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SCSL-2004-14-PT
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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Renate Winter, Acting President
Judge Geoffrey Robertson, QC
Judge Emmanuel O. Ayoola
Judge Gelaga King
Judge A. Raja N. Fernando

Registrar: Mr Robin Vincent

Date filed: 31 March 2004

THE PROSECUTOR

Against

SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

CASE NO. SCSL – 2003 – 14 – PT

PROSECUTION RESPONSE TO THE MOTION OF SAM HINGA NORMAN TO RECUSE JUDGE WINTER

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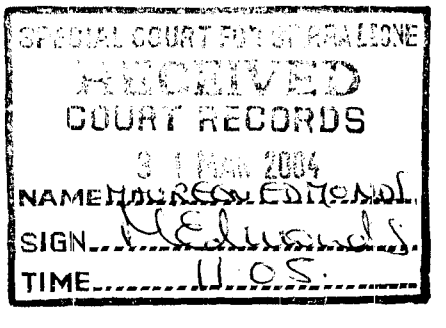

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

CASE NO. SCSL – 2003 – 014 – PT

PROSECUTION RESPONSE TO THE MOTION OF SAM HINGA NORMAN TO RECUSE JUDGE WINTER

I. INTRODUCTION

1. The Prosecution files this response to the "Motion to Recuse Judge Winter from Deliberating in the Preliminary Motion on the Recruitment of Child Soldiers", dated 24 March 2004, and filed on behalf of Sam Hinga Norman on 25 March 2004 (the "**Recusal Motion**".[1]

2. The Recusal Motion submits that Judge Winter should withdraw from any further deliberation in the "Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment" (the "**Preliminary Motion**"),[2] and that any past contribution by her be struck from the consideration of the remaining Appeals Chamber Judges. In the event that Judge Winter declines to withdraw from deliberating in the Preliminary Motion, the Recusal Motion submits that the remaining members of the Appeals Chamber

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1 Registry page number ("**RP**") 693-864.

2 This Preliminary Motion was filed on behalf of Sam Hinga Norman before the Trial Chamber on 26 June 2003 (RP 694-756 in case no. SCSL–2003–08–PT). On 17 September 2003, the Trial Chamber, acting pursuant to Rule 72(E) of the Rules of Procedure and Evidence (the "**Rules**"), referred the Preliminary Motion to the Appeals Chamber for determination (*Order Pursuant to Rule 72(E)—Defence Preliminary Motion on Lack of Jurisdiction: Child Recruitment*, 17 September 2003, RP 1750-1752). Oral hearings on the Preliminary Motion were held before the Appeals Chamber on 5-6 November 2003.

must disqualify her pursuant to Rule 15(B) of the Rules. The Prosecution submits that the Recusal Motion must be rejected for the reasons given below.

II. ARGUMENT

(1) General matters

3. The principle of judicial impartiality is fundamental. This principle is recognised in all legal systems adhering to international standards. The scope and application of this principle in the context of international criminal courts and tribunals has been considered in some detail by the Appeals Chamber of the ICTY in the *Furundzija Appeal Judgement*[3] and in the *Celebici Appeal Judgement.*[4]

4. There is a presumption of impartiality which attaches to a Judge. It is for the party seeking the disqualification of a Judge to adduce sufficient evidence to satisfy the Chamber that the Judge is not impartial, or that there is a reasonable apprehension of bias. There is a high threshold to reach in order to rebut this presumption, and a reasonable apprehension of bias must be "firmly established".[5] Judges have a duty to sit in any case in which they are not obliged to recuse themselves, and just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias.[6] The reasonableness of any apprehension of bias must be assessed in the light of the oath of office taken by the

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[3] *Prosecutor v. Furundzija, Judgement,* Case No. IT-95-17/1-A, Appeals Chamber, 21 July 2000 ("***Furundzija Appeal Judgement***"), paras. 164-215, especially paras. 177-215. (A copy of this judgement is annexed as an authority to the Recusal Motion.)

[4] *Prosecutor v. Delalic et al. (Celebici case)*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, paras. 694-709 ("***Celebici Appeal Judgement***"),

[5] *Furundzija Appeal Judgement*, para. 197; *Celebici Appeal Judgement*, para. 707.

[6] *Celebici Appeal Judgement*, para. 707. In this paragraph, the Appeals Chamber also quotes *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444, 448 (Australia: High Court of Australia): "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party [....]. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour".

Judge to administer justice without fear or favour, and his or her ability to carry out that oath by reason of his or her training and experience. It must be assumed that a Judge can disabuse his or her mind of any irrelevant personal beliefs or predispositions.[7]

5. In the proceedings before the Appeals Chamber in relation to the Preliminary Motion, the United Nations Children's Fund ("UNICEF") filed an *amicus curiae* brief[8] which made submissions adverse to the Defence case. The Defence now seeks the recusal of Judge Winter, on the basis that she has a "close connection" with UNICEF. According to the Defence, this "close connection" is based on the following circumstances:

   (a) A paper was jointly published in September 2002 by UNICEF and No Peace Without Justice entitled *International Criminal Justice and Children* (the "**September 2002 Publication**"). This publication contains an acknowledgements section thanking over 50 different people for reviewing the draft of the report and supporting the drafting process, one of whom was Judge Winter.[9]

   (b) A paper was published by UNICEF in February 2002 entitled *Working for and with adolescents—Some UNICEF examples* (the "**February 2002 Publication**"). This publication contains an acknowledgement that Judge Winter provided certain technical assistance to a project of the UNICEF Country Office in Iran.[10]

   (c) Judge Winter, as well as certain UNICEF officials, are mentioned in a pamphlet or prospectus for an Executive Master programme in Children's

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7 *Furundzija Appeal Judgement*, paras. 196-197.

8 "*Amicus Curiae* Brief of the United Nations Children's Fund (UNICEF)", dated 21 January 2004, and filed on 22 January 2004 in Case No. SCSL-2003-08-PT, RP 6475-6524.

9 See Recusal Motion, paras. 5-6. The relevant page of the September 2002 Publication is contained in Recusal Motion, Annex A, at RP 784. The full text of this publication is available at http://www.npwj.org/modules.php?name=News&file=article&sid=706.

10 See Recusal Motion, para. 7. The relevant page of the February 2002 Publication is contained in Recusal Motion, Annex B, at RP 824. The full text of this publication is available at http://www.unicef.org/adolescence/working_with_and_for_adolescents.pdf. See further paragraph 15 below.

Rights run by the Univeristy of Fribourg (Switzerland) and the Institut Universitaire Kurt Bösch in Sion (Switzerland).[11]

6. The Prosecution submits, and the Defence does not appear to agree,[12] that in accordance with the test established in the *Furundzija Appeal Judgement*,[13] the relevant questions to be addressed are (1) whether actual bias on the part of Judge Winter in relation to the Preliminary Motion has been shown to exist (as to which see paragraphs 7-10 below); (2) whether there is an unacceptable appearance of bias on the ground that Judge Winter is a party to the Preliminary Motion, or has a financial or proprietary interest in the outcome of the Preliminary Motion, or if the Judge's decision will lead to the promotion of a cause in which she is involved, together with one of the parties (as to which see paragraphs 11-16 below); or (3) whether there is an unacceptable appearance of bias on the ground that the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias (as to which see paragraph 17 below).

(2) Question 1: Whether actual bias has been shown to exist

7. The Recusal Motion argues that Judge Winter has displayed actual bias by pre-judging the very issue that she was called upon to determine judicially in the Preliminary Motion.[14] According to the Preliminary Motion, this is because Judge Winter "approved the draft" of the September 2002 Publication which expresses the "unequivocal (but highly contentious) view that the recruitment of child soldiers was a crime under customary international law prior to the introduction of the Rome Statute, which was the substantive issue of argument before the Appeals Chamber.[15] The Prosecution submits that this argument is unfounded.

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[11] See Recusal Motion, para. 7. The relevant page of a brochure for this programme is contained in the Recusal Motion, Annex C, at RP 830. The Preliminary Motion erroneously indicates that the course is run by the University of Freiburg, which is in Germany, although this may be a typographical error in the Preliminary Motion.

[12] Recusal Motion, para. 18(iv).

[13] At para. 189.

[14] Recusal Motion, para. 20.

[15] *Ibid.*

8. First, contrary to what the Recusal Motion suggests, there is no indication in the September 2002 Publication that Judge Winter "*approved* the draft" of that publication.[16] What the September 2002 Publication indicates is that Judge Winter was one of over 50 people who "*reviewed* the draft" and who "supported the drafting process".[17] It is very common for the authors of publications to submit drafts to experts for their comments or suggestions, and to acknowledge the assistance of those experts in the final publication. In such circumstances, the views expressed in the publication necessarily remain those of the author, who may or may not accept any of the comments or suggestions made. There is no indication in the September 2002 Publication that Judge Winter was one of its authors or had any editorial or other responsibility for the final product. There is also no suggestion that the September 2002 Publication expressed the collective view of all of the 50 or more people mentioned in the acknowledgements as having reviewed the draft (and it would be very surprising if this were the case). It is disingenuous of the Defence to suggest that this publication is an expression of Judge Winter's personal opinions, or that Judge Winter "approved" its contents.

9. Secondly, contrary to what the Recusal Motion suggests, the September 2002 Publication does not express the "unequivocal ... view that the recruitment of child soldiers was a crime under customary international law prior to the introduction of the Rome Statute".[18] In the arguments in relation to the Preliminary Motion, it was not a matter of controversy between the Prosecution and the Defence that the recruitment and use of child soldiers was, at the times material to the indictment, contrary to customary international law (in the sense that States which engaged in such conduct were in breach of their international obligations). Rather, the issue between the Prosecution and the Defence was whether at the relevant time material violations of this prohibition entailed *individual criminal responsibility* under customary international law.[19] At pages 44 to 46, the September 2002 Publication discusses the

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16 *Ibid.* (emphasis added).

17 Recusal Motion, Annex A, at RP 784 (emphasis added).

18 Recusal Motion, para. 20.

19 See, e.g., unofficial transcript of the hearings before the Appeals Chamber on 5th-6th November 2003, "Child Soldiers Motion", paras. 95-97, 525.

fact that the recruitment and use of child soldiers has passed into customary international law. However, it says very little about individual criminal responsibility under customary international law.

