consider the grounds expressed in the cases or other authorities for the current state of the law, in order to analyse whether those grounds were well-founded. However, that step was of little assistance here, partly because there was little case-law on the subject but principally because there was little dispute that the reason set out in the authorities for the state of the law could not be supported (paragraph 4.1 of the Working Paper). The basis of the law was that intercourse against the wife's actual will was excluded from the law of rape by the

1294

fictional deemed consent to intercourse perceived by Sir Matthew Hale in his dictum. This notion was not only quite artificial but, certainly in the modern context, was also quite anomalous. Indeed, it was difficult to find any current authority or commentator who thought that it was even remotely supportable. The artificial and anomalous nature of the marital immunity could be seen if it was reviewed against the current law on the legal effects of marriage (paragraph 4.2).

The concept of deemed consent was artificial because the legal consequences of marriage were not the result of the parties' mutual agreement. Although the parties should have legal capacity to enter into the marriage contract and should observe the necessary formalities, they were not free to decide the terms of the contract; marriage was rather a status from which flow certain rights or obligations, the contents of which were determined by the law from time to time. This point had been emphasised by Mr Justice Hawkins in R. v. Clarence (1888) when he said:

"The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed on her by law." (paragraph 4.3)

In this connection, the Law Commission stressed that:

"[t]he rights and duties arising from marriage have, however, changed over the years as the law has adapted to changing social conditions and values.

The more modern view of marriage is that it is a partnership of equals." (paragraph 4.4)

It then gave examples of such changes in the law and added:

"4.11 This gradual recognition of mutual rights and obligations within marriage, described in paragraphs 4.3-4.10 above, in our view demonstrates clearly that, whatever other arguments there may be in favour of the immunity, it cannot be claimed to be in any way justified by the nature of, or by the law governing, modern marriage."

25. The Law Commission made, inter alia, the provisional proposal that "the present marital immunity be abolished in all cases" (paragraph 5.2 of the Working Paper).

PROCEEDINGS BEFORE THE COMMISSION

26. In his application of 31 March 1992 (no. 20190/92) to the Commission, the applicant complained that, in breach of Article 7 of the Convention, he was convicted in respect of conduct, namely the attempted rape upon his wife, which at the relevant time did not, so he submitted, constitute a criminal offence.

27. The Commission declared the application admissible on 14 January 1994. In its report of 27 June 1994 (Article 31), the Commission expressed the opinion that there had been no violation of Article 7(1) of the Convention (fourteen votes to three).

ORAL-PROCEEDINGS:
FINAL SUBMISSIONS MADE TO THE COURT

28. At the hearing on 20 June 1995 the Government, as they had done in their memorial, invited the Court to hold that there had been no violation of Article 7 of the Convention.

29. On the same occasion the applicant reiterated the request to the Court stated in his memorial to find that there had been a breach of Article 7 and to award him just satisfaction under Article 50 of the Convention.

1295

DECISION:
AS TO THE LAW

Alleged Violation of Article 7 of the Convention

30. The applicant complained that his conviction and sentence for attempted rape of his wife constituted retrospective punishment in breach of Article 7 of the Convention, which reads:

"1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

31. The Government and the Commission disagreed with the above contention.

A. General principles

32. The guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.

33. Accordingly, as the Court held in its Kokkinakis v. Greece judgment of 25 May 1993 (Series A no. 260-A, p. 22, para. 52), Article 7 is not confined to prohibiting the retrospective application of the criminal law to an accused's disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence must be clearly defined in the law. In its aforementioned judgment the Court added that this requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable. The Court thus indicated that when speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability (see, as a recent authority, the Tolstoy Miloslavsky v. **United Kingdom** judgment of 13 July 1995, Series A no. 316-B, pp. 71-72, para. 37).

34. However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.

Indeed, in the **United Kingdom,** as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition.

Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be

1296

foreseen.

B. Application of the foregoing principles

35. The applicant maintained that the general common law principle that a husband could not be found guilty of rape upon his wife, albeit subject to certain limitations, was still effective on 12 November 1989, when he committed the acts which gave rise to the charge of attempted rape paragraph 10 above). A succession of court decisions before and also after that date, for instance on 20 November 1990 in R. v. J. (see paragraph 20 above), had affirmed the general principle of immunity. It was clearly beyond doubt that as at 12 November 1989 no change in the law had been effected, although one was being mooted. The removal of the immunity by the Court of Appeal on 14 March 1991 and the House of Lords on 23 October 1991 occurred by way of direct reversal, not clarification, of the law.

When the House of Commons debated the Bill for the Sexual Offences (Amendment) Act 1976 (see paragraph 17 above), different views on the marital immunity were expressed. On the advice of the Minister of State to await a report of the Criminal Law Revision Committee, an amendment that would have abolished the immunity was withdrawn and never voted upon. In its report, which was not presented until 1984, the Criminal Law Revision Committee recommended that the immunity should be maintained and that a new exception should be created.

In 1988, when considering certain amendments to the 1976 Act, Parliament had the opportunity to take out the word "unlawful" in section 1 (1)(a) (see paragraph 17 above) or to introduce a new provision on marital intercourse, but took no action in this respect.

On 17 September 1990 the Law Commission provisionally recommended that the immunity rule be abolished (see paragraphs 24 and 25 above).

However, the debate was pre-empted by the Court of Appeal's and the House of Lords' rulings in the applicant's case (see paragraphs 14 and 15 above). In the applicant's submission, these rulings altered the law retrospectively, which would not have been the case had the Law Commission's proposal been implemented by Parliament. Consequently, he concluded, when Parliament in 1994 removed the word "unlawful" from section 1 of the 1976 Act (see paragraph 18 above), it did not merely restate the law as it had been in 1976.

36. The applicant further argued that in examining his complaint under Article 7(1) of the Convention, the Court should not consider his conduct in relation to any of the exceptions to the immunity rule. The issue was never resolved by the national courts, as the sole ground on which the applicant's conviction rested was in fact the removal of the common law fiction by the Court of Appeal and the House of Lords.

37. Should a foreseeability test akin to that under Article 10(2) apply in the instant case, the applicant was of the opinion that it had not been satisfied. Although the Court of Appeal and the House of Lords did not create a new offence or change the basic ingredients of the offence of rape, they were extending an existing offence to include conduct which until then was excluded by the common law. They could not be said to have adapted the law to a new kind of conduct but rather to a change of social attitudes. To extend the criminal law, solely on such a basis, to conduct which was previously lawful was precisely what Article 7 of the Convention was designed to prevent. Moreover, the applicant stressed, it was impossible to specify with precision when the change in question had occurred. In November 1989, change by judicial interpretation was not foreseen by the Law Commission, which considered that a parliamentary enactment would be necessary.

38. The Government and the Commission were of the view that by November 1989 there was significant doubt as to the validity of the alleged marital immunity for rape. This was an area

1297

where the law had been subject to progressive development and there were strong indications that still wider interpretation by the courts of the inroads on the immunity was probable. In particular, given the recognition of women's equality of status with men in marriage and outside it and of their autonomy over their own bodies, the adaptation of the ingredients of the offence of rape was reasonably foreseeable, with appropriate legal advice, to the applicant. He was not convicted of conduct which did not constitute a criminal offence at the time when it was committed.

In addition, the Government pointed out, on the basis of agreed facts Mr Justice Owen had found that there was an implied agreement between the applicant and his wife to separation and to withdrawal of the consent to intercourse. The circumstances in his case were thus covered by the exceptions to the immunity rule already stated by the English courts.

39. The Court notes that the applicant's conviction for attempted rape was based on the statutory offence of rape in section 1 of the 1956 Act, as further defined in section 1(1) of the 1976 Act (see paragraphs 16 and 17 above). The applicant does not dispute that the conduct for which he was convicted would have constituted attempted rape within the meaning of the statutory definition of rape as applicable at the time, had the victim not been his wife. His complaint under Article 7 of the Convention relates solely to the fact that he could not avail himself of the marital immunity under common law because, so he submitted, it had been retrospectively abolished.

40. It is to be observed that a crucial issue in the judgment of the Court of Appeal (summarised at paragraph 14 above) related to the definition of rape in section 1(1)(a) of the 1976 Act: "unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it". The question was whether "removal" of the marital immunity would conflict with the statutory definition of rape, in particular whether it would be prevented by the word "unlawful". The Court of Appeal carefully examined various strands of interpretation of the provision in the case-law, including the argument that the term "unlawful" excluded intercourse within marriage from the definition of rape. In this connection, the Court recalls that it is in the first place for the national authorities, notably the courts, to interpret and apply national law (see, for instance, the Kemmache v. France (no. 3) judgment of 24 November 1994, Series A no. 296-C, pp. 86-87, para. 37). It sees no reason to disagree with the Court of Appeal's conclusion, which was subsequently upheld by the House of Lords (see paragraph 15 above), that the word "unlawful" in the definition of rape was merely surplusage and did not inhibit them from "removing a common law fiction which had become anachronistic and offensive" and from declaring that "a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim" (see paragraph 14 above).

41. The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife (for a description of this development, see paragraphs 14 and 20-25 above). There was no doubt under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape.

Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law (see paragraph 34 above).

42. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 of the Convention, namely to ensure that no

1298

one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 32 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.

43. Having reached this conclusion, the Court does not find it necessary to enquire into whether the facts in the applicant's case were covered by the exceptions to the immunity rule already made by the English courts before 12 November 1989.

44. In short, the Court, like the Government and the Commission, finds that the national courts' decisions that the applicant could not invoke immunity to escape conviction and sentence for attempted rape upon his wife did not give rise to a violation of his rights under Article 7(1) of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 7(1) of the Convention.1 Case no. 47/1994/494/576.

[1995] ECHR 20190/92

PROSECUTION INDEX OF AUTHORITIES

ANNEX 18.

US v Alstoetter (The Justice case) 3 CCL No. 10 Trials 954

1300

The Nuremberg Trials: The Justice Trial

United States of America v. Alstötter et al.
("The Justice Case") 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).

The Justice Trial is one of the most interesting of the Nuremberg trials. The trial of sixteen defendants, members of the Reich Ministry of Justice or People's and Special Courts, raised the issue of what responsibility judges might have for enforcing grossly unjust--but arguably binding--laws. The trial was the inspiration for the movie *Judgment at Nuremberg*. The movie presented a somewhat fictionalized view of the trial.

A Commentary on the Justice Trial

Decision: U.S.A. v. ALSTOETTER ET AL. (The Justice Cases)

War Crimes and Crimes Against Humanity: A Discussion of the Applicable Law

The Ex Post Facto Principle as Applied to These Cases

The Law in Action: The "Fuehrer Principle" and its Affects on the Defendant Judges

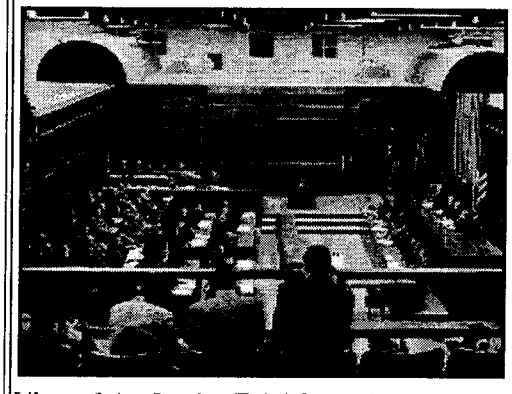
Racial Persecution: A Review of the Evidence Against the Defendants

Decision of the Court with Respect to Defendant Rothaug

Decision of the Court with Respect to Defendant Schlegelberger

Images from the Justice Trial

Lothar Kreyssig: The Judge Who Stood Up to the Nazis



View of the Justice Trial from the visitors gallery.

Trying Body: Military Tribunal III
Arraignment Date: Feb. 17, 1947
Trial Opened: March 5, 1947
Summations Concluded: October 18, 1947
Verdicts Returned: Dec. 3 and 4, 1947

Verdict: Ten of the sixteen defendants convicted, four acquitted, one died before verdict, one mistrial due to serious illness during trial.

Sentence: Four defendants sentenced to life, the other six convicted defendants sentenced to terms ranging from five to ten years.

1301

the stand to express their opinions that Katzenberger was guilty. Rothaug's real task, however, was getting Katzenberger's punishment increased from life in prison (the normal punishment for violations of Article 2) to death. This he did by a creative construction of a law that prescribed death for breaking certain laws "to take advantage of the war effort." Rothaug argued that death was the appropriate punishment for Katzenberger because he exploited the lights-out situation provided by air raid precautions to develop his "romance" with Seiler.

Most German judges over-identified with the Nazi regime. They came to see themselves as fighters on the internal battlefront, with the responsibilty to punish "the enemy within."

Richard A. Posner, federal court of appeals judge and one of the most astute observers of the legal scene, has noted that it is not only German judges that might over-identify with popular causes. In the New Republic, Posner writes:

> **Perhaps in the fullness of time the growing of marijuana plants, the "manipulation" of financial markets, the bribery of foreign government officials, the facilitating of the suicide by the terminally ill, and the violation of arcane regulations governing the financing of political campaigns will come to be no more appropriate objects of criminal punishment than "dishonoring the race." Perhaps not; but [the story of the German judges] can in any event help us to see that judges should not be eager enlisters in popular movements of the day, or allow themselves to become so immersed in a professional culture that they are oblivious to the human consequences of their decisions."**

U.S.A. v. ALSTOETTER ET AL (The Justice Cases): Excerpts from the Decision

[Note: The movie *Judgment at Nuremberg* was based on this set of cases.]

War Crimes and Crimes Against Humanity

We next approach the problem of the construction of C.C. Law 10, for whatever the scope of international common law may be, the power to enforce it in this case is defined and limited by the terms of the jurisdictional act.

The first penal provision of Control Council Law No. 10, with which we are concerned is as follows:

> "Article II, 1.—Each of the following acts is recognized as a crime: . . . (b) War crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labor or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity."

The scope of inquiry as to war crimes is, of course, limited by the provisions, properly construed, of the Charter and C.C. Law 10. In this particular, the two enactments are in substantial harmony. Both

1302

indicate by inclusion and exclusion the intent that the term "war crime" shall be employed to cover acts in violation of the laws and customs of war directed against non-Germans, and shall not include atrocities committed by Germans against their own nationals. It will be observed that Article VI of the Charter enumerates as war crimes acts against prisoners of war, persons on the seas, hostages, wanton destruction of cities and the like, devastation not justified by military necessity, plunder of public or private property (obviously not property of Germany or Germans), and "ill treatment or deportation to slave labor, or for any other purpose, of civilian population of, or in, occupied territory". C.C. Law 10, supra, employs similar language. It reads:

> ". . . ill treatment or deportation to slave labor or for any other purpose of civilian population from occupied territory".

This legislative intent becomes more manifest when we consider the provisions of the Charter and of C.C. Law 10 which deal with crimes against humanity. Article VI of the Charter defines crimes against humanity, as follows:

> ". . . murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

C.C. Law 10 defines as criminal:

> ". . . Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other acts committed against any civilian population, or persecutions on political, racial or religious groups whether or not in violation of the domestic laws of the country where perpetrated."

Obviously, these sections are not surplusage. They supplement the preceding sections on war crimes and include within their prohibition not only war crimes, but also acts not included within the preceding definitions of war crimes. In place of atrocities committed against civilians of or in or from occupied territory, those sections prohibit atrocities against any civilian population".Again, persecutions on racial, religious, or political grounds are within our jurisdiction "whether or not in violation of the domestic laws of the country where perpetrated". We have already demonstrated that C.C. Law 10 is specifically directed to the punishment of German criminals. It is, therefore, clear that the intent of the statute on crimes against humanity is to punish for persecutions and the like, whether in accord with or in violation of the domestic laws of the country where perpetrated, to wit: Germany. The intent was to provide that compliance with German law should be no defense. Article III of C.C. Law 10 clearly demonstrates that acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish. That Article provides that each occupying authority within its zone of occupation shall have the right to cause persons suspected of having committed a crime to be arrested and . . . (d) shall have the right to cause all persons so arrested . . . to be brought to trial . . . . Such Tribunal may, in case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorized by the occupying authorities.

As recently asserted by General Telford Taylor before Tribunal No. IV, in the case of the United States vs. Flick, et al.:

> "This constitutes an explicit recognition that acts committed by Germans against other Germans

1303

are punishable as crimes under Law No. 10, according to the definitions contained therein, since only such crimes may be tried by German courts, in the discretion of the occupying power. If the occupying power fails to authorize German courts to try crimes committed by Germans against other Germans (and in the American Zone of Occupation no such authorization has been given), then these cases are tried only before non-German tribunals, such as these Military Tribunals."

Our jurisdiction to try persons charged with crimes against humanity is limited in scope, both by definition and illustration, as appears from C.C. Law 10. It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. It is significant that the enactment employs the words "against any civilian population" instead of "against any civilian individual". The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government.

The opinion of the first International Military Tribunal in the case against Goering, et al., lends apport [sic] to our conclusion. That opinion recognized the distinction between war crimes and crimes against humanity, and said:

". . . in so far as the inhumane acts charged in the indictment and committed after the beginning of the war did not constitute war crimes, they were all committed in execution of, or in connection with, aggressive war and, therefore, constituted crimes against humanity." (Trial of major war criminals, Vol. I, pp. 254-255).

The Ex Post Facto Principle

The defendants claim protection under the principle nullum crimen sine lege, though they withheld from others the benefit of that rule during the Hitler regime. Obviously the principle in question constitutes no limitation upon the power or right of the Tribunal to punish acts which can properly be held to have been violations of international law when committed. By way of illustration, we observe that C.C. Law 10, Article II, 1 (b), "War Crimes", has by reference incorporated the rules by which war crimes are to be identified. In all such cases it remains only for the Tribunal, after the manner of the common law, to determine the content of those rules under the impact of changing conditions.

Whatever view may be held as to the nature and source of our authority under C.C. Law 10 and under common international law, the ex post facto rule, properly understood, constitutes no legal nor moral barrier to prosecution in this case.

Under written constitutions the ex post facto rule condemns statutes which define as criminal, acts committed before the law was passed, but the ex post facto rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, though the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth . . . .

1,304

As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by C.C. Law 10 can assert that he did not know that he would be brought to account for his acts. Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the States at war with Germany.

The Law in Action

We pass now from the forgoing incomplete summary of Nazi legislation to a consideration of the law in action, and of the influence of the "Fuehrer principle" as it affected the officials of the Ministry of Justice, prosecutor, and judges. Two basic principles controlled conduct within the Ministry of Justice. The first concerned the absolute power of Hitler in person or by delegated authority to enact, enforce, and adjudicate law. The second concerned the incontestability of such law. Both principles were expounded by the learned Professor Jahrreiss, a witness for all of the defendants. Concerning this first principle, Dr. Jahrreiss said:

> "If now in the European meaning one asks about legal restrictions, and first of all one asks about restrictions of the German law, one will have to say that restrictions under German law did not exist for Hitler. He was legibus solutus in the same meaning in which Louis XIV claimed that for himself in France. Anybody who said something different expresses a wish that does not describe the actual legal facts."

Concerning the second principle, Jahrreiss supported the opinion of Gerhard Anschuetz, "Crown Jurist of the Weimar Republic", who holds that if German laws were enacted by regular procedure, judicial authorities were without power to challenge them on Constitutional or ethical grounds. Under the Nazi system, and even prior thereto, German judges were also bound to apply German law even when in violation of the principles of international law, As stated by Professor Jahrreiss:

> "To express it differently, whether the law has been passed by the State in such a way that it was inconsistent with international law on purpose or not, that could not play any part at all; and that was the legal state of affairs, regrettable as it may be."

This, however, is not to deny the superior authority of international law. Again we quote a statement of extraordinary candor by Professor Jahrreiss:

> "On the other hand, certainly there were local restrictions for Hitler under international law. He was bound by international law. Therefore, he could commit acts violating international law. Therefore, he could issue orders violating international law to the Germans."

The conclusion to be drawn from the evidence, presented by the defendants themselves is clear: In German legal theory Hitler's law was a shield to those who acted under it, but before a Tribunal authorized to enforce international law, Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates, if in violation of the law of the community of nations.

In German legal theory, Hitler was not only the Supreme Legislator, he was also the Supreme Judge. On 26 April 1942 Hitler addressed the Reichstag in part as follows:

1305

> "I do expect one thing: that the nation gives me the right to intervene immediately and to take action myself whenever a person has failed to render unqualified obedience...."
> "I therefore ask the German Reichstag to confirm expressly that I have the legal right to keep everybody to his duty and to cashier or remove from office or position without regard for his person or his established rights, whoever, in my view and according to my considered opinion, has failed to do his duty...."
> "From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour."

On the same day the Greater German Reichstag resolved in part as follows:

> " . . . the Fuehrer must have all the rights postulated by him which serve to further or achieve victory. Therefore—without being bound by existing legal regulations—in his capacity as leader of the nation, Supreme Commander of the Armed Forces, governmental chief and supreme executive chief, as supreme justice, and leader of the Party—the Fuehrer must be in a position to force with all means at his disposal every German, if necessary, whether he be common soldier or officer, low or high official or judge, leading or subordinate official of the Party, worker or employee, to fulfill his duties. In case of violation of these duties, the Fuehrer is entitled after conscientious examination, regardless of so-called well-deserved rights, to mete out due punishment, and to remove the offender from his post, rank and position, without introducing prescribed procedures."

The assumption by Hitler of supreme governmental power in all departments did not represent a new development based on the emergency of war. The declaration of the Reichstag was only an echo of Hitler's declaration of 13 July 1934. After the mass murders of that date (the Roehm purge) which were committed by Hitler's express orders, he said:

> "Whenever someone reproaches me with not having used ordinary court for their sentencing, I can only say: 'In this hour I am responsible for the fate of the German nation and hence the supreme law lord of the German people'."

The conception of Hitler as the Supreme Judge was supported by the defendant Rothenberger. We quote:

> "However, something entirely different has occurred; with the Fuehrer a man has risen within the German people who awakens the oldest, long forgotten times. Here is a man who in his position represents the ideal of the judge in its perfect sense, and the German people elected him for their judge—first of all, of course, as 'judge' over their fate in general, but also as 'supreme magistrate and judge'."

In the same document the defendant Rothenberger expounded the National Socialist theory of judicial independence. He said:

> "Upon the fact that the judge can use his own discretion is founded the magic of the word 'judge'."

He asserted that "every private and Party official must abstain from all interference or influence upon the judgment", but this statement appears to be mere window-dressing, for after his assertion that a judge "must judge like the Fuehrer", he said:

1306

> "In order to guarantee this, a direct liaison officer without any intermediate agency must be established between the Fuehrer and the German judge, that is, also in the form of a judge, the supreme judge in Germany, the 'Judge of the Fuehrer'. He is to convey to the German judge the will of the Fuehrer by authentic explanation of the laws and regulations. At the same time he must upon the request of the judge give binding information in current trials concerning fundamental political, economic, or legal problems which cannot be surveyed by the individual judge."

Thus it becomes clear that the Nazi theory of the judicial independence was based upon the supreme independence of the Fuehrer, which was to be channelized through the proposed liaison officer from Fuehrer to judge.

On 13 November 1934, Goering, in an address before the Academy for German Law, expressed similar sentiments concerning the position of Hitler.

> "Gentlemen, for the German nation this matter was settled by the words of the judge in this hour, the Fuehrer, who stated that in this hour of uttermost danger he alone, the Fuehrer elected by the people, was the supreme and only judge of the German nation."

The defendant Schlegelberger, on 10 March 1936, said:

> "It should be emphasized, however, that in the sphere of the law, also, it is the Fuehrer and he alone who sets the pace of development."

To the same effect we quote Reich Minister of Justice Dr. Thierack, who, on 5 January 1943, said:

> "So also with as the conviction has grown in these ten years in which the Fuehrer has led the German people that the Fuehrer is the Chief Justice and the Supreme Judge of the German people."

On17 February 1943 the defendant Under-Secretary Dr. Rothenberger summed up his legal philosophy with the words:

> "The judge is on principle bound by the law. The laws are the orders of the Fuehrer."

As will be seen, the foregoing pronouncements by the leaders in the field of Nazi jurisprudence were not mere idle theories. Hitler did, in fact, exercise the right assumed by him to act as Supreme Judge, and in that capacity in many instances he controlled the decision of the individual criminal cases.

The evidence demonstrates that Hitler and his top-ranking associates were by no means content with the issuance of general directives for the guidance of the judicial process. They tenaciously insisted upon the right to interfere in individual criminal sentences. In discussing the right to refuse confirmation of sentences imposed by criminal courts, Martin Bormann, as Chief of the Party Chancellery, wrote to Dr, Lammers, Chief of the Reich Chancellery, as follows:

> "When the Fuehrer has expressly requested the right of direct interference over all formal legal provisions, this is emphasizing the very importance of the modification of a judicial sentence.'"

The Ministry of Justice was acutely conscious of the interference by Hitler in the administration

1307

of criminal law. On 10 March 1941 Schlegelberger wrote to Reich Minister Lammers in part as follows:

> "It has come to my knowledge that just recently a number of sentences passed have roused the strong disapproval of the Fuehrer. I do not know exactly which sentences are concerned, but I have ascertained for myself that now and then sentences are pronounced, which are quite untenable. In such cases I shall act with the utmost energy and decision. It is, however, of vital importance for justice and its standing in the Reich, that the head of the Ministry of Justice should know to which sentences the Fuehrer objects, ..."

On the same date Schlegelberger wrote to Hitler in part as follows:

> "In the course of the verdicts pronounced daily there are still judgments which do not entirely comply with the necessary requirements. In such cases I will take the necessary steps . . . . Apart from this it is desirable to educate the judges more and more to a correct way of thinking, conscious of the national destiny. For this purpose it would be invaluable, if you, my Fuehrer, could let me know if a verdict does not meet with your approval. The judges are responsible to you, my Fuehrer; they are conscious of this responsibility and are firmly resolved to discharge their duties accordingly. Heil, my Fuehrer!"

Hitler not only complied with the foregoing request, but proceeded beyond it. Upon his personal orders persons who been sentenced to prison terms were turned over to the Gestapo for execution. We quote briefly from the testimony of Dr. Hans Gramm, who for many years was personal referent to the defendant Schlegelberger, and who testified in his behalf.

> "Q: Do you know anything about transfers of condemned persons to the police, or to the Gestapo?
> A: I know that it frequently occurred that Hitler gave orders to the police to call for people who had been sentenced to prison terms. To be sure, it was an order from Hitler directed to the police to the effect that the police had to take such and such a man into their custody. Those orders had rather short limits. As a rule, there was only a time limit of 24 hours before execution by the police, after which the police had to report that it had been executed. These transfers, as far as I can remember, took place only during the war."

This procedure was well-known in the ministry of Justice. Gramm was informed by the defendant Schlegelberger that the previous Reich Minister Justice, Dr. Guertner, had protested to Dr. Lammers against this procedure and had received the reply:

> "That the courts could not stand up to the special requirements of the war, and that therefore these transfers would have to continue."

The only net result of the protest was that "from that time on in every individual case when such a transfer had been ordered, the Ministry of Justice was informed about that."

The witness, Dr. Lammers, former Chief of the Reich Chancellery whose hostility toward the prosecution, and evasiveness, were obvious, conceded that the practice was continued under Schlegelberger, though Lammers stated that Schlegelberger never agreed to it.

By reference to case histories we will illustrate three different methods by which Hitler, through the

1308

Ministry of Justice, imposed his will in disregard of judicial proceedings. One Schlitt had been sentenced to a prison term, as a result of which Schlegelberger received a telephone call from Hitler protesting the sentence. In response the defendant Schlegelberger on 24 March 1942 wrote in part as follows:

> "I entirely agree with your demand, my Fuehrer, for very severe punishment for crime, and I assure you that the judges honestly wish to comply with your demand. Constant instructions in order to strengthen them in this intention, and the increase of threats of legal punishment, have resulted in a considerable decrease of the number of sentences to which objections have been wade from this point of view, out of a total annual number of more than 300,000.
> I shall continue to try to reduce this number still more, and if necessary, I shall not shrink from personal measures, as before.In the criminal case against the building technician Ewald Schlitt from Wilhelmshaven, I have applied through the Public Prosecutor for an extraordinary plea for nullification against the sentence, at the Special Senate of the Reich Court. I will inform you of the verdict of the Special Senate immediately it has been given."

On 6 May 1942, Schlegelberger informed Hitler that the ten year sentence against Schlitt was "quashed within ten days and that Schlitt was sentenced to death and executed at once".
In the case against Anton Scharff, the sentence of ten years penal servitude had been imposed. Thereupon, on 25 May 1941,Bormann wrote to Dr. Lammers: "The Fuehrer believes this sentence entirely incomprehensible * * *. The Fuehrer requests that you inform State Secretary Schlegelberger again of his point of view."
On 28 June 1941 defendant Schlegelberger wrote Dr. Lammers:

> "I am very obliged to the Fuehrer for informing me, on my request, of his conception of atonements of blackout crimes in reference to the sentence of the Munich Special Court against Anton Scharff. I shall re-instruct the presidents of the courts of appeal and the Chief Public Prosecutors of this conception of the Fuehrer as soon as possible."

As a final illustration of a general practice, we refer to the case of the Jew Luftgas, who had been sentenced to two and one-half years imprisonment for hoarding eggs. On 25 October 1941 Lammers notified Schlegelberger: "The Fuehrer wishes that Luftgas be sentenced to death". On 29 October 1941 Schlegelberger wrote Lammers: "***I have handed over to the Gestapo for the purpose of execution the Jew Marcus Luftgas who had been sentenced to two and one-half years imprisonment ***".

Although Hilter's personal intervention in criminal cases was a matter of common occurrence, his chief control over the judiciary was exercised by the delegation of his power to the Reich Minister of Justice, who, on 20 August 1942, was expressly authorized "to deviate from any existing law".

Among those of the Ministry of Justice who joined in the constant pressure upon the judges in favor of more severe or more discriminatory administration of justice, we find Thierack, Schlegelberger, Klemm, Rothenberger, and Joel. Neither the threat of removal nor the sporadic control of criminal justice in individual cases was sufficient to satisfy the requirements of the Ministry of Justice. As stated by the defendant Rothaug, "only during 1942, after Thierack took over the Ministry, the 'guidance' of justice was begun. ***There was an attempt to guide the administration of justice uniformly from above."

