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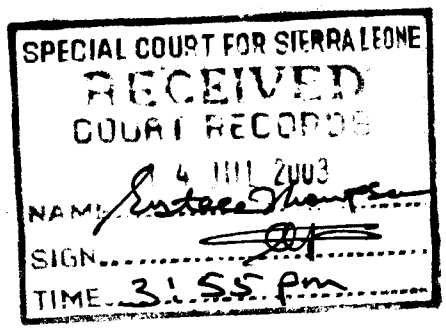
SCSL-2003-08-PT-054

(1549 - 1582)

THE SPECIAL COURT FOR SIERRA LEONE

IN THE TRIAL CHAMBER

Before: Judge Thompson, Presiding Judge
Judge Itoe
Judge Boutet



Registrar: Robin Vincent

Date: 14th July 2003

The Prosecutor

V.

Sam Hinga Norman

SCSL-2003-08-PT

REPLY - PRELIMINARY MOTION BASED ON LACK OF JURISDICTION: CHILD RECRUITMENT

Office of the Prosecutor:

Desmond DaSilva, Q.C.
Luc Côté
Walter Marcus-Jones
Abdul Tejan-Cole

Defence Counsel

James Blyden Jenkins-Johnston
Sulaiman Banja Tejan-Sie

I. INTRODUCTION

1. The accused replies to the "Prosecution Response to the Fourth Defence Preliminary Motion on Lack of Jurisdiction (Child Recruitment)" (the "Response") filed on 7 July 2003 and served on counsel for the accused on 9 July 2003.

2. The accused submits the only issue before the Court is whether the recruitment of child soldiers was recognized as a crime under customary international law at any time within this Court's temporal jurisdiction. The issue of whether child recruitment was prohibited under customary international law which the Response addresses at some length is therefore tangential. Even if it can be established that recruitment of soldiers under the age of 15 was prohibited under customary international law the establishment of the prohibition does not necessarily make child recruitment an international crime.

II. *NULLUM CRIMEN SINE LEGE*

3. Paragraphs 15-18 of the Response seek to restrict the application of the legality principle – expressed in the Latin maxim *nullum crimen sine lege* (no crime without law). The accused replies that this principle is recognized as a fundamental one in international criminal justice and as such requires a robust interpretation. The principle's applicability was recognized in the war crimes trials following World War II[1]. The principle was also recognized as fundamental by the Secretary-General at the time the ICTY was set up[2] and the ICTY and ICTR have consistently upheld the validity of the principle[3]. The accused therefore submits it is beyond debate, particularly in light of Article 20.3 of the Court's Statute, that this Court cannot hold individuals criminally responsible for acts or omissions that were not entrenched as crimes in customary international law at the time they were alleged to have been committed.

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[1] See for instance *U.S. v. Alstoetter (The Justice Case)* 3 C.C.L. No. 10 Trials 954 at p. 7 of Annex 18 to the Response:

> As a principle of justice and fair play, the rule in question ["the *ex post facto* principle"] 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 know 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 know or should have known that he would be subject to punishment if caught* [emphasis added].

[2] Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), 3 May 1993 at paragraph 34.

[3] See, *inter alia*, *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (Annex 13 to the Response) and *Prosecutor v. Rutaganda*, Judgment and Sentence 6 december 1999 at paragraph 86.

4. In its reliance (at paragraph 15) on the judgment of the ICTY Trial Chamber in *Handzihasanovic*, the Prosecution appears to assert that a vague notion that one's conduct may be wrong is sufficient to render the legality principle inapplicable. The very quotation from *Hadzihasanovic* upon which the Prosecution relies in support of this proposition undermines it. It is not enough that an accused know his conduct was not condoned under international law. He must be aware that "its commission was punishable" at the relevant time.

5. The accused also points out that the existence of a prohibition under international law does not necessarily entail criminal responsibility where the prohibition is violated. Many of the rights under the *International Covenant on Civil and Political Rights* enjoin certain behaviour on the part of State actors without making such behaviour criminal under international law. For instance, no international criminal tribunal has jurisdiction over violations of Article 18's protection of freedom of religion and conscience.

6. Paragraph 12 if the Response contends that language such as that contained in Article 38(3) of the *Convention on the Rights of the Child* requiring State Parties take "all feasible measures" to prohibit child recruitment is sufficient to make child recruitment a crime under customary international law. The accused replies that Article 2.2 of the *ICCPR* contains similar language[4] and yet violations of its provisions are not *per se* crimes under customary international law. The accused also notes with respect to the article by Theodor Meron cited in footnote 17 of the Response that the jurisprudence of the ICTY and ICTR[5] released subsequent to that article undermine the force of the quotation upon which the Prosecution seeks to rely.

7. The accused also submits that the Prosecution's reliance (at paragraph 11 of the Response) on the ICTY Appeals Chamber's judgment in the *Tadic Jurisdiction Appeal* is misplaced. The Prosecution contends that the Appeals Chamber's observation in its judgment that "a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment" means that "the prohibition of an act or omission under customary law is sufficient to satisfy the principle of *nullum crimen sine lege*". The portion of *Tadic* from which the Response quotes dealt with whether Article 3 of the ICTY Statute (which sought to establish criminal liability for violations of the laws or customs of war

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[4] The sub-article reads:

> Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its own constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

[5] Cited in footnote 4 above.

other than those contained in the "grave breaches" regime of the Geneva Conventions) applied to internal armed conflicts. The Appeals Chamber in *Tadic* was dealing with those laws of war which were similar to the Conventions' grave breaches regime. The accused submits the Chamber simply concluded that it made little sense to view certain violations of the laws of war as criminal while regarding similar violations as non-criminal. The similarity between the grave breaches provisions and the "other violations" was a factor which contributed to the Appeals Chamber's conclusion that violations of both types of provision was criminal under international law. Child recruitment, on the other hand, is significantly different from the violence and property offences at issue in the grave breaches and "other violations" regimes and thus is not amenable to the Appeals Chamber's analysis in *Tadic*.

8. Furthermore, the test which the Appeals Chamber in *Tadic* formulated, and which the Prosecution cited at paragraph 11 of the Response, is not satisfied, if it applies at all[6]. That test requires 1) "the clear and unequivocal recognition of the rules of warfare in international law"; 2) "State practice indicating an intention to criminalize the prohibition" and 3) "punishment of violations by national courts and military tribunals". The accused submits that requirement 2) of the test is not satisfied for the reasons set out in III below. The accused also submits that there is no evidence, to the best of counsel's knowledge, of any national court or military tribunal meting out punishment for child recruitment. Even if isolated examples of such punishment exist the accused submits more is required for child recruitment to be regarded as a crime under international law.