10. On page 45, it states that the inclusion of this customary international law prohibition as a crime in the Statute of the International Criminal Court was an important step for enforcing the international prohibition against the use of child soldiers, but does not suggest that the crime existed under international law even before the Rome Statute. Footnote 45 on the same page of the September 2002 Publication contains a mere neutral reference to fact that there is a discussion in the Secretary-General's Report[20] of the customary international law status of the crime in non-international armed conflicts, without consideration of the issue, and without any expression of any conclusion on the question. Page 115 of the September 2002 Publication contains a similarly neutral reference to the objective fact that the Statute of the Special Court includes as one of the crimes within its jurisdiction the recruitment and use of child soldiers, without any discussion of the customary international law status of that crime.[21] It is significant that at page 75 of the September 2002 Publication (which is not referred to or reproduced in the Recusal Motion), it is stated that "the inclusion of the recruitment of children under the age of 15 as a war crime reflects customary international law at the time of the adoption of the Rome Statute", without any suggestion as to its customary international law status prior to the adoption of the Rome Statute. The September 2002 Publication simply contains no detailed analysis or conclusions with respect to the issue in dispute in the Preliminary Motion.

(3) Question 2: Whether there is an appearance of bias due to an association with UNICEF

11. The Recusal Motion argues that there is an appearance of bias because Judge Winter has "a personal interest" and/or "a personal association" by "her relationship with UNICEF".[22]

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[20] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000 (the "***Secretary-General's Report***").

[21] At RP 817.

[22] Recusal Motion, para. 21.

12. The Recusal Motion suggests (at paragraphs 15-17 and 21-22) that this is somehow a case analogous to the *Pinochet* case[23] in the United Kingdom. In the *Pinochet* case, Amnesty International had been granted leave to intervene in certain extradition proceedings. It was held that one of the judges that sat in that case should have been disqualified, on the ground that he was a director and chairperson of Amnesty International Charity Ltd, a body incorporated to carry out Amnesty International's charitable purposes. What was crucial in the *Pinochet* case was the fact that the judge concerned held the position of director and chairperson of the organisation in question. The House of Lords made it clear that mere involvement of the judge in the activities of the organisation would not have required the judge to be disqualified. As Lord Browne-Wilkinson said in that case:

> "It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the [earlier decision] ... would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that AI [Amnesty International] was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to AI and sharing, in this respect, AI's objects. Only in cases where a judge is taking ***an active role as trustee or director*** of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest."[24]

13. There is no suggestion in the Recusal Motion, and certainly no evidence, that Judge Winter holds any senior position in UNICEF, or in any other organisation that exists to support the work of UNICEF, or has any executive or managerial responsibility in UNICEF or related organisation. In accordance with the *Pinochet* decision, mere involvement by Judge Winter in the activities of UNICEF would not disqualify her from sitting as a judge in relation to the Preliminary Motion. Furthermore, on the basis of the material advanced by the Defence in the Recusal Motion, it cannot even

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[23] *R v. Bow Street Metropolitan Stipendiary Magistrates, ex parte Pinochet Ugarte (No. 2)* [2000] 1 AC 119 (United Kingdom (England and Wales): House of Lords) (the "***Pinochet*** case"). (This case is annexed as an authority to the Recusal Motion.)

[24] At RP 720 (emphasis added).

be said that Judge Winter has any particularly close involvement in the activities of UNICEF. First, all of the matters raised in the Recusal Motion occurred before Judge Winter became a Judge of the Special Court. (Judge Winter was sworn in as a Judge of the Special Court on 2 December 2002.) Secondly, the matters raised in the Recusal Motion can hardly be considered as establishing a "close connection" between Judge Winter and UNICEF.

14. As to the September 2002 Publication, reference is made to paragraph 8 above. There is no suggestion that Judge Winter had any authorship, editorial, management or other responsibility for the publication. The mere fact that she, at a time before she was a Judge of the Special Court, was one of more than 50 different people who "reviewed the draft" and "supported the drafting process" of one particular UNICEF publication, can hardly be regarded as a "close connection" or "relationship" with UNICEF.

15. As to the February 2002 Publication, the Recusal Motion relies on a section of the publication dealing with one particular project undertaken by the Iran Country Office of UNICEF.[25] This project had the aims, amongst other things, of gathering information on the situation of children in conflict with the law in Iran and the current Iranian penal system, to identify the main problems and the ways to address them. The project included a study tour in February 1999 to Austria, described as "a country well known for its advanced juvenile justice system". There is an acknowledgement that the UNICEF Country Office "benefited immensely from the technical assistance provided by Austrian Judge Renate Winter and would like to recommend her to other country offices".[26] Presumably Judge Winter's assistance was in connection with the visit to Austria. There is no suggestion in the publication that Judge Winter had any managerial or organisational responsibility for the project, or even that she was a participant in the project as such. The mere fact that she may, at a time before she was a judge of the Special Court, have provided certain technical assistance to a UNICEF Country Office in relation to a particular project, can hardly be regarded as a "close connection" or "relationship" with UNICEF.

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[25] The Recusal Motion does not annex a copy of the whole of this section of the February 2002 Publication (pages 52-56).

[26] The relevant page of the September 2002 Publication is contained in Recusal Motion, Annex B, at RP 824.

16. As to the Executive Master programme in Children's Rights run by the Univeristy of Fribourg and the Institut Universitaire Kurt Bösch, the Prosecution submits that it is difficult to understand exactly what is the Defence's concern. Contrary to what the Recusal Motion suggests (at paragraph 7), Judge Winter is not listed in the pamphlet as "forming part of an expert panel" for the Master programme. On the page of the pamphlet reproduced at RP 830, there is a statement that "At present, the following professors have confirmed their participation in the course". There then follows a list of names. The next paragraph states "Also, the following experts have agreed to intervene", followed by a list of names that include Judge Winter (then a Judge of the Supreme Court of Kosovo) as well as several officials of UNICEF. The pamphlet thus appears to indicate that Judge Winter and the named UNICEF officials had agreed to speak or lecture to participants in this Master programme. There is no suggestion that either Judge Winter or any of the UNICEF officials had any involvement in the management or organisation of this Master programme,[27] or even that Judge Winter and the UNICEF officials had any contact with eachother in connection with this programme.[28] The suggestion in the Recusal Motion appears to be that if a Judge speaks (or has ever spoken) at a conference, or gives (or has ever given) a lecture as part of a university course, then he or she has a "close connection" with any organisation an official of which spoke at the same conference or gave a lecture at the same university course. This suggestion is absurd.

(4) Question 3: Whether there was otherwise an unacceptable appearance of bias

17. Apart from the matters referred to above, the Recusal Motion does not suggest that there were otherwise any circumstances that would lead a reasonable observer, properly informed, to reasonably apprehend bias. The Prosecution would merely note that any past experience and involvement that Judge Winter may have had in issues concerning the legal position of children cannot be a basis for a reasonable person to apprehend bias in proceedings involving such issues. In this respect, the Prosecution

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[27] Indeed, it appears from the page of the pamphlet reproduced at RP 829 (listing the persons responsible for the organisation and co-ordination of the programme) that they did not.

[28] It is noted also as an aside that although the pamphlet indicates that Judge Winter had agreed to "intervene" in the Masters programme, there is no evidence that she actually did so.

relies on the findings of the Appeals Chamber of the ICTY in paragraphs 200-215 of the *Furundzija Appeal Judgement*, and in paragraph 702 of the *Celebici Appeal Judgement*.

III. CONCLUSION

18. The Appeals Chamber should rule that there is no basis for the recusal or disqualification of Judge Winter on any of the grounds advanced in the Recusal Motion.

Freetown, 31 March 2004.

For the Prosecution,

Desmond de Silva, QC
Deputy Prosecutor

PP Walter Marcus-Jones
Senior Appellate Counsel

PP Christopher Staker
Senior Appellate Counsel

ANNEXES

A **Page additional to Annex A of the Recusal Motion (page 75 of the September 2002 Publication)**
(obtained from http://www.rpwj.net/documents/icjac/061-098_03Cap.pdf)

B **Page additional to Annex B of the Recusal Motion (pages 52-56 of the February 2002 Publication)**
(obtained from
http://www.unicef.org/adolescence/working_with_and_for_adolescents.pdf)

AUTHORITIES

Prosecutor v. Delalic et al. (Celebici case), Case No. IT-96-21-A, Appeals Chamber, 20 February 2001

CHAPTER THREE

THE INTERNATIONAL CRIMINAL COURT AND HOW IT RELATES TO CHILDREN

3.1 Basic facts on the ICC

The Rome Statute, which is the constitutive instrument for the permanent International Criminal Court, was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. By 31 December 2000, the last day on which the Rome Statute was open for signature, 139 countries from every part of the world had signed. On 11 April 2002, the 60th ratification was deposited with the United Nations, allowing the Statute to enter into force on 1 July 2002.[91] As of 11 August 2002, 77 States have ratified the Rome Statute.

3.1.1 Structure of the ICC

The International Criminal Court is a permanent court, seated at The Hague in the Netherlands, which consists of the following organs:

- The Presidency;
- A Pre-Trial Division, a Trial Division and an Appeals Division;
- The Office of the Prosecutor;
- The Registry.[92]

The judicial functions of the Court are carried out by 18 judges, elected by the Assembly of States Parties,[93] in the Pre-Trial, Trial and Appeals Divisions, which are organized into separate Chambers.[94] The judges will be chosen among persons of "high moral character, impartiality and integrity" who have established competence in criminal law and procedure as well as relevant areas of international law, including international humanitarian law and human rights law.[95] The judges hold office for nine years and are not eligible for re-election.[96]

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[91] See article 126 of the Rome Statute.
[92] Rome Statute, article 34.
[93] Ibid., article 36.
[94] Ibid., article 39.
[95] Ibid , article 36(3)(b)(i) and (ii).
[96] Ibid , article 36(9)(a). The judges elected during the first election will, however, serve for periods of varying length – three, six or nine years. Judges elected for three years will be eligible for re-election for a full term.

The Presidency, comprised of the President and two Vice-Presidents,[97] oversees the proper administration of the Court, with the exception of the Office of the Prosecutor, which is responsible for its own administration.[98]

The Office of the Prosecutor is an independent and separate organ of the Court that receives referrals and information on crimes, conducts investigations and brings prosecutions before the Court.[99] The Prosecutor and one or more Deputy Prosecutors are elected by the Assembly of States Parties for a period of nine years and are not eligible for re-election.

The Registry handles all non-judicial aspects of the administration and servicing of the ICC. In addition, the Registry will also set up a Victims and Witnesses Unit[100] that will, in cooperation with the Prosecutor and the defence,[101] provide protective measures, security arrangements, counselling and other assistance to victims and witnesses.

3.1.2 Crimes within the jurisdiction of the ICC

The ICC will deal with the "most serious crimes of international concern", namely genocide, crimes against humanity and war crimes.[102] The Rome Statute provides definitions of genocide, crimes against humanity and war crimes, and enumerates the acts that constitute them. The Preparatory Commission has also drafted the

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[97] The judges will elect the President and two Vice-Presidents among themselves: see article 38 of the Rome Statute.

[98] Rome Statute, article 42(2).

[99] Ibid., article 42.

[100] Ibid., article 43.

[101] The Rules of Procedure and Evidence, rule 17.