In September 1942 Thierack commenced the systematic distribution to the German judges of Richterbriefs. The first letter to the judges under date of 1 October 1942 called their attention to the fact that Hitler was the Supreme Judge and that "leadership and judgeship have related characters". We quote:

1309

> "A corps of judges like this will not slavishly use the crutches of law. It will not anxiously search for support by the law, but, with a satisfaction in its responsibility, it will find within the limits of the law the decision which is the most satisfactory for the life of the community."

In the judges' letters Thierack discussed particular decisions which had been made in the various courts and which failed to conform to National Socialist ideology. As an illustration of the type of guidance which was furnished by the Ministry of Justice to the German judiciary, we cite a few instances from the Richterbriefs:

A letter to the judges of 1 October 1942 discusses a case decided in a district court on 24 November 1941. A special coffee ration had been distributed to the population of a certain town. A number of Jews applied for the coffee ration but did not receive it, being "excluded from the distribution per se". The food authorities imposed fines upon the Jews for making the unsuccessful application. In 500 cases the Jews appealed to the court and the judge informed the food authorities that the imposition of a fine could not be upheld for legal reasons, one of which was the statute of limitations. In deciding favorably to the Jews, the court wrote a lengthy opinion stating that the interpretation on the part of the food authorities was absolutely incompatible with the established facts. We quote, without comment, the discussion of the Reich Minister of Justice concerning the manner in which the case was decided:

> "The ruling of the district court, in form and content matter, borders on embarrassing a German administrative authority to the advantage of Jewry. The judge should have asked himself the question: What is the reaction of the Jew to this 20-page long ruling, which certifies that he and the 500 other Jews are right and that he won over a German authority, and does not devote one word to the reaction of our own people to this insolent and arrogant conduct of the Jews. Even if the judge was convinced that the food office had arrived at a wrong judgment of the legal position, and if he could not make up his mind to wait with his decision until the question, if necessary, was clarified by the higher authorities, he should have chosen a form for his ruling which under any circumstances avoided harming the prestige of the food office and thus putting the Jew expressly in the right toward it."

A Richterbrief also discusses the case of a Jew who, after the "Aryanization of his firm, attempted to get funds transferred to Holland without a permit. He also attempted to conceal some of his assets. Concerning this case the judges of Germany received the following "guidance":

> "The court applies the same criteria for the award of punishment as it would if it were dealing with a German fellow citizen as defendant. This cannot be sanctioned. The Jew is the enemy of the German people, who has plotted, stirred up, and prolonged this war. In doing so, he has brought unspeakable misery upon our people. Not only is he of different but he is also of inferior race. Justice, which must not measure different matters by the same standard, demands that just this racial aspect must be considered in the award of punishment."

Space does not permit the citation of other instances of this form of perverted political guidance of the courts. Notwithstanding solemn protestations on the part of the Minister that the interdependence of the judge was not to be affected, the evidence satisfies us beyond a reasonable doubt that the purpose of the judicial guidance was sinister and was known to be such by the Ministry of Justice and by the judges who received the directions. If the letters had been written in good faith with the honest purpose of aiding independent judges in the performance of their duties, there would have been no occasion for the carefully guarded secrecy with which the letters were distributed. A letter of 17 November 1942 instructs the judges that the letters are to be "carefully locked up to avoid that they get into the hands of

1310

unauthorized persons. The receivers are subject to official secrecy as far as the contents of the judges' letters are concerned".

In a letter of 17 November 1942 Thierack instructs the judges that "in cases where judges and prosecutors are suspected of political unreliability they are to be excluded in a suitable manner from the list of subscribers to the judges' letters."

Not being content with regimenting the judges and Chief Prosecutors and making them subservient to the National Socialist administration of justice, Dr. Thierack next took up the regimentation of the lawyers. On 11 March 1943 he wrote to the various judges and prosecutors announcing the proposed distribution of confidential lawyers' letters. An examination of these letters convinced the Tribunal that the actual, though undeclared purpose, was to suggest to defense counsel that they avoid any criticism of National Socialist justice and refrain from too much ardor in the defense of persons charged with political crimes.

Not only did Thierack exert direct influence upon the judges, but he employed as his representative the most sinister, brutal and bloody judge in the entire German judicial system. In a letter to Freisler, President of the People's Court, Thierack said that the judgment of the People's Court must be "in harmony with the leadership of the State". He urges Freisler to have every charge submitted to him and to recognize the cases in which it was necessary "in confidential and convincing discussion with the judge competent for the verdict to emphasize what is necessary from the point of view of the State". He continues:

> "As a general rule, the judge of the People's Court must get used to regarding the ideas and intentions of the State leadership as the primary factor and the individual fate which depends on him as only a secondary factor."

He continues:

> "I will try to illustrate this with individual cases:
> 1. If a Jew—and a leading Jew at that—is charged with high treason—even if he is only an accomplice therein—, he has behind him the hate and the will of Jewry to exterminate the German people. As a rule this will therefore be high treason and must be punished by the death penalty."

He concludes with the following admonition to Freisler, which appears to have been wholly unnecessary:

> "In case you should ever be in doubt as to which line to follow or which political necessities to take into consideration, please address yourself to me in all confidence."

It will be recalled that on 26 April 1942 Hitler stated that he would remove from office "those judges who evidently do not understand the demand of the hour." The effect of this pronouncement upon such judges as still retained ideals of judicial independence can scarcely be over-estimated. The defendant Rothenberger stated that it was "absolutely crushing".

In a private letter to his brother, the defendant Oeschey expressed his view of the situation created by Hitler's interference in the following words:

> "After the well-known Fuehrer speech things developed in a frightful manner. I was never a supporter of the stubborn doctrine of the independence of the judge which granted the judge within the frame of the law the position of a public servant, only subordinated to his conscience but otherwise 'neutral', that is, politically completely

> independent. * * * Now it is an absurdity to tell the judge in an individual case which is subject to his decision how he has to decide. Such a system would make the judge superfluous; such things have now com to pass. Naturally it was not done in an open manner; but even the most camouflaged form could not hide the fact that a directive was to be given. Thereby the office of judge is naturally abolished and the procedures in a trial become a farce. I will not discuss who bears the guilt of such a development."

The threat alone of the removal was sufficient to impair the independence of the judges, but the evidence discloses that measures were actually carried out for the removal or transfer of judges who proved unsatisfactory from the Party standpoint.On 29 March 1941 Schlegelberger received a letter from the Chief of the Reich Chancellery protesting against the sentence which had been imposed against the Polish farmhand Wojciesk. The court at Luenburg had recognized some extenuating circumstances in the case.
Schlegelberger was advised as follows:

> "The Fuehrer urges you to take immediately the steps necessary to preclude repetition in other courts of the view of the Luenburg court."

The final degradation of the judiciary is disclosed in a secret communication by Ministerial Director Letz of the Reich Ministry of Justice to Dr. Vollmer, also a Ministerial Director in the Department. Not only were the judges "guided" and at times coerced; they wore also spied upon. We quote:

> "Moreover, I know from documents, which the Minister produces from time to time out of his private files, that the Security Service takes up special problems of the administration of justice with thoroughness and makes summarized situation reports about them. As far as I am informed, a member of the Security Service is attached to each judicial authority. This member is obliged to give information under the seal of secrecy. This procedure is secret and the person who gives the information is not named. In this way we get, so to say, anonymous reports. Reasons given for this procedure are of State political interest. As long as the direct interests of the State security are concerned, nothing can be said against it, especially in wartime."

In view of the conclusive proof of the sinister influences which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office. If the evidence cited supra does not demonstrate the utter destruction of judicial independence and impartiality, then we "never writ nor no man ever" proved. The function of the Nazi courts was judicial only in a limited sense. They more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner.

In operation the Nazi system forced the judges into one of two categories. In the first we find the judges who still retained ideals of judicial independence and who administered justice with a measure of impartiality and moderation. Judgments which they rendered were act aside by the employment of the nullity plan and the extraordinary objection. The defendants they sentenced were frequently transferred to the Gestapo on completion of prison terms and were then shot or sent to concentration camps. The judges themselves were threatened and criticized and sometimes removed from office. To this group the defendant Ouhorst belonged. In the other category were the judges who with fanatical zeal enforced the will of the Party with such severity that they experienced no difficulties and little interference from Party

1312

officials. To this group the defendants Rothaug and Oeschey belonged.

Racial Persecution

The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offense charged in the indictment.The defendants are not now charged with conspiracy as a separate and substantive offense, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior. The over acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are: (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.

We turn to the national pattern or plan for racial extermination.

Fundamentally, the program was one for the actual extermination of Jews and Poles, either by means of killing or by confinement in concentration camps, which merely made death slower and more painful. But lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich. We have already noted the decree by which Jews were excluded from the legal profession. Intermarriage between Jews and persons of German blood was prohibited. Sexual intercourse between Jews and German nationals was punished with extreme severity by the courts. By other decrees Jews were almost completely expelled from public service, from educational institutions, and from many business enterprises. Upon the death of a Jew his property was confiscated. Under the provisions for confiscation under the 11th amendment to the German Citizenship Law, supra, the decision as to confiscation of the property of living Jews was left to the Chief of the Security Police and the SD. The law against Poles and Jews, cited supra (4 December 1941), was rigorously enforced. Poles and Jews convicted of specific crimes were subjected to different types of punishment from that imposed upon Germans who had committed the same crimes. Their rights as defendants in court were severely circumscribed. Courts were empowered to impose death sentences on Poles and Jews even where such punishment was not prescribed by law, if the evidence showed "particularly objectionable motives". And, finally, the police were given carte blanche to punish all "criminal" acts committed by Jews without any employment of the judicial process. From the great mass of evidence we can only cite a few illustrations of the character and operation of the program.

On 30 January 1939, in an address before the Reichstag, Hitler, who was at that very time perfecting his plot for aggressive war, said:

> "If the international Jewish financiers within and without Europe succeed in plunging the nations once more into a world war, then the result will not be the Bolshevization of the world and thereby the victory of Jewry, but the obliteration of

1313

the Jewish race in Europe."

We quote from the writings of Alfred Rosenberg (since hanged), "High Priest of the Nazi Racial Theory and Herald of the Master Race":

> "A new faith is arising today: the myth of the blood, the faith to defend with the blood the divine essence of man. The faith, embodied in clearest knowledge, that the Nordic blood represents that mysterium which has replaced and overcome the old sacraments." (Rosenberg, Der Mythus des 20. Jahrhunderts, (Munich, 1935), page 114 (1st ed., 1930)). (National Socialism, page 31, Department of State Bulletin).

The Rosenberg philosophy strongly supported the program of the Nazi party, which reads as follows:

> "None but members of the nation (Volk) may be citizens of the State. None but those of German blood, whatever their creed, may be members of the nation. No Jew, therefore, may be a member of the nation."

It was to implement this program that the disciminatory [sic] laws against Poles and Jews were enacted as herinabove set forth.

A directive of the Reich Ministry of Justice, signed by Freisler, dated 7 August 1942, addressed to prosecutors and judges, sets forth the broad general purposes which were to govern the application of the law against Poles and Jews and the specific application of that law in the trial of cases. We quote:

> "The penal law ordinance of 4 December 1941 concerning Poles, was intended not only to serve as a criminal law against Poles and Jews but beyond that, also to provide general principles for the German administration of law to adopt in all its judicial dealings with Poles and Jews, irrespective of the role which the Poles and Jews play in the individual proceedings.The regulations of Article IX for instance, according to which Poles and Jews are not to be sworn in, apply to proceedings against Germans as well.* * *
> "1. Proceedings against Germans should be carried on whenever possible without calling Poles and Jews as witnesses. If, however, such a testimony cannot be evaded, the Pole or Jew must not appear as a witness against the German during the main trial. He must always be interrogated by a judge who has been appointed or requested to do so, * * *.
> "2. Evidence given by Poles and Jews during proceedings against Germans must be received with the utmost caution especially in those cases where other evidence is lacking."

On 13 October 1942 the Reich Minister of Justice Thierack wrote to Reichsleiter Bormann, in part as follows:

> "With a view to freeing the German people of Poles, Russians, Jews, and gypsies and with a view to making the Eastern territories which have been incorporated into the Reich available for settlements for German nationals, I intend to turn over criminal proceedings against Poles, Russians, Jews, and gypsies to the Reichsfuehrer SS. In so doing I base myself on the principle that the administration of justice can only make a small contribution to the extermination of members of these peoples. The Justice Administration undoubtedly pronounces very severe sentences on such persons, but that is not enough to constitute any material contribution towards the

1314

realization of the above-mentioned aim."

With few exceptions Jews were wholly excluded from the administration of justice. In a speech before the NSDAP Congress on 14 September 1934, Hans Frank stated:

> "It is unbearable to us to permit Jews to play any role whatsoever in the German Administration of Justice. * * * It will, therefore, be our firm aim to exclude Jews increasingly from the administration of the law as time goes on."

On another occasion Frank, as President of the Academy for German Law, directed: For all future time it will be impossible that Jews will act in the name of German law. * * *". In an order reminiscent of the "burning of the books" in medieval days, Frank also directed that the works of Jewish authors should be removed from all public or study libraries whenever possible. On 5 April 1933, the defendant, Barnickel made an entry in his diary:

> "Today it is said in the newspaper that in Berlin there are about 3,500 attorneys and more than half of them are Jewish. Only 35 of them are to be admitted as-lawyers. * * * To exclude these Jewish attorneys from one day to the next means terrible brutality."

The defense witness, Fritz Walentin, stated that in general all non-Aryan judges were removed from the administration of penal justice very soon after 30 January 1933. The evacuation of Jews to the East for extermination was in full swing at least as early as November 1941, and continued through the war years thereafter. As an illustration of the nature of this program as carried out throughout the Reich, we cite the report of the Secret State Police Main Office, Nuremberg-Furth; Branch Office Wurzburg. This report refers to the deportation from, a comparatively small area around the city of Wurzburg and shows evacuations of Jews to the East in the following numbers: On 27 July 1941, 202 persons; on 24 March 1942, 208 persons; on 25 April 1942, 850 persons; on 10 September 1942 (to Theresienstadt) 177 persons; on 23 September 1942 (to Theresienstadt), 562 persons; on 17 June 1943 (to Theresienstadt), seven persons; on 17 June 1943, 57 Jews were evacuated to the East. The report continues: "With this last transport, all the Jews who had to be evacuated according to instructions issued have left Main Franken." The report shows that the total number of 2,063 Jews were evacuated from the Main Franken area alone. The furniture, clothing, and laundry items left by the Jews were given to the Finance Offices of Main Franken and turned into cash by them.

Even before transfers to the Gestapo had been substituted for judicial procedure the position of a Pole or a Jew who was tried by the courts was not a happy, one. The right of self defense on the part of a Pole was specifically limited. Poles and Jews could not challenge a German judge for prejudice. Other limitations upon the right of appeal and the like are set forth, supra (Law Against Poles and Jews, 4 December 1941).

On 22 July 1942 Reich Minister Goebbels stated that "it was an untenable situation that still today a Jew could protest against the charge of the president of the police, who was an old Party member and a high SS leader. The Jew should not be granted any legal remedy at all nor any right of protest."

The defendant Lautz testified that according to the provisions of a decree which antedated the war and by reason of the general regulations of the law in every case it had to be pointed out in the indictment if the person was a Jew or of mixed race.

On 23 January 1943 the Oberlandesgerichts President at Koenigsberg wrote to the Minister of Justice concerning defense of Poles before tribunals in incorporated Eastern territories. We quote:

13 15

> "The decree of 21 May 1942 states that in accordance with the order on penal justice in Poland of 4 December 1941 attorneys are not (to) undertake the defense of Polish persons before tribunals in the incorporated Eastern territories. This decree has been received with satisfaction by all the judges and prosecutors in the whole of my district."

These directives by the authorities in the Reich under Hitler were not mere idle threats. The policies and laws were rigorously enforced. We quote from a sworn statement of former defendant Karl Engert as follows:

> "The handing over to the Gestapo of Jews, Poles, and gypsies was not under my supervision, but under that of Mr. Hecker, who worked under me in my division. However, he was not responsible to me, but directly to the Minister Thierack."

Again, he said:

> "About 12,000 inmates of the correction houses were assigned for transfer to the Gestapo. * * * Out of the total 12,000, my division assigned 3,000 for transfer in 1942. How many Jews, Poles, and gypsies were assigned I do not know; that must be in the statistics."

Reich Minister Goebbels, in an address to the judges of the People's Court, on 22 July 1942, stated that "if still more than 40,000 Jews, whom we considered enemies of the State, could freely go about in Berlin, this was solely due to the lack of sufficient means of transportation. Otherwise the Jews would have been in the East long ago."

Between 9 and 11 November 1938, a pogrom was carried out against the Jews throughout the Reich, and upon direct orders from Berlin. Defense witness Peter Eiffe testified that he heard rumors of the proposed pogrom on the night of 8 November and called at the Ministry of Propaganda where he was told "somebody has let the cat out of the bag again." During the three-day period Jewish property was destroyed throughout the Reich and thousands of Jews were arrested.

In Berlin the destruction of Jewish property was particularly great. To cap the climax on 12 November 1938 Field Marshall Goering issued the following decree:

> "Article 1.—All damage done due to the indignation of the people at the incitement of international Jewry against National Socialist Germany carried out on the 8, 9, and 10 November 1938, on Jewish enterprises and living quarters is to be removed by the Jewish owners immediately. (RGB1. 1938 I. page 1581).
> "Article II. —The costs of restoration are to be borne by the owner of the Jewish business concerned * * *.
> "Section 2. —Insurance claims of Jews of German nationality will be confiscated in favor of the Reich."

For this purpose a fine of one billion marks wells imposed upon the Jews. The witness Eiffe, who was an attorney in Berlin, acted in behalf of Frau Liebermann, the widow of the internationally known artist, Max Liebermann. Frau Liebermann was at that time eighty years old and the share of the fine imposed upon her was 280,000 marks. Ultimately orders. were issued for her deportation to East. She, however, died, either from heart failure or poison, as she descended the steps to be carried away.

The Roman Catholic chaplain at Amberg prison stated under oath that a large proportion of the inmates of that prison were Poles who had been sentenced under the "Poles Act". Many of them died from under-nourishment. They were forced to eat potato peelings and hunt through the rubbish heaps for

eatable refuse. From this prison "a-social elements" were picked out and sent in batches to the Mauthausen concentration camp. All of the first batch was said to have perished. Among the prisoners were Jews who had been sentenced for race pollution.

The witness Hecker stated under oath that after Thierack' s "doubtful decree" concerning the transfer of Jews, Poles, and gypsies, prisoners in protective custody, and a-social elements from the Justice prisons to the RSHA in the autumn of 1942, the Jews as a whole were immediately handed over. The work was carried out by Department V of the Ministry of Justice. Lists were prepared monthly and sent to Minister Thierack through the chief of the department.

On 22 October 1942 a directive under the letterhead of the Reich Minister of Justice was issued to various prosecuting officers in which it was stated that "by agreement with the Reich Fuehrer SS, lawfully sentenced prisoners confined in penal institutions will be transferred to the custody of the Reich Leader SS." Those designated for transfer to the SS included "Jews, men and women, detained under arrest, protective custody, or in the workhouse, * * * and Poles, residing in the former Polish State territory on 1 September 1939, men and women, sentenced to penal camps or subsequently turned over for penal execution, if sentence is above three years, * * *. With completion of the transfer to the police, the penal term is considered interrupted. Transfer to the police is to be reported to the penal authority and is cases of custody to the superior executive authority, with the information that the interruption of the penal term has been ordered by the Reich Ministry of Justice." The directive is signed "Dr. Crohne".

As a crowning example of fanatical imbecility, we cite the following document issued in April 1943, which was sent to the desk of the defendant Rothenberger for his attention and was initialed by him.

"The Reich Minister of Justice
"Information for the Fuehrer
1943 No.

"After the birth of her child, a full-blooded Jewess sold her mother's milk to a pediatrician and concealed that she vas a Jewess. With this milk babies of German blood were fed in a nursing home for children. The accused will be charged with deception. The buyers of the milk have suffered damage, for mother's a milk from a Jewess cannot be regarded as food for German children. The impudent behavior of the accused is an insult as well. Relevant charges, however, have not been applied for so that the parents, who are unaware of the true facts, need not subsequently be worried.

"I shall discuss with the Reich Health Leader the racial-hygenic aspect of the case.

"Berlin, April 1943."

The witness Lammers, former Chief of the Reich Chancellery, testified as follows:

"Q:* * * Now, you answered Dr. Kubuschok that the subject of sterilization of half-Jews was an alternative to their being moved to the East and that it had been raised by half-Jews themselves in 1942 or prior thereto.

"A: Yes. I said so."

He testified further that the half-Jews were not subject to any compulsion. He was apparently of the

opinion that a person was a free agent if he had a choice between sterilization and deportation to a concentration camp.

While the part played by the Ministry of Justice in the extermination of Poles and Jews was small compared to the mass extermination of millions by the SS and Gestapo in concentration camps, nevertheless the courts contributed greatly to the "final solution" of the problem. From a secret report from the office of the Reich Minister of Justice to the judges and prosecutors, including the defendant Lautz, it appears that 189 persons were sentenced under the law for the protection of German blood and honor in 1941, and 109 in 1942. In the year 1942, 61,836 persons were convicted under the law against Poles and Jews. This figure includes persons convicted in the incorporated Eastern territories, and also convictions for crimes committed in "other districts of the German Reich by Jews and Poles who on 1 September 1939 had their residence or permanent place of abode in territory of the former Polish State". These figures, of course, do not include any cases in which Jews were convicted of other crimes in which the law of 4 December 1943 was not involved.

The defendants contend that they were unaware of the atrocities committed by the Gestapo and in concentration camps. This contention is subject to serious question. Dr. Behl testified that he considered it impossible that anyone, particularly in Berlin, should have been ignorant of the brutalities of the SS and the Gestapo. He said: "In Berlin it would have been hardly possible for anybody not to know about it, and certainly not for anybody who was a lawyer and who dealt with the administration of justice." He testified specifically that he could not imagine that any person in the Ministry of Justice or in the Party Chancellery or as a practicing attorney or a judge of a special (or) Peoples Court could be in ignorance of the facts of common knowledge concerning the treatment of prisoners in concentration camps. It has been repeatedly urged by and in behalf of various defendants that they remained in the Ministry of Justice because they feared that if they should retire, control of the matters pertaining to the Ministry of Justice would be transferred to Himmler and the Gestapo. In short, they claim that they were withstanding the evil encroachments of Himmler upon the Justice Administration, and yet we are asked to believe that they were ignorant of the character of the forces which they say they were opposing. We concur in the finding of the first Tribunal in the case of United States et al. vs. Goering, et al., concerning the use of concentration camps. We quote:

> "Their original purpose was to imprison without trial all those persons who were opposed to the Government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was widely extended, and in course of time concentration camps became places of organized and systematic murder, where millions of people were destroyed. * * *
> "A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the 'final solution' of the Jewish problem. * * *
> "In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by exclusion and annihilation, in order that their territory could be used for colonization by Germans. Hitler had written in 'Mein Kampf' on these lines, and the plan was clearly stated by Himmler in July 1942, when he wrote:
>
> > "It is not our task to Germanize the East in the old sense, that is, to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the East."(IT Judgment, pages, 234, 235, 237).

A large proportion of all of the Jews in Germany were transported to the East. Millions of persons disappeared from Germany and the occupied territory without a trace. They were herded into concentration camps within and within [sic] Germany. Thousands of soldiers and members of the

1318

Gestapo and the SS must have been instrumental in the processes of deportation, torture, and extermination. The mere task of disposal of mountainous piles of corpses, (evidence of which we have seen), became a serious problem and the subject of disagreement between the various organizations involved. The thousands of Germans who took part in the atrocities must have returned from time to time to their homes in the Reich. The atrocities were of a magnitude unprecedented in the history of the world. Are we to believe that no whisper reached the ears of the public or of those officials who were most concerned? Did the defendants think that the nationwide pogrom of November 1938, officially directed from Berlin, and Hitler's announcement to the Reichstag threatening the obliteration of the Jewish race in Europe were unrelated? At least they cannot plead ignorance concerning the decrees which were published in their official organ "The Reichsgesetzblatt". Therefore, they knew that Jews were to be punished by the police in Germany and in Bohemia and Moravia. They knew that the property of Jews was confiscated on death of the owner. They knew that the law against Poles and Jews had been extended to occupied territories and they knew that the Chief of the Security Police was the official authorized to determine whether or not Jewish property was subject to confiscation. They could hardly be ignorant of the fact that the infamous law against Poles and Jews of 4 December 1941 directed the Reich Minister of Justice himself, together with the Minister of the Interior, to issue legal and administrative regulations for "implementation of the decree". They read "The Stuermer". They listened to the radio. They received and sent directives. They heard and delivered lectures. This Tribunal is not so gullible as to believe these defendants so stupid that they did not know what was going on. One man can keep a secret, two men may, but thousands never.

The evidence conclusively establishes the adoption and application of systematic governmentally-organized and approved procedures amounting to atrocities and offenses of the kind made punishable by C.C. Law 10 and committed against "populations" and amounting to persecution on racial grounds. These procedures when carried out in occupied territory constituted war crimes and crimes against humanity. When enforced in the Alt Reich against German nationals they constituted crimes against humanity.

The pattern and plan of racial persecution has been made clear. General knowledge of the broad outlines thereof, in all its immonsity, has been brought home to the defendants. The remaining question is whether or not the evidence proves beyond a reasonable doubt in the case of the individual defendants that they each consciously participated in the plan or took a consenting part therein.

The Defendant Rothaug

Oswald Rothaug was born 17 May 1897. His education was interrupted from 1916 to 1918 while he was in the army. He passed the final law examination in 1922 and the State examination for the higher administration of justice in 1925.

He joined the NSDAP in the spring of 1938 and the membership was made effective from May 1937.

Rothaug was a member of the National Socialist Jurists' League and the National Socialist Public Welfare Association. In his affidavit he denies belonging to the SD. However, the testimony of Elkar and his own admission on the witness stand establishes that he was an "honorary collaborator" for the SD on legal matters.

In December 1925 he began his career as a jurist, first as an assistant to an attorney in Ansbach and later as assistant judge at various courts. In 1927 he became Public Prosecutor in Hof in charge of criminal cases. From 1929 to 1933 he officiated as Counsellor at the Local Court in Nuernberg. In June 1933 he became Senior Public Prosecutor in the Public Prosecution in Nuernberg. Here he was the official in charge of general criminal cases, assistant of the chief public prosecutor handling examination

1319

of suspensions of proceedings and of petitions for pardon. From November to April 1937 he officiated as Counsellor of the District Court in Schweinfurt. He was legal advisor in the Civil and Penal Chamber and at the Court of Assizes, as well as Chairman of the lay assessor's court from April 1937 to May 1943 he was Director of the District Court in Nuernberg, except for a period in August and September of 1939 when he was in the Wehrmacht. During this time he was Chairman of the Court of Assizes, of a penal chamber, and of the special court.

From May 1943 to April 1945 he was Public Prosecutor of the Public Prosecution at the People's Court in Berlin. Here, as head of Department I he handled for a time cases of high treason in the Southern Reich territory, and from January 1944, cases concerning the undermining of public morale in the Reich territory.

Crimes charged in the indictment, as heretofore stated in this opinion, have been established by the evidence in this case. The questions, therefore, to be determined as to the defendant Rothaug are: first, whether he had knowledge of any crime so established and, second, whether he was a participant in or took a consenting part in its commission.

Rothaug's sources of knowledge have, with those of all the defendants, already been pointed out. But Rothaug's knowledge was not limited to those general sources. Rothaug was an official of considerable importance in Nuernberg. He had many political and official contacts; among these---he was the friend of Haberkern, Gau Inspector of the Gau Franconia; he was the friend and associate of Oeschy, Gau Legal Advisor for the Gau Franconia; and was himself Gauwalter of the Lawyer's League. He was the "honorary collaborator" for the SD. According to the witness Elkar, the agent of the SD for Nuernberg and vicinity, this position was more important than that of a confidential agent, and an honorary collaborator was active in SD affairs. He testifies that Rothaug took the SD oath of secrecy.

Whether Rothaug knew of all the aspects of the crimes alleged, we need not determine. He knew of crimes as established by the evidence, and it is the function of this Tribunal to determine his connection, if any, therewith.

The defendant is charged under Counts two, three, and four of the indictment. Under Count four he is charged with being a member of the Party Leadership Corps. He is not charged with membership in the SD. The proof as to Count four establishes that he was Gauwalter of the Lawyers' League. The Lawyers' League was a formation of the Party and not a part of the Leadership Corps as determined by the International Military Tribunal in the case against Goering, et al.

As to Counts two and four of the indictment, from the evidence submitted, the Tribunal finds the defendant not guilty. The question of the defendant's guilt as to Count three of the indictment remains to be determined.

The evidence as to the character and activities of the defendant is voluminous. We shall confine ourselves to the question as to whether or not he took a consenting part in the plan for the persecution, oppression, and extermination of Poles and Jews.

His attitude of virulent hostility towards these races is proved from many Sources and is in no wise shaken by the affidavits he has submitted on his own behalf.

The evidence in this regard comes from his own associates---the judges, prosecutors, defense counsel, medical experts, and others with whom he dealt. Among, but not limited to these, we cite the evidence of Doebig, Ferber, Bauer, Derfmueller, Elkar, Engert, Greben(sp?), and Markl. In particular the

1320

testimony of Father Schosser is important. He testified as to many statements made by the defendant Rothaug during the trial of his own case, showing the defendant's hostility to Poles and his general attitude toward them. He stated that concerning the Poles in general, Rothaug expressed himself in the following manner:

> "If he (Rothaug) had his way, then no Pole would be buried in a German cemetery, and then he went on to make the remark which everybody heard in that courtroom--- that he would get up from his coffin if near to him there was a Pole being buried. Rothaug himself had to laugh because of this mean joke, and he went on to say, 'You have to be able to hate, because according to the Bible, God is a hating God.'"

The testimony of Elkar is even more significant. He testified that Rothaug believed in severe measures against foreigners and particularly against Poles and Jews, whom he felt should be treated differently from German transgressors. Rothaug felt there was a gap in the law in this respect. He states that Rothaug asserted that in his own court he achieved this discrimination by interpretation of existing laws but that other courts failed to do so. Such a gap, according to Rothaug, should be closed by singling out Poles and Jews for special treatment. Elkar testifies that recommendations were made by the defendant Rothaug, through the witness, to higher levels and that the subsequent decree of 1941 against Poles and Jews conformed to Rothaug's ideas as expressed and forwarded by the witness Elkar through SD channels to the RSHA.