9. Finally, the Prosecution also appears to assert (at paragraphs 17 and 18) that the commission of certain acts which are sufficiently "abhorrent" or which frustrate the "primary purpose of international humanitarian law . . . to regulate the means and methods of warfare and to protect persons not actively participating in armed conflict" overrides the legality principle. The accused replies that the international community and, more importantly, this Court must abide by international law whatever its perceived shortcomings. If the recruitment of child soldiers is abhorrent or frustrates the "primary purpose of international humanitarian law" it is for the international community to not only prohibit it but to make it a crime. In those circumstances no violation of the *nullum crimen sine lege* principle occurs. If, and the accused submits this is the case at bar, the international community has acted equivocally in how it will deal with a problem deemed by some to be abhorrent it is the international community, not an individual accused, who must pay whatever price such equivocation demands. The legality principle exists to ensure

[6] The accused respectfully submits that the Prosecution's insertion of "issue" for "rules of warfare" significantly alters the test articulated by the Appeals Chamber in *Tadic*. The test applies only to the "rules of warfare" and not the issue raised.

that blame, if it exists, lies with those who have the power to make international penal law not with those who are its subjects.

III. CUSTOMARY INTERNATIONAL LAW, STATE PRACTICE AND INTERNATIONAL CRIMES

10. The accused submits that the Prosecution relies almost exclusively on State practice to support its position that child recruitment was an international crime throughout the period of this Court's temporal jurisdiction. The accused replies that such practice is only one factor to be assessed in determining whether a principle has become part of customary international law[7]. In any event, the State practice upon which the Prosecution relies does not demonstrate the criminality of child recruitment, only its restriction under various domestic laws. For instance, Section 16 of the *Royal Sierra Leone Military Forces Act, 1961* upon which the Prosecution relies (in footnote 3 to paragraph 5) does not create a crime of recruiting underage soldiers, it restricts such recruitment without penal consequence. In fact, and contrary to the Prosecution's suggestion in the Response, Section 16 does not even prohibit recruitment of soldiers under the age of $17^1/_2$. It merely requires parental permission where the recruit is under that age. Similarly, the long list of countries cited in footnote 3 of the Response, in the Prosecution's own words, have enacted legislation that merely "restricts the voluntary and/or compulsory military service to those over the age of 15 years [emphasis added]". The State practice cited by the Prosecution thus supports the accused's position that child recruitment is not a crime under customary international law.

11. In paragraph 5 of the Response the Prosecution contends that academic literature supports its contention that recruitment of child soldiers is a crime. Footnote 4 offered in support of the contention cites only the work of NGO's who advocate against child recruitment. Without criticizing the work of these NGO's in this regard, the accused respectfully submits that their reports do not amount to the kind of academic opinion which may be cited in support of the position that a principle has achieved the status of customary international law. The NGO reports cited do not purport to analyze the current state of customary international law and therefore cannot be offered in support of the Prosecution's contention in this regard. Even if the reports were admissible as academic opinion, they are only a subsidiary source of

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[7] The accused also points out that practice alone is insufficient. As the *North Sea Continental Shelf Cases* judgment points out in a passage excluded from Annex 11 of the Response but excerpted in J. Dugard, *International Law: A South African Perspective*, 2nd Ed. (Kenwyn, S.A.: Juta & Co., 2000) at p.32,

> [n]ot 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 *opinion juris sive necessitates*. 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.

customary international law. In light of State practice which, on the Prosecution's own admission, does not criminalize child recruitment, such academic opinion, if it existed, would be insufficient to support the Prosecution's contention.

12. The accused also submits that the "reports, statements, declarations" and "resolutions" (Annexes 19-28) upon which the Prosecution seeks to rely in support of its contention child recruitment has been criminalized under customary international law are equivocal with respect to the sole issue raised in the present motion. Six of the ten sources arguably call for the criminalization of child recruitment. Like the "academic literature" discussed above, these sources are secondary at best and thus fail to establish a principle of customary international law in light of the State practice to the contrary conceded by the Prosecution.

IV WHEN (IF EVER) DID CHILD RECRUITMENT BECOME AN INTERNATIONAL CRIME?

13. Should this Court accept the argument of the Prosecution and declare that child recruitment is a crime under international law, the accused submits this Court ought to pinpoint the moment that such recruitment became a crime. The accused makes this submission on the basis of the time period which the evidence cited by the Prosecution spans. While the Prosecution contends that child recruitment was recognized as a crime under international law "as of" 30 November 1996 the evidence on which it relies is, with a few exceptions, very recent – i.e. 1998 to the present. For instance, the "reports, statements, declarations" and "resolutions" upon which the Prosecution relies span a period from 1993 to 2000. However, those documents which refer to child recruitment as a crime span a period from 30 April 1997 (the *Capetown Principles* which call for State action rather than evidencing it) to 11 August 2000 (Security Council Resolution 1314 (2000) which calls on States to ratify the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*). The accused submits none of these documents are satisfactory evidence of customary international law. However, should this Court disagree they support the further position that child recruitment has become a crime some time after 30 November 1996. Pinpointing the date of this "crystallization" will establish those acts of child recruitment over which the Court has jurisdiction and those within the Court's temporal jurisdiction over which it lacks such jurisdiction.

14. In footnote 6 the Response suggests that the key date with respect to the effect of treaties such as the *Rome Statute of the ICC* and the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* is the date on which their texts were adopted. The accused

submits the key date with respect to the crystallization of the principle of international law at issue is not the date on which texts were finalized but the date on which the treaty in question entered into force. Acceptance of a treaty's final text does not indicate acceptance of the treaty itself. It may simply be a State's way of indicating that further drafting is pointless as nothing will improve the proposed treaty to its satisfaction. Ratification, however, signifies a State's acceptance of the principles embodied in the treaty[8]. It is this latter date then which assists in pinpointing when a prohibition crystallizes into a crime under customary international law. In the present case, should this Court disagree with the accused's main contention that child recruitment is not a crime under customary international law, the accused submits the date on which it became such a crime is the 14 February 2002 when the *Optional Protocol to the Convention on the Rights of the Child* came into force.

Dated at Freetown this 14th day of July 2003

for James Blyden Jenkins-Johnston

Sulaiman Banja Tejan-Sie

[8] For instance, the United States participated in the process leading up to finalization of the *Rome Statute* but has failed to ratify it.

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2	Excerpt from *Prosecutor v. Rutaganda*, Judgment and Sentence 6 December 1999
3	Excerpt from J. Dugard, *International Law: A South African Perspective*, 2nd Ed. (Kenwyn, S.A.: Juta & Co., 2000)

ANNEX 1

Excerpt from Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808(1993), 3 May 1993.

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Article 1

COMPETENCE OF THE INTERNATIONAL TRIBUNAL

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

A. Competence ratione materiae (subject-matter jurisdiction)

33. According to paragraph 1 of resolution 808 (1993), the international tribunal shall prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. This body of law exists in the form of both conventional law and customary law. While there is international customary law which is not laid down in conventions, some of the major conventional humanitarian law has become part of customary international law.