[102] Article 5 of the Rome Statute also provides that the ICC will have jurisdiction over the crime of aggression, once the definition of the crime and the conditions for the exercise of jurisdiction are adopted by the Assembly of States Parties. As this will not occur at least until the first review conference, which will take place seven years after the entry into force of the Statute, i.e. in 2009, the crime of aggression is not being considered during this discussion of the crimes within the jurisdiction of the ICC.

[103] The Assembly of States Parties will oversee the work of the Court and provide management oversight regarding the administration of the Court for the President, the Prosecutor and the Registrar; decide on the budget for the Court; decide whether to alter the number of judges; and

'Elements of Crimes' for adoption by the Assembly of States Parties,[103] which will assist the Court in interpreting those definitions.[104] Each of the three categories of crimes has its own common elements in order for an act to fit within a particular category. For example, in order for an act to constitute a war crime it must have been committed in the context of and been associated with an armed conflict. In addition to these common elements, each crime listed under the three general categories of crimes has specific elements that must be proven beyond a reasonable doubt in order for the Court to find an accused guilty of that crime. Financial and statutory requirements also dictate that crimes must be of a certain gravity in order to be brought before the ICC.[105]

3.1.2.a Genocide

The crime of genocide was first defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948, which has since passed into customary international law and is the basis for the definition of the crime of genocide contained in the Rome Statute:[106]

> *" 'Genocide' means any of the following acts committed with the 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."*[107]

In order to constitute the crime of genocide, an act must have the following attributes: any of the *above-mentioned acts* carried out *against*

consider any questions relating to non-cooperation of States with the Court. See article 112 of the Rome Statute for a full description of the Assembly of States Parties, its functions and powers.

[104] Rome Statute, article 9.

[105] Ibid., article 17(1)(d).

[106] Convention on the Prevention and Punishment of the Crime of Genocide, article 2.

[107] Rome Statute, article 6.

one of the listed groups with the *intent to destroy that group in whole or in part.*[108] If one of these elements is missing, then the act – while possibly amounting to a war crime or crime against humanity – will not constitute the crime of genocide. Thus, even the killing of over 1 million Cambodians during the Pol Pot regime would not constitute genocide according to this definition, since the main targets for the killings were chosen because they were political opponents and Cambodian intellectuals, regardless of ethnicity or race. This example demonstrates that the process whereby certain acts are found to constitute the crime of genocide can be quite complex and, at times, counter-intuitive.

3.1.2.b Crimes against humanity

Prior to the Rome Statute and the Elements of Crimes, there was no single document defining crimes against humanity and their legal elements; rather, the various definitions were spread across 11 international legal instruments. Although the term originated in the preamble to Hague Convention IV of 1907 Respecting the Laws and Customs of War on Land, which codified the customary law of armed conflict, the crimes were first defined in article 6(c) of the Nuremberg Charter.

In order for an act to constitute a crime against humanity, the following general elements must be fulfilled:

- The act is committed as part of a widespread or systematic attack directed against any civilian population;
- The act is committed pursuant to or in furtherance of a State or organizational policy to commit such attack, which is understood to mean that the State or organization actively promotes or encourages such an attack against a civilian population.[109]

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[108] Steven R. Ratner and Jason S. Abrams, *Accountability for human rights atrocities in international law: Beyond the Nuremberg legacy*, Oxford University Press, 1997, p. 27.

[109] Elements of Crimes, preamble to article 7.

The Rome Statute identifies a number of acts that can constitute crimes against humanity such as murder, extermination, enslavement, torture, persecution, deportation or forcible transfer of a population, enforced disappearance of persons and apartheid. In addition to these acts, the Statute explicitly identifies rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilization and other forms of sexual violence as crimes against humanity.[110] Enslavement is also listed as a crime against humanity and, according to the Elements of Crimes, is understood to include trafficking in persons, particularly women and children,[111] provided the general elements of the crime are established. It is important to note that crimes against humanity can occur in times of peace and during an armed conflict.

3.1.2.c War crimes

War crimes are violations of the laws of war that attract individual criminal responsibility,[112] and include acts such as murder, torture and inhumane treatment, the taking of hostages, the passing of sentences without due process, recruitment of children under the age of 15 years, rape and other forms of sexual violence. War crimes also include intentional attacks against civilians, humanitarian personnel or protected buildings such as schools.[113] Other acts, such as the use of certain types of weapons or means and methods of warfare that cause unnecessary suffering, may constitute war crimes, depending on whether they were committed in the course of an international or non-international armed conflict. Most of the child-specific war crimes or war crimes to which children are particularly vulnerable apply in all types of armed conflict.[114]

One element common to all war crimes is that they occur in the context of and in association with an armed conflict.[115] Further, the acts

[110] Rome Statute, article 7.
[111] Elements of Crimes, article 7(1)(c), footnote 11.
[112] Steven Ratner, 'Categories of war crimes', in Roy Gutman and Michael Rieff (eds.), *The crimes of war: What the public should know*, Norton, 1999, p. 374.
[113] Rome Statute, article 8.
[114] An exception is the crime of using starvation as a method of warfare, which only applies in international conflicts.
[115] See any of the articles on war crimes in the Elements of Crimes, for example article 8(2)(a)(iii) and (e)(iv).

must have been carried out against persons protected under one or more of the Geneva Conventions,[116] namely non-combatants, including civilians and medical or religious personnel who are not taking an active part in hostilities; and combatants who are *hors de combat*, including sick and wounded combatants on land; sick, wounded or shipwrecked combatants at sea; and prisoners of war.[117]

Under the Fourth Geneva Convention, "protected persons" are civilians who find themselves in the hands of a State of which they are not nationals.[118] The ICTY has held that this concept should be interpreted in light of its object and purpose, namely the provision of the maximum possible protection to all civilians, and should not be dependent upon formal relations and purely legal bonds.[119] In the *Tadic* case, the ICTY held that Bosnian victims – who appeared to have the same nationality as the Bosnian Serb perpetrators – were nevertheless protected under the Geneva Convention, since they did not owe allegiance to the Federal Republic of Yugoslavia, on whose behalf the Bosnian Serbs had been fighting.[120] For children, the approach adopted by the ICTY is preferable because it ensures protection for minority children and children with disputed nationalities who are effectively 'stateless'. International humanitarian law should not leave the protection of these children to national citizenship laws, because in many cases these laws operate to deny them a nationality and leave them unprotected by the State.

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[116] This is a common element for all war crimes occurring in international armed conflicts. See for example article 8(2)(a)(iii) of the Elements of Crimes.

[117] This is a common element for all war crimes occurring in non-international armed conflicts. See for example article 8(2)(c)(i)-(3) of the Elements of Crimes.

[118] Article 4 of the Fourth Geneva Convention states that "persons protected by the Convention are those who... find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". It should be noted that articles 13-26 of this Convention apply to all civilians and provide general protection against certain consequences of war.

[119] *The Prosecutor v. Dusko Tadic*, ICTY Appeals Chamber (IT-94-1-A), 15 July 1999, para. 168.

[120] Ibid., paras. 166-168; *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (*Celebici* case, IT-96-21-T), 16 November 1998, para. 275; and Knut Dörmann, 'Preparatory Commission for the International Criminal Court: The elements of war crimes', *International Review of the Red Cross*, no. 839, September 2000, pp. 771-795.

3.1.3 Who can bring a case before the ICC?

There are three ways in which a case can be brought before the ICC:

- A State Party may refer a situation in which a crime appears to have been committed;
- The Security Council of the United Nations may refer a situation if it determines that the situation fulfils the requirements of Chapter VII of the UN Charter, namely that the situation constitutes a threat to or breach of international peace and security;
- The Prosecutor may initiate investigations *proprio motu*, namely on his or her own authority, on the basis of information about crimes within the jurisdiction of the Court.

In the case of the Security Council referring a situation to the ICC, it is important to note that the Security Council can refer situations to the Court irrespective of where the crimes allegedly occurred and the nationality of the alleged perpetrator(s). A referral by the Security Council therefore overrides jurisdictional thresholds applicable to other situations, since decisions taken under Chapter VII of the UN Charter are binding on all States.[121]

The Prosecutor's authority to investigate crimes *proprio motu* is important, as it gives the Prosecutor the ability to pursue cases in the absence of a referral from the Security Council or States Parties. The Prosecutor can receive information on crimes within the jurisdiction of the Court from many sources, including States, the United Nations and its organs, and intergovernmental or non-governmental organizations such as those working in the field of children's rights. If the Prosecutor decides that there is reasonable basis to proceed, he or she will request the Pre-Trial Chamber to authorize an investigation.[122] Given this, one role that child rights advocates can play is to encourage the Prosecutor to adopt prosecutorial policies requiring proactive and systematic collection of information on crimes committed against children.

[121] Rome Statute, article 13(b). See also Chapter VII of the United Nations Charter.

[122] Rome Statute, article 15(3).

3.1.4 What cases can be brought before the ICC?

To be prosecuted before the ICC, an act must constitute one of the crimes within the Court's jurisdiction as set out in the Statute, namely genocide, crimes against humanity and war crimes.[123] Further, the acts in question must have occurred after the entry into force of the Rome Statute, i.e. on or after 1 July 2002.[124] In the absence of a referral from the Security Council, the Court may only exercise its jurisdiction in the following circumstances:

- The crimes occurred on the territory of a State that has accepted the Court's jurisdiction; or
- The conduct was committed by the national of such a State.[125]

By becoming a party to the Statute, States automatically accept the Court's jurisdiction, although they may lodge a declaration stating that the provisions of the Statute in respect of war crimes committed on their territory or by their nationals will not apply for a period of seven years.[126] A State that is not party to the Statute may also accept the Court's jurisdiction by filing a declaration to that effect with the Court's Registrar.[127]

The ICC has jurisdiction over natural persons over the age of 18 and may exercise that jurisdiction irrespective of an individual's official capacity, such as Head of State or member of government.[128] Individual criminal responsibility will apply in cases where an individual commits the crime, orders that the crime be committed, aids or abets the commission of the crime, or – in respect of genocide – directly and publicly incites the commission of the crime.[129]

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[123] As noted above, article 5 of the Rome Statute provides that the ICC will also have jurisdiction over the crime of aggression, once the definition of the crime and the conditions for the exercise of jurisdiction are adopted by the Assembly of States Parties in 2009.

[124] Rome Statute, article 11; see also article 126.

[125] Ibid., article 12(2)(a)-(b).

[126] Ibid., article 124. France has lodged such a declaration, withholding the jurisdiction of the Court in relation to war crimes for a period of seven years. It should be noted that such a declaration can only be made in relation to war crimes and not for other categories of crimes under the ICC's jurisdiction. It is a transitional provision which is intended to apply only for a period of seven years after a State becomes a party to the Rome Statute.

[127] Rome Statute, article 12(3).

[128] Ibid., article 27.

[129] Ibid., article 25.