This animosity of the defendant to these races is further established by documents in this case which show that his discrimination against these races encompassed others who he felt lacked the necessary harshness to carry out the policy of the Nazi State and Party to these people.

In this connection the communication of Oeschey to Deputy Gauleiter Holz, concerning Doobig, is worthy of note. In this communication many charges were made against Doobig for his failure to take action against officials under him who had failed to carry out the Nazi programs against Jews and Poles. Oeschey testified that these charges were copied from a letter submitted to him by the defendant Rothaug and that the defendant assumed responsibility for these charges. Rothaug denies that he assumed responsibility or had anything do with the charges made, except in one immaterial instance. However, in the light of the circumstances themselves, the Tribunal accepts Oeschey's testimony in this regard, particularly in view of the unimpeached affidavit of Oeschey's secretary to the effect that these charges were copied directly by her from a letter of Rothaug's.

Documentary proof of Rothaug's attitude in this respect is further found in the records of cases tried by him which will hereafter be considered.

The third case to be considered is that of Leo Katzenberger.The record in this case shows that Lehman Israel Katzenberger, commonly called Leo Katzenberger, was a merchant and head of the Jewish community in Nuernberg; that he was "sentenced to death for an offense under paragraph two legally identical with an offense under paragraph four of the Decree Against Public Enemies in connection with the offense of racial pollution". The trial was held in the public session on 13 March 1942. Katzenberger's age at that time was over 68 years.

The offense of racial pollution with which he was charged comes under Article 2 of the Law for the Protection of German Blood and Honor. This section reads as follows:

> "Sexual intercourse (except in marriage) between Jews and German nationals of German or German related blood is forbidden."

The applicable sections of the Decree Against Public Enemies reads as follows:

1324

"Section 2

"Crimes During Air Raids

"Whoever commits a crime or offense against the body, life, or property, taking advantage of air raid protection measures, is punishable by hard labor of up to fifteen (15) years or for life, and in particularly severe cases, punishable by death.

* * * * * * * * *

"Section 4

"Exploitation of the State of War a Reason

Cause for More Severe Punishment

"Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to fifteen (15) years or for life, or is punishable by death if the sound common sense of the people requires it on account of the crime being particularly despicable."

The evidence in this case, aside from the record, is based primarily upon the testimony of Hans Groben, the investigating judge who first investigated the case; Hermann Markl, the official who prosecuted the ease; Karl Ferber, who was one of the associate judges in the trial; Heinz Hoffman, who was the other associate judge in the trial; Armin Bauer, who was medical expert in the trial; Georg Engert, who dealt with clemency proceedings; and Otto Ankenbrand, another investigating judge. The salient facts established in connection with this case are in substance as follows: Some time in the first half of the year 1941 the witness Groben issued a warrant of arrest against Katzenberger, who was accused of having had intimate relations with the photographer Seiler. According to the results of the police inquiry, actual intercourse had not been proved, and Katzenberger denied the charge. Upon Groben's advice, Katzenberger agreed that he would not move against the warrant of arrest at that time but would wait the results of further investigation. These further investigations were very lengthy, although Groben pressed the public prosecutor for speed. The police, in spite of their efforts, were unable to get further material evidence, and it became apparent that the way to clarify the situation was to take take the sworn statement of Seiler, and this was done.

In her sworn statement she said that Katzenberger had known both her and her family for many years before she had come to Nuernberg and that his relationship to her was a friendly and fatherly one and denied the charge of sexual intercourse. The evidence also showed that Katzenberger had given Seiler financial assistance on various occasions and that he was administrator of the property where Seiler lived, which was owned by a firm of which he was a partner. Upon Seiler's statement, Groben informed Dr. Herz, counsel for Katzenberger, of the result and suggested that it was the right time to move against the warrant of arrest.

When this was done, Rothaug learned of it and ordered that the Katzenberger case be transferred from the Criminal Division Court to the Special Court. The first indictment was withdrawn, and another indictment was prepared for the Special Court.

The witness Markl states that Rothaug dominated the prosecution, especially through his close friendship with the Senior Public Prosecutor, Dr. Schroeder, who was the superior of Markl.

1322

The indictment before the Special Court was prepared according to the orders of Rothaug, and Katzenberger was not charged only with race defilement in this new indictment, but there was also an additional charge under the Decree Against Public Enemies, which made the death sentence permissible. The new indictment also joined the Seiler woman on a charge of perjury. The effect of joining Seiler in the charge against Katzenberger was to preclude her from being a witness for the defendant, and such a combination was contrary to established practice. Rothaug at this time told Markl that there was sufficient proof of sexual intercourse between Seiler and Katzenberger to convince him, and that he was prepared to condemn Katzenberger to death. Markl informed the Ministry of Justice of Rothaug's intended procedure against Katzenberger and was told that if Rothaug so desired it, the procedure would be approved.

Prior to the trial, the defendant Rothaug called on Dr. Armin Baur, medical Counsellor for the Nuernberg Court, as the medical expert for the Katzenberger case. He stated to Bauer that he wanted to pronounce a death sentence and that it was, therefore, necessary for the defendant to be examined. This examination, Rothaug stated, was a mere formality since Katzenberger "would be beheaded anyhow". To the doctor's reproach that Katzenberger was old and it seemed questionable whether he could be charged with race defilement, Rothaug stated:

"It is sufficient for me that the swine said that a German girl had sat upon his lap."

The trial itself, as testified to by many witnesses, was in the nature of a political demonstration. High Party officials attended, including Reich Inspector Oexle. Part of the group of Party officials appeared in uniform.

During the proceedings, Rothaug tried with all his power to encourage the witnesses to make incriminating statements against the defendants. Both defendants were hardly heard by the court. Their statements were passed over or disregarded. During the course of the trial, Rothaug took the opportunity to give the audience a National Socialist lecture on the subject of the Jewish question. The witnesses found great difficulty in giving testimony because of the way in which the trial was conducted, since Rothaug constantly anticipated the evaluation of the facts and gave expression to his own opinions.

Because of the way the trial was conducted, it was apparent that the sentence which would be imposed was the death sentence.

After the introduction of evidence was concluded, a recess was taken, during which time the prosecutor Markl appeared in the consultation room and Rothaug made it clear to him that he expected the prosecution to ask for a death sentence against Katzenberger and a term in the penitentiary for Seiler. Rothaug at this time also gave him suggestions as to what he should include in his arguments.

The reasons for the verdict were drawn up by Ferber. They were based upon the notes of Rothaug as to what should be included. Considerable space is given to Katzenberger's ancestry and the fact that he was of the Mosaic faith, although that fact was admitted by Katzenberger. Much space is also given to the relationship between Katzenberger and Seiler. That there was no proof of actual sexual intercourse is clear from the opinion. The proof seems to have gone little farther than the fact that the defendant Seiler had at times sat upon Katzenberger's lap and that he had kissed her, which facts were also admitted. Many assumptions were made in the reasons stated which obviously are not borne out by the evidence. The court even goes back to the time prior to the passing of the Law for the Protection of German Blood and Honor, during which Katzenberger had known Seiler. It draws the conclusion apparently without evidence, that their relationship for a period of approximately ten years, had always been of a sexual nature. The opinion undertakes to bring the case under the decision of the Reich Supreme Court that actual sexual intercourse need not be proved, provided the acts are sexual in nature.

Having wandered far afield from the proof to arrive at this conclusion as to the matter of racial

1323

pollution, the court then proceeds to go far afield in order to bring the case under the Decree Against Public Enemies. Here the essential facts proved were that the defendant Seiler's husband was at the front and that Katzenberger, on one or possibly two occasions, had visited her after dark. On both points the following paragraphs of the opinion are enlightening:

> "Looked at from this point of view, Katzenberger's conduct is particularly contemptible. Together with his offense of racial pollution he is also guilty of an offence under paragraph 4 of the ordinance against people's parasites. It should be noted here that the national community is in need of increased legal protection from all crimes attempting to destroy or undermine its inner cohesion.
> "On several occasions since the outbreak of war the defendant Katzenberger crept into Seiler's flat after dark. In those cases the defendant exploited the measures taken for the protection in air raids. His chances were further improved by the absence of the bright street lighting which exists in the street along Spittlertorgraben in peacetime. He exploited this fact fully aware of its significance because thus he instinctively escaped during his excursions being observed by people in the street.
> "The visits by Katzenberger to Seiler under the protection of the blackout served at least the purpose of keeping relations going. It does not matter whether during these visits extra-marital sexual relations took place or whether they only conversed as when the husband was present, as Katzenberger claims. The request to interrogate the husband was therefore overruled. The court holds the view the defendant's actions, done with a purpose within a definite plan, amount to a crime against the body according to paragraph 2 of the ordinance against people's parasites. The law of 15 September,1935, has been passed to protect German blood and German honor. The Jew's racial pollution amounts to a grave attack on the purity of German blood, the object of the attack being the body of a German woman. The general need for protection, therefore, makes appear as unimportant the behavior of the other partner in racial pollution who anyway is not liable to prosecution. The fact that racial pollution occurred up to at least 1939-1940 becomes clear from statements made by the witness Zouschel to whom the defendant repeatedly and consistently admitted that up to the end of 1939 and the beginning of 1940 she was used to sitting on the Jews lap and exchanging caresses as described above.
> "Thus the defendant committed an offense also under paragraph 2 of the ordinance against people's parasites."The personal character of the male defendant also stamps him as a people's parasite. The racial pollution practiced by him through many years grew, by exploiting war time conditions, into an attitude inimical to the nation, into an attack on the security of the national community, during an emergency. "This is was why the defendant Katzenberger had to be sentenced both on a charge of racial pollution and of an offense under paragraphs 2 and 4 of the ordinance against people's parasites, the two charges being taken in conjunction according to paragraph 73 of the criminal code.* * * * *"In passing sentence the court was guided by these considerations: the political life of the German people under National Socialism is based on the community. One fundamental factor of the life of the national community is race. If a Jew commits racial pollution with a German woman, this amounts to polluting the German race and, by polluting a German woman, to a grave attack on the purity of German blood. The need for protection is particularly strong.

"Katzenberger has been practicing pollution for years. He was well acquainted with the point of view taken by patriotic German men and women as regards racial questions and he knew that by this conduct he insulted the patriotic feelings of the German people. Nor did he mend his ways

after the National Socialist revolution of 1933, after the passing, of the Law for the Protection of German Blood, in 1935, after the action against Jews in 1938, or the outbreak of war in 1939. "The court therefore regards it as indicted, as the only feasible answer to the frivolous conduct of the defendant, to pass death sentence, as the heaviest punishment provided by paragraph 4 of the Decree against Public Enemies. His case takes on the complexion of a Particularly grave crime as he was to be sentenced in connection with the offense of committing racial pollution, under paragraph 2 of the Decree Against Public Enemies, especially if one takes into consideration the defendant's character and the accumulative nature of commission. This is why the defendant is liable to the death penalty which the law provides for only such cases. Dr. Bauer, the medical expert, describes the defendant as fully responsible."

We have gone to some extent into the evidence of this case to show the nature of the proceedings and the animus of the defendant Rothaug. One undisputed fact, however, is sufficient to establish this case as being an act in furtherance of the Nazi program to persecute and exterminate Jews. That fact is that nobody but a Jew could have been tried for racial pollution. To this offense was added the charge that it was committed by Katzenberger through exploiting war conditions and the blackout. This brought the offense under the Ordinance Against Public Enemies and made the offense capital. Katzenberger was tried and executed only because he was a Jew. As stated by Elkar in his testimony, Rothaug achieved the final result by interpretations of existing laws as he boasted to Elkar he was able to do.

This Tribunal is not concerned with the legal incontestability under German law of these cases above discussed. The evidence establishes beyond a reasonable doubt that Katzenberger was condemned and executed because he was a Jew; and Durka, Struss, and Lopata met the same fate because they were Poles. Their execution was in conformity with the policy of the Nazi State of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in that program of persecution and extermination.

From the evidence it is clear that these trials lacked the essential elements of legality. In these cases the defendant's court, in spite of the legal sophistries which he employed, was merely an instrument in the program of the leaders of the Nazi State of persecution and extermination. That the number the defendant could wipe out within his competency was smaller than the number involved in the mass persecutions and exterminations by the leaders whom he served, does not mitigate his contribution to the program of those leaders. His acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.

The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national program of racial persecution. It is of the essence of the proof that he identified himself with this national program and gave himself utterly to its accomplishment. He participated in the crime of genocide.

Again, in determining the degree of guilt the Tribunal has considered the entire record of his activities, not alone under the head of racial persecution but in other respects also. Despite protestations that his judgments were based solely upon evidence introduced in court, we are firmly convinced that in numberless cases Rothaug's opinions were formed and decisions made, and in many instances publicly or privately announced before the trial had even commenced and certainly before it was concluded. He was in constant contact with his confidential assistant Elkar, a member of the criminal SD, who sat with him in weekly conferences in the chambers of the court. He formed his opinions from dubious records submitted to him before trial. By his manner and methods he made his court an instrumentality of terror and won the fear and hatred of the population. From the evidence of his closest associates as well as his victims, we find that Oswald Rothaug represented in Germany the personification of the secret Nazi

intrigue and cruelty. He was and is a sadistic and evil man. Under any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant Rothaug is guilty under Count three of the indictment. In his case we find no mitigating circumstances; no extenuation.

The Defendant Schlegelberger

The defendant Schlegelberger was born on 23 October 1875 in Koenigsberg. He received the degree of Doctor of Law at the University of Leipzig in 1899 and passed the higher State law examination in 1901. He is the author of several law books. His first employment was as an assistant judge at the Local Court in Koenigsberg. In 1904 he became judge at the District Court at Lyck. In 1908 he was appointed judge of the Local Court in Berlin and in the fall of the same year was appointed as an assistant judge of the Berlin Court of Appeals. He was then appointed Councillor of the Berlin Court of Appeals in 1914, where he worked until 1918. During the first World War, on 1 April 1918 he became an assistant to the Reich Board of Justice. On 1 October 1918 he was appointed Privy Government Councillor and department chief. In 1927 he was appointed Ministerial Director in the Reich Ministry of Justice. On 10 October 1931 he was appointed Secretary of State in the Reich Ministry of Justice under Ministe of Justice Guertner, which position he held until Guertner's death. Upon Guertner's death on 29 January 1941 Schlegelberger was put in charge of the Reich Ministry of Justice as Administrative Secretary of State. When Thierack became the new Minister of Justice on 20 August 1942, Schlegelberger resigned from the Ministry.

In 1938 Hitler ordered Schlegelberger to join the NSDAP. Schlegelberger testified that he made no use of the Party, that he never attended a Party meeting, that none of his family belonged to the Party, and that Party attitudes often rendered his position difficult. However, upon his retirement as Acting Minister of Justice on 20 August 1942, Schlegelberger received a letter of appreciation from Hitler together with a gift of 100,00 RM.

Later, in 1944, Hitler gave Schlegelberger the special privilege to use the 100,000 RM to purchase a farm, which under the rule then prevailing could have been purchased only be an expert agriculturist. Schlegelberger states that the 100,000 RM were on deposit in a Berlin German bank to his account when the collapse came. Thus it is shown that Hitler and Schlegelberger were not too objectionable to each other. These transactions also show that Hitler was at least attempting to reward Schlegelberger for good and fathful service rendered, in the performance of some of which Schlegelberger committed both war crimes and crimes against humanity as charged in the indiectment.

We have already adverted to his speech at the University of Rosteck on 10 March 1936, on the subject "A Nation Beholds Its Rightful Law". In this speech Schlegelberger declared:

> "In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the New Reich has been opened uop by a new wording of Section 2 of the Criminal Code, whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto."

As amended, Section 2 remained in effect until repealed by Law No. 11 of the Allied Control Council. The term "the sound people's sentiment" as used in amended Section 2 has been the subject of much discussion and difference of view as to both its proper translation and interpretation. We regard the statute as furnishing no objective standards "by which the people's sound sentiment may be measured". In application and in fact this expression became the "healthy instincts" of Hitler and his co-conspirators.

What has been said with regard to the amendment to Section 2 of the Criminal Code is equally true of the amendment of Section 170a of the Code by the decree of Hitler of 28 June 1935, which is also signed by Minister Guertner and which provides:

> "If an act deserves punishment according to the common sense of the people but is not declared punishable in the Code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of the penal law."

This new conception of criminal law was a definite encroachment upon the rights of the individual citizen because it subjected him to the arbitrary opinion of the judge as to what constituted an offense. It destroyed the feeling of legal security and created an atmosphere of terrorism. This principle of treating crimes by analogy provided an expedient instrumentality for the enforcement of Nazi principles in the occupied countries. German criminal law was therefore introduced in the incorporated areas and also in the non-incorporated territories, and German criminal law was thereafter applied by German courts in the trial of inhabitants of occupied countries though the inhabitants of those countries could have no possible conception of the acts which would constitute criminal offenses.

In the earlier portions of this opinion we have repeatedly referred to the actions of the defendant Schlegelberger. Repetition would serve no good purpose. By way of summary we may say that Schlegelberger supported the pretension of Hitler in his assumption of power to deal with life and death in disregard of even the pretense of judicial process. By his exhortations and directives, Schlegelberger contributed to the destruction of judicial independence. It was his signature on the decree of 7 February 1942 which imposed upon the Ministry of Justice and the courts the burden of the prosecution, trial, and disposal of the victims of Hitler's Night and Fog. For this he must be charged with primary responsibility.

He was guilty of instituting and supporting procedures for the wholesale persecution of Jews and Poles. Concerning Jews, his ideas were less brutal than those of his associates, but they can scarcely be called humane. When the "final solution of the Jewish question" was under discussion, the question arose as to the disposition of half-Jews. The deportation of full Jews to the East was then in full swing throughout Germany. Schlegelberger was unwilling to extend the system to half-Jews. He therefore proposed to Reich Minister Lammers, by secret letter on 5 April 1942:

> "The measures for the final solution of the Jewish question should extend only to full Jews and descendants of mixed marriages of the first degree, but should not apply to descendants of mixed marriages of the second degree.
> "With regard to the treatment of Jewish descendants of mixed marriages of the first degree, I agree with the conception of the Reich Minister of the Interior which he expressed in his letter of 16 February 1942, to the effect that the prevention of propagation of these descendants of mixed marriages is to be preferred to their being thrown in with the Jews and evacuated. It follows therefrom that the evacuation of those half-Jews who are no more capable of propagation is obviated from the beginning. There is no national interest in dissolving the marriage between such half-Jews and a full-blooded German.
> Those half-Jews who are capable of propagation should be given the choice to

1327

submit to sterilization or to be evacuated in the same manner as Jews."

Schlegelberger knew of the pending procedures for the evacuation of Jews and acquiesced in them. As to half-Jews his only suggestion wts that they be given the frne choice of either one of the impaling horns of a dilemma. On 17 April 1941 Schlegelberger wrote to Lammars as follows:

> "On being informed of the Fuehrer's intention to discriminate in the sphere of penal law between the Poles (and probably tho Jews as well), and the Germans, I prepared., after preliminary discussions with the presidents of the courts of appeal and the attorney-generals of the annexed Eastern territories, the attached draft concerning the administration of the penal law against the Poles and Jews in the annexed Eastern territories anel in the territory of the former Free City of Danzig.

The draft of a proposed ordincance concerning the administration of justice regarding the Poles and Jews in the incorporated Eastern territories" was attached to his letter and is in evidence. A comparison of its phraseology with the phraseology contained in the notorious law against Poles and Jews of 4 December 1941 discloses beyond question that Schlegelberger's draft constituted the basis on which, with certain modifications and changes, the law against Poles and Jews was enacted. In this respoct he was not only guilty of participation in the racial persecution of Poles and Jews; he was also guilty of violation of the laws and customs of war by establishing that legislation in the occupied territories of the East. The extension of this type of law into occupied territories was in direct violation of the limitations imposed by The Hague Convention, which we have previously cited.
It is of interest to note that on 31 January 1942 Schlegelberger issued a decree providing that the provisions of the law against Poles and Jews "will be equally applicable with the consent of the public prosecutor to offenses committed before the decree came into force". We doubt if the defendant would contend that the extension of this discriminatory and retroactive law into occupied territory was based on military necessity.
Schlegelberger divorced his inclinations from his conduct. He disapproved "of the revision of sentences" by the police, yet he personally ordered the murder of the Jew Luftgas on the request of Hitler. and assured the Fuehrer thatt he would himself take action if the Fuehrer would inform him of other sentences which were disapproved.

Schlegelberger's attitude toward atrocities committed by the police must be inferred from his conduct. A milking hand, Bloodling, was sentenced to death in October 1940, and during the trial he insisted his purported confession had been obtained as a result of beatings imposed upon him by the police officer Klinzmann. A courageous judge tried Klinzmann and convicted him of brutality and sentenced him to a few months imprisonment. Himmler protested against the sentence of Klinzmann and stated that he was going "to take the action of the Hauptwachtmeister of the police Klinzmann as an occasion to express gratitude for hiss farsighted conduct which was only beneficial to the community." He said further:

> "I must reward his action because otherwise the joy of serving in the police would be destroyed by such verdicts. But finally K has to be rehabilitated in public because his being sentenced by a court is known in public."

On 10 December 1941 Schlegelberger wrote to the Chief of the Reich Chancellery stating that he was unable to understand the sentence passed against Klinzmann. We quote:

> No sooner had the verdict passed on Klinzmann become known here, orders were for this reason to be given to the effect that the sentence, in case of its validation, should not be carried out for the time beign. Instead, reports concerning the granting of a pardon should

1328

be made as soon as possible. In the meantime, however, the sentence passed on Klinzmann became valid, by decision of the Reich Court of 24 November 1941, which abandoned the procedure of revision as apparently unfounded. Taking into regard also the opinion you expressed on the sentence, Sir, I now ordered the remission of the sentcnce and of the costs of proceedings by by way of pardon as well as sking out of the penalty note in the criminal records."

On 24 December 1941 Schlegelberger wrote to Lammers that he had quashed the proceedings. In February 1942 Himmler wrote expressing appreciation of the efforts in quashing the proceedings against Klinzmann and stated that he had since promoted him to Minister of the Municipal Police.
Schlegelberger presents an interesting defense, which is also claimed in some measure by most of the defendants. He asserts that the administration of justice was undcr persistent assault by Himmler and other advocates of the police state. This is true. He contends that if the functions of the administration of justice were usurped by the lawless forces unler Hitler and Himmler, the last state of the nation would be worse than the first. He feared that if he were to resign, a worse man would take his place. As the event proved, there is much truth in this also. Under Thierack the police did usurp the functions of the administration of justice and murdered untold thousands of Jews and political prisoners. Upon analysis this plausible claim of the defense squares neither with the truth, logic, or the circumstances.
The evidence conclusively shows that in order to maintain the Minisistry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler's police, Schlegleberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the State demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home. That their program of racial extermination under the guise of law failed to attain the proportions which were reached by the pogroms, deportations, and mass murders by the police, is cold comfort to the survivors of the "judicial"l process and constitutes a poor excuse before this Tribunal. The. prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.

Schlegelberger resigned. The cruelties of the system which he had helped to develop were too much for him, but he resigned too late. The damage was done. If the judiciary could slay their thousands, why couldn't the police slay their tens of thousands? The consequences which Schlegelberger feared were realized. The police, aided by Thierack prevailed. Schlegelbergcr had failed. His hesitant injustices no longer satisfied the urgent demands of the hour. He retired under fire. In spite of all that he had done he still bore an unmerited reputation as the last of the German jurists and so Hitler gave him his blessing and 100,000 RM as a parting gift.We are under no misapprehension. Schlegelberger is a tragic character He loved the life of intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mass of political pottage and for the vain hope of personal security. He is guiltv under Counts two and three of the indictment.

Back to Nuremberg Main Page

PROSECUTION INDEX OF AUTHORITIES

ANNEX 19.

General Assembly resolution 48/157 entitled "Protection of Children Affected by Armed Conflict." U.N. Doc A/RES/48/157 (20 December 1993)

1330

United Nations

A/RES/48/157

General Assembly

Distr. GENERAL

20 December 1993

ORIGINAL: ENGLISH

A/RES/48/157
85th plenary meeting
20 December 1993

Protection of children affected by armed conflicts

The General Assembly,

Reaffirming its resolution 44/25 of 20 November 1989, by which it adopted the Convention on the Rights of the Child, and its resolution 3318 (XXIX) of 14 December 1974, by which it proclaimed the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recalling that the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto, of 1977, as well as article 38 of the Convention on the Rights of the Child, accord children special protection and treatment,

Recalling the World Declaration on the Survival, Protection and Development of Children and the Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in the 1990s, adopted by the World Summit for Children, held in New York on 29 and 30 September 1990, and stressing the necessity of implementing their provisions,

Taking note of the report of the Committee on the Rights of the Child on its third session, held at Geneva from 11 to 29 January 1993, in particular its recommendation to the General Assembly that the Secretary- General should undertake a study of the ways and means of improving the protection of children from the adverse effects of armed conflicts,

Taking note also of Commission on Human Rights resolution 1993/83 of 10 March 1993,

Mindful of the strong support of the World Conference on Human Rights, held at Vienna from 14 to 25 June 1993, for the proposed study by the Secretary-General, as reflected in paragraph 50 of section II of the Vienna Declaration and Programme of Action,

Profoundly concerned about the grievous deterioration in the situation of children in many parts of the world as a result of armed conflicts, and convinced that immediate and concerted action is called for,

Convinced that children affected by armed conflicts require the special protection of the international community and that there is a need for all States to work towards the alleviation of their plight,

Recognizing the valuable work done in this field by United Nations bodies and organizations, as well as by other relevant intergovernmental and non-governmental organizations,

1. Expresses grave concern about the tragic situation of children in many parts of the world as a result of armed conflicts;

2. Calls upon States fully to respect the provisions of the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto, of 1977, as well as those of the Convention on the Rights of the Child, which accord children affected by armed conflicts special protection and treatment;

3. Urges all Member States to continue seeking comprehensive improvement of the situation of children affected by armed conflicts with appropriate and concrete measures;

4. Requests bodies and organizations of the United Nations, as well as intergovernmental and non-governmental organizations, within the scope of their respective mandates, to cooperate in order to ensure more effective action in addressing the problem of children affected by armed conflicts;

5. Requests the Secretary-General to submit to the General Assembly at its forty-ninth session a report on those concrete measures which have been taken, pursuant to paragraphs 3 and 4 above, to alleviate the situation of children in armed conflict;

6. Takes note with appreciation of the report of the Committee on the Rights of the Child on its third session and the recommendations contained therein concerning the situation of children affected by armed conflict;

7. Requests the Secretary-General to appoint an expert, working in collaboration with the Centre for Human Rights of the Secretariat and the United Nations Children's Fund, to undertake a comprehensive study of this question, including the participation of children in armed conflict, as well as the relevance and adequacy of existing standards, and to make specific recommendations on ways and means of preventing children from being affected by armed conflicts and of improving the protection of children in armed conflicts and on measures to ensure effective protection of these children, including from indiscriminate use of all weapons of war, especially anti-personnel mines, and to promote their physical and psychological recovery and social reintegration, in particular, measures to ensure proper medical care and adequate nutrition, taking into account the recommendations by the World Conference on Human Rights and the Committee on the Rights of the Child;

8. Requests Member States and United Nations bodies and organizations, as well as other relevant intergovernmental and non-governmental organizations, including the Committee on the Rights of the Child, the United Nations Children's Fund, the Office of the United Nations High Commissioner for Refugees, the World Health Organization and the International Committee of the Red Cross, to contribute to the study requested in paragraph 7 above;

9. Requests the Secretary-General to submit a progress report on the study to the General Assembly at its forty-ninth session;

10. Invites the Commission on Human Rights to consider the study at

1332

its fifty-first session;

11. Decides to consider this question at its forty-ninth session under the item entitled "Necessity of adopting effective measures for the promotion and protection of the rights of children throughout the world who are victims of especially difficult circumstances, including armed conflicts".

PROSECUTION INDEX OF AUTHORITIES

ANNEX 20.

Statements of the President of the Security Council dated 29 June 1998 (S/PRST/1998/18)

UNITED
NATIONS

1334
S

Security Council

Distr.
GENERAL

S/PRST/1998/18
29 June 1998

ORIGINAL: ENGLISH

STATEMENT BY THE PRESIDENT OF THE SECURITY COUNCIL

At the 3897th meeting of the Security Council, held on 29 June 1998, in connection with the Council's consideration of the item entitled "Children and armed conflict", the President of the Security Council made the following statement on behalf of the Council:

"The Security Council expresses its grave concern at the harmful impact of armed conflict on children.

"The Security Council strongly condemns the targeting of children in armed conflicts, including their humiliation, brutalization, sexual abuse, abduction and forced displacement, as well as their recruitment and use in hostilities in violation of international law, and calls upon all parties concerned to put an end to such activities.

"The Security Council calls upon all parties concerned to comply strictly with their obligations under international law, in particular their obligations under the Geneva Conventions of 1949, the Additional Protocols of 1977 and the United Nations Convention on the Rights of the Child of 1989. The Council stresses the obligation of all States to prosecute those responsible for grave breaches of international humanitarian law.

"The Security Council recognizes the importance of the mandate of the Special Representative of the Secretary-General on Children and Armed Conflict, supports his activities and welcomes his cooperation with all relevant programmes, funds and agencies of the United Nations system which he deems appropriate.

"The Security Council expresses its intention to pay serious attention to the situation of children affected by armed conflicts and, to this end, to maintain contact, as appropriate, with the Special Representative of the Secretary-General and with the relevant programmes, funds and agencies of the United Nations system.

"The Security Council, while dealing with situations of armed conflict, expresses its readiness to consider, when appropriate, means to assist with the effective provision and protection of humanitarian aid and

1335

assistance to civilian population in distress, in particular women and children; to consider appropriate responses whenever buildings or sites that usually have a significant presence of children such as, inter alia, schools, playgrounds, hospitals, are specifically targeted; to support efforts aimed at obtaining commitments to put to an end the recruitment and use of children in armed conflicts in violation of international law; to give special consideration to the disarmament and demobilization of child soldiers, and to the reintegration into society of children maimed or otherwise traumatized as a result of an armed conflict; and to support or promote child-focused mine clearance and mine-awareness programmes, as well as child-centred physical and social rehabilitation programmes.

"The Security Council recognizes the importance of special training of personnel involved in peacemaking, peacekeeping and peace-building activities on the needs, interests and rights of children, as well as on their treatment and protection.