34. In the view of the Secretary-General, 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 specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims[3]; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907[4]; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948[5]; and the Charter of the International Military Tribunal of 8 August 1945.[6]

36. Suggestions have been made that the international tribunal should apply domestic law in so far as it incorporates customary international humanitarian law. While international humanitarian law as outlined above provides a sufficient basis for subject-matter jurisdiction, there is one related issue which would require reference to domestic practice, namely, penalties (see para. 111).

Grave breaches of the 1949 Geneva Conventions

37. The Geneva Conventions constitute rules of international humanitarian law and provide the core of the customary law applicable in international armed conflicts. These Conventions regulate the conduct of war from the humanitarian perspective by protecting certain categories of persons: namely, wounded and sick members of armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war, and civilians in time of war. **B2–006**

38. Each Convention contains a provision listing the particularly serious violations that qualify as "grave breaches" or war crimes. Persons committing or ordering grave breaches are subject to trial and punishment. The lists of grave breaches contained in the Geneva Conventions are reproduced in the article which follows.

[3] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, Convention relative to the Treatment of Prisoners of War of 12 August 1949, Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (United Nations, *Treaty Series*, vol. 75, No. 970–973).

[4] Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), p. 100.

[5] United Nations, *Treaty Series*, vol. 78, No. 1021.

[6] The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London on 8 August 1945 (United Nations, *Treaty Series*, vol. 82, No. 251); see also Judgement of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis (United States Government Printing Office, *Nazi Conspiracy and Aggression, Opinion and Judgement*) and General Assembly resolution 95(I) of 11 December 1946 on the Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal.

ANNEX 2

Excerpt from *Prosecutor v. Rutaganda*, Judgment and Sentence 6 December 1999

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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Judgement and Sentence

The Prosecutor v. Georges Anderson Nderubumwe Rutaganda

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2. THE APPLICABLE LAW

2.1 Individual Criminal Responsibility

31. The Accused is charged under Article 6(1) of the Statute with individual criminal responsibility for the crimes alleged in the Indictment. Article 6(1) provides that:

"A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute shall be individually responsible for the crime".

32. In the *Akayesu Judgement* findings were made on the principle of individual criminal responsibility under Article 6(1) of the Statute. The Chamber notes that these findings are, in the main, the same as those made in the *Tadic Judgement* and in the judgements in *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (the "*Kayishema and Ruzindana Judgement*")(1) and *The Prosecutor versus Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo: 'The Celebici Case'*, (the "*Celebici Judgement*")(2). The Chamber is of the view that the position as derived from the afore-mentioned case law, with respect to the principle of individual criminal responsibility, and as articulated, notably, in the *Akayesu Judgement* is sufficiently established and is applicable in the instant case.
33. The Chamber notes, that under Article 6 (1), an accused person may incur individual criminal responsibility as a result of five forms of participation in the commission of one of the three crimes referred to in the Statute. Article 6 (1) covers various stages in the commission of a crime, ranging from its initial planning to its execution.
34. The Chamber observes that the principle of individual criminal responsibility under Article 6 (1) implies that the planning or preparation of a crime actually leads to its commission. However, the Chamber notes that Article 2 (3) of the Statute, on the crime of genocide, provides for prosecution for attempted genocide, among other acts. However, attempt is by definition an inchoate crime, inherent in the criminal conduct *per se* irrespective of its result. Consequently, the Chamber holds that an accused may incur individual criminal responsibility for inchoate offences under Article 2 (3) of the Statute and that, conversely, a person engaging in any form of participation in other crimes falling within the jurisdiction of the Tribunal, such as those covered in Articles 3 and 4 of the Statute, could incur criminal responsibility only if the offence were consummated.
35. The Chamber finds that in addition to incurring responsibility as a principal offender, the Accused may also be held criminally liable for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed or aided and abetted another in the commission of such acts.
36. The Chamber defines the five forms of criminal participation under Article 6(1) as follows:
37. Firstly, in the view of the Chamber, "planning" of a crime implies that one or more persons contemplate designing the commission of a crime at both its preparatory and execution phases.
38. In the opinion of the Chamber, the second form of participation, that is, incitement to commit an offence, under Article 6(1), involves instigating another, directly and publicly, to commit an offence. Instigation is punishable only where it leads to the actual commission of an offence

desired by the instigator, except with genocide, where an accused may be held individually criminally liable for incitement to commit genocide under Article 2(3)(c) of the Statute, even where such incitement fails to produce a result.(3)

39. In the opinion of the Chamber, ordering, which is a third form of participation, implies a superior-subordinate relationship between the person giving the order and the one executing it, with the person in a position of authority using such position to persuade another to commit an offence.
40. Fourthly, an accused incurs criminal responsibility for the commission of a crime, under Article 6(1), where he actually "commits" one of the crimes within the jurisdiction *rationae materiae* of the Tribunal.
41. The Chamber holds that an accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act.
42. A fifth and last form of participation where individual criminal responsibility arises under Article 6(1), is "[...] otherwise aid[ing] and abett[ing] in the planning or execution of a crime referred to in Articles 2 to 4".
43. The Chamber finds that aiding and abetting alone is sufficient to render the accused criminally liable. In both instances, it is not necessary that the person aiding and abetting another to commit an offence be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the offence. The Chamber holds that aiding and abetting include all acts of assistance in either physical form or in the form of moral support; nevertheless, it emphasizes that any act of participation must substantially contribute to the commission of the crime. The aider and abettor assists or facilitates another in the accomplishment of a substantive offence.

2.2 Genocide (Article 2 of the Statute)

44. In accordance with the provisions of Article 2(3)(a) of the Statute, which stipulate that the Tribunal shall have the power to prosecute persons responsible for genocide, the Prosecutor has charged the Accused with genocide, Count 1 of the Indictment.
45. The definition of genocide, as given in Article 2 of the Tribunal's Statute, is taken verbatim from Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention")(4). It reads as follows:

"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."

46. The Genocide Convention is undeniably considered part of customary international law, as reflected in the advisory opinion issued in 1951 by the International Court of Justice on reservations to the Genocide Convention, and as noted by the United Nations Secretary-General in his Report on the establishment of the International Criminal Tribunal for the Former Yugoslavia(5).
47. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on

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Genocide on 12 February 1975[6]. Therefore the crime of genocide was punishable in Rwanda in 1994.

48. The Chamber adheres to the definition of the crime of genocide as it was defined in the *Akayesu Judgement*.
49. The Chamber accepts that the crime of genocide involves, firstly, that one of the acts listed under Article 2(2) of the Statute be committed; secondly, that such an act be committed against a national, ethnical, racial or religious group, specifically targeted as such; and, thirdly, that the "act be committed with the intent to destroy, in whole or in part, the targeted group".