Commanders can be held criminally responsible for crimes committed by forces under their effective control if the commanders failed either to prevent the crime or to punish its commission.[130] Individual criminal responsibility, including command responsibility, applies irrespective of whether the individual concerned is a civilian, a political leader, or is serving in regular armed forces or in other forces, such as paramilitaries or irregular armed groups.

The jurisdictional limitations of the ICC and their effect on possibilities for the prosecution of crimes committed against children have important implications for the protection of children during armed conflict. Violations committed against children cannot be brought before the ICC unless they fit the strict parameters of the crimes over which the ICC has jurisdiction and unless the jurisdictional thresholds are met.[131] Therefore, only crimes committed in the territory of or by nationals of ratifying States can be brought before the Court, unless, in exceptional circumstances, the Security Council refers a case to the Court.

The most effective way to address these limitations is by advocating at both the national and international levels for widespread ratification, thereby providing the Court with the broadest possible jurisdictional base. This is an area where child rights advocates have an important role to play, both in terms of direct advocacy to governments and State representatives, as well as in building support for the Court at the grass roots and assisting local efforts to advocate for ratification and implementation of the Rome Statute.

3.1.5 When is a case admissible?

The ICC is founded on the concept of complementarity, based on the principle that States have the primary responsibility to investigate and prosecute crimes under international law within their own national systems. The investigation or prosecution of a

[130] Ibid., article 28.

[131] For definitions of these crimes, see section 3.1.2.

case within a national system will therefore normally bar the ICC from commencing proceedings, unless a situation has been referred by the Security Council. Prior to commencing any investigation, the Prosecutor must notify all States Parties and all States who would normally exercise jurisdiction over the crimes concerned.[132] This permits a State to inform the Prosecutor that the State itself is investigating or has investigated the case. Therefore, even if the ICC *prima facie* has jurisdiction, a case can be declared inadmissible if a State that also has jurisdiction over the case:

- is currently investigating the case or prosecuting the perpetrators; or
- has already investigated the case and decided not to proceed with prosecutions.[133]

However, the ICC may step in if it finds that the State concerned is unable or unwilling genuinely to take action, with respect either to investigating or to prosecuting a case. In the case of unwillingness, the Court will consider whether proceedings were undertaken for the purpose of shielding an individual from criminal responsibility; whether there have been unjustified delays that are inconsistent with an intent to bring the accused to justice; and whether proceedings were conducted impartially or independently. In the case of inability, the Court will consider whether the national justice system has suffered total or substantial collapse to the extent that it is unable properly to carry out its functions.

A case can also be declared inadmissible if:

- the person concerned has already been tried for the conduct which is the subject of the complaint (*ne bis in idem*);[134] or
- the case is not of sufficient gravity to justify further action by the Court.[135]

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[132] Rome Statute, article 18(1)

[133] Ibid., article 17(1).

[134] Ibid., article 20. The principle of *ne bis in idem*, which is a fundamental principle of criminal law, also known as double jeopardy, does not prevent victims from bringing civil law suits against those that are responsible for harming them.

[135] Rome Statute, article 17(1)(d).

It should be noted that even if a person has already been tried in a national court for conduct constituting a crime within the jurisdiction of the ICC, the ICC may still exercise jurisdiction if the prosecution is determined not to have been genuine. This will be evidenced by the finding that proceedings were designed to shield the perpetrator from justice or were not otherwise conducted impartially or independently and in a manner consistent with the intent to bring the person to justice.[136]

3.2 The International Criminal Court and children

The ICC has no jurisdiction over children under the age of 18 at the time of the alleged commission of the crime. The decision to exclude persons under 18 from the jurisdiction of the ICC recognizes that children are not likely to hold positions of leadership during armed conflict, and that other mechanisms – such as national courts or truth commissions – are more appropriate forums to address crimes allegedly committed by children. Therefore the role of a child in the ICC process is restricted to that of victim and/or witness. Three types of child-related provisions, examined in detail in this section, can be found in the Rome Statute and its accompanying documents:

- Crimes against children within the jurisdiction of the Court;
- Special measures to protect children during the investigation and prosecution of cases;
- Requirements for ICC staff with expertise on children's issues, and other provisions relating to administrative matters.

3.2.1 Child-specific crimes

While children can become victims of any of the crimes within the jurisdiction of the Court, the Rome Statute enumerates some 'child-specific' crimes, which by definition can only be committed against children, such as the genocidal act of transferring children from one group to another and the recruitment of children under 15 into armed forces or groups. The Statute sets out other crimes, not

[136] Ibid., article 20(3).

exclusively committed against children, that are of particular relevance to children, such as crimes of sexual violence, the genocidal act of preventing births, the use of starvation as a method of warfare and attacking humanitarian staff or objects.[137]

DEFINITIONS OF CHILD SOLDIERING

"A child soldier is any child – boy or girl – under the age of 18, who is compulsorily, forcibly or voluntarily recruited or used in hostilities by armed forces, paramilitaries, civil defence units or other armed groups. Child soldiers are used for forced sexual services, as combatants, messengers, porters and cooks."

Graça Machel, The impact of war on children: A review of progress, Hurst & Co., 2001, p. 7.

"'Child soldier' . . 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."

Cape Town Principles, adopted 30 April 1997 at a joint UNICEF/NGO symposium.

3.2.1.a War crime: Using, conscripting or enlisting children as soldiers

Conscripting or enlisting children under the age of 15, or using them to participate actively in hostilities, is a war crime within the jurisdiction of the ICC.[138] This holds true under all conditions, whether the child is recruited into national armed forces or armed groups, whether the conflict is international or non-international and whether the child is coerced or has volunteered. The crime is focused on children who participate directly in hostilities as combatants, yet child soldiers may perform many related tasks, as messengers, porters, cooks or spies, or they may be exploited for

[137] For commentaries on the other criminal acts that do not specifically apply to children, the reader can refer to a general commentary on the Rome Statute, such as Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, 1999.

[138] Rome Statute, article 8(2)(b)(xxvi) and (e)(vii).

sexual purposes. It is often difficult to separate these roles, since the same child may be forced to cook, bear arms and serve as sex slave. In many instances, support functions constitute an 'entry level' position for children from which they can be promoted in rank to become soldiers. UNICEF and other child protection agencies use, in their work on war-affected children, the Cape Town Principles definition of child soldiers (see text box).[139]

The abduction or kidnapping of children by armed groups has been common in many ongoing and recent armed conflicts, for well-documented reasons. Children are perceived as cheap and obedient; they are more easily manipulated and controlled. Children are recruited into armed groups due to a variety of pressures, economic, cultural, social and political. Once initiated, they may stay on with armed forces and groups simply to be sure of regular meals, clothing and survival. Additionally, children in a militarized environment may feel that by belonging to an armed group they are afforded some protection. In numerous cases, children have been forced to commit atrocities in their own villages, precisely to prevent their return. For those who are recruited young, life with an army might be the only way of life they know, and their comrades-in-arms might have come to represent their 'family'. Very often, children who are targeted for recruitment are marginalized before they join an armed group. They might be living on the street or they may belong to ethnic minorities or socio-economically disadvantaged groups or they may be orphans. Thus, children have in most cases already suffered hardship or are disadvantaged prior to their involvement with the armed forces and groups. When it comes to children – especially children under 15 – so-called 'voluntary recruitment' is always a misnomer. Child rights advocates maintain that children's participation in armed forces will always

[139] For a definition of child soldiers, see the Cape Town Principles, adopted by a 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 Working Group on the Convention on the Rights of the Child, Cape Town, 30 April 1997. Another definition is supplied in Graça Machel, op. cit., p. 7.

involve some form of pressure, be it cultural, political, or simply the need to ensure their safety or daily subsistence.

Based on research and the experiences of child rights advocates there is an increased knowledge and understanding of the wider contexts of child soldiering. These realities are also reflected in the definitions used by child protection agencies and advocates. The definitions need to address clearly the realities on the ground; a definition should include both girls and boys; it should reflect all forms of recruitment, i.e. whether forced or voluntary; and it should include recruitment both by regular armed forces as well as by armed groups, paramilitaries and other irregular forces.

While not all of the elements mentioned in the definition used by child protection agencies are explicitly included in the Rome Statute, the provisions relating to child soldiers are formulated broadly to cover, for example, child soldiers who have been recruited by an armed group but have not been used directly in combat.[140] Therefore, the enlistment and exploitation of children under 15 by armed forces and groups can be prosecuted before the ICC, regardless of whether the children are out in the front lines or forced to serve as porters or to perform sexual services.[141] It should be noted that unless the practice of recruitment or using children to participate in hostilities attains a significant magnitude, it will not reach the level of seriousness necessary for prosecution by an international judicial body.

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[140] It should be noted that other legal instruments also provide a wide interpretation of what constitutes members of armed forces. For example the Regulations annexed to the Hague Convention IV of 1907 recognize that the armed forces may consist of combatants as well as non-combatants. The Third Geneva Convention of 1949 relating to prisoners of war states that persons who accompany the armed forces without actually being members thereof, such as members of services responsible for the welfare of the armed forces, shall be granted prisoner of war status if captured by the enemy forces.

[141] The term 'child soldier' does not include only combatants within the meaning of international humanitarian law. Child soldiers, whether or not they are actively involved in hostilities, in all circumstances come under the protection of the relevant Geneva Convention. In particular, they are entitled to the special protection accorded by international humanitarian law to children.

The Elements of Crimes require that the perpetrator "knew or should have known" that such a person was under the age of 15 years.[142] Difficulties may arise in determining the exact age of children who lack birth documentation or are uncertain of their age. In order for the Court to establish that a crime has occurred, i.e. that a child soldier was in fact under the age of 15 at the time he or she was recruited, the prosecution will most likely look for the youngest children who have been conscripted or enlisted. Child rights advocates and organizations therefore need to support and advocate for better and more reliable birth registration mechanisms in order to enhance protection of all children.

There are a number of ways child rights advocates might assist in identifying instances where children under 15 have been recruited. In general, child rights advocates, both local and international, are well positioned to obtain information on child recruitment; indeed, as part of their mandates and for their own programming needs, they collect this type of information on a regular basis. Child rights advocates could provide information, training and briefings for the ICC on the specific factors and dynamics of child soldiering in a particular context. They can also assist the Court in finding child victims and witnesses, as they are likely to have contacts through demobilization programmes with former child soldiers, and would be in a position to help children make informed choices about whether they want to testify. In some cases, child rights advocates might choose to bring information on the use of children by armed groups and armed forces to the attention of the Prosecutor.[143]

As noted, the inclusion of the recruitment of children under the age of 15 as a war crime reflects customary international law at the time of the adoption of the Rome Statute.[144] However, the entry into force of

[142] Elements of Crimes, article 2(b)(xxvi) and (e)(vii).
[143] Rome Statute, article 15.
[144] See article 38 of the CRC; article 4(3)(c) of Additional Protocol II to the Geneva Conventions; and article 77(2) and (3) of Additional Protocol I.

the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict raises the minimum age for compulsory recruitment and participation in hostilities to 18, signifying the gradual emergence of a new standard. Given this, criminalization of the recruitment and participation of children under the age of 18 might be among the first amendments proposed for the Rome Statute. Child rights advocates have a significant role to play in advocating and lobbying for such a strengthening of the Statute.