"The Security Council further recognizes that, whenever measures are adopted under Article 41 of the United Nations Charter, consideration should be given to their impact on the civilian population, bearing in mind the needs of children, in order to consider appropriate humanitarian exemptions."

PROSECUTION INDEX OF AUTHORITIES

ANNEX 21.

Security Council Resolution 1083 (1996) (U.N. Doc S/RES/1083)

1337

UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/RES/1083 (1996)
27 November 1996

RESOLUTION 1083 (1996)

Adopted by the Security Council at its 3717th meeting,
on 27 November 1996

The Security Council,

Recalling its previous resolutions concerning the situation in Liberia, in particular resolution 1071 (1996) of 30 August 1996,

Welcoming the report of the Secretary-General dated 19 November 1996 (S/1996/962),

Noting with grave concern the continued violations by the factions of the ceasefire as agreed to in the 19 August 1995 Abuja Agreement (S/1995/742) and in the timetable for implementation established on 17 August 1996 (S/1996/679) when the Abuja Agreement was extended, which threaten the prospects for peace in Liberia,

Welcoming the beginning of the disarmament process on 22 November in accordance with the amended implementation schedule of the Abuja Agreement and urging all factions to participate as they have agreed,

Reiterating that the people of Liberia and their leaders bear the ultimate responsibility for achieving peace and national reconciliation,

Noting with appreciation the active efforts of the Economic Community of the West African States (ECOWAS) to restore peace, security and stability to Liberia and commending the African States which have contributed to the ECOWAS Monitoring Group (ECOMOG),

Expressing its appreciation to those States which have supported the United Nations Military Observer Mission in Liberia (UNOMIL) and those which have contributed to the Trust Fund for Liberia,

Emphasizing that the continued presence of UNOMIL is predicated on the presence of ECOMOG and its commitment to ensure the safety of UNOMIL,

1338

1. Calls upon the Liberian factions to cease hostilities immediately and to implement the commitments they have entered into, especially the agreement of ECOWAS in Abuja on 17 August 1996, which established a timetable for implementation of the agreement, adopted a mechanism to verify compliance by the faction leaders with the agreement, and proposed possible measures against the factions in the event of non-compliance;

2. Urges the factions to complete on time the disarmament process, which is one of the key steps leading up to the forthcoming elections in 1997;

3. Stresses the urgent need for the international community to support the work and training projects to help ensure the social and economic rehabilitation of demobilized combatants;

4. Decides to extend the mandate of UNOMIL until 31 March 1997;

5. Decides further to maintain UNOMIL deployments at an appropriate level as recommended in paragraph 37 of the report of the Secretary-General (S/1996/962), and requests that the Secretary-General, taking into account the need to ensure the security of UNOMIL personnel, advise the Council of any planned further deployments;

6. Condemns in the strongest possible terms the practice of recruiting, training, and deploying children for combat, and demands that the warring parties immediately cease this inhumane and abhorrent activity and release all child soldiers for demobilization;

7. Condemns all attacks against and intimidation of personnel of ECOMOG, UNOMIL, and the international organizations and agencies delivering humanitarian assistance as well as the looting of their equipment, supplies, and personal property, and calls upon the leaders of the factions to return stolen property;

8. Demands that the factions facilitate the freedom of movement of UNOMIL, ECOMOG, and international organizations and agencies and the safe delivery of humanitarian assistance and that they strictly abide by the principles and rules of international humanitarian law;

9. Stresses the importance of respect for human rights in Liberia, and emphasizes the human rights aspect of UNOMIL's mandate;

10. Stresses also the obligation of all States to comply strictly with the embargo on the deliveries of weapons and military equipment to Liberia imposed by resolution 788 (1992) of 19 November 1992, to take all actions necessary to ensure strict implementation of the embargo, and to bring all instances of violations of the embargo before the Committee established pursuant to resolution 985 (1995) of 13 April 1995;

11. Reiterates strongly its appeal to all States to provide financial, logistical and other assistance in support of ECOMOG to assist it in carrying out its mission and to contribute to the United Nations Trust Fund for Liberia in order to help implement the peace process, including demobilization and reintegration;

12. Stresses the importance of close contacts and enhanced coordination between UNOMIL and ECOMOG at all levels and calls upon ECOMOG, in accordance with the agreement regarding the respective roles and responsibilities of UNOMIL and ECOMOG in the implementation of the Cotonou agreement (S/26272) and with the UNOMIL concept of operations, to provide security for UNOMIL;

13. Requests the Secretary-General to keep the Council informed of the situation in Liberia, especially on the progress of demobilization and disarmament and to submit by 31 January 1997 a progress report and recommendations on possible United Nations support for the holding of free and fair elections;

14. Decides to remain seized of the matter.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 22.

Security Council Resolution 1071 (1996) (U.N. Doc S/RES/1071)

1341

UNITED NATIONS

S

Security Council

Distr.
GENERAL

S/RES/1071 (1996)
30 August 1996

RESOLUTION 1071 (1996)

Adopted by the Security Council at its 3694th meeting, on 30 August 1996

The Security Council,

Recalling all its previous resolutions concerning the situation in Liberia, in particular resolution 1059 (1996) of 31 May 1996,

Having considered the report of the Secretary-General dated 22 August 1996 (S/1996/684) on the United Nations Observer Mission in Liberia (UNOMIL),

Noting the letter of 21 August 1996 to the President of the Security Council containing the Final Communiqué of the Heads of State and Government of the Economic Community of West Africa (ECOWAS) Committee of Nine of Liberia, held at Abuja on 17 August 1996 (S/1996/679),

Welcoming the increasing restoration of Monrovia as a safe haven,

Emphasizing once again that the people of Liberia and their leaders bear the ultimate responsibility for achieving peace and national reconciliation,

Recognizing the positive role of ECOWAS in its efforts to restore peace, security and stability in Liberia,

Expressing its appreciation to those African States contributing troops to the ECOWAS Monitoring Group (ECOMOG),

Commending also those Member States that have supported the peace process, UNOMIL, and ECOMOG, including through contributions to the United Nations trust fund for Liberia,

Stressing also that the continued presence of UNOMIL in Liberia is predicated on the presence of ECOMOG and its commitment to ensure the safety of UNOMIL and emphasizing the need for enhanced coordination between UNOMIL and ECOMOG,

1342

1. Welcomes the report of the Secretary-General dated 22 August 1996;

2. Decides to extend the mandate of UNOMIL until 30 November 1996;

3. Welcomes the agreement of ECOWAS in Abuja on 17 August 1996, which extended the 1995 Abuja agreement until 15 June 1997, established a timetable for implementation of the agreement, adopted a mechanism to verify compliance by the faction leaders with the agreement, and proposed possible measures against the factions in the event of noncompliance;

4. Calls upon the Liberian factions to implement fully and expeditiously all the agreements and commitments they have entered into;

5. Requests the Secretary-General to report to the Security Council by 15 October 1996 with proposals for assistance which UNOMIL or other United Nations agencies could provide in support of the Liberian peace process, including support for the election process, disarmament, demobilization, and verification of compliance by the factions;

6. Further decides to maintain UNOMIL deployments at an appropriate level as recommended in the report of the Secretary-General and requests that the Secretary-General take into account the need to ensure the security of UNOMIL personnel and advise the Council of any planned further deployments;

7. Stresses that the continued support of the international community for the peace process in Liberia, including the participation of UNOMIL, is contingent on the Liberian factions' demonstrating their commitment to resolve their differences peacefully and to achieve national reconciliation in accordance with the agreement reached in Abuja on 17 August 1996;

8. Condemns all attacks against and intimidation of personnel of ECOMOG, UNOMIL, and the international organizations and agencies delivering humanitarian assistance as well as the looting of their equipment, supplies, and personal property, calls upon the leaders of the factions to ensure the immediate return of looted property, and requests the Secretary-General to include in the report referred to in paragraph 5 above information on how much of the stolen property has been returned;

9. Condemns the practice of some factions of recruiting, training, and deploying children for combat, and requests the Secretary-General to include in the report referred to in paragraph 5 above details on this inhumane and abhorrent practice;

10. Demands once more that the factions and their leaders strictly respect the status of the personnel of ECOMOG, UNOMIL and international organizations and agencies, including humanitarian assistance workers, and further demands that these factions facilitate the freedom of movement of UNOMIL and the delivery of humanitarian assistance and that they strictly abide by the relevant principles and rules of international humanitarian law;

11. Stresses the importance of respect for human rights in Liberia and also the human rights aspect of UNOMIL's mandate;

12. Stresses the obligation of all States to comply strictly with the embargo on all deliveries of weapons and military equipment to Liberia imposed by resolution 788 (1992) of 19 November 1992, to take all actions necessary to ensure strict implementation of the embargo, and to bring all instances of violations of the embargo before the Committee established pursuant to resolution 985 (1995) of 13 April 1995;

13. Urges all States to provide financial, logistical and other assistance in support of ECOMOG to assist it to carry out its mandate;

14. Urges all States to contribute to the United Nations trust fund for Liberia;

15. Stresses the importance of close contacts and enhanced coordination between UNOMIL and ECOMOG in their operational activities at all levels and calls on ECOMOG, in accordance with the agreement regarding the respective roles and responsibilities of UNOMIL and ECOMOG in the implementation of the Cotonou agreement (S/26272) and with the UNOMIL concept of operations, to provide security for UNOMIL;

16. Requests the Secretary-General to continue to keep the Security Council closely informed of the situation in Liberia;

17. Decides to remain seized of the matter.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 23.

Security Council Resolution 1231 (1999) (U.N. Doc S/RES/1231)

1345

UNITED NATIONS

S

Security Council

Distr.
GENERAL

S/RES/1231 (1999)
11 March 1998

RESOLUTION 1231 (1999)

Adopted by the Security Council at its 3986th meeting, on 11 March 1999

The Security Council,

Recalling its resolutions 1181 (1998) of 13 July 1998 and 1220 (1999) of 12 January 1999 and the statement of its President of 7 January 1999 (S/1999/PRST/1),

Expressing its continued concern over the fragile situation in Sierra Leone,

Affirming the commitment of all States to respect the sovereignty, political independence and territorial integrity of Sierra Leone,

Having considered the fifth Report of the Secretary-General on the United Nations Observer Mission in Sierra Leone (UNOMSIL) of 4 March 1999 (S/1999/237) and noting the recommendations contained therein,

1. Decides to extend the mandate of UNOMSIL until 13 June 1999;

2. Welcomes the intention of the Secretary-General to re-establish UNOMSIL in Freetown as soon as possible, and to that end to increase the current number of military observers and human rights personnel as referred to in paragraphs 46 and 54 of his report, and to re-deploy the necessary staff to support the relocation to Freetown, subject to strict attention to the security situation there;

3. Condemns the atrocities perpetrated by the rebels on the civilian population of Sierra Leone, including in particular those committed against women and children, deplores all violations of human rights and international humanitarian law which have occurred in Sierra Leone during the recent escalation of violence as referred to in paragraphs 21 to 28 of the report of the Secretary-General, including the recruitment of children as soldiers, and urges the appropriate authorities to investigate all allegations of such violations with a view to bringing the perpetrators to justice;

4. Calls upon all parties to the conflict in Sierra Leone fully to respect human rights and international humanitarian law and the neutrality and impartiality of humanitarian workers, and to ensure full and unhindered access for humanitarian assistance to affected populations;

5. Expresses its grave concern at continued reports that support is being afforded to the rebels in Sierra Leone, including through the supply of arms and mercenaries, in particular from the territory of Liberia;

6. Acknowledges the letter of the President of Liberia to the Secretary-General of 23 February 1999 (S/1999/213) and the statement by the Government of Liberia of 19 February 1999 (S/1999/193) on the action it is taking to curtail the involvement of Liberian nationals in the fighting in Sierra Leone, including measures to encourage the return of Liberian fighters and directives to the Liberian national security agencies to ensure that no cross-border movement of arms takes place and that there be no transshipment of arms and ammunition through Liberian territory, and requests the Secretary-General to continue to consider, in coordination with the countries of the Mano River Union and other member States of the Economic Community of West African States (ECOWAS), the practicability and effectiveness of the deployment of United Nations monitors along with forces of the Military Observer Group of ECOWAS (ECOMOG) at the Liberia/Sierra Leone border;

7. Reaffirms the obligation of all States to comply strictly with the provisions of the embargo on the sale or supply of arms and related matériel imposed by its resolution 1171 (1998) of 5 June 1998;

8. Expresses its intention to keep the issue of external support to the rebels in Sierra Leone under close review, and to consider further steps to address this in the light of developments on the ground;

9. Expresses its support for all efforts, in particular by ECOWAS States, aimed at peacefully resolving the conflict and restoring lasting peace and stability to Sierra Leone, encourages the Secretary-General, through his Special Representative for Sierra Leone, to facilitate dialogue to these ends, welcomes the statement of the President of Sierra Leone of 7 February 1999 (S/1999/138, annex) expressing his Government's readiness to continue their efforts for dialogue with the rebels, and calls upon all parties involved, especially the rebels, to participate seriously in these efforts;

10. Commends the efforts of ECOMOG towards the restoration of peace, security and stability in Sierra Leone, and calls upon all Member States to provide ECOMOG with financial and logistical support and to consider the provision of prompt bilateral assistance to the Government of Sierra Leone in the creation of a new Sierra Leonean army to defend the country;

11. Requests the Secretary-General to keep the Council closely informed on the situation in Sierra Leone and in this regard to submit an additional report to the Council with recommendations on the future deployment of UNOMSIL and the implementation of its mandate by 5 June 1999;

12. Decides to remain actively seized of the matter.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 24.

Security Council Resolution 1261 (1999) (U.N. Doc S/RES/1261)

1348

UNITED NATIONS

S

Security Council

Distr.
GENERAL

S/RES/1261 (1999)*
30 August 1999

RESOLUTION 1261 (1999)

Adopted by the Security Council at its 4037th meeting,
on 25 August 1999

The Security Council,

Recalling the statements of its President of 29 June 1998 (S/PRST/1998/18), 12 February 1999 (S/PRST/1999/6) and 8 July 1999 (S/PRST/1999/21),

Noting recent efforts to bring to an end the use of children as soldiers in violation of international law, in International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour which prohibits forced or compulsory labour, including the forced or compulsory recruitment of children for use in armed conflict, and in the Rome Statute of the International Criminal Court in which conscripting or enlisting children under the age of fifteen into national armed forces or using them to participate actively in hostilities is characterized as a war crime,

1. Expresses its grave concern at the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development;

2. Strongly condemns the targeting of children in situations of armed conflict, including killing and maiming, sexual violence, abduction and forced displacement, recruitment and use of children in armed conflict in violation of international law, and attacks on objects protected under international law, including places that usually have a significant presence of children such as schools and hospitals, and calls on all parties concerned to put an end to such practices;

3. Calls upon all parties concerned to comply strictly with their obligations under international law, in particular the Geneva Conventions of 12 August 1949 and the obligations applicable to them under the Additional Protocols thereto of 1977 and the United Nations Convention on the Rights of the

* Reissued for technical reasons.

Child of 1989, and stresses the responsibility of all States to bring an end to impunity and their obligation to prosecute those responsible for grave breaches of the Geneva Conventions of 12 August 1949;

4. Expresses its support for the ongoing work of the Special Representative of the Secretary-General for Children and Armed Conflict, the United Nations Children's Fund (UNICEF), the United Nations High Commissioner for Refugees (UNHCR), other parts of the United Nations system and other relevant international organizations dealing with children affected by armed conflict, and requests the Secretary-General to continue to develop coordination and coherence among them;

5. Welcomes and encourages efforts by all relevant actors at the national and international level to develop more coherent and effective approaches to the issue of children and armed conflict;

6. Supports the work of the open-ended inter-sessional working group of the Commission on Human Rights on a draft optional protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and expresses the hope that it will make further progress with a view to finalizing its work;

7. Urges all parties to armed conflicts to ensure that the protection, welfare and rights of children are taken into account during peace negotiations and throughout the process of consolidating peace in the aftermath of conflict;

8. Calls upon parties to armed conflicts to undertake feasible measures during armed conflicts to minimize the harm suffered by children, such as "days of tranquillity" to allow the delivery of basic necessary services, and further calls upon all parties to armed conflicts to promote, implement and respect such measures;

9. Urges all parties to armed conflicts to abide by concrete commitments made to ensure the protection of children in situations of armed conflict;

10. Urges all parties to armed conflicts to take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender-based violence in situations of armed conflict and to take into account the special needs of the girl child throughout armed conflicts and their aftermath, including in the delivery of humanitarian assistance;

11. Calls upon all parties to armed conflicts to ensure the full, safe and unhindered access of humanitarian personnel and the delivery of humanitarian assistance to all children affected by armed conflict;

12. Underscores the importance of the safety, security and freedom of movement of United Nations and associated personnel to the alleviation of the impact of armed conflict on children, and urges all parties to armed conflicts to respect fully the status of United Nations and associated personnel;

13. Urges States and all relevant parts of the United Nations system to intensify their efforts to ensure an end to the recruitment and use of children

in armed conflict in violation of international law through political and other efforts, including promotion of the availability of alternatives for children to their participation in armed conflict;

14. Recognizes the deleterious impact of the proliferation of arms, in particular small arms, on the security of civilians, including refugees and other vulnerable populations, particularly children, and, in this regard, recalls resolution 1209 (1998) of 19 November 1998 which, inter alia, stresses the importance of all Member States, and in particular States involved in manufacturing and marketing of weapons, restricting arms transfers which could provoke or prolong armed conflicts or aggravate existing tensions or armed conflicts, and which urges international collaboration in combating illegal arms flows;

15. Urges States and the United Nations system to facilitate the disarmament, demobilization, rehabilitation and reintegration of children used as soldiers in violation of international law, and calls upon, in particular, the Special Representative of the Secretary-General for Children and Armed Conflict, UNICEF, the UNHCR and other relevant agencies of the United Nations system to intensify their efforts in this regard;

16. Undertakes, when taking action aimed at promoting peace and security, to give special attention to the protection, welfare and rights of children, and requests the Secretary-General to include in his reports recommendations in this regard;

17. Reaffirms its readiness when dealing with situations of armed conflict:

(a) to continue to support the provision of humanitarian assistance to civilian populations in distress, taking into account the particular needs of children including, inter alia, the provision and rehabilitation of medical and educational services to respond to the needs of children, the rehabilitation of children who have been maimed or psychologically traumatized, and child-focused mine clearance and mine-awareness programmes;

(b) to continue to support the protection of displaced children including their resettlement by UNHCR and others as appropriate; and

(c) whenever adopting measures under Article 41 of the Charter of the United Nations, to give consideration to their impact on children, in order to consider appropriate humanitarian exemptions;

18. Reaffirms also its readiness to consider appropriate responses whenever buildings or sites which usually have a significant presence of children are specifically targeted in situations of armed conflict, in violation of international law;

19. Requests the Secretary-General to ensure that personnel involved in United Nations peacemaking, peacekeeping and peace-building activities have appropriate training on the protection, rights and welfare of children, and urges States and relevant international and regional organizations to ensure

that appropriate training is included in their programmes for personnel involved in similar activities;

20. Requests the Secretary-General to submit to the Council by 31 July 2000 a report on the implementation of this resolution, consulting all relevant parts of the United Nations system and taking into account other relevant work;

21. Decides to remain actively seized of the matter.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 25.

Security Council Resolution 1314 (2000) (U.N. Doc S/RES/1314)

United Nations S/RES/1314 (2000)

Security Council

Distr. General
11 August 2000

Resolution 1314 (2000)

Adopted by the Security Council at its 4185th meeting, on 11 August 2000

The Security Council,

Recalling its resolution 1261 (1999) of 28 August 1999,

Further recalling its resolutions 1265 (1999) of 17 September 1999, 1296 (2000) of 19 April 2000, 1306 (2000) of 5 July 2000 and the statements of its President of 29 June 1998 (S/PRST/1998/18), 12 February 1999 (S/PRST/1999/6), 8 July 1999 (S/PRST/1999/21), 30 November 1999 (S/PRST/1999/34) and 20 July 2000 (S/PRST/25),

Welcoming the adoption by the General Assembly on 25 May 2000 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,

Bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,

Underlining the need for all parties concerned to comply with the provisions of the Charter of the United Nations and with the rules and principles of international law, in particular international humanitarian, human rights and refugee law, and to implement fully the relevant decisions of the Security Council, *and recalling* the relevant provisions on the protection of children contained in International Labour Organization Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, the Rome Statute of the International Criminal Court and the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction,

Noting the regional initiatives on war-affected children, including within the Organization for Security and Cooperation in Europe, the West African Conference on War-Affected Children held in Accra, Ghana, in April 2000, and the forthcoming International Conference on War-Affected Children to be held in Winnipeg, Canada from 10 to 17 September 2000,

Having considered the report of the Secretary-General of 19 July 2000 on the implementation of resolution 1261 (1999) on Children and Armed Conflict (S/2000/712),

1. *Reaffirms* its strong condemnation of the deliberate targeting of children in situations of armed conflict and the harmful and widespread impact of armed conflict on children, and the long-term consequences this has for durable peace, security and development;

2. *Emphasizes* the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes, and, in this regard, *stresses* the need to exclude these, where feasible, from amnesty provisions and relevant legislation;

3. *Urges* all parties to armed conflict to respect fully international law applicable to the rights and protection of children in armed conflict, in particular the Geneva Conventions of 1949 and the obligations applicable to them under the Additional Protocols thereto of 1977, the United Nations Convention on the Rights of the Child of 1989 and the Optional Protocol thereto of 25 May 2000, and to bear in mind the relevant provisions of the Rome Statute of the International Criminal Court;

4. *Urges* Member States in a position to do so to sign and ratify the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;

5. *Expresses* support for the ongoing work of the Special Representative of the Secretary-General for Children and Armed Conflict, the United Nations Children's Fund, the United Nations High Commissioner for Refugees, other parts of the United Nations system and other relevant international organizations dealing with children affected by armed conflict;

6. *Urges* Member States and parties to armed conflict to provide protection and assistance to refugees and internally displaced persons, as appropriate, the vast majority of whom are women and children;

7. *Calls upon* all parties to armed conflict to ensure the full, safe and unhindered access of humanitarian personnel and the delivery of humanitarian assistance to all children affected by armed conflict;

8. *Expresses its grave concern* at the linkages between the illicit trade in natural resources and armed conflict, as well as the linkages between the illicit trafficking in small arms and light weapons and armed conflict, which can prolong armed conflict and intensify its impact on children, and in this regard *expresses* its intention to consider taking appropriate steps, in accordance with the Charter of the United Nations;

9. *Notes* that the deliberate targeting of civilian populations or other protected persons, including children, and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law, including that relating to children, in situations of armed conflict may constitute a threat to international peace and security, and in this regard *reaffirms* its readiness to consider such situations and, where necessary to adopt appropriate steps;

10. *Urges* all parties to abide by the concrete commitments they have made to the Special Representative of the Secretary-General for Children and Armed Conflict as well as relevant United Nations bodies to ensure the protection of children in situations of armed conflict;

11. *Requests* parties to armed conflict to include, where appropriate, provisions for the protection of children, including the disarmament, demobilization and reintegration of child combatants, in peace negotiations and in peace agreements and the involvement of children, where possible, in these processes;

12. *Reaffirms* its readiness to continue to include, where appropriate, child protection advisers in future peacekeeping operations;

13. *Underlines* the importance of giving consideration to the special needs and particular vulnerabilities of girls affected by armed conflict, including, *inter alia*, those heading households, orphaned, sexually exploited and used as combatants, and *urges* that their human rights, protection and welfare be incorporated in the development of policies and programmes, including those for prevention, disarmament, demobilization and reintegration;

14. *Reiterates* the importance of ensuring that children continue to have access to basic services during the conflict and post-conflict periods, including, *inter alia*, education and health care;

15. *Indicates its willingness*, when imposing measures under Article 41 of the Charter of the United Nations, to consider assessing the potential unintended consequences of sanctions on children and to take appropriate steps to minimize such consequences;

16. *Welcomes* recent initiatives by regional and subregional organizations and arrangements for the protection of children affected by armed conflict, and *urges* them to:

(a) Consider establishing, within their secretariats, child protection units for the development and implementation of policies, activities and advocacy for the benefit of children affected by armed conflict, including children in the design and implementation of such policies and programmes where possible;

(b) Consider including child protection staff in their peace and field operations and providing training to members of their peace and field operations on the rights and protection of women and children;

(c) Undertake initiatives to curb the cross-border activities deleterious to children in times of armed conflict, such as the cross-border recruitment and abduction of children, the illicit movement of small arms and the illicit trade in natural resources;

(d) Allocate resources, as applicable, during policy and programme development for the benefit of children affected by armed conflict;

(e) Integrate a gender perspective into all policies, programmes and projects;

(f) Consider declaring regional initiatives towards full implementation of the prohibition of the use of child soldiers in violation of international law;

17. *Encourages* Member States, relevant parts of the United Nations system and regional organizations and arrangements to undertake efforts to obtain the release of children abducted during armed conflict and their family reunification;

18. *Urges* Member States and relevant parts of the United Nations system to strengthen the capacities of national institutions and local civil society for ensuring the sustainability of local initiatives for the protection of children;

19. *Calls on* Member States, relevant parts of the United Nations system, and civil society to encourage the involvement of young persons in programmes for peace consolidation and peace-building;

20. *Encourages* the Secretary-General to continue to include in his written reports to the Council on matters of which the Council is seized, as appropriate, observations relating to the protection of children in armed conflict;

21. *Requests* the Secretary-General to submit a report to the Security Council on the implementation of this resolution and of resolution 1261 (1999) by 31 July 2001;

22. *Decides* to remain actively seized of this matter.

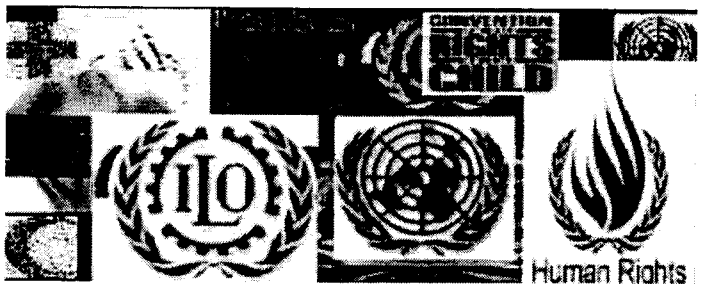
PROSECUTION INDEX OF AUTHORITIES

ANNEX 26.

Organization of African Unity, *Decision on the African Conference on the Use of Children as Soldiers* CM/Dec. 482, April 1999, Articles 2 and 22

1358

OAU Decision - APRIL 1999



Organization of African Unity
CM/Dec.482(LXX) Decision on the African Conference on the Use of Children as Soldiers

Council:

COMMENDS the ?African Conference on the Use of Children as Soldiers?, held in Maputo, Mozambique, from 19-22 April 1999;

REITERATES its Resolution 1659 (LXIV), on the plight of African Children in situations of armed conflicts, adopted in Yaounde, Cameroon, in July 1996, and WELCOMES the outcome of the OAU/African Network for Prevention and Protection Against Child Abuse and Neglect Continental Conference on Children in Situations of Armed Conflict of June 1997;

EXPRESSES ITS SATISFACTION at the outcome of the Maputo Conference;

URGES all Member States to ratify the African Charter on the Rights and Welfare of the Child;

RECOMMENDS the setting up of a Special Committee on the Situation of Children in Armed Conflicts;

FURTHER URGES Member States to adopt and promote norms in respective countries prohibiting recruitment and use as soldiers, children under 18 years of age;

COMMENDS the Secretary-General for his efforts in the dissemination of the African Charter on the Rights and Welfare of the Child and other relevant documents, and for sensitizing African Governments for the eradication of the use of children as soldiers.

INVITES the OAU Secretary-General to put in place the appropriate mechanisms in order to

set in motion the process of combatting this phenomenon in anticipation of the elaboration of an International

1359

Convention on this issue.

Endorsed by the OAU Assembly of Heads of State and Government without amendment, July 1999.

COALITION TO STOP THE USE OF CHILD SOLDIERS, PO BOX 22696, LONDON N4 3ZJ. UK. TEL: (44)(0) 20 7 226-0606

WHAT'S NEW ▪ ABOUT CHILD SOLDIERS ▪ ABOUT THE CSC ▪ APPEALS ▪ CHILD SOLDIER NEWS ▪ CSC EVENTS ▪
CSC PUBLICATIONS: ▪ DONATIONS ▪ OPTIONAL PROTOCOL ▪ OTHER INTERNATIONAL LAW ▪ PRESS RELEASES ▪ USEFUL LINK / RESOURCES ▪
WHAT YOU CAN DO ▪ SEARCH ▪

PROSECUTION INDEX OF AUTHORITIES

ANNEX 27.

Maputo Declaration on the Use of Children as Soldiers, African Conference on the Use of Children As Soldiers, Maputo, Mozambique, 19-22 April 1999

1361

Stop The Use Of Child Soldiers!

AFRICAN CONFERENCE ON THE USE OF CHILDREN AS SOLDIERS

Maputo Declaration on the Use of Children as Soldiers

What's New
(November 9, 2000)
Child Soldiers Campaign - Home Page
Facts
Voices of Child Soldiers
HRW Reports
The Child Soldiers Protocol
Statements and Resolutions
International Law
What You Can Do
Links

Participants in the African Conference on the Use of Children as Soldiers, held in Maputo, Mozambique, from 19-22 April 1999;

Appalled that more than 300,000 children under 18 years of age are currently participating in armed conflicts worldwide;

Acknowledging that poverty, injustice, displacement, lack of access to education, the proliferation of small arms and other factors contribute to the recruitment of children as soldiers;

Recognising the need to include children in building peace and reconciliation;

Welcoming and supporting the work of the Special Representative of the Secretary-General for Children and Armed Conflict to prohibit the recruitment and use of children in armed conflict;

Recalling with approval the Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilisation and Social Reintegration of Child Soldiers in Africa (27-30 April 1997), the Organization of African Unity/African Network for Prevention and Protection Against Child Abuse and Neglect Continental Conference on Children in Situations of Armed Conflict of June 1997, and Resolution 1659 (LXIV) on the Plight of African Children in Situations of Armed Conflict, adopted by the Council of Ministers of the OAU in July 1996, Yaounde, Cameroon;

Mindful that the African Charter on the Rights and Welfare of the Child prohibits the recruitment and use as soldiers of children under 18 years of age;

Welcoming the fact that the national legislation of the overwhelming majority of African States sets 18 years as the minimum age for military recruitment;

Welcoming the adoption of the Statute of the International Criminal Court that makes the conscripting or enlisting of children under the age of 15 years or using them to participate actively in hostilities a war crime, both in international and internal armed conflict and whether by armed forces or armed groups, while regretting that the age specified was not 18 years;

Alarmed that despite these standards African children, girls as well as boys, are currently taking part in armed conflicts across the continent in

both governmental armed forces, including militia, and armed opposition groups, and are often subject to abuse or misuse as military "wives" or

labourers, and that in many cases these include children under 15 years of age;

Determined to put an end to the use of children as soldiers;

1) Solemnly declare that the use of any child under 18 years of age by any armed force or armed group is wholly unacceptable, even where that child claims or is claimed to be a volunteer.