The Acts Enumerated under Article 2(2)(a) to (e) of the Statute

50. Article 2(2)(a) of the Statute, like the corresponding provisions of the Genocide Convention, refers to "meurtre" in the French version and to "killing" in the English version. In the opinion of the Chamber, the term "killing" includes both intentional and unintentional homicides, whereas the word "meurtre" covers homicide committed with the intent to cause death. Given the presumption of innocence, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the Accused should be adopted, and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder in the Criminal Code of Rwanda, which provides, under Article 311, that "Homicide committed with intent to cause death shall be treated as murder".
51. For the purposes of interpreting Article 2(2)(b) of the Statute, the Chamber understands the words "serious bodily or mental harm" to include acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution. The Chamber is of the opinion that "serious harm" need not entail permanent or irremediable harm.
52. In the opinion of the Chamber, the words "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", as indicated in Article 2(2)(c) of the Statute, are to be construed "as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group", but which are, ultimately, aimed at their physical destruction. The Chamber holds that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard.
53. For the purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the words "measures intended to prevent births within the group" should be construed as including sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages. The Chamber notes that measures intended to prevent births within the group may be not only physical, but also mental.
54. The Chamber is of the opinion that the provisions of Article 2(2)(e) of the Statute, on the forcible transfer of children from one group to another, are aimed at sanctioning not only any direct act of forcible physical transfer, but also any acts of threats or trauma which would lead to the forcible transfer of children from one group to another group.

Potential Groups of Victims of the Crime of Genocide

55. The Chamber is of the view that it is necessary to consider the issue of the potential groups of victims of genocide in light of the provisions of the Statute and the Genocide Convention, which stipulate that genocide aims at "destroy[ing], in whole or in part, a national, ethnical, racial or religious group, as such."
56. The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a

subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.

57. Nevertheless, the Chamber is of the view that a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention. It appears, from a reading of the *travaux préparatoires* of the Genocide Convention(7), that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.
58. Therefore, the Chamber holds that in assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the political and cultural context as indicated *supra*.

The Special Intent of the Crime of Genocide.

59. Genocide is distinct from other crimes because it requires *dolus specialis*, a special intent. Special intent of a crime is the specific intention which, as an element of the crime, requires that the perpetrator clearly intended the result charged. The *dolus specialis* of the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". A person may be convicted of genocide only where it is established that he committed one of the acts referred to under Article 2(2) of the Statute with the specific intent to destroy, in whole or in part, a particular group.
60. In concrete terms, for any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone. The perpetration of the act charged, therefore, extends beyond its actual commission, for example, the murder of a particular person, to encompass the realization of the ulterior purpose to destroy, in whole or in part, the group of which the person is only a member.
61. The *dolus specialis* is a key element of an intentional offence, which offence is characterized by a psychological nexus between the physical result and the mental state of the perpetrator. With regard to the issue of determining the offender's specific intent, the Chamber applies the following reasoning, as held in the *Akayesu Judgement*:

> " [...] intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber is of the view that the genocidal intent inherent in a particular act charged can be inferred from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."(8)

62. Similarly, in the *Kayishema and Ruzindana Judgement*, Trial Chamber II held that :

> "[...] The Chamber finds that the intent can be inferred either from words or deeds and may be determined by a pattern of purposeful action. In particular, the Chamber considers evidence such as [...] the methodical way of planning, the systematic manner of killing. [...]"(9)

63. Therefore, the Chamber is of the view that, in practice, intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused .

2.3 Crimes against Humanity (Article 3 of the Statute)

64. The Chamber notes that the *Akayesu Judgement* traced the historical development and evolution of crimes against humanity, as far back as the Charter of the International Military Tribunal of Nuremberg. The *Akayesu Judgement* also considered the gradual evolution of crimes against humanity in the cases of *Eichmann*, *Barbie*, *Touvier* and *Papon*(10). The Chamber concurs with the historical development of crimes against humanity, as set forth in the *Akayesu Judgement*.
65. The Chamber notes that Article 7 of the Statute of the International Criminal Court defines a crime against humanity as any of the enumerated acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. These enumerated acts are murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any other crime within the jurisdiction of the court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health.(11)

Crimes against Humanity pursuant to Article 3 of the Statute of the Tribunal

66. Article 3 of the Statute confers on the Tribunal the jurisdiction to prosecute persons for various inhumane acts which constitute crimes against humanity. The Chamber concurs with the reasoning in the *Akayesu Judgement* that offences falling within the ambit of crimes against humanity may be broadly broken down into four essential elements, namely:

(a) the *actus reus* must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health

(b) the *actus reus* must be committed as part of a widespread or systematic attack

(c) the *actus reus* must be committed against members of the civilian population

(d) the *actus reus* must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.(12)

The *Actus Reus* Must be Committed as Part of a Widespread or Systematic Attack

67. The Chamber is of the opinion that the *actus reus* cannot be a random inhumane act, but rather an act committed as part of an attack. With regard to the nature of this attack, the Chamber notes that Article 3 of the English version of the Statute reads "[...] as part of a widespread or systematic attack. [...]" whilst the French version of the Statute reads "[...] dans le cadre d'une attaque généralisée et systématique [...]". The French version requires that the attack be both of a widespread *and* systematic nature, whilst the English version requires that the attack be of a widespread *or* systematic nature and need not be both.
68. The Chamber notes that customary international law requires that the attack be either of a

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widespread *or* systematic nature and need not be both. The English version of the Statute conforms more closely with customary international law and the Chamber therefore accepts the elements as set forth in Article 3 of the English version of the Statute and follows the interpretation in other ICTR judgements namely: that the "attack" under Article 3 of the Statute, must be either of a widespread or systematic nature and need not be both.(13)

69. The Chamber notes that "widespread", as an element of crimes against humanity, was defined in the *Akayesu Judgement*, as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims, whilst "systematic" was defined as thoroughly organised action, following a regular pattern on the basis of a common policy and involving substantial public or private resources(14). The Chamber concurs with these definitions and finds that it is not essential for this policy to be adopted formally as a policy of a State. There must, however, be some kind of preconceived plan or policy.(15)
70. The Chamber notes that "attack", as an element of crimes against humanity, was defined in the *Akayesu Judgement*, as an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute, such as murder, extermination, enslavement etc. An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner may also come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner(16). The Chamber concurs with this definition.
71. The Chamber considers that the perpetrator must have:

"[...]actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan."(17)

The *Actus Reus* Must be Directed against the Civilian Population

72. The Chamber notes that the *actus reus* must be directed against the civilian population, if it is to constitute a crime against humanity. In the *Akayesu Judgement*, the civilian population was defined as people who were not taking any active part in the hostilities(18). The fact that there are certain individuals among the civilian population who are not civilians does not deprive the population of its civilian character(19). The Chamber concurs with this definition.