3.2.1.b Genocide: Forcibly transferring children of a group to another group

The forcible transfer of persons under age 18, belonging to a national, ethnical, racial or religious group intentionally targeted for whole or partial destruction, constitutes genocide.[145] In this context, 'forcible' is not limited to physical force but can also include the threat of force or coercion, such as that caused by fear of violence, psychological oppression or abuse of power.[146] The prosecution needs to demonstrate that the transfer was part of a "manifest pattern of similar conduct" directed against the specific group or was conduct that could itself effect the destruction of the group.[147]

Guided by the CRC, child protection agencies help implement a child's right to be cared for by his or her own parents (CRC article 7) and not be separated from the parents against their will (CRC article 9). Child protection agencies are situated to assess the circumstances on the ground and what steps were taken to prevent separation. They very often lead the way in tracing efforts and family reunification. Agencies collect data on lost persons and document the events surrounding separation. This information could be important in establishing whether the separation or transfer of children was forced and part of a genocidal policy, and whether there was a manifest pattern of similar conduct. As with the other crimes, child protection agencies can support the ICC in identifying child victims who could serve as potential witnesses.

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[145] Rome Statute, article 6.

[146] Elements of Crimes, article 6(e).

[147] Ibid., article 6(e)(7).

3.2.1.c Crimes of sexual violence

Sexual violence is used as a tool of war for a variety of purposes, including terrorizing individuals and communities, destroying a group's ability to reproduce, and forcibly impregnating an enemy population in order to vilify the victim and her community, to affect their morale, or to achieve any other political objective. Sexual violence is also a consequence of war, because armed conflict strips away many of the protections of women and girls and leaves them particularly vulnerable to attack. Victims of sexual violence may suffer psychological and physical harm, unwanted pregnancies, sexually transmitted infections including HIV/AIDS, and social ostracism. The consequences of sexual violence are often exacerbated by societal attitudes that prevent victims from seeking redress and from obtaining counselling or medical assistance.

Young girls are most often targeted for sexual abuse because they are less capable of defending themselves and because they are perceived as being less likely to have sexually transmitted infections such as HIV/AIDS. Particular attention also needs to be paid to sexual violence against boys. When boys have been raped or forced into prostitution, powerful social taboos that restrict discussion of sexual violence against males generally prevent any mention of the crime.[148]

The Rome Statute has jurisdiction over the following acts of sexual violence, which, depending on the circumstances, can constitute war crimes or crimes against humanity:

- Rape;
- Sexual slavery;
- Enforced prostitution;
- Forced pregnancy;
- Enforced sterilization;
- Other forms of sexual violence of comparable gravity.[149]

[148] Graça Machel, op. cit., p. 55.

[149] Rome Statute, articles 7(1)(g) and 8(2)(b)(xxii) and (e)(vi).

If such acts are committed during an armed conflict they are war crimes, whether they take place during an international or non-international armed conflict. If they are committed against civilians as part of a widespread or systematic attack and pursuant to or in furtherance of a State or organizational policy, they can be prosecuted as crimes against humanity, in times of peace and in times of war.

The Elements of Crimes further clarify each of the above-mentioned acts. For example, rape is defined as the penetration of any part of the body of the victim with a sexual organ or, in specific cases, with any object. The definition therefore includes the rape of boys. To constitute rape, the act must have been committed using some kind of force or threat; by taking advantage of a coercive environment; or, of particular relevance to children, if it was committed against a person incapable of giving genuine consent, which includes age-related incapacity. This is further elaborated in the Rules of Procedure and Evidence, according to which consent cannot be inferred from the words or conduct of a person incapable of giving genuine consent.[150] This is an important provision that acknowledges the fact that consent to a sexual act by a person below the age of 18 may not constitute genuine consent in the context of these crimes.

The crime of enforced prostitution is committed if a person is forced to engage in sexual acts and thereby the perpetrator or another person obtains money or other advantages in exchange for or in connection with the sexual acts.[151] The same considerations with regard to genuine consent and age-related incapacity, as outlined above, apply. The crime of forced pregnancy requires that a woman is confined and made pregnant against her will, with the intent being to affect the ethnic composition of a population or to carry out "any other grave violations of international law".[152]

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[150] Elements of Crimes, article 8(2)(b)(xxii)-(1) and Rules of Procedure and Evidence, rule 70(b).

[151] Elements of Crimes, article 7(1)(g)-(3).

[152] Ibid., article 7(1)(g)-(4) and article 8(b)(xxii) and (e)(vi)-(4).

Sexual slavery involves the perpetrator exercising 'ownership' over other individuals by selling, buying, lending or otherwise depriving them of liberty and causing such persons to engage in sexual acts. The crime of sexual slavery is also understood to cover trafficking in persons, in particular women and children.[153] In relation to trafficking, it should be noted that the ICC will only prosecute those cases where the other elements of a war crime or crime against humanity have occurred. For example, if the trafficking occurs in the context of and in association with an armed conflict or as part of a widespread or systematic attack against a civilian population pursuant to or in furtherance of a State or organizational policy, charges could be brought before the ICC.

While the Rome Statute does not directly consider sexual violence as genocide, recent jurisprudence by the *ad hoc* Tribunals has created precedents according to which sexual violence has been found to constitute genocide. For example, the ICTR found Jean-Paul Akayesu, a former communal leader in Rwanda, guilty of genocide, partly on the grounds of having witnessed and encouraged rape and other acts of sexual violence against Tutsi women during a genocidal campaign targeting the Tutsi population.[154] In addition, forced pregnancies can be a constitutive element of genocide if the aim is to affect the ethnic composition of a population.

It is important that in situations where sexual crimes have been part of a widespread policy directed against a civilian population, the ICC prosecutorial staff consider to what extent such crimes were also committed against children. While the experience of any person who has suffered crimes of sexual violence is devastating, the impact on child victims will be more profound and long-lasting, given the effect on their development. This is especially so in cases where children have been gang-raped, forced into prostitution or used as

[153] Ibid., article 7(1)(g)-(2), footnote 18.

[154] ICTR: *The Prosecutor v. Jean-Paul Akayesu* (ICTR-96-4), 2 September 1998. See also Human Rights Watch, 'Kosovo background: Sexual violence as international crime', *Human Rights Watch World Report 1999.*

sex slaves in so-called 'rape camps'. These crimes have all been committed in the recent past.

In addition to psychological distress and trauma, sexual violence has long-term socio-economic implications. Research demonstrates that sexual exploitation of women and girls during times of conflict can become generally accepted within society after the war is over.[155] In many societies, girls and boys who have been raped or forced into prostitution might be rejected by their families. Girls might not be able to marry and may be pushed into prostitution as a means of survival; they might have become pregnant and so become heads of households of one or more children. In addition to this, children might have contracted HIV/AIDS, which further increases their need for care and treatment. These specific considerations need to be taken into account when the ICC is considering the issue of reparations to child victims of sexual violence and exploitation.

For all of these reasons, it is important that sexual crimes committed against children are carefully reviewed in all indictments and deliberations before the ICC. In fact, crimes involving sexual violence against children should form specific and separate indictments, on the basis that they are crimes of extreme gravity, and not simply part of an overall pattern of sexual violence committed against the civilian population. Child rights advocates could support efforts to this end and actively lobby the ICC to ensure there is no impunity for sexual violence against children.

3.2.1.d War crime: Intentionally attacking schools

Intentionally directing attacks against protected buildings is a war crime, regardless of whether it occurs during an non-international or international armed conflict.[156] This crime is defined as an intentional attack on protected buildings; the Elements of Crimes specify that the perpetrator must have launched an attack intending to target a school

[155] Graça Machel, op. cit., p. 58.

[156] Rome Statute, article 8(2)(b)(ix) and (e)(iv).

or other protected object. In addition to schools, the list of protected buildings includes buildings dedicated to education, religion, art, science or charitable purposes, and historical monuments, as well as hospitals and other places where the sick and wounded are cared for,[157] provided they are not used for military purposes. Therefore incidents where the damage to or destruction of a school is the unintended result of an attack against a legitimate target are not included.

This provision is increasingly important because of the trend in recent years towards targeting places where children should be safe and protected and where cultural heritage is preserved. For example, UNICEF estimated that 45 per cent of schools in Kosovo were either totally destroyed or seriously damaged during the war.[158] It should be noted that, for the purposes of the ICC, 'victims' are not restricted to natural persons, but can include schools or other protected institutions,[159] thus allowing schools access to reparations that could be vital for rebuilding after an armed conflict.

In prosecuting perpetrators of intentional attacks on schools and other educational or cultural facilities, the Court would be looking for information on schools that have come under direct attack, and for evidence that the school was not used for military purposes. Child rights advocates can help to gather information on this crime, for example by documenting the destruction of schools during their discussions with children and others, and by referring information on the location of the buildings and other details to the ICC.

3.2.1.e War crime: Attacks on humanitarian staff and objects

Attacks against humanitarian operations – including their staff and resources – have become a common feature of recent armed conflicts. This is a very effective means of blocking civilian access to essential supplies and services, as humanitarian organizations cannot operate if

[157] Ibid.

[158] UNICEF press release, 2 September 1999, CF/DOC/PR/1999/35.

[159] Rules of Procedure and Evidence, rule 85.

their protected status is not respected. When aid does not reach civilians in need, children are likely to be among the first casualties.

Under the Rome Statute, intentional attacks against "personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter" constitute a war crime.[160] The inclusion of the war crime of attacking humanitarian operations marks an important development of international humanitarian law, as attacks against humanitarian operations are included neither in the list of "grave breaches" in the Geneva Conventions of 1949, nor in Additional Protocol I of 1977.[161]

According to the elements of this crime, humanitarian or peacekeeping personnel or objects must be the target of the attack. Furthermore, the attack must take place within the context of and be associated with an armed conflict, whether international or non-international. An important precondition for making attacks on humanitarian or peacekeeping operations punishable, and entitling their personnel or objects to the protection given to civilians or civilian objects, is that they do not take direct part in the hostilities. It is important to note that only attacks directed against humanitarian actors, including murder and kidnapping,[162] constitute the war crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission under the ICC Statute. Intentional denial or hampering of aid efforts must be considered under other categories of war crimes, for instance, the starvation of civilians as a method of warfare in international armed conflicts.[163]

During recent years, the Security Council has taken an increasing interest in the protection of civilians and children affected by armed conflict.[164] A number of thematic resolutions have been adopted on

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[160] Rome Statute, article 8(2)(b)(iii).