2) Call upon all African States to promote an environment that favours the safe and healthy development of children and to take all necessary measures to ensure that no child under 18 years of age takes part in armed conflict, in particular by:

- ending the recruitment of all children under 18 years of age into the
- armed forces and ensuring that measures are in place to prevent re-recruitment;
- establishing thorough recruitment procedures in particular for determining age;
- ensuring that birth registration is systematised and that identity documents are provided to children, and that in the absence of age documentation, the armed forces require sworn affidavits from parents or community elders that a recruit is 18 years or older;
- demobilising into safety all children, girls as well as boys, currently serving in the armed forces;
- ensuring the physical and psycho-social rehabilitation and effective reintegration into society of demobilised child soldiers;
- refraining from conscripting demobilised child soldiers;
- prohibiting the recruitment of all children into militia forces under their jurisdiction;
- bringing to justice those who continue to recruit or use children as soldiers;
- ensuring that children enrolled into military schools are not members of
- the armed forces and are treated in full accord with international and regional human rights law, in particular the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child;
- ratifying without delay the African Charter on the Rights and Welfare of the Child and the Statute of the International Criminal Court, to ensure their entry into force as soon as possible.

3) Condemn the use of children as soldiers by armed opposition groups and call upon these groups to end the recruitment of children and to demobilise or release into safety children already being used as soldiers.

4) Call upon African States to use their influence to bring pressure to bear on any government or armed opposition group which recruits or uses children as soldiers by refraining from providing them, whether directly or indirectly, with arms, military equipment, training or personnel.

1363

5) Call upon African States to respect fully the provisions of international human rights and humanitarian law, in particular in the case of captured child soldiers, especially by:

- considering the broadest possible amnesty;
- recognising the need for justice and reconciliation and the importance of rehabilitation and reintegration; and
- ensuring that neither the death penalty nor life imprisonment without possibility of release is imposed for offences committed by persons below 18 years of age and that child participants in armed opposition groups are not charged with or convicted of treason.

6) Call upon African States to refrain from providing sanctuary to any armed opposition group recruiting or using children as soldiers.

7) Call upon African States actively to support:

- the adoption of an Optional Protocol to the Convention on the Rights of the Child setting 18 years as the minimum age for all military recruitment and participation in hostilities; and
- the inclusion in the ILO Convention on the Worst Forms of Child Labour of a specific provision prohibiting the use of children as soldiers.

8) Call upon the Organization of African Unity to reinforce its action to promote an end to the use of children as soldiers across the continent, in particular by:

- requesting the Secretary General to submit an annual report on the use of children as soldiers;
- intensifying its efforts to ensure the early entry into force of, and adherence to, the African Charter on the Rights and Welfare of the Child; and
- ensuring that the issue of child soldiers is taken up on a systematic basis at relevant OAU meetings.

9) Call upon all governments, including those outside Africa, to provide adequate assistance to ensure the implementation of the above aims, in particular by providing resources for alternatives to children induced by circumstance to volunteer to join armed forces or armed groups, and for facilitating the demobilisation, rehabilitation and reintegration of child soldiers.

10) Call upon governments outside Africa to use their influence to bring pressure to bear on any government or armed opposition group which recruits or uses children as soldiers by refraining from providing them, whether directly or indirectly, with arms, military equipment, training or personnel.

11) Call upon the United Nations system to provide adequate assistance to ensure the implementation of the above aims, in particular by providing resources for alternatives to children induced by circumstance to volunteer to join armed forces or armed groups, and for facilitating the

1364

demobilisation, rehabilitation and reintegration of child soldiers, and call upon in particular the Special Representative of the Secretary-General for Children and Armed Conflict, the United Nations Children's Fund, the Office of the High Commissioner for Refugees, and the Office of the High Commissioner for Human Rights to intensify their efforts to ensure an end to the use of children as soldiers.

12) Call upon non-governmental organisations, in particular African NGOs, to work for the implementation of this Declaration and to disseminate it broadly.

13) Call upon African and international media to support efforts to end the use of children as soldiers, bearing in mind the imperative need to protect individual children from stigmatisation and to preserve their dignity, safety and self-respect.

14) Request the Government of Mozambique to present this Declaration to the 1999 Summit of the Organization of African Unity and to request the OAU Secretariat to disseminate the Declaration to all African Foreign Ministries.

15) Express their warm appreciation to the Government of Mozambique for hosting this Conference.

Adopted in Maputo, Mozambique, on 22 April 1999.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 28.

The Capetown Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, Adopted by the participants in the Symposium on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, Cape Town, 30 April 1997

1366

The Capetown Principles

CAPE TOWN PRINCIPLES AND BEST PRACTICE ON THE PREVENTION OF RECRUITMENT OF CHILDREN INTO THE ARMED FORCES AND DEMOBILIZATION AND SOCIAL REINTEGRATION OF CHILD SOLDIERS IN AFRICA

Adopted by the participants in the Symposium on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, organized by UNICEF in cooperation with the NGO Sub-group of the NGO Working Group on the Convention on the Rights of the Child, Cape Town, 30 April 1997

DEFINITIONS

"Child soldier" in this document means any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.

"Recruitment" encompasses compulsory, forced and voluntary recruitment into any kind of regular or irregular armed force or armed group.

"Demobilization" means the formal and controlled discharge of child soldiers from the army or from an armed group.

The term "psycho-social" underlines the close relationship between the psychological and social effects of armed conflict, the one type of effect continually influencing the other. By "psychological effects" is meant those experiences which affect emotions, behaviour, thoughts, memory and learning ability and how a situation may be perceived and understood. By "social effects" is meant how the diverse experiences of war alter people's relationships to each other, in that such experiences change people, but also through death, separation, estrangement and other losses. "Social" may be extended to include an economic dimension, many individuals and families becoming destitute through the material and economic devastation of war, thus losing their social status and place in their familiar social network.

PREVENTION OF CHILD RECRUITMENT

1. Establish 18 as the minimum age for any participation in hostilities and for all forms of recruitment into all armed forces and armed groups.

2. Governments should adopt and ratify an Optional Protocol to the Convention on the Rights of the Child raising the minimum ages from 15 to 18.

3. Governments should ratify and implement pertinent regional and international treaties and incorporate them into national law, namely:

   a. The African Charter on the Rights and Welfare of the Child which upon entry into force will establish 18 as the minimum age for recruitment and participation;

b. The two Additional Protocols to the 1949 Geneva Conventions and the Convention on the Rights of the Child, which currently establish 15 as the minimum age for recruitment and participation.

4. Governments should adopt national legislation on voluntary and compulsory recruitment with a minimum age of 18 years and should establish proper recruitment procedures and the means to enforce them. Those responsible for illegally recruiting children should be brought to justice. These recruitment procedures must include:

a. Requirement of proof of age;

b. Safeguards against violations;

c. Dissemination of the standards to the military, especially the recruiters;

d. Publicization of the standards and safeguards to the civilian population, especially children at risk of recruitment and their families and those organizations working with them;

e. Where the government establishes, condones or arms militias or other armed groups, including private security forces, it must also regulate recruitment into them.

5. A permanent International Criminal Court should be established whose jurisdiction would cover, inter alia, the illegal recruitment of children.

6. Written agreements between or with all parties to the conflict which include a commitment on the minimum age of recruitment should be concluded. The SPLM/Operation Lifeline Sudan Agreement on Ground Rules (July 1995) is a useful example.

7. Monitoring, documentation and advocacy are fundamental to eliminating child recruitment and to informing programmes to this end. Community efforts to prevent recruitment should be developed and supported.

a. Local human rights organisations, the media, former child soldiers, and teachers, health workers, church leaders and other community leaders can play an important advocacy role.

b. Establish a dialogue between government and communities in which children are regarded as adults before the age of 18 about the importance of the 18-year limit for recruitment.

c. Provide children with alternative models to the glorification of war, including in the media;

d. Government representatives, military personnel and former opposition leaders can be instrumental in advocating, negotiating and providing technical assistance to their counterparts in other countries in relation to the prevention of recruitment of child soldiers, as well as their demobilization and reintegration.

8. Programmes to prevent recruitment of children should be developed in response to the expressed needs and aspirations of the children.

9. In programmes for children, particular attention should be paid to those most at risk of recruitment: children in conflict zones, children (especially adolescents) separated from or without families, including children in institutions; other marginalized groups (e.g. street children, certain minorities, refugees and the internally displaced); economically and socially deprived children.

a. Risk mapping can be helpful to identify the groups at risk in particular situations, including such issues as areas of concentration of fighting, the age and type of children being militarized and the main agents of militarization;

b. Promote respect for international humanitarian law;

c. To reduce volunteerism into opposing armed forces, avoid harassment of or attacks on children, their homes and families;

d. Monitor recruitment practices and put pressure on recruiters to abide by the standards and to avoid forced recruitment.

10. All efforts should be made to keep or reunite children with their families or to place them within a family structure.

a. This can be done for example through warnings (e.g. by radio or posters) of the need to avoid separation, or through attaching identification to young children, except where this would expose them to additional risk. For further ideas, see "Unaccompanied Minors: Priority Action Handbook for UNICEF/UNHCR Field Staff".

11. Ensure birth registration, including for refugees and internally displaced children, and the provision of identity documents to all children, particularly those most at risk of recruitment.

12. Access to education, including secondary education and vocational training, should be promoted for all children, including refugee and internally displaced children.

a. Adequate economic provision or opportunities also need to be considered for children or their families.

13. Special protection measures are needed to prevent recruitment of children in camps for refugees and internally displaced persons.

a. Refugee camps should be established at a reasonable distance from the border, wherever possible;

b. The civilian nature and humanitarian character of camps for refugees and internally displaced persons should be ensured. Where this is a problem, specific educational and vocational programmes for children, including adolescents, are even more critical;

c. Host governments, if necessary with the assistance of the international community,

1369

should prevent the infiltration of armed elements into camps for refugees and internally displaced persons, and provide physical protection to persons in such camps.

14. The international community should recognize that children who leave their country of origin to avoid illegal recruitment or participation in hostilities are in need of international protection. Children who are not nationals of the country in which they are fighting are also in need of international protection.

15. Controls should be imposed on the manufacture and transfer of arms, especially small arms. No arms should be supplied to parties to an armed conflict who are recruiting children or allowing them to take part in hostilities.

DEMOBILIZATION

16. All persons under the age of 18 should be demobilized from any kind of regular or irregular armed force or armed group.

a. Direct and free access to all child soldiers should be granted to relevant authorities or organizations in charge of collecting information concerning their demobilization and of implementing specific programmes.

17. Children should be given priority in any demobilization process.

18. In anticipation of peace negotiations or as soon as they begin, preparations should be made to respond to children who will be demobilized.

a. Prepare initial situation analysis/needs assessment of children and their communities;

b. Ensure coordination between all parties to avoid duplication and gaps;

c. Where there is access to governmental and other local structures, incorporate and (where necessary) strengthen existing capacities to respond;

d. Ensure training of staff who will be involved in the process;

e. Organize logistical and technical support in collaboration with agencies responsible for the formal demobilization process;

f. Ensure that the demobilization package is of a long-term, sustaining nature rather than in the form of an immediate "reward", taking into account the implications of the nature of the package for future recruitment of children.

19. The issue of demobilization of children should be included in the peace process from the beginning.

20. Where children have participated in armed conflict, peace agreements and related documents should acknowledge this fact.

21. The demobilization process should be designed as the first step in the social reintegration process.

22. The demobilization process should be as short as possible and take into account the human dignity of the child and the need for confidentiality.

a. Ensure adequate time and appropriate personnel to make children feel secure and comfortable so that they are able to receive information, including about their rights, and to share concerns;

b. Wherever possible, staff dealing with the children should be nationals;

c. Special measures must be taken to ensure the protection of children who are in demobilization centres for extended periods of time;

d. Children should be interviewed individually and away from their superiors and peers;

e. It is not appropriate to raise sensitive issues in the initial interview. If they are raised subsequently, it must be done only when in the best interest of the child and by a competent person;

f. Confidentiality must be respected;

g. All children should be informed throughout the process of the reasons why the information is being collected and that confidentiality will be respected. Children should be further informed about what will happen to them at each step of the process;

h. Wherever possible, communication and information should be in the mother tongue of the children;

i. Particular attention should be paid to the special needs of girls and special responses should be developed to this end.

23. As soon as possible start establishing family tracing, contacts and reunification.

24. Health assessment and treatment should be priorities.

a. As soon as possible during the demobilization process, all children should undergo assessment of their physical health and receive treatment as necessary;

b. Particular responses should be developed for girls;

c. Particular responses are needed for children with special needs, e.g. children with disabilities, child soldiers with children of their own, children with substance abuse problems and sexually-transmitted diseases (HIV/AIDS, etc,);

d. Ensure linkages between the demobilization process and existing programmes which are competent to deal with the health needs of children.

25. Monitoring and documentation of child involvement, as well as advocacy for demobilization and release of children, should be undertaken throughout the armed conflict. Community efforts to this end should be supported.

26. Children who leave any armed forces or groups during on-going hostilities have special needs for protection which must be addressed.

During on-going hostilities there is rarely any formal demobilization. However, children may leave the army, for example by escaping or as a result of being captured or wounded. This may compromise their security, protection and access to services. Despite difficulties in identifying such children, there must be recognition of their special needs for protection:

a. Efforts should be made for an early start to programmes and family tracing for unaccompanied children;

b. Efforts should be made to ensure that re-recruitment does not occur. The likelihood of re-recruitment can be reduced if: (i) children are returned to their care-givers as soon as possible; (ii) children are informed of their rights not to be recruited; and (iii) where children have been formally demobilized, others are informed of this fact;

c. Any assembly areas must be sufficiently far from the conflict zones to ensure security. Particular problems may include: (i) some children may not be able to go home; (ii) some areas may be inaccessible for tracing; (iii) families of some children may be in camps for refugees or internally displaced persons; and (iv) the risk of the children being placed in institutions.

27. Illegally recruited children who leave the armed forces or armed groups at any time should not be considered as deserters. Child soldiers retain their rights as children.

28. Special assistance and protection measures must be taken on behalf of children and those recruited as children. See for example "Basic Rights Recognized For the Angolan Under-aged Soldiers".

29. Ensure to the extent possible that demobilized children return to their communities under conditions of safety.

30. Ensure that demobilized children are not discriminated against in services and benefits for demobilized soldiers.

31. Ensure that the rights of children involved in the demobilization process are respected by the media, researchers and others.

a. With specific regard to journalists, a code of conduct should be developed in order to prevent the exploitation of child soldiers by the media. Such a code should take account of inter alia the manner in which sensitive issues are raised, the child's right to anonymity and the frequency of contacts with the media.

RETURN TO FAMILY AND COMMUNITY LIFE

1372

32. Family reunification is the principal factor in effective social reintegration.

a. For family reunification to be successful, special attention must be paid to re-establishing the emotional link between the child and the family prior to and following return;

b. Where children have not been reunited with their family, their need to establish and maintain stable emotional relationships must be recognized;

c. Institutionalization should only be used as a last resort, for the shortest possible time, and efforts to find family-based solutions should continue.

33. Programmes should be developed with the communities, built on existing resources, taking account of the context and community priorities, values and traditions.

a. Programmes responding to the needs of the children should be developed. They should seek to enhance the self-esteem of children, promote their capacity to protect their own integrity and to construct a positive life. Activities must take into account the age and stage of development of the child and accommodate the particular requirements of girls and children with special needs;

b. Programmes can only develop through relationships of trust and confidence, require time and a commitment of resources, and will necessitate a close and on-going cooperation between all actors involved;

c. The impact of the conflict on children and their families must be assessed in order to develop effective programming. This should be undertaken through interviews and discussions with the children concerned, the families and the community as well as, where appropriate, the government. The information should be gathered as early as possible to enable preparation and planning;

d. Policies and strategies to address the situation of demobilized child soldiers should be developed and implemented on the basis of such assessments.

34. The capacity of the family and community to care for and protect the child should be developed and supported.

a. Identify and support traditional resources and practices in the community which can support the psycho-social integration of children affected by war;

b. Assess and understand the socio-economic context with specific reference to poverty, and food and nutritional security;

c. Identify and build on the traditional ways of generating income, traditional apprenticeships, credit and money-making schemes;

d. Initiate dialogue with communities to understand their main concerns for their children and their perception of their own roles and responsibilities with regard to the children.

1373

35. Programmes targeted at former child soldiers should be integrated into programmes for the benefit of all war-affected children.

a. Whilst stressing that it is essential to normalize the life of child soldiers, it is important to recognize that all children in a community will have been affected to some degree by the conflict. Programmes for former child soldiers should therefore be integrated into efforts to address the situation of all children affected by the conflict, while ensuring the continuing implementation of specific rights and benefits of demobilized children;

b. The existing health, education and social services within the communities should be supported.

36. Provision should be made for educational activities which reflect: the loss of educational opportunities as a consequence of participation; the age and stage of development of the children; and their potential for promoting development of self-esteem.

37. Provision should be made for relevant vocational training and opportunities or (self-) employment, including for children with disabilities.

a. Upon completion of vocational skills training, trainees should be provided with the relevant tools and, where possible, with start-up loans to promote self-reliance.

38. Recreational activities are essential for psycho-social well-being.

a. Recreational activities should be included in all reintegration programmes for war-affected children. These contribute to the children's psycho-social well-being, facilitate the reconciliation process and form part of their rights as children.

39. Programme development and implementation should incorporate the participation of the children and, with due regard for the context of reintegration, reflect their needs and concerns.

40. Psycho-social programmes should assist children to develop and build those capacities that will facilitate a re-attachment to families and communities.

41. Monitoring and follow-up of the children should take place to ensure reintegration and receipt of rights and benefits. Use community resources for this, e.g. catechists, teachers or others, depending on the situation.

42. In order to be successful, reintegration of the child within the community should be carried out in the framework of efforts towards national reconciliation.

43. Programmes to prevent, demobilize and reintegrate child soldiers should be jointly and constantly monitored and evaluated with communities.

Cape Town, 30 April 1997.

Reprinted here with permission of UNICEF from the pamphlet "Capetown Principles and Best

1374

Practices" by Jean Claude Legrand published by UNICEF April 1997.

Back to top

The ARC Project

Action for the Rights of Children (ARC) is a collaboration between the UNHCR and the International Save the Children Alliance. ARC's primary goal is to "increase the capacity of the UNHCR, government, and NGO field staff to protect and care for children and adolescents in emergency situations." Such situations include the protection and support of children and young adults involved in armed conflicts as soldiers. ARC provides participants with background information about International Legal Standards and Principles as well as policy and child development principles, combined with exploration of important issues, such as emergency education, land mine awareness, unaccompanied children, and adolescent health issues. ARC is a direct response to the Graca Machel Report on the Impact of Armed Conflict on Children and links training directly with field operations. An underlying assumption is that particular effective means of providing protection and support services for children and adolescent refugees are partnerships between NGOs and UNHCR. ARC is directed by a steering committee with representatives from the UNHCR and the Alliance. ARC is financially supported by the governments of Denmark, Norway, Sweden, and the United States. The timeline for ARC is as follows:

1997- **Development Phase** to create conceptual and structural framework, training materials, literature review, and field assessments.

1998- **Operations Phase** to complete materials development, conduct capacity building workshops, initiate pilot projects in the field, and revise materials with feedback from workshop participants.

1999- **Expansion Phase** to expand the regional scope of the workshops, link ARC with existing training programs, publish ARC materials, and create an internet resource site.

For more information about ARC or access to training materials relevant to children and adolescents in emergency situations contact: Senior Coordinator for Refugee Children Unit
UNHCR, Geneva
94 rue de Montbrilliant CH-1202 Geneva
Switzerland
boothby@unhcr.ch
41-22-739-8732 (phone)
41-22-739-7374 (fax)

Source: Discussion Paper for the November 1998 Oslo Workshop on the Protection of Children and Adolescents in Complex Emergencies.

1375

Back to top

The Child Labor Law Perspective

Recently, child rights advocates have argued that the use of child and young adult soldiers should be deemed unlawful as a form of illegal child labor. One basis for this line of argument is that the procurement of illegal child labor forces often preys upon the same groups of youth that are targeted for military recruitment. In 1973, the **International Labour Organization (ILO)** recognized the age of 18 as the minimum age for participation in hazardous work (ILO Convention 138). It is not difficult to conceptualize active participation in armed conflicts as hazardous work and the recruitment of underage youth into military duty as a clear form of exploitation. The Coalition to Stop Child Soldiers has recommended that in it's June 1999 meeting the ILO specifically prohibit the recruitment of under 18s into military service as a form of illegal labor practices. The Coalition's advocacy efforts are also supported by the UN Commission on Human Rights which in 1995 established a working group to draft a new Optional Protocol to the Convention on the Rights of the Child which would establish 18 as the minimum age for recruitment and participation in armed conflicts. To date, the text of the Protocol has yet to be agreed upon, however, the UN Commission has urged all States to demobilize youth soldiers and to end their participation in armed conflicts. A copy of the Coalition's proposed text for an Optional Protocol submitted in 1998 can be found at:

http://www.child-soldiers.org/provisional_draft_optional_proto.htm.

An important feature of the Coalition's proposal is that it bars both the compulsory and voluntary recruitment and participation of under 18s in armed conflicts. The current legal minimum age of 15 does not afford adequate protection to youth in their early teens because in many cases, eligibility cannot be verified with documented proof. Even in countries where national law already prohibits the recruitment of under 18s, military organizations can claim adherence to international law which currently does not disallow the recruitment of under 18s.

PROSECUTION INDEX OF AUTHORITIES

ANNEX 29.

Antonio Cassese, *International Criminal Law* (2003: Oxford University Press) pp 50-53, 142-143.

INTERNATIONAL CRIMINAL LAW

ANTONIO CASSESE

OXFORD
UNIVERSITY PRESS

3.3 ESTABLISHING WHETHER A SERIOUS VIOLATION OF INTERNATIONAL HUMANITARIAN LAW HAS BEEN CRIMINALIZED

As pointed out above, in order for a serious violation of international humanitarian law to become a war crime, it is necessary that the violation be criminalized. The question then becomes one of how to determine whether this is the case.

The point of departure is the observation that the failure of the relevant rules of international humanitarian law to provide for any courts or criminal proceedings in the event of the rule being breached is not determinative of the issue. What matters is that criminal or military courts have in fact adjudicated breaches of international humanitarian law. Various courts rightly held this view: for instance, the IMT in *Göring and others* (at 220–1), a US Military Tribunal sitting at Nuremberg in *List and others* (the so-called *Hostages* case) (at 635), and in *Ohlendorf and others* (the so-called *Einsatzgruppen* case) (at 658), as well as the US Supreme Court in *Ex parte Quirin* (at 465).

A second, general and preliminary, remark concerns the need to avoid the following simplistic proposition: to determine whether a particular act may be termed a war crime, one need only establish that the act breaches international humanitarian law, since all violations of the laws of war are war crimes under national law and military manuals. The Judge Advocate at a Canadian Military Court pronouncing in 1946 on a war crime in *Johann Neitz* took this view. After noting that, under Canadian law, a war crime was any 'violation of the laws and usages of war committed during any war in which Canada had been or may be engaged at any time', the Judge Advocate added: 'The test of criminal responsibility is therefore not properly applicable, and the issue upon any charge is not "did the accused commit a crime?" as we understand the word "crime" under our criminal law, but "did he violate the laws and usages of war"?' (at 195–6).

This approach is not convincing, as not all violations of international humanitarian

a civilian could be held responsible for war crimes where he had instigated or ordered the murder of other civilians, the Tribunal held that 'Anyone, whether military or civilian, who attacks a civilian protected by the Geneva Conventions . . . breaches these Conventions and consequently falls under Article 109 of the Swiss Penal Military Code [providing for the punishment of war crimes]. This Appellate Tribunal thus differs from the judgments of the ICTR, which require a close link between the breach and an armed conflict and confine the application of the Geneva Conventions to persons discharging functions within the armed forces or the civilian government (*Musema* §§259[–62] and *Akayesu* §§642–3). Nevertheless this Tribunal considers that in any case there must exist a link between the breach and an armed conflict. If, within the framework of a war, where civilians of the two sides are both protected by the Geneva Conventions, a protected person commits a breach against another protected person, it is necessary to establish a link between this act and the armed conflict. If such link is lacking, the breach does not constitute a war crime but an ordinary offence (*infraction de droit commun*)' (at 39–40). In the case at bar, the Tribunal found this link in the fact that the accused was the mayor of the *commune*, and exercised *de jure* and de facto authority over the local citizenry. He was thus in his capacity as a 'public official' or civil servant that he committed the crimes (at 40–1).

law amount to war crimes, as pointed out in *Tadić* (*Interlocutory Appeal*) (§94). In short, to establish whether a breach of that body of law, in addition to giving rise to State responsibility (if the act was performed by a State agent), is also criminalized, the simple equation, breach of international humanitarian law equals a war crime, may not suffice, in light of case law and the general principles of criminal justice, in particular the principle of legality (*nullum crimen sine lege*).

These points having been established, several situations need to be distinguished. First, it may be that a violation has been consistently considered a war crime by national or international courts (this is, for example, true of the most blatant violations, such as unlawfully killing prisoners of war or innocent civilians, shelling hospitals, refusing quarter, killing shipwrecked or wounded persons, and so on). The existence of war crimes cases on a particular matter may sometimes be considered sufficient for holding the breach to be a war crime. However, strictly speaking the existence of a few (possibly isolated) war crimes cases may not be enough. It would be better if it were possible to show that the breach is considered a war crime under customary international law, in which case there would have to be widespread evidence that States customarily prosecute such breaches as war crimes and that they do so because they believe themselves to be acting under a binding rule of international law (*opinio juris*).

A second possible instance is that a breach is termed a war crime by the Statute of an international tribunal. In this case, even if the breach has never been brought before a national or international tribunal, it may justifiably be regarded as a war crime—or, at least, as a war crime falling under the jurisdiction of that international tribunal.

A third, and more difficult, category is when the case law and statutes of international tribunals are absent or silent on the matter.[7] In such a case, how is one to determine whether violating a prohibition of international humanitarian law amounts to a war crime? In light of the case law (see *List and others* (*Hostages* case), *John G. Schultz*, *Tadić* (*Interlocutory Appeal*), and *Blaškić*, to which I will presently return) and the general principles of international criminal law, one is entitled, in seeking an answer to the question, to examine: (i) military manuals, (ii) the national legislation of States belonging to the major legal systems of the world, or, if these elements are lacking, (iii) the general principles of criminal justice common to nations of the world, as set out in international instruments, acts, resolutions and the like; and (iv) the legislation and judicial practice of the State to which the accused belongs or on whose territory the crime has allegedly been committed.

Let us now take a look at how courts have gone about this matter.

In *List and others* (the *Hostages* case) the defendants were high-ranking officers in the German armed forces charged with war crimes and crimes against humanity. They were accused of offences committed by troops under their command during

[7] An example is the prohibition on the use of weapons that are inherently indiscriminate or cause unnecessary suffering.

the occupation of Greece, Yugoslavia, Albania, and Norway, these offences mainly being reprisal killings, purportedly carried out in an attempt to maintain order in the occupied territories in the face of guerrilla opposition, or wanton destruction of property not justified by military necessity.) They claimed that Control Council Law no. 10, on the basis of which they stood accused, was an *ex post facto* act and retroactive in nature. The Tribunal rejected the contention, holding that the crimes defined in that Law were crimes under pre-existing rules of international law, 'some by conventional law and some by customary law'. It went on to state that the war crimes at issue were such under the Hague Regulations of 1907 and then added:

> In any event, the practices and usages of war which gradually ripened into recognized customs with which belligerents were bound to comply, recognized the crimes specified herein as crimes subject to punishment. It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute or treaty if it is made a crime by international convention, recognized customs and usages or war, or the general principles of criminal justice common to civilized nations generally. (At 634–5.)

The Tribunal then noted that the acts at issue were traditionally punished, adding that, although no courts had been established nor penalties provided for the commission of these crimes, 'this is not fatal to their validity. The acts prohibited are without deterrent effect unless they are punishable as crimes' (at 635).

It was the Appeals Chamber of the ICTY that best addressed the issue under discussion, in *Tadić* (*Interlocutory Appeal*). The question in dispute was whether the accused could be held criminally liable for breaches of international humanitarian law allegedly committed in an internal armed conflict; in other words, whether he could be held responsible for war crimes perpetrated in a civil war. The Appeals Chamber first considered whether there were customary rules of international humanitarian law governing internal armed conflicts, and answered in the affirmative (§§96–127). It then asked itself whether violations of those rules could entail individual criminal responsibility. For this purpose, the Court examined national cases, military manuals, national legislation, and resolutions of the UN Security Council. It concluded in the affirmative (§§128–34) and then added that in the case at issue this conclusion was fully warranted 'from the point of view of substantive justice and equity', because violations of international humanitarian law in internal armed conflicts were punished as criminal offences in the countries concerned, that is both the old Socialist Federal Republic of Yugoslavia and in Bosnia and Herzegovina; as the Court noted, 'Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law' (§135; see also §136).