The *Actus Reus* Must be Committed on Discriminatory Grounds

73. The Statute stipulates that inhumane acts committed against the civilian population must be committed on "national, political, ethnic, racial or religious grounds." Discrimination on the basis of a person's political ideology satisfies the requirement of 'political' grounds as envisaged in Article 3 of the Statute.
74. Inhumane acts committed against persons not falling within any one of the discriminatory categories may constitute crimes against humanity if the perpetrator's intention in committing these acts, is to further his attack on the group discriminated against on one of the grounds specified in Article 3 of the Statute. The perpetrator must have the requisite intent for the commission of crimes against humanity.(20)
75. The Chamber notes that the Appeals Chamber in the *Tadic* Appeal ruled that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. The Appeals Chamber stated that a discriminatory intent is an indispensable element of the offence only with regard to those crimes for which this is expressly required, that is the offence of persecution, pursuant to Article 5(h) of the Statute of the International Criminal Tribunal for the former Yugoslavia (the "ICTY").(21)
76. The Chamber considers the provisions of Article 5 of the ICTY Statute, as compared to the

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provisions of Article 3 of the ICTR, Statute and notes that, although the provisions of both the aforementioned Articles pertain to crimes against humanity, except for persecution, there is a material and substantial difference in the elements of the offence that constitute crimes against humanity. This stems from the fact that Article 3 of the ICTR Statute expressly provides the enumerated discriminatory grounds of "national, political, ethnic, racial or religious", in respect of the offences of Murder; Extermination; Deportation; Imprisonment; Torture; Rape; and; Other Inhumane Acts, whilst the ICTY Statute does not stipulate any discriminatory grounds in respect of these offences..

The Enumerated Acts

77. Article 3 of the Statute sets out various acts that constitute crimes against humanity, namely: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial and religious grounds; and; other inhumane acts. Although the category of acts that constitute crimes against humanity are set out in Article 3, this category is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are satisfied. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.
78. The Chamber notes that in respect of crimes against humanity, the Accused is indicted for murder and extermination. The Chamber, in interpreting Article 3 of the Statute, will focus its discussion on these offences only.

Murder

79. Pursuant to Article 3(a) of the Statute, murder constitutes a crime against humanity. The Chamber notes that Article 3(a) of the English version of the Statute refers to "Murder", whilst the French version of the Statute refers to "Assassinat". Customary International Law dictates that it is the offence of "Murder" that constitutes a crime against humanity and not "Assassinat".
80. The *Akayesu Judgement* defined Murder as the unlawful, intentional killing of a human being. The requisite elements of murder are:

> (a) The victim is dead;
>
> (b) The death resulted from an unlawful act or omission of the accused or a subordinate;
>
> (c) At the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless as to whether or not death ensures;
>
> (d) The victim was discriminated against on any one of the enumerated discriminatory grounds;
>
> (e) The victim was a member of the civilian population; and
>
> (f) The act or omission was part of a widespread or systematic attack on the civilian population.(22)

81. The Chamber concurs with this definition of murder and is of the opinion that the act or omission that constitutes murder must be discriminatory in nature and directed against a member of the civilian population.

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Extermination

82. Pursuant to Article 3(c) of the Statute, extermination constitutes a crime against humanity. By its very nature, extermination is a crime which is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not a pre-requisite for murder.
83. The *Akayesu Judgement*, defined the essential elements of extermination as follows:

(a) the accused or his subordinate participated in the killing of certain named or described persons;

(b) the act or omission was unlawful and intentional;

(c) the unlawful act or omission must be part of a widespread or systematic attack;

(d) the attack must be against the civilian population; and

(e) the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.

84. The Chamber concurs with this definition of extermination and is of the opinion that the act or omission that constitutes extermination must be discriminatory in nature and directed against members of the civilian population. Further, this act or omission includes, but is not limited to the direct act of killing. It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals.

2.4 Serious Violations of Common Article 3 of the Geneva Conventions and Additional Protocol II

Article 4 of the Statute

85. Pursuant to Article 4 of the Statute, the Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the four 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 judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

(h) threats to commit any of the foregoing acts.

Applicability of Common Article 3 and Additional Protocol II

86. In applying Article 4 of the Statute, the Chamber must be satisfied that the principle of *nullum crimen sine lege* is not violated. Indeed, the creation of the Tribunal, in response to the alleged crimes perpetrated in Rwanda in 1994, raised the question all too familiar to the Nuremberg Tribunal and the ICTY, that of jurisdictions applying *ex post facto laws* in violation of this principle. In establishing the ICTY, the Secretary-General dealt with this issue by asserting that in the application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. However, in the case of this Tribunal, it was incumbent on the Chambers to decide whether or not the said principle had been adhered to(23), and whether individuals incurred individual criminal responsibility for violations of these international instruments.
87. In the *Akayesu Judgement*, the Chamber expressed its opinion that the "norms of Common Article 3 had acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which, if committed during internal armed conflict, would constitute violations of Common Article 3". The finding of the Trial Chamber in this regard followed the precedents set by the ICTY(24), which established the customary nature of Common Article 3. Moreover, the Chamber in the *Akayesu Judgement* held that, although not all of Additional Protocol II could be said to be customary law, the guarantees contained in Article 4(2) (Fundamental Guarantees) thereof, which reaffirm and supplement Common Article 3, form part of existing international law. All of the norms reproduced in Article 4 of the Statute are covered by Article 4(2) of Additional Protocol II.
88. Furthermore, the Trial Chamber in the *Akayesu Judgement* concluded that violations of these norms would entail, as a matter of customary international law, individual responsibility for the perpetrator. It was also recalled that as Rwanda had become a party to the 1949 Geneva Conventions and their 1977 Additional Protocols, on 5 May 1964 and 19 November 1984, respectively, these instruments were in any case in force in the territory of Rwanda in 1994, and formed part of Rwandan law. Thus, Rwandan nationals who violated these international instruments incorporated into national law, including those offences as incorporated in Article 4 of the Statute, could be tried before the Rwandan national courts(25).
89. In the *Kayishema and Ruzindana Judgement*, Trial Chamber II deemed it unnecessary to delve into the question as to whether the instruments incorporated in Article 4 of the Statute should be considered as customary international law. Rather the Trial Chamber found that the instruments were in force in the territory of Rwanda in 1994 and that persons could be prosecuted for breaches thereof on the basis that Rwanda had become a party to the Geneva Conventions and their Additional Protocols. The offences enumerated in Article 4 of the Statute, said the Trial Chamber, also constituted offences under Rwandan law(26).
90. Thus it is clear that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the guarantees provided for by the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and convention, incurred individual responsibility, and could result in the prosecution of the authors of the offences.

The Nature of the Conflict

91. The 1949 Geneva Conventions and Additional Protocol I generally apply to international armed conflicts, whereas Common Article 3 extends a minimum threshold of humanitarian protection to persons affected by non-international armed conflicts. This protection has been enhanced and developed in the 1977 Additional Protocol II. Offences alleged to be covered by Article 4 of the Statute must, as a preliminary matter, have been committed in the context of a conflict of a non-international character satisfying the requirements of Common Article 3, which applies to "armed conflict not of an international character" and Additional Protocol II,

applicable to conflicts 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".