[161] Fourth Geneva Convention, article 146, and Additional Protocol I, article 85.

[162] Elements of Crimes, article 8(2)(b)(iii).

[163] Rome Statute, article 8(2)(b)(xxvi).

[164] See for example Security Council resolutions 1265 of 17 September 1999, 1314 of 11 August 2000, and 1379 of 20 November 2001.

these subjects, highlighting the role of humanitarian agencies and calling for safe and unhindered access to victims of war. In country-specific resolutions, the Security Council has also stated that attacks on relief workers and the deliberate impeding of humanitarian assistance can threaten international peace and security.[165] It is conceivable that the Security Council would use its powers to refer such situations to the ICC.

3.2.2 Child victims and witnesses before the ICC

For any child, giving testimony or undergoing questioning by lawyers or investigators can be a very daunting experience, recalling painful or traumatic experiences. Therefore, special measures and procedures for children have been established in most legal systems, in recognition of the vulnerability of children and the need to protect child victims or witnesses. The risk of renewed trauma in court is compounded by the fact that they will have suffered and experienced some of the worst crimes known to humanity.

3.2.2.a Specific provisions relating to victims and witnesses

In order to minimize the risk of excessive distress for victims and witnesses, the ICC has established a victims and witnesses protection and support scheme, as outlined in the Rome Statute. A number of provisions applying generally to all victims and witnesses require that specific regard be paid to children and victims of sexual violence, such as:

> *"The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In doing so the Court shall have regard to all relevant factors, including age, gender... and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual violence or gender violence or violence against children".*[166]

[165] See for example Security Council resolutions 757 of 30 May 1992, 1072 of 30 August 1996, and 1078 of 9 November 1996.

[166] Rome Statute, article 68.

This article (Rome Statute, article 68) requires that appropriate measures are taken during investigations and prosecutions,[167] while ensuring that these measures are not prejudicial to the rights of the accused or to a fair and impartial trial. Based on article 68, the Rules of Procedure and Evidence formulate a general principle according to which the organs of the Court, in performing their functions,

> *"shall take into account the needs of all victims and witnesses... in particular children, elderly persons, persons with disabilities and victims of sexual or gender violence".*[168]

The constitutive and supporting documents of the Court therefore clearly specify that particular care and consideration is to be given to any and all child victims or witnesses who come in contact with the ICC.

3.2.2.b Special measures for child victims and witnesses

The Rome Statute and the Rules of Procedure and Evidence of the ICC contain provisions that call for special measures to be put in place for child victims or witnesses. The Prosecutor, the defence, the victim or witness, or his or her legal representative, each have the right to request special measures with respect to a witness. The Chamber involved may, following such a request or on its own motion and in consultation with the Victims and Witnesses Unit, order special measures to facilitate the testimony of a traumatized victim or witness, a child, or a victim of sexual violence.[169] In ordering such special measures, the Chamber must also take into account the views of the victim or witness on whose behalf the special measures are being ordered. While there are specific provisions regarding child victims and witnesses in the Rome Statute and the Rules of Procedure and Evidence, this general rule is sufficiently flexible to allow the Court to create additional measures, as needed.

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[167] See also article 54(1)(b) of the Rome Statute, which specifically requires the Prosecutor to "respect the interests and personal circumstances of victims and witnesses, including age, gender ... and health, and take into account the nature of the crime, in particular, where it involves sexual violence, gender violence or violence against children".

[168] Rules of Procedure and Evidence, rule 86.

[169] Ibid., rule 88.

In general, hearings before the ICC must be conducted in public to ensure that justice is not only done, it is seen to be done. However, in order to protect certain victims and witnesses, a Chamber might order that specific parts of the proceedings be conducted in such a way as to protect the identity of a witness. For example, hearings can be held *in camera*, i.e. behind closed doors, or evidence can be presented by electronic or other special means, such as video conferencing or recorded testimony.[170] The Statute explicitly states that such measures are mandatory in the case of a victim of sexual violence or a child witness or victim, unless the Court orders otherwise after considering the views of those victims and witnesses.[171] The Rules of Procedure and Evidence require the Chamber to be vigilant in controlling the manner of questioning so as to prevent harassment or intimidation, particularly in relation to victims of sexual violence.[172] Should the Court decide the case does not warrant these measures, but that the identity of the victim or witness should nevertheless be withheld from the public, the Court[173] can order the name of the victim, witness or other person at risk to be expunged from its public records[174] or the person to be referred to by a pseudonym. Furthermore, measures for the alteration of voice or picture, video conferencing or closed-circuit television might be ordered in appropriate circumstances.

One rule directly referring to children states that a child witness appearing before the Court, who is the child of the accused, shall not be required, unless he or she chooses, to make any statement that might incriminate the accused parent.[175] This is an important provision for children and, where applicable, the content of the rule should be explained to the child so that he or she may make an informed decision whether or not to testify.

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[170] Rome Statute, article 68(2); see also rules 67 and 68 of the Rules of Procedure and Evidence.

[171] Rules of Procedure and Evidence, rule 68(2). See also rule 112(4), which provides that the Prosecutor can use audio or video recording when questioning victims of sexual or gender violence, or a child, where such measures could reduce any subsequent detrimental effects to the victim.

[172] Rules of Procedure and Evidence, rule 88(5).

[173] Ibid., rule 87(3)(c) and (d).

[174] Ibid., rule 87(3)(a).

[175] Ibid., rule 75(1).

Another important aspect of the ICC is its ability to order reparations for victims of crimes within the jurisdiction of the Court, including child victims. The Court may make orders for convicted persons to pay reparations to victims for damage, loss or injury.[176] Awards for reparations can also be made through the Trust Fund established pursuant to the Rome Statute.[177]

Both the rule relating to incrimination of another person and the procedures by which reparations may be sought should be dealt with by someone who is competent both to explain these issues to the child and to act on his or her behalf, such as the child's lawyer or other support person. For these and other reasons, the Rules of Procedure and Evidence address the need for special arrangements with regard to the legal representation of children. In the case of a child victim, in order to exercise the rights of victims to participate in certain parts of the proceedings, an application to participate may be made by a person acting on behalf of the victim.[178] Other issues relating to children's legal representation, which are not dealt with in the Rules, will be worked out in the future. This presents an opportunity for child rights advocates to ensure that all relevant issues affecting children are taken into account and dealt with in the best possible way.

3.2.2.c The Victims and Witnesses Unit and its functions

While all the organs and sections of the Court are required to take the needs of witnesses and victims into consideration, there will also be a separate Victims and Witnesses Unit within the Registry. The mandate of the Unit is formulated as follows:

> *"[The Victims and Witnesses Unit] shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses."*[179]

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[176] Ibid., rules 94-98.
[177] Rome Statute, article 79.
[178] Rules of Procedure and Evidence, rule 89(3).
[179] Rome Statute, article 43(6).

The Victims and Witnesses Unit is intended to operate for the benefit of all witnesses and victims who appear before the Court, by providing whatever assistance is necessary and appropriate under the circumstances. The Rules of Procedure and Evidence define a victim as a natural person who has suffered harm as a result of the commission of any crime within the jurisdiction of the ICC.[180] Another category of people who will fall within the mandate of the Victims and Witnesses Unit are "others who are at risk on account of testimony given by such witnesses". This group would include, for example, children who might be at risk of retaliation for testimony given by a parent before the ICC. It should also be noted that the mandate of the Victims and Witnesses Unit operates for the benefit of both prosecution and defence witnesses.

As noted above, the functions of the Victims and Witnesses Unit include protective and security measures, as well as other support functions.

Protective and security functions

Protective measures can be initiated by the Prosecutor, the defence, or at the request of a witness or victim, their legal representative, or by a Chamber (after having consulted the Victims and Witnesses Unit).[181] The security functions of the Victims and Witnesses Unit are intended to protect the physical safety of witnesses and victims during the investigation, the trial and after the trial. These functions ensure the safe arrival of witnesses to the court, as well as their safety after returning home. This might involve measures to ensure that applications for passports or entry or exit formalities at border checks or at airports do not unintentionally reveal the identity of the witness or the reason for the travel. It will also involve guaranteeing that the witness is safely accommodated in The Hague, which may include frequent change of lodging, should a stricter security protocol be necessary.

[180] Rules of Procedure and Evidence, rule 85.

[181] Ibid., rule 87.

The ICC is bound to encounter situations where a witness, as a result of giving testimony, will need to relocate, potentially together with his or her entire family. As an indication, the ICTY received 50 relocation requests in 1999, and 20 requests in 2000. Relocation is a drastic measure and requires a long-term commitment by the Victims and Witnesses Unit to persons for whom relocation is required. If relocation is to a third country, cooperation is required from the receiving State, for example through granting refugee status, by accepting the person or family in question into the domestic witness protection programme, or other appropriate measures.[182]

Figures on witnesses and victims in the ICTY and ICTR

- Number of relocation requests
  ICTY: 50 in 1999 and 20 in 2000.
  ICTR: 32 in 1999 and 38 in 2000.
- Witnesses' average length of stay at the hearing
  ICTY: 7 days in 1999.
  ICTR: 13 days in 1999.
- Number of countries from which witnesses have been called
  ICTY: 30 countries.
  ICTR: 28 countries.

It should be noted that while witness protection before, during and after trial can be life-saving, such measures are also likely to increase the distress and anxiety of any victim or witness, and even more for a child called on to testify. Therefore, it is of utmost importance to inform and consult the child properly about the measures being considered and to offer continued support and counselling to minimize the potential risks, which are compounded for children undergoing critical stages in their development.

Support functions

Alongside the protective and security functions, the Victims and Witnesses Unit is tasked to provide "counselling and other appropriate

[182] The ICTY has entered into various agreements, for example with the Government of the United Kingdom, concerning cooperation with their witness protection programme. See Thordis Ingadottir, Françoise Ngendahayo and Patricia Viseur Sellers, 'The International Criminal Court: The Victims and Witnesses Unit', Project on International Courts and Tribunals (PICT), ICC Discussion Paper no. 1, March 2000, p. 26.

assistance". The Rules of Procedure and Evidence provide some guidance concerning the likely nature of this type of assistance.[183] Nevertheless, the Registrar and personnel of the Victims and Witnesses Unit will be required to elaborate their functions and develop operating procedures in accordance with the needs of victims and witnesses, which will necessarily be an ongoing and constant process, taking account of new situations and developments. In undertaking this task, it is likely that the experience of the ICTY and the ICTR will serve as a precedent for what the Victims and Witnesses Unit might expect and how best to meet the needs of victims and witnesses.[184] The constitutive documents of the ICC also give details on specific areas of expertise the Victims and Witnesses Unit should have in order to fulfil its mandate. These include expertise in social work and counselling, health care, psychology, law, logistics, trauma and especially trauma related to sexual violence, gender and cultural diversity, language interpreting and administrative matters.[185] This wide range of skills and knowledge indicates that the Unit will be expected to respond to varying needs and issues as they arise.