An ICTY Trial Chamber returned to the question in *Blaškić*. The defence contended that violations of common Article 3 of the four 1949 Geneva Conventions (on internal armed conflict) did not entail criminal liability. The Trial Chamber dismissed this contention by noting, first, that those violations were envisaged in Article 3 of the

ICTY Statute, conferring jurisdiction on the Tribunal, and secondly, that the criminal code of Yugoslavia, taken over in 1992 as the criminal code of Bosnia and Herzegovina (the place where the alleged offences had been committed), provided that war crimes committed either in international or in internal armed conflicts involved the criminal liability of the perpetrator (§176). The question was also dealt with, albeit in less compelling terms, by a US Court of Military Appeals in *John G. Schultz*.[8]

[8] The accused, a former captain of the US Air Force who had returned to civilian life, in 1950, in Japan, had killed two Japanese pedestrians. He was tried by a US General Court Martial on charges of involuntary manslaughter and drunken driving, in violation of Articles of War (respectively 93 and 96). The Judge Advocate General of the Air Force appealed the case on, among other grounds, the issue of whether the Court Martial had jurisdiction over the accused and the offences charged. The Court of Appeals, having found that the accused was neither a 'retainer to the camp' nor a 'person accompanying or serving with the US Armies', hence not amenable to a US Court Martial's jurisdiction on these grounds, asked itself whether he fell under the category of 'any other person who by the law of war is subject to trial by military tribunals'. To answer this question it noted, among other things, that US jurisdiction extended to two types of offences: first, crimes committed against the civilian population made 'punishable by the penal codes of all civilized nations', namely war crimes; secondly, 'crimes condemned by local statute which the military occupying power must take cognizance of inasmuch as the civil authority is superseded by the military'. The Court first looked into the first category, to establish whether the offence at issue fell within such category. Having reached a negative conclusion, it turned to the second category, and concluded that the offence came within its purview. Let us now briefly see how the Court discussed the class of war crimes in a lengthy *obiter dictum*.

The Court noted that this category 'finds its basis in the customs and usages of civilized nations'. It then went on to say that, 'In deciding whether a given offence constitutes a crime under the common law of war, we have no single source which will provide a ready answer. This law is nowhere precisely codified. We note, however, that certain crimes are universally recognized as properly punishable under the law of war. These include murder, manslaughter, robbery, rape, larceny, arson, maiming, assaults, burglary, and forgery . . . The test bringing these offences within the common law of war has been their almost universal acceptance as crimes by the nations of the world. This test is consistent with the rule, already noted, that the common law of war has its sources in the principles, customs, and usages of civilized nations. We know of no authority for the proposition that the list of crimes denounced above is either all-inclusive or unchanging. By definition, the law of war must be a concept which changes with the practice of war and the customs of nations. It is neither formalized nor static . . . It is therefore no obstacle to finding a particular offence to be a violation of the law of war that it has not yet been precisely labelled as such. On the other hand, of course, we are not free to add offences at will. In deciding whether an offence comes within the common law of war, we must consider the international attitude towards that offence. The power to define such offences is derived from Articles of War 12 and 15 . . . and it is no objection that Congress has not codified that branch of international law or defined the acts which that law condemns . . . The accused was convicted, in substance, of homicide through negligent operation of a motor vehicle. By the court's findings, there is indicated an intent to find the accused guilty of a crime of a lesser degree than involuntary manslaughter. The question before us is whether the common law of war includes such an offence. We note first that all the crimes which, historically, have been treated as violations of the law of war include an element of *animus criminalis*. Negligent homicide or vehicular homicide, as the term is commonly used, does not include such an element. This is, however, not necessarily determinative. We shall assume that a crime may become a violation of the law of war if universally recognized as an offence even though it contains no element of specific criminal intent. A careful perusal of the penal codes of most civilized nations leads us to the conclusion that homicide involving less than culpable negligence is not universally recognized as an offence. Even in those American jurisdictions—still relatively few in number—which have given statutory recognition to either negligent homicide or vehicular homicide, the degree of negligence required is often held to be "culpable" or "gross"—the same as that required for involuntary manslaughter. Imposing criminal liability for less than culpable negligence is a relatively new concept in criminal law and has not, as yet, been given universal acceptance by civilized nations' (at 114–16).

of citizens; this is expressed by the Latin tag *nullum crimen sine lege stricta*; (iii) criminal rules may not be retroactive, that is, a person may only be punished for behaviour that was considered criminal at the time the conduct was undertaken; therefore he may not be punished on the strength of a law passed subsequently; the maxim referred to in this case is *nullum crimen sine proevia lege*;[13] (iv) resort to analogy in applying criminal rules is prohibited.

Plainly, as stated above, the purpose of these principles is to safeguard citizens as far as possible against both the arbitrary power of government and possibly excessive judicial discretion. In short, the basic underpinning of this doctrine lies in the postulate of *favor rei* (in favour of the accused) (as opposed to *favor societatis* or in favour of society).

In contrast, in common law countries, where judge-made law prevails or is at least firmly embedded in the legal system, there is a tendency to adopt a qualified approach to these principles. For one thing, common law offences (as opposed to statutory offences) result from judge-made law and therefore may lack those requirements of rigidity, foreseeability, and certainty proper to written legislation. For another, common law offences are not strictly subject to the principle of non-retroactivity, as is shown by recent English cases contemplating new offences, or at any rate the extinguishing of traditional defences (see, for instance, *R.* v. *R.* (1992), which held that the fact of marriage was no longer a common law defence to a husband's rape of his wife).[14] However, the European Court of Human Rights has not regarded such cases as questionable or at any rate contrary to the fundamental provisions of the European Convention (see *SW and CR* v. *United Kingdom*, 1995).

Thus, the condition is not the same in every legal system. Let us now see which of the two aforementioned doctrines is applied in international law.

One could merely state that international law, being based on customary processes, is more akin to English law than to French, German, Argentinean, or Chinese law. This, however, is not sufficient. The main problem is that for a long period, and until recently, international law has applied the doctrine of *substantive justice* and it is only

[13] The German Federal Constitutionalal Court set out the principle in admirable terms in its aforementioned decision of 24 October 1996 in *Streletz and Kessler*. In illustrating the scope of Article 103(2) of the German Constitution, laying down the principle at issue, it stated the following: '(1.a) Article 103 §2 of the Basic Law protects against retroactive modification of the assessment of the wrongfulness of an act to the offender's detriment . . . Accordingly, it also requires that a statutory ground of justification which could be relied on at the time when an act was committed should continue to be applied even where, by the time criminal proceedings begin, it has been abolished. However, where justifications are concerned, in contrast to the definition of offences and penalties, the strict reservation of Parliament's law-making prerogative does not apply. In the sphere of the criminal law grounds of justification may also be derived from customary law or case-law'.

[14] It would seem that the English law used to be that a man could not rape his wife because, by agreeing to marry, she had implicitly consented to sexual intercourse for all time. This was obviously a somewhat mediaeval approach. The defence existed only as a matter of common law—it was not in any statute. The judge in *R.* v. *R.* rightly held that societal attitudes had changed and that it was no longer acceptable to hold that a husband could in law never be held guilty of raping his wife; hence he did not allow the old common law defence. In fairness, it was not the introduction of a *new offence*—rape had always been an offence. It was a question of disallowing a (rettograde) common law defence.

in recent years that it is gradually replacing it with the doctrine of *strict legality*, with some important qualifications.

That international law has long applied the former doctrine is not to be attr to a totalitarian or authoritarian streak in the international community. Rath rationale for that attitude was that States were not prepared to enter into t laying down criminal rules, nor had customary rules evolved covering this a practice, there only existed customary rules prohibiting and punishing war (although in a rather rudimentary or unsophisticated manner (see *supra*, 2.2 ar 3.4.1). Hence the need for the international community to rely upon the doct substantive justice when new and extremely serious forms of criminality (against peace, crimes against humanity) suddenly appeared on the internationa

The IMT clearly enunciated this doctrine in *Göring and others*. From the ou Tribunal had to face the powerful objections of German defence counsel tl Tribunal was not allowed to apply *ex post facto* law. These objections were gr in the general principles of criminal law embedded in civil law countri also upheld in German law before and after the Nazi period. The French H. Donnedieu de Vabres, coming from a country where the *nullum crimen* pr is deeply implanted, also showed himself to be extremely sensitive to the princ a consequence, when dealing with the crimes against peace of which the defe stood accused, the Tribunal, before stating that in fact such crimes were prohibited when they were perpetrated (at 219–23)—a finding that still seems questionable—noted that in any case it was not contrary to justice to punisl crimes even if the relevant conduct was not criminalized at the time c commission:

> In the first place, it is to be observed that the maxim *nullum crimen sine lege* i limitation of sovereignty, but is in general a principle of justice. To assert that it is u punish those who in defiance of treaties and assurances have attacked neighbourir without warning is obviously untrue, for in such circumstances the attacker must kr he is doing wrong, and so far from it being unjust to punish him, it would be unj wrong were allowed to go unpunished. (At 219.)

In other words, substantive justice punishes acts that harm society deeply regarded as abhorrent by all members of society, even if these acts were not pr as criminal when they were performed.

In his Dissenting Opinion in the Tokyo trial (*Araki and others*), Judge Röling spelled out the same principle, again with regard to crimes against pe noted that in national legal systems the *nullum crimen* principle 'is not a prin justice but a rule of policy'; this rule was:

> valid only if expressly adopted, so as to protect citizens against arbitrariness of cou well as arbitrariness of legislators . . . the prohibition of *ex post facto* law is an expr political wisdom, not necessarily applicable in present international relations. Thi of liberty may, if circumstances necessitate it, be disregarded even by powers victor war fought for freedom. (At 1059.)

PROSECUTION INDEX OF AUTHORITIES

ANNEX 30.

Theodor Meron, "International Criminalization of Internal Atrocities" 89 American Journal of International Law 554 (July 1995)

1382

89 A.J.I.L. 554, *

The American Journal International Law

July, 1995

89 A.J.I.L. 554

LENGTH: 18001 words

ARTICLE: INTERNATIONAL CRIMINALIZATION OF INTERNAL ATROCITIES

Theodor Meron *

* I should like to express my thanks to Professors George Aldrich, Georges Abi-Saab, Antonio Cassese and Andreas Lowenfeld for their suggestions and, in particular, to Luigi Condorelli for his very important contribution.

SUMMARY:
... The International Law Commission, veterans of the Nuremberg and Tokyo proceedings, individuals such as Rafael Lemkin (who advocated the adoption of the Genocide Convention) and a handful of academics (most notably M. Cherif Bassiouni), among others, helped keep alive the heritage of Nuremberg and the promise of future prosecutions of serious violators of international humanitarian law. ... The Statute thus enhances the prospects for treating egregious violations of human rights law--not only of international humanitarian law--as offenses under international law. ... Given the purposes and objects of the Geneva Conventions and the normative content of their provisions, any state that does not have the necessary laws in place, or is otherwise unwilling to prosecute and punish violators of clauses other than the grave breaches provisions that are significant and have a clear penal character, calls into serious question its good faith compliance with its treaty obligations. ... The identical prohibition of torture, which is widely regarded as a jus cogens norm of general international law, is defined as a grave breach for international armed conflicts. ... Universal jurisdiction over war crimes means that all states have the right under international law to exercise criminal jurisdiction over the offenders. ...

TEXT-1:
[*554] For half a century, the Nuremberg and Tokyo trials and national prosecutions of World War II cases remained the major instances of criminal prosecution of offenders against fundamental norms of international humanitarian law. The heinous activities of the Pol Pot regime in Cambodia and the use of poison gas by Iraq against its Kurdish population are among the many atrocities left unpunished by either international or national courts. Some treaties were adopted that provide for national prosecution of offenses of international concern and, in many cases, for universal jurisdiction; but, with a few exceptions, these treaties were not observed. Notwithstanding the absence of significant prosecutions, an international consensus on the legitimacy of the Nuremberg Principles, the applicability of universal jurisdiction to international crimes, and the need to punish those responsible for egregious violations of international humanitarian law slowly solidified. The International Law Commission, veterans of the Nuremberg and Tokyo proceedings, individuals such as Rafael Lemkin (who advocated the adoption of the Genocide Convention) and a handful of

academics (most notably M. Cherif Bassiouni), among others, helped keep alive the heritage of Nuremberg and the promise of future prosecutions of serious violators of international humanitarian law.

Recent atrocities in the former Yugoslavia and Rwanda shocked the conscience of people everywhere, triggering, within a short span of time, several major legal developments: the promulgation by the Security Council, acting under chapter VII of the United Nations Charter, of the Statutes of the international criminal Tribunals for the former Yugoslavia and Rwanda, and the adoption by the International Law Commission of a treaty-based statute for an international criminal court. These developments warrant a fresh examination of the present state and future direction of the criminal aspects of international humanitarian law applicable to noninternational armed conflicts, conflicts that occur with far greater frequency than international armed conflicts.

The sovereignty of states and their insistence on maintaining maximum discretion in dealing with those who threaten their "sovereign authority" have combined to limit the reach of international humanitarian law applicable to noninternational armed conflicts. [1] Governments have been determined to deal with rebels harshly and to deny them legal recognition and political status. They have refused to be reassured by treaty language, such as Article 3(2) common to the Geneva Conventions for the Protection of Victims of War, [2] which explicitly states that application of listed protective norms will not affect **[*555]** the legal status of the parties. This trend has been attenuated only in part by the heightened impact of human rights law and acceptance of the principle that human rights are a matter of international concern.

International lawmaking and various diplomatic conferences, for example, the conference that adopted the Additional Protocols to the Geneva Conventions in 1977, have, on the whole, been unsympathetic toward extending the protective rules applicable to international wars to civil wars--an attitude that has dampened prospects for redress through orderly treaty making. Because conferences often make decisions by consensus and try to fashion generally acceptable texts, even a few recalcitrant governments may prevent the adoption of more enlightened provisions.

However, the Security Council's Statutes for the criminal Tribunals for the former Yugoslavia and Rwanda have contributed significantly to the development of international humanitarian law and its extension to noninternational armed conflicts. [3] This advance can be explained by the pressure, in the face of atrocities, for a rapid adjustment of law, process and institutions. [4] No matter how many atrocities cases these international tribunals may eventually try, their very existence sends a powerful message. Their statutes, rules of procedure and evidence, and practice stimulate the development of the law. The possible fear by states that the activities of such tribunals might preempt national prosecutions could also have the beneficial effect of spurring prosecutions before national courts for serious violations of humanitarian law.

While supporting the Security Council's establishment of international tribunals for Yugoslavia, [5] where consent to a treaty creating such a tribunal could not be obtained, and Rwanda, I am concerned about the selectivity involved in a system where the establishment of a tribunal for a given conflict situation depends on whether consensus to apply chapter VII of the UN Charter can be obtained. What is needed is a uniform and definite corpus of international humanitarian law that can be applied apolitically to internal atrocities everywhere, and that recognizes the role of all states in the vindication of such law. [6]

The enforcement of international humanitarian law cannot depend on international tribunals alone. They will never be a substitute for national courts. National systems of justice have a vital, indeed, the principal, role to play here. The Draft Statute for an International Criminal Court adopted by the International Law Commission, if generally accepted, may eliminate

some need for establishing more ad hoc tribunals, but the problem of the scope of the substantive international criminal law would remain. Because of the uncertainties surrounding the prospects for an international criminal court, doubts about establishing additional ad hoc criminal tribunals for violations committed in specific countries, and the recognition that the role of international tribunals will always be complementary to that played by national justice systems, the function of national courts cannot be ignored.

To be sure, the record of national prosecutions of violators of such international norms as the grave breaches of the Geneva Conventions is disappointing, even when the obligation to prosecute or extradite violators is unequivocal. A lack of resources, **[*556]** evidence and, above all, political will has stood in the way. International criminal law, of course, is just one element in the life of the society. Addressed in isolation, it will not eliminate abuses. However, greater reliance on that law by national prosecutors and judges would be a move in the right direction. We must therefore rethink the traditional concepts regarding the norms of international law that are applicable to noninternational armed conflicts. We should take a new look at the penal and jurisdictional elements of international humanitarian law, especially universal jurisdiction. In this article, I shall try to develop a broad, principled approach to the prosecution of perpetrators of atrocities committed in civil wars or noninternational armed conflicts (but not in civil strife or situations involving violence of lower intensity), focused not only on the role of international tribunals but also on that of national courts.

THE YUGOSLAVIA AND RWANDA STATUTES AND INTERNAL ATROCITIES

Acting both on the basis of chapter VII of the UN Charter and in pursuance of a request of the Government of Rwanda, the Security Council recently adopted a Statute for the International Tribunal for Rwanda. [7] The new Statute constitutes an extremely important development of international humanitarian law with regard to the criminal character of internal atrocities in Rwanda, and, one may hope, in other conflicts as well. In contrast to the Statute of the International Criminal Tribunal for the Former Yugoslavia, which treats the ensemble of conflicts in the former Yugoslavia as international, [8] the Statute for Rwanda is predicated on the assumption that the conflict in Rwanda is a noninternational armed conflict.

The offenses listed in Articles 2 and 3 of the Yugoslavia Statute (grave breaches of the Geneva Conventions and violations of the laws or customs of war) indicate that the Security Council considered the armed conflicts in Yugoslavia as international. The facts on the ground and the applicable rules of international law strongly support this conclusion. [9] Treating the conflicts in Yugoslavia as international armed conflicts enhances the corpus of the applicable international humanitarian law and fully respects the principle of nullum crimen sine lege.

Subject matter jurisdiction under the Rwanda Statute encompasses three principal offenses. First, like the Yugoslavia Statute, the Rwanda Statute grants the Tribunal the power to prosecute persons who have committed genocide. [10] Of course, the criminal nature of genocide committed in internal conflicts has never been doubted; the customary law character of the peremptory prohibitions stated in the Convention on the Prevention and Punishment of the Crime of Genocide [11] was affirmed long ago by the International Court of Justice, [12] and the possible prosecution of the perpetrators before an international penal tribunal is envisaged by Article VI of the Convention.

Second, the Rwanda Statute--following the example set by the Yugoslavia Statute--confers on the Tribunal the power to prosecute persons who have committed crimes against humanity. Apart from the Nuremberg Charter, where they first appeared, no treaty has defined crimes against humanity and, perhaps inevitably, they have not always been viewed in an identical fashion.

1385

[*557] The tangled meshing of crimes against humanity and human rights violations militates against requiring that the former be linked with war. [13] Thus, the UN Secretary-General's commentary to Article 5 of the Yugoslavia Statute properly suggests that crimes against humanity can be committed even outside international or internal armed conflicts. [14] Nevertheless, the black letter of the Statute itself gives the Tribunal competence over such crimes only when committed in international or internal armed conflicts. [15] By making no allusion to the international or noninternational character of the conflict, the broad language of Article 3 of the Rwanda Statute (entitled "Crimes against humanity") both strengthens the precedent set by the commentary to the Yugoslavia Statute and enhances the possibility of arguing in the future that crimes against humanity (in addition to genocide) can be committed even in peacetime. [16]

This positive element, however, is balanced by a somewhat more complicated definition of crimes against humanity. Thus, in contrast to the Nuremberg definition, the Rwanda Statute requires proof that such crimes were committed "as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" (Article 3, chapeau). [17] While Article 3(h) is based on the Nuremberg Charter ("persecutions on political, racial and religious grounds"), the chapeau draws on the Secretary-General's commentary to Article 5 of the Yugoslavia Statute.

To prosecute crimes against humanity under Article 5 of the Yugoslavia Statute, it is required to show only that the crimes listed in that article were "directed" against any civilian population. Although the requirement of establishing the large-scale, systematic nature of attacks against a civilian population appears in the jurisprudence of Nuremberg, [18] there was no need to include it in the statutory definition. One may ask whether, by stating all these requirements in the text of the Rwanda Statute, the Security Council has not inadvertently made the burden of proving crimes against humanity more difficult to meet.

[*558] Clearly, crimes against humanity overlap to a considerable extent with the crime of genocide. Indeed, the latter can be regarded as a species and particular progeny of the broader genus of crimes against humanity. Crimes against humanity are crimes under customary law. Genocide is a crime under both customary law and a treaty. The core prohibitions of crimes against humanity and the crime of genocide constitute jus cogens norms.

The crime of genocide requires a particularly heavy burden of proof. There is a distinct advantage in being able to prosecute offenders for the crime of genocide or other crimes against humanity, or even both. The departure from the simpler Nuremberg model of crimes against humanity and the drift toward merging these two offenses are unfortunate.

In the circumstances of Rwanda, the crime of genocide and crimes against humanity appear to cover most of the murders that have been committed. Genocide, as we know, requires evidence of "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." [19] Some killings and other violations might fall outside the specific offenses of the crime of genocide and crimes against humanity because of either definitional difficulties or a failure to satisfy the burden of proof. Proof of systematic and deliberate planning, however, is not required to establish the violation of common Article 3 or Additional Protocol II. [20]

In this case, Article 4 of the Statute provides a safety net that is the Statute's greatest innovation. Under Article 4, the Tribunal may prosecute persons who have committed serious violations of common Article 3 of the Geneva Conventions and of Additional Protocol II. [21] A recent report by the UN Secretary-General recognizes that

> the Security Council has elected to take a more expansive approach to the choice

1386

> of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common Article 3 . . . . [22]

The listed violations draw on both Article 4 of Protocol II ("Fundamental guarantees" clause) and common Article 3. Because the list of violations in Article 4 of the Statute **[*559]** is illustrative and not exclusive, the Tribunal is empowered to apply other provisions of Protocol II as well.

Article 4 of the Rwanda Statute stands in sharp contrast to the Yugoslavia Statute. Apart from crimes against humanity and the crime of genocide, the Yugoslavia Tribunal's subject matter jurisdiction under the Statute covers rules of international humanitarian law that are applicable to international armed conflicts (discussed in the next section) and are declaratory of customary law. The jurisdiction of the Tribunal under Article 4 of the Rwanda Statute also derives from instruments governing noninternational armed conflicts (common Article 3 and Additional Protocol II). Whatever the Tribunal does in practice, this development has enormous normative importance.

CRIMINALITY OF HUMANITARIAN LAW

Until very recently, the accepted wisdom was that neither common Article 3 (which is not among the grave breaches provisions of the Geneva Conventions) nor Protocol II (which contains no provisions on grave breaches) provided a basis for universal jurisdiction, and that they constituted, at least on the international plane, an uncertain basis for individual criminal responsibility. [23] Moreover, it has been asserted that the normative customary law rules applicable in noninternational armed conflicts do not encompass the criminal element of war crimes. In its comments on the proposed draft statute for the Yugoslavia tribunal, the International Committee of the Red Cross thus "underlined the fact that, according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict." [24] In its final report, the United Nations War Crimes Commission (for Yugoslavia) was equally categorical. [25]

The International Law Commission also excluded Additional Protocol II from the subject matter jurisdiction of the proposed international criminal court. Its criteria for listing treaties that state crimes within the jurisdiction of that court are:

> (a) that the crimes are themselves defined by the treaty so that an international criminal court could apply that treaty as law in relation to the crime, subject to the nullum crimen guarantee contained in article 39;
>
> (b) that the treaty created either a system of universal jurisdiction based on the principle aut dedere aut judicare or the possibility for an international criminal court to try the crime, or both, thus recognizing clearly the principle of international concern. [26]

As to why Additional Protocol II is not included in the list of treaties stating crimes within the

1387

court's jurisdiction, the ILC explained that it excluded treaties "which merely [*560] regulate conduct, or which prohibit conduct but only on an inter-State basis," [27] and that "Protocol II prohibits certain conduct but contains no clause dealing with grave breaches, nor any equivalent enforcement provision." [28]

The ILC's attitude was too restrictive. Respect for the fundamental guarantees of Protocol II does involve individual conduct and, obviously, is a matter of "international concern." An international tribunal could thus apply the provisions of Protocol II as criminal law.

Nevertheless, one should not attribute too much general doctrinal importance to the Commission's list of treaties establishing crimes over which the tribunal will have jurisdiction. As the ILC itself explained, "article 20(a)-(d) is not intended as an exhaustive list of crimes under general international law. It is limited to those crimes under general international law which the Commission believes should be within the jurisdiction of the Court at this stage . . . ." [29] The ILC was thus concerned with the prospects for states to accept the proposed statute rather than with the broader question of criminality of offenses committed in internal conflicts. As the preamble to the statute states: the "court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole." [30] The Commission acknowledged that it would be difficult to draw a distinction between treaty crimes and crimes under general international law, [31] that the statute is primarily "adjectival and procedural," [32] and that it was not its function "authoritatively to codify crimes under general international law." [33]

As early as the discussions of the Yugoslavia Statute, however, voices urging international criminalization of violations of common Article 3 and Additional Protocol II had been heard. In the Security Council, Ambassador Albright explained the U.S. understanding that the "laws or customs of war" in Article 3 of the Statute (which is illustrative and not exclusive) "include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions." [34]

An additional basis for considering that common Article 3 is applicable to the Yugoslav conflicts despite their international character can be mentioned. This is the Nicaragua Court's dictum that Article 3 contains rules that "constitute a minimum yardstick," [35] or a normative floor, for international conflicts.

The U.S. Joint Chiefs of Staff proposed defining "other inhumane acts" referred to in Article 5 of the Yugoslavia Statute (crimes against humanity) as encompassing various offenses stated in common Article 3 of the Geneva Conventions, which "are part of customary international law and, therefore, [are] consistent with the principle of nullum [*561] crimen sine lege." [36] The International Law Section of the American Bar Association took a similar position. [37]

There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars. Ambassador Albright's statement was therefore a welcome attempt to extend the concept of crimes under international law to abuses committed in noninternational armed conflicts.

The trend toward regarding common Article 3 and Additional Protocol II as bases for individual criminal responsibility was accentuated in reports concerning atrocities in Rwanda. [38] Having determined that the conflict in Rwanda constitutes a noninternational armed conflict, the Independent Commission of Experts on Rwanda asserted that common Article 3 and Additional Protocol II, [39] and the principle of individual criminal responsibility in international law, [40] are applicable.

In contrast to the Yugoslavia Statute, on which there is abundant contemporaneous documentation, the Statute for Rwanda is lacking in documented legislative history. However,

1388

one thing is clear, though surprising. Perhaps because it was realized that the crime of genocide and crimes against humanity might not adequately cover the field and that, for practical reasons, the safety net of common Article 3 and Protocol II was needed, there was no opposition in the Security Council to treating violations of common Article 3 and Additional Protocol II as bases for the individual criminal responsibility of the perpetrators. Objections to the subject matter jurisdiction of the Tribunal based on the arguably ex post facto character of Article 4 of the Statute have not been raised either. For Rwanda, at least, one of the most important weaknesses of international humanitarian law was remedied.

In his commentary on the Yugoslavia Statute, the Secretary-General stated that the principle of nullum crimen sine lege requires that the Tribunal "apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise." [41] Because Rwanda is a party to both the Geneva Conventions and the Additional Protocols, the customary law character of common Article 3, which has been explicitly recognized by the International Court of Justice, [42] and Protocol II is not an issue here. Rather, the question is whether these treaty provisions, which prohibit certain enumerated acts, establish the individual criminal responsibility of the perpetrators, that is, whether the proscriptions applicable to noninternational armed conflicts are criminal in character.

Those who reject common Article 3 and Additional Protocol II as a basis for individual criminal responsibility tend to confuse criminality with jurisdiction and penalties. The question of what actions constitute crimes must be distinguished from the question of jurisdiction to try those crimes. Failure to distinguish between substantive criminality and jurisdiction [43] has weakened the penal aspects of the law of war. Treaties typically obligate contracting states to enforce their norms and punish those who commit listed **[*562]** offenses. [44] A treaty may specify the state or states competent to exercise jurisdiction. When it does not, it may be necessary to resort to interpretation to ascertain whether certain states only, third states or all states parties to the treaty are permitted to exercise jurisdiction over the offense.

Since the readiness of the Nuremberg Tribunals to proceed against violations of the Convention Respecting the Laws and Customs of War on Land [45] and the (Geneva) Convention Relative to the Treatment of Prisoners of War, [46] neither of which contains provisions on punishment of breaches or penalties, it has not been seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offenses, even when there is no accompanying provision for the establishment of the jurisdiction of particular courts or a scale of penalties.

Whether international law creates individual criminal responsibility depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, states, groups or other authorities, and/or to all of these. [47] The extent to which the prohibition is addressed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community are all relevant factors in determining the criminality of various acts.

That an obligation is addressed to governments is not dispositive of the penal responsibility of individuals, if individuals clearly must carry out that obligation. The Nuremberg Tribunals thus considered as binding not only on Germany, but also on individual defendants those provisions of the 1929 Geneva Convention and the fourth 1907 Hague Convention that were addressed to "belligerents," the "occupant" or "an army of occupation." [48] In light of this jurisprudence and the rudimentary nature of instruments of international humanitarian law as penal law, I find unpersuasive the view of commentators who contest the criminality of common Article 3 on the ground that it speaks of the obligations of "each Party to the conflict." As the International Military Tribunal so eloquently stated, "Crimes against international law are committed by men, not by abstract entities, and only by punishing

1389

individuals who commit such crimes can the provisions of international law be enforced." [49]

Typically, norms of international law have been addressed to states. Enforced by individuals acting as agents of the state, they have engaged, in case of violation, the international responsibility of the state. [50] With increasing frequency, however, international law, and especially the law of war, has directed its proscriptions both to states and to individuals and groups. Modern international humanitarian law imposes, and is perceived as imposing, criminal responsibility on individuals, often in addition to the state's international responsibility. International conventions that proscribe certain activities of international concern without creating international tribunals to try the violators characteristically obligate states to prohibit those activities and to punish the natural and legal persons under their jurisdiction for violations according to national law. [51]

[*563] The fact that international rules are normally enforced by national institutions and national courts applying municipal law does not in any way diminish the status of the violations as international crimes. Moreover, the evolution of individual criminal responsibility must not erode the vital concepts of state responsibility for the violation of international norms.

It is often difficult to determine which of the acts prohibited under international law are offenses. As noted above, the penal element of international humanitarian law is still rudimentary. Its development has been nourished by such broad ideas as the Martens clause, [52] general principles of law recognized by civilized nations, and general principles of penal law. [53] When treaties fail to clearly define the criminality of prohibited acts, the underlying assumption has been that customary law and internal penal law would supply the missing links.