92. First to be addressed is the question of what constitutes an armed conflict under Common Article 3. This issue was dealt with extensively during the 1949 Diplomatic Conference of Geneva leading to the adoption of the Conventions. Of concern to many participating States was the ambiguous and vague nature of the term "armed conflict". Although the Conference failed to provide a precise minimum threshold as to what constitutes an "armed conflict", it is clear that mere acts of banditry, internal disturbances and tensions, and unorganized and short-lived insurrections are to be ruled out. The International Committee of the Red Cross (the "ICRC"), specifies further that conflicts referred to in Common Article 3 are armed conflicts with armed forces on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international conflict, but take place within the confines of a single country(27). The ICTY Appeals Chamber offered guidance on the matter by holding "that an armed conflict exists whenever there is [...] 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 [...] in the case of internal conflicts, a peaceful settlement is reached"(28).

93. It can thence be seen that the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis. Hence, in dealing with this issue, the *Akayesu Judgement* suggested an "evaluation test", whereby it is necessary to evaluate the intensity and the organization of the parties to the conflict to make a finding on the existence of an armed conflict. This approach also finds favour with the Trial Chamber in this instance.

94. In addition to armed conflicts of a non-international character, satisfying the requirements of Common Article 3, under Article 4 of the Statute, the Tribunal has the power to prosecute persons responsible for serious violations of the 1977 Additional Protocol II, a legal instrument whose overall purpose is to afford protection to persons affected by non-international armed conflicts. As aforesaid, this instrument develops and supplements the rules contained in Common Article 3, without modifying its existing conditions of applicability. Additional Protocol II reaffirms Common Article 3, which, although it objectively characterized internal armed conflicts, lacked clarity and enabled the States to have a wide area of discretion in its application. Thus the impetus behind the Conference of Government Experts and the Diplomatic Conference(29) in this regard was to improve the protection afforded to victims in non-international armed conflicts and to develop objective criteria which would not be dependent on the subjective judgements of the parties. The result is, on the one hand, that conflicts covered by Additional Protocol II have a higher intensity threshold than Common Article 3, and on the other, that Additional Protocol II is immediately applicable once the defined material conditions have been fulfilled. If an internal armed conflict meets the material conditions of Additional Protocol II, it then also automatically satisfies the threshold requirements of the broader Common Article 3.

95. Pursuant to Article 1(1) of Additional Protocol II the material requirements to be satisfied for the applicability of Additional Protocol II are as follows:

(i) an armed conflict takes place in the territory of a High Contracting Party, between its armed forces and dissident armed forces or other organized armed groups;

(ii) the dissident armed forces or other organized armed groups are under responsible command;

(iii) the dissident armed forces or other organized armed groups are able to exercise such

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control over a part of their territory as to enable them to carry out sustained and concerted military operations; and

(iv) the dissident armed forces or other organized armed groups are able to implement Additional Protocol II.

Ratione Personae

The Class of Perpetrator

96. Under Common Article 3 of the Geneva Conventions, the perpetrator must belong to a "Party" to the conflict, whereas under Additional Protocol II(30) the perpetrator must be a member of the "armed forces" of either the Government or of the dissidents. There has been much discussion on the exact definition of "armed forces" and "Party", discussion, which in the opinion of the Chamber detracts from the overall protective purpose of these instruments. A too restrictive definition of these terms would likewise dilute the protection afforded by these instruments to the victims and potential victims of armed conflicts. Hence, the category of persons covered by these terms should not be limited to commanders and combatants but should be interpreted in their broadest sense.
97. Moreover, it is well established from the jurisprudence of International Tribunals that civilians can be held as accountable as members of the armed forces or of a Party to the conflict. In this regard, reference should be made to the *Akayesu Judgement*, where it was held that:

"It is, in fact, well-established, at least since the Tokyo trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking. Other post-World War II trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favored by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities."(31)

98. Consequently, the duties and responsibilities of the Geneva Conventions and the Additional Protocols will normally apply to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. It will be a matter of evidence to establish if the accused falls into the category of persons who can be held individually criminally responsible for serious violations of these international instruments, and in this case, of the provisions of Article 4 of the Statute.

The Class of Victims

99. Paragraph 8 of the Indictment states that the victims referred to in this Indictment were persons taking no active part in the hostilities. This wording stems from the definition to be found in Common Article 3(1) of the Geneva Conventions, which affords protection to "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat", and is synonymous to Article 4 of Additional Protocol which refers to "all persons who do not take a direct part in the hostilities or who have ceased to take part in the hostilities".
100. From a reading of the Indictment, it can be adduced that the victims were all allegedly civilians. There is no concise definition of "civilian" in the Protocols. As such, a definition has evolved through a process of elimination, whereby the civilian population(32) is made up of

persons who are not combatants or persons placed hors de combat, in other words, who are not members of the armed forces(33). Pursuant to Article 13(2) of the Additional Protocol II, the civilian population, as well as individual civilians, shall not be the object of attack. However, if civilians take a direct part in the hostilities, they then lose their right to protection as civilians *per se* and could fall within the class of combatant. To take a "direct" part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces(34).

101. It would be beyond the scope of the matter at hand for the Chamber to attempt to provide an exhaustive list of all categories of persons who are not considered civilians under the Geneva Conventions and their Additional Protocols. Rather the Chamber considers that a civilian is anyone who falls outside the category of "perpetrator" developed *supra,* "perpetrators" being individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. The class of civilians thus broadly defined, it will be a matter of evidence on a case-by-case basis to determine whether a victim has the status of civilian.

Ratione Loci

102. The protection afforded to individuals under the Geneva Conventions and the Additional Protocols, extends throughout the territory of the State where the hostilities are occurring, once the objective material conditions for applicability of the said instruments have been satisfied.
103. This was affirmed in the Akayesu Judgement(35) and by the ICTY(36) (with regard in particular to Common Article 3), where it has been determined that the requirements of Common Article 3 and Additional Protocol II apply in the whole territory where the conflict is occurring and are not limited to the "war front" or to the "narrow geographical context of the actual theater of combat operations".

The Nexus between the Crime and the Armed Conflict

104. In addition to the offence being committed in the context of an armed conflict not of an international character satisfying the material requirements of Common Article 3 and Additional Protocol II, there must be a nexus between the offence and the armed conflict for Article 4 of the Statute to apply. By this it should be understood that the offence must be closely related to the hostilities or committed in conjunction with the armed conflict(37).
105. The Chamber notes the finding made in the *Kayishema and Ruzindana Judgement*, whereby the term nexus should not be defined *in abstracto*(38). Rather, the evidence adduced in support of the charges against the accused must satisfy the Chamber that such a nexus exists. Thus, the burden rests on the Prosecutor to prove beyond a reasonable doubt that, on the basis of the facts, such a nexus exists between the crime committed and the armed conflict.

The Specific Violation

106. The crime committed must represent a serious violation of Common Article 3 and Additional Protocol II, as incorporated in Article 4 of the Statute. A "serious violation" is one which breaches a rule protecting important values with grave consequences for the victim. The fundamental guarantees included in Article 4 of the Statute represent elementary considerations of humanity. Violations thereof would, by their very nature, be deemed serious.
107. The Accused is charged under Counts 4, 6 and 8 of the Indictment for violations of Article 3 common to the Geneva Conventions, as incorporated by Article 4(a) (murder) of the Statute of the Tribunal. If all the requirements of applicability of Article 4, as developed *supra,* are met, the onus is on the Prosecutor to then prove that the alleged acts of the Accused constituted

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murder. The specific elements of murder are stated in Section 2.3 on Crimes against Humanity in the Applicable law.