It is important for the Victims and Witnesses Unit to remain flexible enough to cater to the wide variety of practical considerations and needs that will arise with respect to child victims and witnesses. A child who is brought to The Hague to testify will often come from a different culture, speak a different language and be unaccustomed to travel across or between continents; indeed, the child might never have entered an airplane before. Children who appear before the Court will most likely be unfamiliar with judicial proceedings in any jurisdiction, let alone in an international criminal court. The educational background of the children will vary widely, and consequently they will have very different ways of understanding what is happening and what is expected from them. This is heightened in the case of a child

[183] Rules of Procedure and Evidence, rule 17.

[184] While the statutory provisions for support services by the ICTY and ICTR are less detailed than those outlined for the ICC, extensive practice has developed in terms of the services provided by the victims and witnesses protection units of these two Tribunals.

[185] Rules of Procedure and Evidence, rule 19.

who has spent the last years as a child soldier, living in hills and dense forests, or has been victimized in other ways.

Providing specific briefings to children who come before the Court should be incorporated into the support functions of the Victims and Witnesses Unit, which is required to "give due regard to children" in the performance of its functions.[186] Any briefings given to a child should be appropriate to the age of the child, and as concrete and 'hands-on' as possible. This preparation should include a visit to the courtroom together with a brief description of the various actors in the room and where they will be seated. If any technical equipment is to be used during the course of the child's testimony, such as language interpreting and recording equipment, that equipment should be shown and explained to the child in advance. The impact of possible technical protective measures, such as measures to conceal the child's visual image, must also be explained to the child so there is no surprise.[187] This function would properly fall within the mandate of the Victims and Witnesses Unit and could be carried out by the child support person or someone else the child trusts.

Support functions also include practical travel arrangements, arranging travel documents, ensuring immigration entry and exit for victims and witnesses, provision of travel support, arranging for safe accommodation during trial and, possibly, compensation for loss of income. One practical problem that has emerged, especially for the ICTR, is that victims and witnesses who have taken refuge in a third country but have not secured legal immigration status may be unable or unwilling to jeopardize their situation by leaving the country in order to testify. These problems are likely to require lengthy negotiations with States to obtain emergency travel documents, enabling potential witnesses to travel to the Court and return safely to their country of residence.[188] To the extent possible, proper procedures and agreements should be worked out in

[186] Ibid., rule 17.
[187] Thordis Ingadottir and others, op. cit., p. 31.
[188] Ibid., p. 28.

advance, so as to minimize the impact on victims and witnesses and avoid any potential delay in the proceedings.

The provision of counselling is explicitly mentioned in the Rome Statute and further elaborated in the Rules of Procedure and Evidence to include assisting victims and witnesses in obtaining medical, psychological and other appropriate assistance.[189] Specifically in relation to children, the Rules of Procedure and Evidence provide that a child support person may be assigned to a child victim or witness to assist throughout all stages of the proceedings.[190] The impact of recounting or reliving the worst moments in the child's life can reopen old wounds and tear down the child's defences, leading to long-lasting damage, especially if there is no follow-up or continued support.[191] Indeed, the need for post-trial follow-up with witnesses emerged as an important issue in interviews with women who testified before the ICTR in cases involving sexual violence,[192] and the needs of children in this regard are likely to be even greater, given their developmental stage in life.

In general, the type of assistance that may be required is illustrated by the experience of the ICTR where the Victims and Witnesses Unit has provided medical, gynaecological and psychological care to witnesses.[193] The *ad hoc* Tribunals report positive experiences with 'witness assistants' who are present to provide practical and emotional support 24 hours a day.[194] This round-the-clock presence of support staff is of particular importance for children, to help them feel secure, knowing that someone is there to take care of their needs, whether physical, psychological or emotional. While giving proper explanations and support prior to the trial is necessary to help minimize adverse

[189] Rules of Procedure and Evidence, rule 17(2)(iii).

[190] Ibid., rule 17(3). In assigning a support person to a child, the Victims and Witnesses Unit should seek the agreement of the parents or the legal guardian.

[191] Graça Machel, op. cit., p. 86.

[192] Fourth annual report by the President of the International Tribunal for Rwanda, United Nations, A/54/315-S/1999/943, 7 September 1999, para. 82.

[193] Thordis Ingadottir and others, op. cit., p. 32.

[194] Ibid., p. 31.

impact, it is also critical that the Victims and Witnesses Unit develop policies and practices for continued care and support of child victims and witnesses. This includes coordinating with States and child protection agencies to provide proper care and support for children after they return home or have moved on to a third country.

3.2.3 A child-friendly ICC: Staffing requirements

The extent to which the ICC can successfully investigate and prosecute crimes committed against children and address the special requirements and vulnerabilities of child victims and witnesses will largely depend on whether the Court has staff who possess adequate expertise in issues related to children. Fortunately, this has been foreseen by the Rome Statute, which includes specific provisions to ensure sufficient expertise in these areas. Thus, the Rome Statute explicitly provides that:

- When selecting judges, States Parties must take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children;[195]
- The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children;[196]
- The Victims and Witnesses Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence. In addition, the Unit may have staff with expertise in children's issues, in particular traumatized children, and gender and cultural diversity.[197]

The Assembly of States Parties will elect the judges of the ICC from a pool of candidates nominated by States Parties. Given this and the need to include judges with expertise in children's issues, it is important that States adopt national procedures for identifying and nominating candidates with the right expertise for international judicial positions. In order to ensure a broad range of qualified

[195] Rome Statute, article 36(8)(b).

[196] Ibid., article 42(9).

[197] Ibid., article 43(6). See also rule 19 of the Rules of Procedure and Evidence.

candidates, these procedures should include broad consultation within the legal community and civil society. Child rights advocates can assist the process by lobbying for appropriate identification and nomination procedures and by identifying candidates with appropriate child expertise.

Given the nature of the crimes within the jurisdiction of the Court, the ICC requires staff who are familiar with child support services and juvenile justice issues and, in particular, have experience relating to children affected by armed conflict and displacement. In addition, the ICC will need to ensure that all staff members, particularly those likely to come in direct contact with children, receive training in issues relating to children and child protection. The training should address relevant issues such as child soldiers, sexual violence against children and discrimination against girl children. The Rules of Procedure and Evidence mandate the Victims and Witnesses Unit to make available to the Court, and to all relevant parties, training in issues of trauma, sexual violence, security and confidentiality,[198] which could extend to issues specific to child trauma. Child protection agencies could provide valuable contributions to such training initiatives, given their expertise and practical experience on the ground.

The importance of having staff in the ICC with experience in child protection and children's issues, especially in the context of war and displacement, cannot be overstated. While many of the needs of witnesses and victims are covered in the Statute and the Rules of Procedure and Evidence, the concerns of children can often be solved only on a case-by-case basis, frequently through practical measures. For example, while it might be reassuring for an adult witness to be escorted by police or security staff in uniforms, it might be a frightening experience for a child, especially if the child has suffered or witnessed crimes perpetrated

[198] Rules of Procedure and Evidence, rule 17(2)(a)(iv).

by people in uniform. The ways in which children express anxiety and fright might also differ from adults and be influenced by the children's own culture; thus staff will need to be trained to recognize these reactions and deal with them accordingly. In the case of girls who are victims of sexual violence, female staff of the Court should always be present, and a female lawyer should conduct the questioning, provided that this is the wish of the child, in order to provide the child with as comfortable and safe an environment as possible. Considerations of this type are familiar to persons experienced in supporting children through judicial proceedings and to persons experienced with children and armed conflict. Their expertise will be invaluable for the ICC.

3.2.4 Cooperation between child rights advocates and the ICC

The ICC creates both opportunities and challenges for child rights advocates. Ending impunity for crimes committed against children, while at the same time developing procedures and policies to ensure that the needs of child victims and witnesses are properly taken into account, will require concentrated effort and preparation.

3.2.4.a Preparation for the ICC

Child rights advocates will need to ensure they are properly prepared to work with the ICC in the most constructive manner possible, which will require training on relevant issues. In particular, such training will be needed for staff based in countries where there is an armed conflict or there is a risk of breakdown of law and order. This training should familiarize staff with the role and work of the ICC, ensuring that they understand the processes and what information might be relevant for the prosecution of crimes against children so as not to hinder ongoing or future investigations. Equally important, training will enable staff to inform children and civil society about the ICC and answer questions they may have. In addition, child rights advocates should define their policies vis-à-vis the ICC and adopt practical guidelines on how they will cooperate with the ICC, including the role of individual staff members.

3.2.4.b Providing information and testifying

Child rights advocates can be a vital source of information with respect to crimes committed against children, particularly as they may have information that discloses the widespread or systematic nature of the commission of crimes. In general, child rights advocates can work with the ICC to develop proper guidelines concerning their information-sharing and the cooperation of their staff with the ICC including, when necessary, testifying before the Court.

The Prosecutor may seek information from child rights advocates and organizations, for example, in determining whether to request authorization to commence an investigation.[199] The Rules of Procedure and Evidence specify that the Prosecutor shall protect the confidentiality of such information.[200]

In many cases, child rights advocates may be in possession of information that is sensitive or should otherwise be kept in confidence. The Rules of Procedure and Evidence contain specific guidelines concerning non-disclosure of privileged and confidential information, outlining cases in which a person will not be compelled to disclose information. Of relevance to child rights advocates, the Rules of Procedure and Evidence specifically provide for protected categories of relationships within which such communications might be made, in particular those related to or involving victims.[201] Where the Court determines that reasonable expectations of privacy and confidentiality are essential to the relationship – patient and therapist, for example – the information is protected, provided recognition of the privilege would further the objectives of the Statute.[202] Following these rules, it is likely that information shared by a child with his or her social worker would qualify as privileged information, and consequently the social worker would not be compelled to disclose that information when giving testimony before the ICC. In this context privileged information relates primarily to information received from an individual child in the

[199] Pursuant to article 15 of the Rome Statute.

[200] Rules of Procedure and Evidence, rule 46.

[201] Ibid., rule 73(3).

[202] Ibid., rule 73(2).

context of a professional relationship, rather than information on children overall. However it should be noted that the ICC grants special status to the International Committee of the Red Cross (ICRC), in that any information or evidence in its possession is regarded as privileged and not subject to disclosure.[203]

3.2.4.c Advocating with the ICC

Child rights advocates must also work to ensure that the ICC addresses the rights and needs of child victims and witnesses and that crimes committed against children receive due judicial attention. Training of judges, prosecutorial staff and staff of the Victims and Witnesses Unit will be essential to ensure proper measures for involving children in the ICC. The training should encompass international child rights standards, ways of dealing with war-affected children and best practices for the participation of child victims and witnesses in judicial processes.