The development of penal aspects of international humanitarian law has shifted back and forth between a preference for more or less comprehensive lists of crimes and brief references to the laws and customs of war. The first approach was attempted in the report of the commission established by the Preliminary Peace Conference in 1919, which adopted a formal list of thirty-two different crimes. [54] This approach was also taken in the lists of grave breaches in the 1949 Geneva Conventions, and in the expanded list of grave breaches in Additional Protocol I to the Geneva Conventions. In Article 228 of the Treaty of Versailles, however, the German Government recognized the right of the Allied and Associated Powers to bring persons before military tribunals who were accused of having committed acts in violation of the laws and customs of war tout court. [55]

The fourth Hague Convention, which contains a normative statement in the "Regulations respecting the laws and customs of war on land, annexed to the present Convention," was silent regarding penal responsibility. The early Geneva Conventions contain no penal provisions whatsoever. Nor does the 1929 POW Convention [56] (except with respect to penal and disciplinary measures against POWs), which so prominently figured in the Nuremberg trials as a basis for the prosecution and conviction of offenders. However, the other Geneva Convention of the same date, the Convention for the Amelioration of the Condition of the Wounded and Sick in the Field, contained a weak provision requiring governments to "propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention" (Article 29). [57]

[*564] The Nuremberg Tribunals appear to have taken it for granted that violations of the substantive provisions of the Hague and Geneva Conventions were criminal. These Tribunals considered those provisions of the two treaties that were declaratory of customary law as having created an adequate basis for individual criminal responsibility. Establishing the customary law character of these provisions was compelled because the Hague Convention was not formally applicable as a result of the si omnes clause (some belligerents were not

1390

parties), and because the Soviet Union was not a party to the Geneva Convention. [58] Thus, although neither the Geneva Conventions that preceded those of 1949 nor the fourth Hague Convention contained explicit penal provisions, they were accepted as a basis for prosecutions and convictions in the post-World War II Tribunals.

The grave breaches system was introduced by the Geneva Conventions of August 12, 1949. The penal system of the Conventions requires the states parties to criminalize certain acts, and to prosecute or extradite the perpetrators. The advantage of this approach is its clarity and transparency, which is so important for criminal law. The disadvantage is the creation of the category of "other" breaches, which involves the violation of all the remaining provisions of the Conventions, which are arguably less categorically penal. Of course, the introduction of the system of grave breaches cannot alter the possibility that the other breaches may be considered war crimes under the customary law of war. Moreover, the list of grave breaches may always be expanded through interpretation and various types of conduct may be treated as war crimes. [59]

The creation of the penal system of the Geneva Conventions led some commentators to conclude that jurisdiction was limited to the courts of the detaining powers and that international courts, such as the Nuremberg and Tokyo Tribunals, would have no competence in respect of grave breaches of the Conventions and Protocol I. [60] I disagree. Although international trials are not contemplated by the Conventions, which envisage a national and cooperative system of penal enforcement, neither do they exclude the possibility of establishing international criminal tribunals and granting them jurisdiction over breaches of the Geneva Conventions [61] or Protocols, as the Security Council did in the Statutes of the ad hoc Tribunals for Yugoslavia and Rwanda. Surely, states can do jointly what they may do severally, especially when such joint action is undertaken through the Security Council.

Mandatory prosecution (or extradition) of perpetrators of grave breaches of the Geneva Conventions and discretionary prosecution for other (nongrave) breaches are left to the penal courts of the detaining power, as are, subject to certain broad principles stated in the Conventions, the law of evidence, procedural rules and the system of penalties.

Treating violations of common Article 3 as a basis for individual criminal responsibility is affirmed by some national military manuals or laws (discussed below). The U.S. Department **[*565]** of the Army's Field Manual, for example, lists common Article 3 [62] together with other provisions of the Geneva Conventions and the Hague Convention Respecting the Laws and Customs of War on Land and, without any exception for that article, proclaims that "every violation of the law of war is a war crime." [63] The U.S. Army thus regards violations of Article 3 as encompassed by the notion of war crimes and it could prosecute captured military personnel for war crimes if they were accused of breaches of Article 3. [64] The recent German Military Manual actually describes some violations of common Article 3 and Protocol II as "grave breaches of international humanitarian law." [65] The draft Canadian Forces manual takes a different approach but agrees that violations of common Article 3 and Protocol II should be prosecuted. "While non-application [of common Article 3] would appear to render those responsible to trial for war crimes, trials would be held under national criminal law, since no 'war' would be in existence." [66] As for breaches of Protocol II in noninternational armed conflicts, the Canadian manual requires that "both the governmental and rebel authority should treat them as breaches of the national criminal law, since the law concerning war crimes relates to international armed conflicts." [67] Although this manual may not support the proposition that violations of common Article 3 and Protocol II are a matter for universal jurisdiction, it supplies additional evidence of the growing recognition of the criminality of violations of common Article 3.

Ex POST FACTO?

Future defendants may well challenge Article 4 of the Rwanda Statute as contrary to the

1391

principle prohibiting retroactive penal measures. The prohibition of retroactive penal measures is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals. The Security Council could not have intended in Resolution 955 to oblige the Tribunal to act counter to this fundamental principle. The prospects of such a challenge must therefore be assessed.

The ILC's recent discussion of the principle of legality (nullum crimen sine lege) in the Draft Statute for an International Criminal Court (Article 39) is illuminating. With regard to crimes under general international law (Article 20(a)-(d) of the statute), Article 39 requires that the accused not be held guilty unless the act or omission in question constituted a crime under international law at the time it was committed. [68] With regard to treaty crimes (Article 20 (e)), Article 39(b) requires that the treaty in question must be applicable to the conduct of the accused under the appropriate national law of the state party to the treaty. [69] Nowhere do these provisions suggest that prosecution before **[*566]** an international tribunal for crimes under a treaty that does not contain provisions on universal jurisdiction clashes with the prohibition of retroactive penal measures.

One may ask how this discussion relates to common Article 3 and Protocol II. Surely, prosecution of violations of common Article 3 could be regarded as trial of crimes under general international law; prosecution of violations of Protocol II could be treated, depending on the case, as trial of either crimes under general international law or treaty crimes.

In arguing against any challenge on ex post facto grounds, one must emphasize that common Article 3 and Additional Protocol II are treaty obligations binding on Rwanda, that they clearly proscribe certain acts, and that those acts are also prohibited by the criminal law of Rwanda, albeit in different terms. As was already explained in the preceding section, common Article 3 and Protocol II impose important prohibitions on the behavior of participants in noninternational armed conflicts, be they governments, other authorities and groups, or individuals. The fact that these proscribed acts are considered nongrave rather than grave breaches concerns questions of discretionary versus obligatory prosecution or extradition, and for some commentators, universal jurisdiction, but not criminality. Jurisdiction over such acts can be established in other ways, for example, by national law or, exceptionally, by Security Council resolutions adopted under chapter VII.

The egregious acts listed in Article 4 of the Rwanda Statute, such as murder, the taking of hostages, pillage, degrading treatment and rape, constitute offenses under both international law and the national law of the perpetrators. Therefore, no person who has committed such acts, in Rwanda or elsewhere, could claim in good faith that he/she did not understand that the acts were prohibited. And the principle nullum crimen is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed.

It is true that neither common Article 3 nor Additional Protocol II says anything about penalties. However, those provisions of the Geneva Conventions whose violation constitutes grave breaches also say nothing about penalties, and they incontestably establish a basis for the perpetrators' individual criminal responsibility, and even for universal jurisdiction. The Geneva Conventions define offenses but leave it to the contracting states to determine penal sanctions. Persons prosecuted for violations of the Geneva Conventions cannot argue that they are being subjected to retroactive penal sanctions if the penalties do not exceed those previously established by their national states. [70] Although Rwandan law allows for capital punishment, the penalty imposed by the International Tribunal is limited to imprisonment. Article 23 of the Rwanda Statute states that, in determining the terms of imprisonment, the trial chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

1392

It follows, therefore, that the principal requirements of Article 15(1) of the International Covenant on Civil and Political Rights [71] prohibiting ex post facto penal measures are satisfied: the acts were previously prohibited under both international and national law; and the penalty that is authorized under the Rwanda Statute does not exceed the one provided for under national law and is, in fact, lighter.

The fact that some trials would be the subject of international, rather than national, jurisdiction concerns procedure rather than a fundamental principle of justice. As the post-World War II United Nations War Crimes Commission concluded, "a violation of the laws of war constitutes both an international and a national crime, and is therefore justiciable both in a national and international court." [72] The fact that offenses ex jure **[*567]** gentium that normally would be enforced by national courts applying domestic law--such as violations of the Geneva Conventions--would be enforced by an international tribunal directly vis-a-vis individuals, in my view, does not raise ex post facto problems.

Article 15(2) of the Political Covenant is particularly pertinent. It provides that the article shall not "prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." The legislative history of this provision suggests that the goal was to "confirm and strengthen" the principles of Nuremberg and Tokyo and to "ensure that if in the future crimes should be perpetrated similar to those punished at Nurnberg, they would be punished in accordance with the same principles." [73] There is no doubt that the ethnic killings in Rwanda were criminal according to the general principles of law recognized by the community of nations. Murder is murder all over the world.

The authority of the Nuremberg Tribunals can be invoked here. As the U.S. Tribunal established under Control Council Law No. 10 stated in the Ohlendorf trial, in the context of crimes against humanity, "Murder, torture, enslavement, and similar crimes which heretofore were enjoined only by the respective nations now fall within the prescription of the family of nations. Thus murder becomes no less murder because directed against a whole race instead of a single person." [74] Of course, the recognition that certain types of conduct are and have been criminal according to the principles of both national law and international law, and are thus crimes ex jure gentium, serves not only to answer potential ex post facto challenges but also to support the principle of universal jurisdiction, the right of third states to prosecute those who commit international offenses.

The International Military Tribunal (IMT) emphasized that, long before the fourth Hague Convention was adopted, many of the prohibitions in the Convention had been enforced by military tribunals in the trial and punishment of individuals accused of violating the rules of land warfare stated in the Convention.

> Yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. . . . The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. [75]

Elsewhere the Tribunal, in referring to war crimes mentioned in Article 6(b) of its Charter, underscored with regard to certain provisions of the Hague and Geneva Conventions that the fact that their breach "constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument." [76]

Or, as the Military Tribunal under Control Council Law No. 10 stated in the High Command Case, the Geneva Convention and the Hague Convention "were binding insofar as they were in substance an expression of international law as accepted by the civilized nations of the world." [77] The Tribunal emphasized that

> it is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of **[*568]** criminal justice common to civilized nations generally. If the acts charged were in fact crimes under international law when committed, they cannot be said to be ex post facto acts or retroactive pronouncements. [78]

In the RuSHA case, the Tribunal added that the acts of which the defendants were accused were in violation "of the laws and customs of war, of the general principles of criminal law as derived from the criminal laws of all civilized nations, of the internal penal laws of the countries in which such crimes were committed." [79] Can anyone doubt that the atrocities in Rwanda were, in the language of Article 15(2) of the Political Covenant, "criminal according to the general principles of law recognized by civilized nations"?

Challenges to Article 4 of the Rwanda Statute based on its allegedly ex post facto character must fail. Of course, the language of common Article 3 and the relevant provisions of Protocol II is clearly prohibitory; it addresses fundamental offenses such as murder and torture, which are prohibited in all states. The Geneva Conventions have been universally ratified and are largely declaratory of customary law. The latter is true, on the authority of the International Court of Justice, of common Article 3. Protocol II has also been ratified by a large number of states. The substantive international offenses covered by common Article 3 and Protocol II may even overlap with crimes against humanity. Their criminality cannot be questioned. Article 4 of the Rwanda Statute does not try to create new categories of grave breaches. It uses the different, and perhaps broader, term "serious violations," which obviously are matters of international concern. The meshing of the criminality of the acts prohibited under international law with their punishability under the laws of Rwanda suggests that the Statute respects the prohibition of retroactive legal measures.

Common Article 3 and Article 4 of Additional Protocol II cover areas also addressed by human rights law, in some cases even by peremptory norms. The Statute thus enhances the prospects for treating egregious violations of human rights law--not only of international humanitarian law--as offenses under international law.

NONGRAVE BREACHES AND UNIVERSAL JURISDICTION

In establishing the law for the Tribunal, how does the Rwanda Statute relate to a right of third states--i.e., states that have no territorial or nationality (active or passive) or "protective principle" links with the offender or the victim--to prosecute those who commit violations in internal armed conflicts? I refer here to a principle already briefly mentioned, that of universal jurisdiction. It is worth recalling that following World War II, it was not the various international tribunals and courts of the occupying powers in Germany, but primarily the national courts of various Allied states that tried the greater number of persons for war crimes and crimes against humanity [80] --although such trials were not required by international law, and (outside of the Nuremberg Charter) the offenses were not even characterized as crimes by any general international treaty in force at the time.

1394

The right of states to punish perpetrators of violations committed outside their territory, while admittedly broad, is not unlimited and must conform to accepted jursdictional principles recognized by international law, as well as to national constitutions and other laws. [81] Even states committed in principle to territorial criminal jurisdiction may **[*569]** and do provide by statute for prosecutions regarding particular categories of offenses committed outside their territories. Often the acts concerned are recognized as criminal by international treaties, and less frequently by customary law, and sometimes by both. Obviously, universal jurisdiction over international offenses can be exercised only in those states that have the necessary national laws.

It is now widely accepted that crimes against humanity (Article 3 of the Rwanda Statute) are subject to universal jurisdiction. [82] And it is increasingly recognized by leading commentators that the crime of genocide [83] (despite the absence of a provision on universal jurisdiction in the Genocide Convention) may also be cause for prosecution by any state. [84] Is this also true, however, of violations of common Article 3 and Additional Protocol II to the Geneva Conventions (Article 4 of the Rwanda Statute)? Possible challenges to this basis for the prosecution of offenders before the courts of third states, and conceivably even before the Hague criminal Tribunals, would presumably focus on the fact that violations of these provisions fall outside the grave breaches provisions of the Geneva Conventions.

Just because the Geneva Conventions created the obligation of aut dedere aut judicare only with regard to grave breaches does not mean that other breaches of the Geneva Conventions may not be punished by any state party to the Conventions. Indeed, Article 129(3) of the Third Geneva Convention provides that each state party "shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches." Identical provisions are contained in the other 1949 Geneva Conventions. As the Commentary to the Third Convention states, "The Contracting Parties . . . should at least insert in their legislation a general clause providing for the punishment of other breaches." [85] Even if there is no clear obligation to punish or extradite authors of violations of the Geneva Conventions that are not encompassed by the grave breaches provisions, such as common Article 3, all states have the right to punish those guilty of such breaches. In this sense, nongrave breaches may fall within universal jurisdiction. Moreover, in the Nicaragua [86] case, the International Court of Justice recognized the applicability of common Article 1 of the Conventions to noninternational **[*570]** armed conflicts addressed by common Article 3. [87] The command of Article 1 that all the contracting parties must respect and ensure respect [88] may, of course, entail resort to penal measures to suppress violations.

One finds some apparent confusion in the literature with regard to the relationship of the Geneva Conventions to universal jurisdiction. In denying the applicability of universal jurisdiction to nongrave breaches of the Geneva Conventions, some commentators assume that universal jurisdiction requires recognition not only of the right, but also of the duty, to prosecute perpetrators of international offenses. I dissent. There is no reason why universal jurisdiction should not also be acknowledged in cases where the duty to prosecute or to extradite is unclear, but the right to prosecute when offenses are committed by aliens in foreign countries is recognized. Indeed, the true meaning of universal jurisdiction is that international law permits any state to apply its laws to certain offenses even in the absence of territorial, nationality or other accepted contacts with the offender or the victim. These are the offenses that are recognized by the community of nations as of universal concern, and as subject to universal condemnation. [89] Although Judge Roling was critical of the concept of universal jurisdiction, he agreed that "the distinction between 'grave' and 'other' violations might find its perfect explanation in the obligation to prosecute grave violators and the right to prosecute those who have committed other breaches." [90] Roling argued, however, that the Geneva Conventions obtain only between belligerents, [91] a view that was debatable at the time it was expressed and that is clearly unacceptable today.

1395

As regards the national state of the perpetrators of nongrave breaches, its obligations go further. Given the purposes and objects of the Geneva Conventions and the normative content of their provisions, any state that does not have the necessary laws in place, or is otherwise unwilling to prosecute and punish violators of clauses other than the grave breaches provisions that are significant and have a clear penal character, calls into serious question its good faith compliance with its treaty obligations.

I would not like to suggest that all violations of the Geneva Conventions must thus be treated as offenses. Some provisions may address administrative matters without any penal significance. The Conventions state many different kinds of obligations that bear on core humanitarian values in quite different degrees. Some of these are technical or administrative and would not seem an appropriate predicate for criminal proceedings. For example, would a third state have the right to prosecute a foreign army officer for failure to comply with Article 94 of the Third Geneva Convention, which requires **[*571]** notification on recapture of an escaped prisoner of war? Or with Article 96, which requires that a record of disciplinary punishments be kept by the camp commander? I think not. Of course, third states will have no interest in such breaches and usually no evidence to prosecute the offenders. These technical breaches are not recognized by the community of nations as of universal concern and as subject to general condemnation.

Suppose, however, that a third state prosecuted a violator of the prohibition of torture under common Article 3 or the prohibition of rape under Article 27 (of the Fourth Geneva Convention), neither of which is designated as a grave breach. No one can doubt the categorical character of the proscriptions stated in these articles. The identical prohibition of torture, which is widely regarded as a jus cogens norm of general international law, is defined as a grave breach for international armed conflicts. Even as regards the "peacetime" commission of torture, third states, such as the United States under the Alien Tort Claims Act, have occasionally exercised civil jurisdiction over the alleged torturer (in the case of suits by aliens) without any protest by the defendant's national state.

Possibly, some governments will protest foreign prosecutions based on activity that may reflect their state policy. And probably, legal advisers of many foreign ministries will discourage the justice departments of their countries from prosecuting foreign officers for their conduct during a civil war in their own country. If protests by the national state of the accused are rejected, would that state prevail in an international action against the prosecuting state alleging violation of accepted jurisdictional principles delineating the competence of states to punish acts committed outside their territory? Would the prosecuting state incur international responsibility for the prosecution? If the activity at the core of the prosecution is a significant international offense clearly giving rise to international concern, such as murder in violation of common Article 3, I believe that the answer to both questions should be, and probably would be, in the negative.

In situations not clearly regulated by treaties, difficulties could arise between the custodial state and the state of nationality of the offender when the latter, in good faith, asserts its readiness to prosecute and requests the former to desist from prosecution and to deliver the person to it. The possibility that both states would exercise jurisdiction must be subject to the non bis in idem principle. Given states' traditional lack of interest in prosecuting those who have committed international offenses in internal conflicts, the likelihood that two states will compete bona fide for the exercise of criminal jurisdiction is quite remote. It may be noted that the grave breaches provisions of the Geneva Conventions do not clearly address the priority of jurisdiction. In any event, the Conventions do not require the state ready to prosecute (the custodial state) to extradite the offender to a state party requesting extradition as an alternative to proceeding with the prosecution.

Geneva Additional Protocol I did not contribute to clarifying the criminal system of repression of violations of international humanitarian law. The Protocol uses such terms as "grave

1396

breaches," "breaches," "violations" and even "serious violations" of the "Conventions or of this Protocol." [92] Violations of the Protocol that are not defined as grave breaches have consequences similar to those resulting from violations other than grave breaches of the Geneva Conventions and may, in many cases, be prosecuted as war crimes by third states. [93]

[*572] WAR CRIMES AND UNIVERSAL JURISDICTION

Those concerned about the recognition of the violations of common Article 3 and Protocol II as international offenses should remember that, until fairly recently, questions were raised even about universal jurisdiction over war crimes at customary international law, which is now largely taken for granted. [94] As important a scholar as Draper wrote in 1976 of the customary law right of a belligerent to try those charged with war crimes who fall into its hands; he therefore raised the question whether such jurisdiciton is genuinely universal, on an analogy with jurisdiction over piracy. [95] From that perspective, which considers trial of captured war criminals as a manifestation of the principle of self-help, the Nuremberg process represented an expanded protection of the interests of co-belligerents. [96] Hersch Lauterpacht opened the door to a truly universal jurisdiction over war crimes by arguing that, in trying enemy soldiers for war crimes, the state is enforcing not only its national law but also the law of nations: "War criminals are punished, fundamentally, for breaches of international law. They become criminals according to the municipal law of the belligerent only if their action . . . is contrary to international law." [97]

Richard Baxter suggested that

> one of the intermediate stages on the way to a true international penal jurisdiction may be the recognition that any state, including a neutral, has jurisdiction to try war crimes. By what state prosecution of a particular offence will actually be undertaken would then be determined, as it is now between allied or associated belligerents, by the convenience of the forum. If a neutral state should, by reason of the availability of the accused, witnesss, and evidence be the most convenient locus in which to try a war crime, there is no reason why that state should not perform that function. [98]

The laws and usages of war are, of course, universal and war crimes are crimes against the jus gentium. [99] The British Report of the War Crimes Inquiry states that it is a generally recognized principle of international law that belligerent and neutral states have a right to exercise jurisdiction in respect of war crimes since they are crimes ex jure gentium. [100] The British War Crimes Act 1991 allows proceedings to be brought against any British **[*573]** citizen or resident of the United Kingdom, irrespective of his or her nationality at the time of its commission, for an alleged World War II offense (murder, manslaughter or culpable homicide) that constituted a violation of the laws and customs of war. [101] Clearly, the object of the British legislation was to deal with suspected war criminals who had settled in the United Kingdom. It would be altogether artificial to regard the British legislation as based on the principle of passive nationality, rather than on the right of all states to prosecute serious violations of the law of nations. As the commission suggested:

> War crimes, or grave breaches of the 1949 Geneva Conventions, wherever in the world they are committed, are alreadly triable in the United Kingdom under the the Genvena Conventions Act 1957 . . . . Parliament did not demur from the proposition that war crimes are offenses sufficiently serious for the British courts

1397

to be given jurisdiciton over them, whatsoever the nationality of the person committing them and wheresoever they were committed. [102]

Contemporary international law would allow the United Kingdom to go further and prosecute even those simply present in the country, as was done by Canada in 1987, without encountering any objections from other states. The Canadian legislation provides for jurisdiction over acts that constitute war crimes and crimes against humanity under either customary or conventional international law in force at the time of their commission when the alleged offender is present in Canada, and Canada, in conformity with international law, can exercise jurisdiction. [103] The Austrian Military Manual clearly recognizes the the principle of universality of jurisdiction over war crimes: "If a soldier breaches the laws of war, although he can recognize the the illegality of his own action, his own State, the enemy State and also a neutral State can punish him for that action." [104]

Universal jurisdiction over war crimes means that all states have the right under international law to exercise criminal jurisdiction over the offenders. Most states do not have the necessary resources or interest to prosecute offenders when the state itself was not involved in the situation in question. Many states also do not have national laws in **[*574]** place that allow them to prosecute offenders. The United States appears to be among these states. [105] It does have, however, ample authority under both the U.S. Constitution [106] and international law [107] to adopt the necessary legislation. Whether or not the United States, in concrete situations that may arise, prosecutes offenders involved in foreign conflicts, it should, as a world leader, have such legislation in place.

WAR CRIMES AND INTERNAL CONFLICTS

The Rwanda Statute contains no provisions paralleling Article 3 of the Yugoslavia Statute, which grants the Tribunal jurisdiction over violations of the fourth Hague Convention and annexed Regulations. This omission reflects the accepted wisdom, which unfortunately denies war crimes a place in internal conflicts. War crimes under the "Hague law," i.e., those perpetrated in the conduct of hostilities, should also be punishable when committed in noninternational armed conflicts. This is particularly important with regard to such terrible and nondiscriminating weapons as poison gas and land mines, which have been used in internal conflicts. Despite all the obstacles, international law prohibitions that apply to international wars are gradually being extended to noninternational armed conflicts.

The ILC decided to make Article 22 of its Draft Code of Crimes against the Peace and Security of Mankind, entitled "Exceptionally serious war crimes," applicable to both international and internal armed conflicts. [108] This position is confirmed by the Commission's statute for an international criminal court. Article 22 of the statute lists serious violations of the laws and customs applicable in armed conflict among those crimes within the jurisdiction of the court. The commentary explains that this language reflects not only the Yugoslavia Statute (which in Article 3 speaks of violations of the laws or customs of war), but also Article 22 of the draft code, which applies to noninternational armed conflicts as well. Thus, the proposed court's subject matter jurisdiction would arguably include war crimes even when committed in civil wars.

Experience has shown that cultural property can be extensively destroyed in noninternational armed conflicts. The applicability of parts of the (Hague) Convention for the Protection of Cultural Property in the Event of Armed Conflict, [109] which is primarily addressed to international wars, to noninternational armed conflicts is therefore useful. [110] The Convention also contains a penal clause obligating states parties, within their ordinary criminal jurisdiction, to prosecute and impose penal or disciplinary sanctions on persons of whatever nationality who commit breaches of the Convention; [111] logically, this clause must cover

1398

breaches of obligations pertaining to noninternational armed conflicts.

The extension of prohibitions on the use of gas to domestic conflicts has already been achieved through recent international treaties. Although the 1925 (Geneva) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare [112] was arguably addressed to international wars only, later treaties on this subject clearly were not so limited. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) **[*575]** and Toxin Weapons and on Their Destruction -a 1972 arms control treaty -- obligates the parties "in any circumstances." [113] Similarly, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, of January 13, 1993 (which concerns both arms control and use), provides that the obligations of states under the Convention shall apply "under any circumstances," including noninternational armed conflicts and even civil strife. [114] Article VII of the Convention contains provisions requiring each state party to prohibit natural and legal persons anywhere in its territory or subject to its jurisdiction from undertaking any activity prohibited to a state party under the Convention and to penalize violators. [115]

The most recent development in this field has been a proposal to extend the international prohibitions on the use of land mines to internal conflicts. [116] This proposal holds great humanitarian promise because of the catastrophic dimensions of the use of mines in internal conflicts. The Group of Governmental Experts to Prepare the Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects is seriously considering expanding the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) to include noninternational armed conflicts; the experts are also considering applying the provisions on grave breaches of the Geneva Conventions to the amended Protocol. The revision of Article 1, which concerns material scope of application, contains two possible versions: a broader "Alternative A," proposed by Denmark, which would make the Protocol applicable "in all circumstances including armed conflict and times of peace"; and a narrower "Alternative B," based on a proposal of India, which would make it applicable to "situations referred to in Articles 2 and 3 and common to the Geneva Conventions of 12th August 1949" (international and noninternational armed conflicts covered by the Geneva Conventions), but not to the situations excluded from Additional Protocol II under its Article 1(2).

Alternative A has the advantage of avoiding the need to engage in controversies over the characterization of conflicts. [117] The adoption of either version would represent an **[*576]** extremely important step toward remedying an unacceptable lacuna in existing treaty law: that the use of land mines causing incalculable damage to the population of countries involved in noninternational armed conflicts has not been prohibited by the law of war treaties. According to a number of proposals, these explicit prohibitions would be accompanied by the clear criminalization of violations. [118]

CONCLUSION

Once internal atrocities are recognized as international crimes and thus as matters of major international concern, the right of third states to prosecute violators must be accepted. Typically, these would be offenses of such significance that the international community would have an important interest in prosecuting the violators, especially when the criminal justice systems of the state where the offenses were committed and/or the state of nationality have failed to act. Many serious violations of common Article 3 and Geneva Protocol II, as well as other significant norms of the Geneva Conventions, though not explicitly listed as grave breaches, are of universal concern and subject to universal condemnation. These are crimes jure gentium and therefore all states have the right to try the perpetrators. This right can be seen as an analogue, mutatis mutandis, of the prerogative

1399

of all states to invoke obligations erga omnes against states that violate the basic rights of the human person. [119]

The ad hoc Tribunals for Yugoslavia and Rwanda have concurrent jurisdiction with national courts, but have primacy over them. These international tribunals may request that national courts defer to their competence, subject to the principle of non bis in idem. Otherwise, the establishment of the ad hoc international criminal Tribunals for Yugoslavia and Rwanda does not affect the right or duty of states, as the case may be, to prosecute those who violate international humanitarian law. [120]

The extension of the concept of international criminality to violations of common Article 3 and Protocol II should not lead to the conclusion that the distinction between "common law crimes" or other crimes under municipal law and offenses under international law would be eliminated. It simply means that certain egregious crimes, such as murder, that in certain circumstances were considered as war crimes in international wars will now be treated as international offenses in situations of noninternational armed conflict as well.

[*577] The impact of the explicit extension of the concept of criminality to common Article 3 and Additional Protocol II in the Rwanda Statute will depend on the achievements of the Rwanda Tribunal and, even more, on whether the normative pronouncement of the Security Council will be reiterated and confirmed, first and foremost by national laws and national courts. The normative contribution made by the Statute for Rwanda must not remain isolated. It should be clear, however, that, given the present system of international organization, even one such pronouncement by the Security Council substantially influences the shaping of international law.

It is not surprising that, on a subject of such great humanitarian importance, the practice of states lags behind opinio juris, and general principles of law play an important role. Nevertheless, slowly but unmistakably, the practice of states is evolving. The Belgian law entitled Crimes de droit international (1993) thus provides for the criminal jurisdiction of Belgian courts over certain breaches not only of the Geneva Conventions and Protocol I, but also of Protocol II, regardless of the nationality of the victim or perpetrator or of where the offense was committed. [121] On the basis of this law, which also established a scale of penalties, the Brussels prosecutor's office, on May 29, 1995, issued several international arrest warrants against persons involved in the atrocities in Rwanda. Providing a perfect, but also rare, example of universal jurisdiction over perpetrators of atrocities committed in internal conflicts in foreign countries, one of the three warrants was issued against a Rwandan responsible for massacres of other Rwandans in Rwanda. [122] Without doubt, the law applicable to noninternational armed conflicts will be quite different from now on.

FOOTNOTES:

n1 This applies even more to situations of lower-intensity internal strife. For a discussion of the norms applicable in noninternational armed conflicts and internal strife and the problem of characterizing conflicts, see generally Theodor Meron, On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument, 77 AJIL 589 (1983); Theodor Meron & Allan Rosas, A Declaration of Minimum Humanitarian Standards, 85 AJIL 375 (1991); Asbjorn Eide, Allan Rosas & Theodor Meron, Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards, 89 AJIL 215 (1995).