2.5 Cumulative Charges

108. In the indictment, the Accused, by his alleged acts in relation to the events described in paragraphs 10-19, is cumulatively charged with genocide (count 1) and crimes against humanity (extermination) (count 2). Moreover, by his alleged acts in relation to the killings at the *École Technique Officielle* described in paragraph 14, his acts at the gravel pit in Nyanza described in paragraphs 15 and 16, and for the alleged murder of Emmanuel Kayitare described in paragraph 18, Rutaganda is charged cumulatively with crimes against humanity (murder) (counts 3, 5 and 7) and violations of Article 3 common to the Geneva Conventions (murder) (counts 4, 6 and 8).
109. Therefore, the issue before the Chamber is whether, assuming that it is satisfied beyond a reasonable doubt that a particular act alleged in the indictment and given several legal characterizations under different counts has been established, it may adopt only one of the legal characterizations given to such act or whether it may find the Accused guilty on all the counts arising from the said act.
110. The Chamber notes, first of all, that the principle of cumulative charges was applied by the Nuremberg Tribunal, especially regarding war crimes and crimes against humanity.(39)
111. Regarding especially the concurrence of the various crimes covered under the Statute, the Chamber, in the *Akayesu Judgement*, the first case brought before this Tribunal, considered the matter and held that:

"[...]it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the previous creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, [...]or (b) where one offence charges accomplice liability and the other offence charges liability as [...]"(40).

112. Trial Chamber II of the Tribunal, in its *Kayishema and Ruzindana Judgement*, endorsed the afore-mentioned test of concurrence of crimes and found that it is only acceptable:

"(1) where offences have differing elements, or (2) where the laws in question protect differing social interests."(41)

113. Trial Chamber II ruled that the cumulative charges in the *Kayishema and Ruzindana Judgement* in particular were legally improper and untenable. It found that all elements including the *mens rea* element requisite to show genocide, "extermination" and "murder" in the particular case were the same, and the evidence relied upon to prove the crimes were the same. Furthermore, in the opinion of Trial Chamber II, the protected social interests were also the same. Therefore, it held that the Prosecutor should have charged the Accused in the alternative.(42)
114. Judge Tafazzal H. Khan, one of the Judges sitting in Trial Chamber II to consider the said case, dissented on the issue of cumulative charges. Relying on consistent jurisprudence he pointed out that the Chamber should have placed less emphasis on the overlapping elements of the cumulative crimes.

"What must be punished is culpable conduct; this principle applies to situations where the conduct offends two or more crimes, whether or not the factual situation also satisfies the

distinct elements of the two or more crimes, as proven."(43)

115. In his dissenting opinion, the Judge goes on to emphasized that the full assessment of charges and the pronouncement of guilty verdicts are important in order to reflect the totality of the accused's culpable conduct.

"[...]where the culpable conduct was part of a widespread and systematic attack specifically against civilians, to record a conviction for genocide alone does not reflect the totality of the accused's culpable conduct. Similarly, if the Majority had chosen to convict for extermination alone instead of genocide, the verdict would still fail to adequately capture the totality of the accused's conduct."(44)

116. This Chamber fully concurs with the dissenting opinion thus entered. It notes that this position, which endorses the principle of cumulative charges, also finds support in various decisions rendered by the ICTY. In the case of the *Prosecutor v. Zoran Kupreskic and others*, the Trial Chamber of ICTY in its decision on Defence challenges to form of the indictment held that:

"The Prosecutor may be justified in bringing cumulative charges when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others."(45)

117. Furthermore, the Chamber holds that offences covered under the Statute - genocide, crimes against humanity and violations of Article 3 common to Geneva Conventions and of Additional Protocol II - have disparate ingredients and, especially, that their punishment is aimed at protecting discrete interests. As a result, multiple offenses may be charged on the basis of the same acts, in order to capture the full extent of the crimes committed by an accused.

118. Finally, the Chamber notes that in Civil Law systems, including that of Rwanda, there exists a so called doctrine of *concours idéal d'infractions* which allows multiple charges for the same act under certain circumstances. Rwandan law allows multiple charges in the following circumstances:

"Penal Code of Rwanda: Chapter VI - Concurrent offences:

Article 92: Where a person has committed several offences prior to a conviction on any such charges, such offences shall be concurrent.

Article 93: Notional plurality of offences occurs:

1. Where a single conduct may be characterized as constituting several offences;

2. Where a conduct includes acts which, though constituting separate offences, are interrelated as deriving from the same criminal intent or as constituting lesser included offences of one another.

In the former case, only the sentence prescribed for the most serious offence shall be passed while, in the latter case, only the sentence provided for the most severely punished offence shall be passed, the maximum of which may be exceeded by half".(46)

119. Consequently, in light of the foregoing, the Chamber maintains that it is justified to convict an accused of two or more offences for the same act under certain circumstances and reiterates the above findings made in the *Akayesu Judgement*.

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1. Judgement of the International Criminal Tribunal for Rwanda, Trial Chamber II, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, (Case No. ICTR 95-1-T) 21 May 1999.

2. Judgement of the International Criminal Tribunal for the Former Yugoslavia, (Case No. IT-96-21-T) *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo, "The Celebici Case"*, 16 November 1998.

3. *Akayesu Judgement*, para. 562

4. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948.

5. Secretary-General's Report pursuant to para. 2 of Resolution 808 (1993) of the Security Council, 3 May 1993, S/25704.

6. Legislative Decree of 12 February 1975, Official Gazette of the Republic of Rwanda, 1975, p.230. Rwanda acceded to the Genocide Convention but stated that it shall not be bound by Article 9 of this Convention.

7. Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly.

8. *Akayesu Judgement*, para. 523

9. *Kayishema and Ruzindana Judgement*, para. 93.

10. *Akayesu Judgement* para. 563 to 576

11. Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court on 17 July 1998.

12. *Akayesu Judgement*, para. 578.

13. *Akayesu Judgement*, p. 235, fn 144; *Kayishema and Ruzindana Judgement*, p. 51, fn 63.

14. *Akayesu Judgement* para. 580.

15. Report on the International Law Commission to the General Assembly, 51 U.N. GAOR Supp. (No 10) at 94 U.N.Doc. A/51/10 (1996)

16. *Akayesu Judgement* para. 581.

17. *Kayishema and Ruzindana Judgement* para. 134

18. *Akayesu Judgement*, para. 582. Note that this definition assimilates the definition of "civilian" to the categories of person protected by Common Article 3 of the Geneva Conventions.

19. *Ibid* para. 582, Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict; Article 50.

20. *Akayesu Judgement*, para. 584.

21. *The Prosecutor v. Dusko Tadic*; Appeals Judgment of 15 July 1999; para. 305; p. 55.

22. *Akayesu Judgement*, para. 589 and 590.

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23. See *Akayesu Judgement*, para. 603 to 605.

24. See *Tadic Judgement* and Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995.

25. See *Akayesu Judgement*, para. 616 and 617.

26. See *Kayishema and Ruzindana Judgement*, para. 156 and 157.

27. See generally ICRC Commentary IV Geneva Convention, para. 1 - Applicable Provisions.

28. *Ibid.* 34

29. Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May to 12 June 1971, and 3 May to 3 June 1972; Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 20 February to 29 March 1974, 3 February to 18 April 1975, 21 April to 11 June 1976 and 17 March to 10 June 1977.

30. See Article 1(1) of Additional Protocol II

31. *Akayesu Judgement*, para. 633

32. It should be noted that the civilian population comprises all persons who are civilians. (Article 50 (2) of Additional Protocol II)

33. See ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, commentary on Protocol I, Article 50.

34. *Ibid.*, Commentary on Additional Protocol II, Article 13.

35. See *Akayesu Judgement* para. 635-636.

36. See ICTY *Tadic* decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 69.

37. See *Akayesu Judgement* para. 643 and *ibid*, para. 70.

38. See *Kayishema and Ruzindana Judgement* para. 188.

39. The indictment against the major German War Criminals presented to the International Military Tribunal stated that "the prosecution will rely upon the facts pleaded under Count Three (violations of the laws and customs of war) as also constituting crimes against humanity (Count Four)". Several accused persons were convicted of both war crimes and crimes against humanity. The judgement of the International Military Tribunal delivered at Nuremberg on 30 September and 1 October 1946 ruled that "[...] from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity." The commentary on *Justice* case held the same view: "It is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crimes." The trials on the basis of Control Council Law No. 10 followed the same approach. *Pohl, Heinz Karl Franslau, Hans Loerner*, and *Erwin Tschentscher* were all found to have committed war crimes and crimes against humanity. National cases, such as *Quinn v. Robinson*, the *Eichmann* case and the *Barbie* case also support this finding. In the *Tadic* case, the Trial Chamber II of ICTY, based on the above reasoning, ruled that "acts which are enumerated elsewhere in the statute may also entail additional culpability if they meet the requirements of persecution." Thus, the same acts, which meet the requirements of other crimes -- grave breaches of Geneva Conventions, violation of the laws or customs of war and genocide, may also constitute the crimes against humanity for persecution.

40. *Akayesu Judgement*, para.468.

41. *Kayishema and Ruzindana Judgement*, para. 627.

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42. *Kayishema and Ruzindana Judgement*, para. 645, 646 and 650.

43. *Kayishema and Ruzindana Judgement*, Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan Regarding the Verdicts Under the Charges of Crimes Against Humanity/Murder and Crimes Against Humanity/Extermination, para. 13.

44. *Ibid.* para.33.

45. *The Prosecutor v. Zoran Kupreskic and others*, Decision on Defence Challenges to Form of the Indictment, IT-95-16-PT, 15 May 1998.

46. The English text quoted is an unofficial translation of the following "Code pénal du Rwanda : Chapitre VI - Du concours d'infractions" :

> Article 92 - Il y a concours d'infractions lorsque plusieurs infractions ont été commises par le même auteur sans qu'une condamnation soit intervenue entre ces infractions.
>
> Article 93 - Il y a concours idéal :
>
> 1. Lorsque le fait unique au point de vue matériel est susceptible de plusieurs qualifications ;
> 2. Lorsque l'action comprend des faits qui, constituant des infractions distinctes, sont unis entre eux comme procédant d'une intention délictueuse unique ou comme étant les uns des circonstances aggravantes des autres.
>
> Seront seules pronocées dans le premier cas les peines déterminées par la qualification la plus sévère, dans le second cas les peines prévues pour la répression de l'infraction la plus grave, mais dont le maximum pourra être alors élevé de moitié".

ANNEX 3

Excerpt from J. Dugard, *International Law: A South African Perspective*, 2nd Ed. (Kenwyn, S.A.: Juta & Co., 2000)

INTERNATIONAL LAW
A SOUTH AFRICAN PERSPECTIVE

By

JOHN DUGARD SC

BA, LLB (Stellenbosch), LLB, Diploma in International Law,
LLD (Cantab), Hon LLD (Natal, UCT)

Emeritus Professor of Law in the University of the Witwatersrand
Professor of Public International Law, University of Leiden
Member of the International Law Commission

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acted because they felt legally compelled to draw [continental-shelf boundaries] in this way by reason of a rule of customary law obliging them to do so'.[28] Elaborating on this requirement, the Court stated:

> '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, ie 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.'[29]

Proof of *opinio juris* is difficult to produce. Consequently it is argued by some jurists that *opinio juris* will be presumed when there is evidence of a general practice in support of a particular rule.[30] The judgments of the International Court of Justice in the *North Sea Continental Shelf Cases* and the *Nicaragua Case*,[31] however, do not endorse such a presumption.

3 Resolutions of the political organs of the United Nations

The extent to which recommendations of the political organs of the United Nations play a part in the formation of custom is a matter of much debate.[32] Clearly a resolution of either the General Assembly or the Security Council categorized as a recommendation is not binding on states per se. However, it is suggested that an accumulation of resolutions, a repetition of recommendations on a particular subject, may amount to evidence of collective practice on the part of states. While it is possible that recommendations may indeed contribute to the formation of a customary rule in this way, it is difficult to indicate the precise point at which such a practice becomes a customary rule. There are problems relating to the extent of the support required for such resolutions, the weight to be attached to the votes of the major actors in the field (for example the votes of the major maritime powers in a resolution on the law of the sea) and the amount of repetition required.

In some cases it is accepted that a recommendation of the General Assembly may become a customary rule with very little repetition. As

[28] At 45.
[29] At 44.
[30] Brownlie op cit (n 24) at 7–9. Judge Tanaka, dissenting opinion in *North Sea Continental Shelf Cases* 1969 ICJ Reports 176; ad hoc Judge Sørensen, dissenting opinion, at 246–7.
[31] 1986 ICJ Reports 14 at 108–9.
[32] In addition to the writings in n 1 above, see I McGibbon 'Means for the Identification of International Law. General Assembly Resolutions: Custom, Practice and Mistaken Identity' in Bin Cheng (ed) *International Law: Teaching and Practice* (1982) 10; B Sloan 'General Assembly Resolutions Revisited' (1987) 58 *BYIL* 39. For a critical perspective, see P Weil 'Towards Relative Normativity in International Law' (1983) 77 *AJIL* 413, 417.

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JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE
PHONE: +1 212 963 9915 Extension: 178 7000 or +39 0831 257000 or +232 22 295995
FAX: Extension: 178 7001 or +39 0831 257001 Extension: 174 6996 or +232 22 295996

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