For descriptions of noninternational armed conflicts, see common Article 3 of the Geneva Conventions, infra note 2, and Article 1 of Additional Protocol II to the Geneva Conventions, infra note 20.

n2 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 UST 3114, 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked

1400

Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 UST 3217, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 UST 3316, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

See also Hague Convention on the Protection of Cultural Property, May 14, 1954, Art. 19(4), 249 UNTS 240; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, Art. 4, 1125 UNTS 3, reprinted in 16 ILM 1391 (1977) [hereinafter Protocol I].

n3 See James C. O'Brien, The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia, 87 AJIL 639 (1993); Theodor Meron, War Crimes in Yugoslavia and the Development of International Law, 88 AJIL 78 (1994).

n4 Theodor Meron, Rape as a Crime under International Humanitarian Law, 87 AJIL 424 (1993).

n5 Theodor Meron, The Case for War Crimes Trials in Yugoslavia, FOREIGN AFF., Summer 1993, at 122.

n6 See James Crawford, The ILC Adopts a Statute for an International Criminal Court, 89 AJIL 404, 416 (1995).

n7 UN Doc. S/RES/955, annex (1994) [hereinafter Rwanda Statute].

n8 UN Doc. S/25704, annex (1993) [hereinafter Yugoslavia Statute]. Note, however, that the first annual report of the Yugoslav Tribunal states that the Tribunal is empowered to adjudicate cases of crimes committed in both interstate wars and internal strife. UN Doc. A/49/342-S/1994/1007, para. 19 (1994).

n9 O'Brien, supra note 3, at 647; Meron, supra note 3, at 80-81.

n10 SC Res. 995 (1994), UN Doc. S/RES/995, supra note 7, Art. 2.

n11 Dec. 9, 1948, 78 UNTS 277 [hereinafter Genocide Convention].

n12 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ REP. 15, 23 (Advisory Opinion of May 28), discussed in THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 10-11 (1989).

n13 For further discussion, see Meron, supra note 3, at 85.

n14 Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para. 47 (1993) [hereinafter Report of the Secretary-General].

n15 "When committed in armed conflict, whether international or internal in character, and directed against any civilian population . . ." Id., para. 49; Yugoslavia Statute, supra note 8, Art. 5.

n16 The Charter of the International Military Tribunal, 82 UNTS 280, Art. 6(c), defined crimes against humanity as crimes including "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal." Article 3 of the Rwanda

1401

Statute defines crimes against humanity in accordance with paragraph 48 of the commentary to Article 5 of the Yugoslavia Statute (Report of the Secretary-General, supra note 14). The ILC's commentary on Article 20 of the Draft Statute for an International Criminal Court reflects the same trend:

> It is the understanding of the Commission that the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population in whole or part. The hallmarks of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful act . . . are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part. . . . The term "directed against any civilian population" should be taken to refer to acts committed as part of a widespread and systematic attack against a civilian population on national, political, ethnic, racial or religious grounds. The particular acts referred to in the definition are acts deliberately committed as part of such an attack.

Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. No. 10, at 76, UN Doc. A/49/10 (1994). The black-letter law of Article 20 tracks the definition of crimes against humanity that appears in the Yugoslavia Statute.

The Final Report of the Commission of Experts on Rwanda complicates the matter further by defining crimes against humanity as "gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the armed conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim." UN Doc. S/1994/1405, annex, para. 135 (1994).

n17 Rwanda Statute, supra note 7, Art. 3.

n18 Meron, supra note 5, at 130; 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 135-36 (1949).

n19 Genocide Convention, supra note 11, Art. 2. See also Rwanda Statute, supra note 7, Art. 2.

n20 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 UNTS 609, reprinted in 16 ILM at 1442 [hereinafter Protocol II].

n21 Article 4 of the Rwanda Statute, supra note 7, reads:

> The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
>
> (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
>
> (b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

n22 UN Doc. S/1995/134, para. 12 (1995).

n23 One of the legal advisers of the International Committee of the Red Cross thus wrote: "IHL applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty of violations." Denise Plattner, The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts, 30 INT'L REV. RED CROSS 409, 414 (1990).

The chapter on execution of the Convention in each of the 1949 Geneva Conventions contains provisions on penal sanctions. For example, for the grave breaches provisions of the Fourth Geneva Convention, supra note 2, see Articles 129-30.

n24 Unpublished comments (Mar. 25, 1993).

n25 "The content of customary law applicable to internal armed conflict is debatable. As a result, in general . . . the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification." UN Doc. S/1994/674, annex, para. 42 (1994).

"There does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes." Id., para. 52.

"It must be observed that the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal [for the Former Yugoslavia] are offences when committed in international, but not in internal armed conflicts." Id., para. 54.

n26 Report of the International Law Commission on the work of its forty-sixth session, supra note 16, at 78 (commentary to Art. 20).

n27 Id., commentary to annex, at 142.

n28 Id. at 145.

n29 Report of the International Law Commission on the work of its forty-sixth session, supra note 16, at 77-78.

n30 Id. at 44.

1403

n31 Id. at 66.

n32 Id. at 71.

n33 Id.

n34 UN Doc. S/PV.3217, at 15 (May 25, 1993). The prosecution at the Yugoslavia Tribunal has followed this approach in treating forcible sexual intercourse as cruel treatment in violation of common Article 3(1)(a). See note 59 infra. The prosecution appears to believe that it may bring actions for violations of common Article 3 as if they were violations of the laws or customs of war. Thus, Indictment No. 1 against Nicolic (Nov. 7, 1994) states at paragraph 16.2 that Nicolic "violated the Laws or Customs of War, contrary to Article 3(1)(a) of the [Fourth] Geneva Convention" by participating in cruel treatment of certain victims. More generally, the indictment charges the accused with "violations of the Laws and Customs of War including those recognized by Article 3 of the Fourth Geneva Convention." On common Article 3 in the Yugoslavia Statute, see also O'Brien, supra note 3, at 646.

n35 Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 114 (June 27).

n36 Office of the Chairman, Joint Chiefs of Staff, Memorandum for the DoD General Counsel, appendix (June 25, 1993) (unpublished, in the author's files).

n37 TASK FORCE OF THE ABA SECTION OF INTERNATIONAL LAW AND PRACTICE, REPORT ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA 15 (1993).

n38 Rene Degni-Sequi, Report on the Situation of Human Rights in Rwanda, UN Doc. E/CN.4/1995/7, para. 54 (1994). See also infra text at notes 39-40.

n39 UN Doc. S/1994/1125, annex, paras. 90-93 (1994). Rwanda has been a party to Protocol II since 1984.

n40 Id., paras. 125-28.

n41 Report of the Secretary-General, supra note 14, para. 34.

n42 Militaly and Paramilitary Activities in and against Nicaragua, supra note 35, 1986 ICJ REP. at 114. The Court also decided that the obligation of states under common Article 1 to respect and to ensure respect for the Geneva Conventions applies to common Article 3.

n43 G.I.A.D. Draper, The Modern Pattern of War Criminality, 6 ISR. Y.B. HUM. RTS. 9, 22 (1976).

n44 Yoram Dinstein, International Criminal Law, 20 ISR. L. REV. 206, 221-22 (1985).

n45 Oct. 18, 1907, 36 Stat. 2277, 118 LNTS 343 [hereinafter Hague Convention No. IV].

n46 Opened for signature July 27, 1929, 47 Stat. 2021 (1932).

n47 See generally NUGUYEN QUOC DINH, DROIT INTERNATIONAL PUBLIC 621 (Patrick Daillier & Alain Pellet eds., 5th ed. 1994); MERON, supra note 12, at 208-15.

n48 United States v. von Leeb, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNSIL LAW NO. 10, at 462, 537, 539-40 (1948) (" The High Command Case") [hereinafter TRIALS].

n49 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945-1 OCTOBER 1946, 1 OFFICIAL DOCUMENTS 223 (1947) [hereinafter TRIAL DOCUMENTS].

n50 Cf. crimes of state in the meaning of Article 19 of the ILC's draft articles on state responsibility (part one), adopted by the ILC on first reading. [1976] 2 Y.B. Int'l L. Comm'n, pt. 2, at 73, 95-96, UN Doc. A/CN.4/SER.A/1976/Add.1 (pt. 2). See generally MERON, supra note 12, at 208-15.

n51 E.g., Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, Art VII, 32 ILM 800, 810 (1993).

n52 Hersch Lauterpacht, The Law of Nations and the Punishment of War Crimes, 21 BRIT. Y.B. INT'L L. 58, 65 (1944). See also Lord Wright, War Crimes under International Law, 62 L. Q. REV. 40, 42 (1946). The Martens clause reads as follows:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them [and annexed to the Convention], the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

Hague Convention No. IV, supra note 45, Preamble.

n53 Draper, supra note 43, at 18.

n54 UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 34-35 (1948).

n55 Treaty of Peace with Germany, June 28, 1919, 2 Bevans 43, 11 Martens Nouveau Recueil (ser. 3) 323. See also Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, reprinted in 14 AJIL 95, 112-15 (1920) and CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, DIVISION OF INTERNATIONAL LAW, PAMPHLET NO. 32, VIOLATION OF THE LAWS AND CUSTOMS OF WAR 16-19 (1919). The Commission recommended prosecuting all those guilty of offenses "against the laws and customs of war or the laws of humanity." 14 AJIL at 117 (emphasis added).

n56 Supra note 46.

n57 118 LNTS 303.

n58 MERON, supra note 12, at 37-41.

n59 As happened in the case of rape, see Meron, supra note 4, at 426-47 (concerning the readiness of the International Committee of the Red Cross and the U.S. Government to regard rape as a grave breach or war crime). It may be noted that the indictments presented by the Prosecutor against Meakic and others (Indictment No. 2, paras. 22.8-22.10 (Feb. 13, 1995)), and against Tadic and others (Indictment No. 3, paras. 4.2-4.4 (Feb. 13, 1995)) to the International Criminal Tribunal for the Former Yugoslavia treat "forcible sexual

1405

intercourse" as "cruel treatment" in violation of the laws or customs of war recognized by Article 3 of its Statute and common Article 3(1) (a) of the Geneva Conventions, and also as a grave breach of the Conventions of causing "great suffering" under Article 2(c) of its Statute. "Rape" is treated as a crime against humanity recognized by Article 5(g) of the Statute of the Tribunal.

n60 G.I.A.D. Draper, The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977, 164 RECUEIL DES COURS 1, 38 (1979 III).

n61 Theodor Meron, Prisoners of War, Civilians and Diplomats in the Gulf Crises, 85 AJIL 104, 106 (1991).

The COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: [No.] IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 593 (Oscar M. Uhler & Henri Coursier eds., 1958) observes that Article 146(2) of the Fourth Geneva Convention "does not exclude handing over the accused to an international criminal court whose competence has been recognized by the Contracting Parties."

n62 U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, para. 11 (Field Manual No. 27-10, 1956).

n63 Id., para. 499. The British Military Manual states that "all other violations of the Conventions not amounting to 'grave breaches', are also war crimes." UK WAR OFFICE, THE LAW OF WAR ON LAND, BEING PART III OF THE MANUAL OF MILITARY LAW, para. 626 (1958).

n64 Regarding the exercise of jurisdiction over war crimes, see U.S. DEP'T OF THE ARMY, supra note 62, para. 505(d). Regarding the law to be applied, see id., para. 505(e). See also 10 U.S.C. § 802(a) (9)-(10) (1988) (the following persons, among others, are subject to the U.C.M.J.: prisoners of war in custody of the armed forces and, in time of war, persons serving with or accompanying an armed force in the field). See also id. § 818 ("General courts martial shall have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."). Although the U.S. authority under international law to prosecute violators is, in my view, clear, the U.S. statutory authority to prosecute is less so. See also infra note 81. The United States would typically not be interested in prosecuting alien violators of common Article 3 when the offenses occurred in civil wars in other countries.

n65 FEDERAL REPUBLIC OF GERMANY, FEDERAL MINISTRY OF DEFENCE, HUMANITARIAN LAW IN ARMED CONFLICTS--MANUAL, para. 1209 (1992).

n66 Canadian Forces, Law of Armed Conflict Manual (Second Draft) at 18-5--18-6 (undated).

n67 Id. at 18-23.

n68 Report of the International Law Commission on the work of its forty-sixth session, supra note 16, at 112-13.

n69 Id. at 113-14.

n70 See Meron, supra note 5, at 127.

n71 Opened for signature Dec. 16, 1966, 999 UNTS 171.

1406

n72 UNITED NATIONS WAR CRIMES COMMISSION, supra note 54, at 232.

n73 MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PREPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 331-32 (1987).

n74 4 TRIALS, supra note 48, at 497 (1949). As Judge B. V. A. Roling put it, "The crime against humanity is new, not in the sense that those acts were formerly not criminal. . . . The newness is not the newness of the crime, but rather the newness of the competence to try it." B. V. A. Roling, The Law of War and the National Jurisdiction Since 1945, 100 RECUEIL DES COURS 325, 345-46 (1960 II).

n75 TRIAL DOCUMENTS, supra note 49, at 220-21.

n76 Id. at 253.

n77 11 TRIALS, supra note 48, at 534.

n78 United States v. List, id. at 759, 1239 ("The Hostage Case").

n79 4 id. at 597, 618.

n80 15 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 28-48 (1949).

n81 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) [hereinafter RESTATEMENT]. See also Richard R. Baxter, The Municipal and International Law Basis of Jurisdiction over War Crimes, 28 BRIT. Y.B. INT'L L. 382, 391 (1951).

The U.S. Constitution grants Congress the power to define and punish offenses against the law of nations and permits it to make acts committed abroad crimes under U.S. law when this is permitted by international law. Andreas F. Lowenfeld, U.S. Law Enforcement Abroad: The Constitution and International Law, 83 AJIL 880, 881-82 (1989). See also supra note 64 and infra note 121.

n82 Dinstein, supra note 44, at 211-12; Baxter, supra note 81; 1 OPPENHEIM'S INTERNATIONAL LAW 998 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L.J. 2537, 2555, 2593-94 & n.91 (1991); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 510-27 (1992). See also Judgment of Oct. 6, 1983 (In re Barbie), Cass. crim., 1983 Gazette du Palaise, Jur. 710.

In its comments on the establishment of an international criminal court, the United States emphasized that states have a continuing responsibility to prosecute those who commit crimes against humanity. UN Doc. A/AC.244/1/Add.2, para. 23 (1995) [hereinafter U.S. Comments].

n83 RESTATEMENT, supra note 81, § 404. Reporters' Note 1 states that "universal jurisdiction to punish genocide is widely accepted as a principle of customary law." See also A. R. Carnegie, Jurisdiction over Violations of the Laws and Customs of War, 39 BRIT. Y.B. INT'L L. 402, 424 (1963);Jordan J. Paust, Congress and Genocide: They're Not Going to Get Away with It, 11 MICH. J. INT'L L. 90, 92 & n.2 (1989).

In his separate opinion in the Genocide case before the International Court of Justice, Judge ad hoc Lauterpacht stated that the description of genocide as a crime under international law in Article 1 of the Convention was intended "to permit parties, within the domestic legislation

1407

that they adopt, to assume universal jurisdiction over the crime of genocide--that is to say, even when the acts have been committed outside their respective territories by persons who are not their nationals." Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, 1993 ICJ REP. 325, 443, para. 110 (Order of Sept. 13).

n84 The ILC's Statute for an International Criminal Court allows any state party to the Genocide Convention to lodge a complaint with the Prosecutor alleging that a crime of genocide has been committed (Art. 25(1)). The court will have an inherent, or compulsory, jurisdiction over the crime of genocide (Art. 21(1)(a)). Although addressing international, not national, jurisdiction, these provisions appear to reflect the principle of universal concern for the punishment of the crime of genocide.

n85 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: [NO.] III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 624 (Jean de Preux ed., 1960).

n86 Military and Paramilitary Activities in and against Nicaragua, supra note 35.

n87 1986 ICJ REP. at 114.

n88 On Article 1, see Luigi Condorelli & Laurence Boisson de Chazournes, Quelques remarques a propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances," in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 17 (Christophe Swinarski ed., 1984). See also Protocol I, supra note 2, Arts. 1(1) and 89. Article 89 refers to the broader category of "serious violations" rather than to grave breaches, and appears to leave to each state the choice of means for complying with its obligations to act in situations of serious violations of the Conventions and the Protocol.

n89 RESTATEMENT, supra note 81, § 404.

n90 Roling, supra note 74, at 342. Accord HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 192-93 (1993). Solf and Cummings observe that breaches of the Geneva Conventions are distinguishable from grave breaches by not being made subject to extradition, but they remain crimes under customary law and the perpetrators may be punished. Waldemar A. Solf & Edward R. Cummings, A Survey of Penal Sanctions under Protocol I to the Geneva Conventions of August 12, 1949, 9 CASE W. RES. J. INT'L L. 205, 217 (1977). Draper points out that

> the Conventions' system of repression of breaches seems to assume that non-grave breaches are to be treated as war crimes for whose suppression States have a duty to take all measures necessary. Beyond that obligation, it is left to individual States to decide the mode of suppression. This might be by way of penal proceedings, judicial or disciplinary, or of administrative action.

Draper, supra note 43, at 45.

n91 Roling, supra note 74, at 359.

n92 Protocol I, supra note 2, Art. 90(2)(c)(i).

n93 INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL

1408

PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1033 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds., 1987). States parties may, of course, "suppress any act or omission contrary to the provisions of these instruments [the Geneva Conventions and Protocol I]; furthermore they must impose penal sanctions on conduct defined by these same instruments as 'grave breaches'." Id. See also id. at 1012. The Commentary recognizes that, although the punishment of other than grave breaches is the responsibility of the power to which the perpetrators belong, "this does not detract from the right of States under customary law, as reaffirmed in the writings of a number of publicists, to punish serious violations of the laws of war under the principle of universal jurisdiction." Id. at 1011. Contra Erich Kussbach, The International Humanitarian Fact-Finding Commission, 43 INT'L & COMP. L.Q. 174 177 (1994) (who believes that only grave breaches of Protocol I involve individual criminal responsibility and that serious violations implicate state responsibility only). Mr. Di Bernardi (Italy) stated that national legislation which went beyond the grave breaches provisions could not be applied to armed forces of other states. 6 DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974-1977), OFFICIAL RECORDS, DOC. CDDH/SR.44 (May 30, 1977) para. 76. A more persuasive view was expressed by Mr. Ullrich (German Democratic Republic), who stated that

> the definition of grave breaches within the system of the Conventions and Protocol was a specific form of international co-operation in the prosecution of war crimes, but that it did not determine or limit the scope of war crimes. There were many other war crimes which were extremely grave violations of international law.

Id., para. 90.

n94 RESTATEMENT, supra note 81, § 404; OPPENHEIM'S INTERNATINAL LAW, supra note 82, at 470.

n95 Draper, supra note 43, at 21. Compare G. Brand, The War Crimes Trials and the Laws of War, 26 BRIT. Y.B. INT'L L. 414, 416 (1949).

n96 Roling, supra note 74, at 359-60. See also UNITED NATIONS WAR CRIMES COMMISSION, supra note 54, at 30.

n97 Lauterpacht, supra note 52, at 64.

n98 Baxter, supra note 81, at 392 (footnotes omitted). Frits Kalshoven agrees that, in "customary international law, jurisdiction over war criminals is universal," but points out that, in practice, it is limited to the belligerent parties. FRITS KALSHOVEN, THE LAW OF WARFARE 119 (1973).

n99 14 UNITED NATIONS WAR CRIMES COMMISSION, supra note 80, at 15.

n100 THOMAS HETHERINGTON & WILLIAM CHALMERS, WAR CRIMES: REPORT OF THE WAR CRIMES INQUIRY, 1989, CMND 744, at 45.

n101 For other states' war crimes legislation, see id. at 65-74.

n102 Id. at 60.

n103 Id. at 72-73. See also L.C. Green, The German Federal Republic and the Exercise of

1409

Criminal Jurisdiction, 43 U. TORONTO L.J. 207, 208 (1993). The Canadian law, in its most pertinent part, reads as follows:

> every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,
>
> . . .
>
> (b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada, and subsequent to the time of the act or omission the person is present in Canada.

[1987] 1 R.S.C. ch. 37.

Arnold Fradkin, who served as lead counsel for the prosecution in several Canadian war crimes cases, made this comment on the Canadian legislation:

> A second subsection provides extraterritorial jurisdiction on the basis of the person's presence in Canada where, at the time of the crime, Canada could have, in conformity with international law, exercised jurisdiction over the person with respect to the crime committed. This expresses what is known in international law as the "universal jurisdiction" concept. Certain crimes are committed not against a particular state but against the international community, and therefore any state in which the offender is located has the right to try the offender . . . . War crimes are crimes against humanity and should be subsumed under that same principle of universal jurisdiction.

Holocaust and Human Rights Law: The Fifth International Conference, 12 B.C. THIRD WORLD L.J. 37, 48 (1992) (footnotes omitted).

n104 BUNDESMINISTERIUM FUR LANDESVERTEIDIGUNG, TRUPPENFUHRUNG, para. 52 (1965) (my translation).

n105 U.S. DEP'T OF THE ARMY, supra note 62, paras. 506-07.

n106 Supra note 81.

n107 Supra note 83.

n108 Report of the International Law Commission on the work of its forty-third session, [1991] 2 Y.B. Int'l L. Comm'n, pt. 2, at 104-05, UN Doc. A/CN.4/SER.A/1991/Add.1 (Pt. 2).

n109 May 14, 1954, 249 UNTS 240.

n110 Id., Article 19(1) provides:"In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention

1410

which relate to respect for cultural property."

n111 Id., Art. 28.

n112 June 17, 1925, 26 UST 571, 94 LNTS 65.

n113 Apr. 10, 1972, Art. 1, 26 UST 583, 1015 UNTS 163.

n114 Art. 1(1), 32 ILM 800 (1993). The Department of State's Article-by-Article Analysis of the Convention, annexed to the President's Letter of Transmittal to the Senate, points out that

> the prohibtion on the use of chemical weapons extends beyond solely their use in international armed conflicts, i.e. chemical weapons may not be used in any type of situation, including purely domestic conflicts, civil wars or state-sponsored terrorism. As such, this article closes a loophole in the Geneva Protocol of 1925, which covered only uses in war, i.e. international armed conflicts. Note that the phrase "never under any circumstances" reflects a similar phrase in Article I of the Biological Weapons Convention.

S. TREATY DOC. NO. 21, 103d Cong., 1st Sess. 4 (1993). A recent commentary notes that the words "undertakes never under any circumstances" have a universal dimension, extend to all activities of state parties everywhere, and are independent of the character of the conflict, whether it is international armed conflict, noninternational armed conflict, or civil strife. WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION 12-13 (1994).

n115 KRUTZSCH & TRAPP, supra note 114, at 109-15; S. TREATY DOC. NO. 21, supra note 114, at 40-41.

n116 Chairman's Rolling Text, in Final Report of the Group of Governmental Experts to Prepare the Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Doc. CCW/CONF.I/GE/23, Ann. 1 (1995) [hereinafter Final Report]. See generally THE ARMS PROJECT OF HUMAN RIGHTS WATCH & PHYSICIANS FOR HUMAN RIGHTS, LANDMINES: A DEADLY LEGACY (1993).

n117 Making Protocol II applicable in peacetime offers additional advantages. A key proposal accepted in principle by most of the delegations at the experts' meetings would require that long-lived antipersonnel land mines be placed in marked and monitored areas protected to exclude civilians. Given the number of permanent, so-called barrier mine fields emplaced throughout the world, such a marking and monitoring requirement should apply at all times. Moreover, the proposal of the Netherlands to amend Protocol II to restrict the transfer of mines (Art. 6 ter) would make no sense if limited to times of armed conflict.

n118 The Western "Alternative C" of Appendix I, Final Report, supra note 116, concerning compliance provides, in Article 12(4), as follows:

> The provisions of the 1949 Geneva Conventions relating to measures for the repression of breaches and grave breaches shall apply to breaches and grave breaches of this Protocol during armed conflict. Each party to a conflict shall take all appropriate measures to prevent and suppress breaches of this Protocol. Any

1411

> act or omission occurring during armed conflict in violation of this Protocol, if committed wilfully or wantonly and causing death or serious injury to the civilian population shall be treated as a grave breach. A party to the conflict which violates the provisions of this Protocol shall, if the case demands, be liable to pay compensation, and shall be responsible for all acts committed by persons forming part of its armed forces. States parties and parties to a conflict shall require that commanders ensure that members of the armed forces under their command are aware of, and comply with, their obligations under this Protocol.

Another area that merits urgent attention is to extend to noninternational armed conflicts the international law prohibitions on environmental damage that are applicable to international wars.

n119 Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain) (New Application) 1970 ICJ REP. 3, 32 (Feb. 5).

n120 Yugoslavia Statute, supra note 8, Arts. 9-10; Rwanda Statute, supra note 7, Arts. 8-9; International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 [Yugoslavia Tribunal], Rules of Procedure and Evidence, UN Doc. IT/32/Rev.3 (Jan. 30, 1995); Yugoslavia Tribunal, Application [by the Prosecutor] for Deferral by the Federal Republic of Germany in the Matter of Dusco Tadic, Case No. 1 of 1994 (Nov. 8, 1994); Decision of the Trial Chamber in Case No. 1 of 1994, IT-94--1-D (Nov. 8, 1994); Yugoslavia Tribunal, Application by the Prosecutor for a Formal Request for Deferral by the Government of Bosnia and Herzegovina of Its Investigations and Criminal Proceedings in Respect of Radovan Karadzic, Ratko Mladic and Mico Stanisic (Apr. 21, 1995), Decision by the Trial Chamber in Case No. IT-95-5-D (May 16, 1995); and, concerning the Lasva River Valley Investigation, Decision by the Trial Chamber in Case No. IT-95-6-D (May 11, 1995).

Regarding the relations between national courts and the proposed international criminal court, see Report of the International Law Commission on the work of its forty-sixth session, supra note 16, at 129-38, Arts. 51-58.

The United States expressed the concern that the statute adopted by the ILC does not adequately reflect the principle that the jurisdiction of the proposed international tribunal should be complementary to the national criminal justice systems. U.S. Comments, supra note 82, paras. 6-14. The United States proposed that the state of nationality, or any other state actively exercising jurisdiction, should have preemptive rights of jurisdiction in relation to the proposed international tribunal. Id., para. 68.

n121 Loi de 16 juin 1993 relative a la repression des infractions graves aux conventions internationales de Geneve du 12 aout 1949 et aux protocoles I et II du 8 juin 1977, additionnels a ces conventions, Moniteur Belge, Aug. 5, 1993; ERIC DAVID, PRINCIPES DE DROIT DES CONFLITS ARMES 556 (1994).

n122 Other warrants involved the killing of Belgian peacekeepers, among others. Parquet de Bruxelles, Crimes de guerre au Rwanda, Press Communique No. 30.99.3959/94 (May 30, 1995) (in the author's files).

1412

PROSECUTION INDEX OF AUTHORITIES

ANNEX 31.

United States Code Service §505-(a) (2003)

1414

10 USCS § 505

*** CURRENT THROUGH P.L. 108-30, APPROVED 5/29/03 ***

TITLE 10. ARMED FORCES
SUBTITLE A. GENERAL MILITARY LAW
PART II. PERSONNEL
CHAPTER 31. ENLISTMENTS

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

10 USCS § **505** (2003)

§ **505.** Regular components: qualifications, term, grade

(a) The Secretary concerned may accept original enlistments in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard, as the case may be, of qualified, effective, and able-bodied persons who are not less than seventeen years of age, nor more than thirty-five years of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control.

(b) A person is enlisted in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard in the grade or rating prescribed by the Secretary concerned.

(c) The Secretary concerned may accept original enlistments of persons for the duration of their minority or for a period of at least two but not more than six years, in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard, as the case may be.

(d) (1) The Secretary concerned may accept a reenlistment in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard, as the case may be, for a period determined under this subsection.

(2) In the case of a member who has less than 10 years of service in the armed forces as of the day before the first day of the period for which reenlisted, the period for which the member reenlists shall be at least two years but not more than six years.

(3) In the case of a member who has at least 10 years of service in the armed forces as of the day before the first day of the period for which reenlisted, the Secretary concerned may accept a reenlistment for either--

(A) a specified period of at least two years but not more than six years; or

(B) an unspecified period.

(4) No enlisted member is entitled to be reenlisted for a period that would expire before the end of the member's current enlistment.

HISTORY:

(Added Jan. 2, 1968, P.L. 90-235, § 2(a)(1)(B), 81 Stat. 754; May 24, 1974, P.L. 93-290, §§ 1, 2, 88 Stat. 173; Oct. 20, 1978, P.L. 95-485, Title VIII, § 820(a), 92 Stat. 1627; Sept. 24, 1983, P.L. 98-94, Title X, Part C, § 1023, 97 Stat. 671; Sept. 23, 1996, P.L. 104-201, Div A, Title V, Subtitle B, § 511, 110 Stat. 2514.)

PROSECUTION INDEX OF AUTHORITIES

ANNEX 32.

1415

Sierra Leone Military Forces Act, 1961, Section 16(2)

1416

Act 5/71
29/72
8/74 19

No. 34

Sierra Leone

An Ordinance to consolidate and amend the Law as to the Establishment, Government and Discipline of the Royal Sierra Leone Military Forces and its Reserves and to provide for Appeals from Courts-Martial and purposes connected therewith and incidental thereto.

[27th April, 196

BE IT ENACTED by the Legislature of Sierra Leone, as follows:-

PART I—PRELIMINARY

1. This Ordinance may be cited as the ~~Royal~~ Sierra Leon Military Forces Ordinance, 1961, and shall come into operatic on the date to be appointed by the Governor by notification the *Gazette*.

16. (1) A person offering to enlist in the Force shall be given a notice in the prescribed form setting out the questions to be answered on attestation and stating the general conditions of the engagement to be entered into by him, and a recruiting officer shall not enlist any person in the Force unless satisfied by that person that he has been given such a notice, understands it, and wishes to be enlisted.

(2) A recruiting officer shall not enlist a person under the apparent age of seventeen and a half years unless consent to the enlistment has been given in writing by his parent or guardian or, where the parents or guardian are dead or unknown, by the District Commissioner or an Assistant District Commissioner of the district in which such person resides or, if he resides in an area where there is no District Commissioner, the Director of Social Development.

TERMS AND CONDITIONS OF SERVICE

of ent.

17. The term for which a person enlisting in the Force may be enlisted shall be such period beginning with the date of his attestation not exceeding twelve years of either army or reserve service (or partly army and partly reserve service) as shall be prescribed:

Provided that where the person enlisting has not attained the apparent age of seventeen and a half years the period which may be prescribed may continue for twelve years from the date on which he apparently attains that age.

RE-ENGAGEMENT AND EXTENSION OF SERVICE

ge- d nce e.

18. (1) Any soldier before or after completing the term of his army service may with the approval of the competent military authority re-engage for such further period or periods of army service and service in the reserve as may be prescribed:

Provided that—

(*a*) at the expiration of twelve years' continuous army service from the date of his original attestation or the date when he apparently attained the age of seventeen and a half years, which ever is the later, all reserve service due by him shall be deemed to have been completed; and

(*b*) such further period or periods of army service, together with the original period of army service, shall not, except as provided by subsections (2) and (3), exceed a total continuous period of eighteen