3.2.4.d Advocating for national action

Given the jurisdictional limitations on cases that can be brought before the ICC, widespread ratification from all regions in the world is essential. Child rights advocates based in States that are not parties to the Statute can play an important role in advocating for that State to become a party. In States that are already parties to the Statute, child rights advocates can assume an active role in advocating for implementation, for example by assisting the process of reforming national laws in accordance with the Rome Statute, particularly as it relates to children. They can also use the prospect of an ICC case to encourage national authorities to investigate and prosecute cases involving crimes against children properly, since failure to do so could result in the ICC exercising jurisdiction over those crimes.

3.2.4.e Educating children about the ICC

Educating children about the ICC is essential so that they have access to all relevant and appropriate information and can make informed choices about their involvement with the ICC. Thus, global and

[203] Ibid., rule 73(4).

national advocacy activities should seek to inform children about the work of the ICC and other international justice and truth-seeking mechanisms. Children's participation should be voluntary, and in all instances, special safeguards for their protection must be in place.[204]

3.2.4.f The ICC and the United Nations

While the ICC is not an organ of the UN, it will be closely linked to the UN through various agreements, the most important being the draft Relationship Agreement between the Court and the United Nations. The Relationship Agreement defines the nature and scope of the cooperation between the Court and the United Nations.[205] The Agreement is important since the UN provides humanitarian assistance in areas of conflict and also deploys peacekeeping and other missions. It is anticipated that the ICC will investigate and prosecute crimes occurring in areas and at times when the UN has personnel on the ground.

The Agreement outlines a general obligation of cooperation between the two institutions,[206] implementing the provision of the Rome Statute that authorizes the Court to ask intergovernmental agencies for information or documents or other forms of cooperation.[207] According to the Relationship Agreement, the UN will undertake to provide to the Court information or documents, as requested.[208] If the disclosure of information or documents would endanger in some way the safety of current or former UN staff or would prejudice or affect the security of UN operations, either the Court or the UN may order appropriate protective measures.

The United Nations, including its funds, programmes and agencies, will also cooperate with the Prosecutor, although information or

[204] CRC, articles 12 and 40. See also *UNICEF handbook*, op. cit., sections on these CRC articles.

[205] 'Report of the Preparatory Commission for the International Criminal Court, Addendum, Draft Relationship Agreement between the Court and the United Nations', United Nations, PCNICC/2001/1/Add.1, 8 January 2002. The draft Relationship Agreement will be submitted for adoption to the first Assembly of States Parties in 2002. For the sake of brevity, the draft will be referred to below as the Relationship Agreement.

[206] Relationship Agreement, article 3.

[207] Rome Statute, article 87(6).

[208] Relationship Agreement, article 15(1).

documents may be provided to the Prosecutor on a confidential basis, ensuring that the information will not be shared with other organs of the Court or outside the Court without the consent of the UN.[209] A UN body can enter into any necessary arrangements with the Prosecutor to ensure the confidentiality of information, the protection of persons including current or former UN staff, and the "security and proper conduct" of any UN operations or activities. Such agreements with the Court may be considered for UN entities which seek to highlight crimes committed against children, while also ensuring the safety of children and the continued security and proper conduct of its operations.

Staff of the United Nations, including its funds, programmes and agencies, can be called to testify before the Court.[210] Should this occur, there is an obligation to cooperate, through the provision of testimonies by UN staff; if necessary, the UN will waive the staff's duty of confidentiality in line with the Relationship Agreement.[211] The Court might also authorize the Secretary-General to appoint a representative to assist a staff member who appears before the Court as a witness.[212] If giving testimony would endanger current or former UN staff, or otherwise prejudice the security or proper conduct of any operation or activity of the United Nations, protective measures can be ordered by the Court, according to the usual rules governing the protection of witnesses and victims.

The Relationship Agreement between the UN and the ICC also provides that the Court and the UN shall "cooperate in the interchange of personnel" and "strive for the maximum cooperation in order to achieve the most efficient use of specialized personnel, systems and services".[213] This article leaves room for the secondment of child protection staff from the UN to the ICC, which might be worth pursuing during the Court's initial stages to ensure that the ICC has appropriate child expertise.

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[209] Ibid., article 18.
[210] Ibid., article 16.
[211] Ibid., article 16(1).
[212] Ibid., article 16(1) and (2).
[213] Ibid., article 8.

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United Nations Children's Fund

Working for and with Adolescents

- Some UNICEF examples

February 2002

Adolescent Development and Participation Unit

Children in Conflict with the Law, Iran

Project Name and Location (City/Country):
Children in Conflict with the Law, Iran

Background/Rationale for Project:
Based on the comparative study on CRC and internal laws and also the situation analysis conducted by UNICEF in 1998, the scope of the work that had to be carried out in the field of juvenile justice was very broad and went well beyond some minor law revisions. There was need for the Iranian justice system to develop a National Plan of Action which would involve all the key players (lawmakers, judges, social workers, police, prison staff, academicians). In late 1998, UNICEF supported a comprehensive study of the Iranian justice system, the task of which was to gather information on the situation of children in conflict with the law, children at risk, and the current Iranian penal system/facilities to identify the main problems and the ways to address them. This study highlighted the following main needs:

- A new Juvenile Code
- Exposure to modern trends in the field of Juvenile Justice (diversion, alternatives, etc)
- Re-establishment of juvenile courts
- Specialized juvenile judges
- Trained stakeholders such as social workers, police, prison staff, etc

Project Description:
Timeframe: 1999-2004 (initiated during CP cycle 1998-1999 and continuing into current CP 2000-2004)
Initiator(s): UNICEF
Implementer(s): The Judiciary, Organization of Prisons, police
Funding Source(s) and Overall Budget: US $391,000 (all RR)
Partner(s)/alliances: Justice System, NGOs, media, academicians

Objective(s):

- Enhance compatibility of internal laws with the CRC through support to a process of review of laws
- Support establishment of a juvenile justice system:
  - Development of a Juvenile Code
  - Establishment of juvenile courts throughout the country
- Strengthen the technical capacity of juvenile judges, social workers, staff of Juvenile Correction centres, police, academicians
- Improve situation of children in conflict with law
- Increase skills of child caregivers with regards to psycho-social development of children incarcerated with their mothers

Beneficiaries/participants (number, age group and gender):
The official statistics puts the number of the boys in the correction centres and prisons at 3,000; girls at 300, and children incarcerated with their mothers at 600. These figures exclude the large number of children at risk who are direct beneficiaries of this project. Moreover, within the framework of the new juvenile code the project will address such issues as age of criminal responsibility (currently 9 for girls and 15 for boys), which will have a great impact on all the children and young adults. In a country like Iran, with one of the youngest populations in the world, the number of indirect beneficiaries of this project could rise to about 30 million (half of the total population being under the age of 18).

Description of Activities:

- A study tour to Austria, a country well known for its advanced juvenile justice system, was organized in February 1999. The participants were from different sectors in the justice system, including judges, prosecutors, police, prison and juvenile rehabilitation centre staff, social workers, and academicians. The visit highlighted the need to establish a juvenile justice system in Iran, to run specialized training courses for the key players, and to establish the youth police. A report of the visit was disseminated widely among the judiciary officials throughout the country to raise awareness and to create an accepting environment.
- In line with its objective to introduce the key concepts and disseminate information in the field of juvenile justice, UNICEF translated and distributed a number of documents, including the UN Model Laws on juvenile justice, the three international instruments (Beijing Rules, Riyadh Guidelines, and Juveniles Deprived of Liberty), the Austrian Juvenile Justice Law, Out of Court Settlement in Austria, and Innocenti Digests on "Ombudswork for Children" and "Juvenile Justice."
- To put the development of a Plan of Action for juvenile justice on the agenda of policy and decision makers, UNICEF organized a workshop on juvenile justice in Sion (Switzerland) in June 1999, which involved a number of key officials from different parts of the justice system as well as researchers and academicians. The recommendations that emerged from the workshop highlighted the necessity of establishing juvenile courts, the importance of training, the need to review sentences and sanctions and look at alternatives and the issue of criminal responsibility and age of maturity.
- As a follow up to the Sion workshop, UNICEF succeeded in encouraging the officials to establish the first Juvenile Rehabilitation Centre for girls in the country. With UNICEF's support, the centre opened in October 1999, and by the end of November all the girls under 18 who were previously kept in women's prison in Tehran were transferred to this centre.
- At the request of the Iranian judiciary officials and in close collaboration with them, UNICEF organized the first juvenile justice seminar in Iran in February 2000. The seminar received great publicity and helped sensitize the stakeholders in general. The seminar also helped pave the way and create a more accepting environment among different partners.
- UNICEF also continued its support to the boys' Juvenile Correction and Rehabilitation centre in Tehran by providing equipment for vocational training and

teaching aids. UNICEF also provided musical instruments and supported a pilot "Music therapy" project for the juveniles in the centre to examine the effect of art therapy projects in the improvement of the quality of life of children in detention centres. The project placed special emphasis on improving cooperative skills and respect among the children, and to promote their independence and self-confidence.

- In 1999, UNICEF developed a training module on life skills, which can be used for different target groups including juveniles in conflict with law, unattended children in welfare centres, and street children. This was followed by workshops for training of master trainers from different groups working with children in need of special protection including staff of Juvenile Correction and Rehabilitation Centres (JCRCs) from all over the country.
- UNICEF also conducted two CRC training workshops for staff of the Organization of Prisons and JCRCs, who are in daily contact with children in conflict with law. The training sessions helped increase the participants' knowledge on Child Rights and provided a forum for discussing different ways of improving implementation of the Convention.
- To improve the knowledge and skills of educators attending to children incarcerated with their mothers in child care centres of prisons, UNICEF organized a training on early childhood care and development for caregivers from all over the country. The training, which was conducted by an NGO working on pre-school education, was immensely welcomed by the participants, and UNICEF plans to support this activity further in 2001. UNICEF also helped equip care centres of prisons with educational equipment and teaching aids.
- In November 2000, UNICEF conducted specialized training for more than 90 juvenile judges all throughout the country. The training programme covered CRC, international umbrella principles (Beijing Rules, Riyadh Guidelines, Juveniles Deprived of Liberty), diversion, and the application of these principles in the context of Iran.

How have adolescent boys and girls been involved in the project? In what stages have they been involved – situation assessment, situation analysis, planning, implementation, monitoring, and/or evaluation?
The Country Programme development process involved over 600 stakeholders including government, NGOs, bilateral donors, and children. A listening session with children from Tehran JCRC, as well as Future Search Conferences on "child abuse" and "street children" were set up during programme planning to specifically seek the beneficiaries' views regarding their needs, problems, and priorities. This guided the process and the content for the preparation of the Country Programme including for the Children in Need of Special Protection programme and the children in conflict with the law project.

How has their involvement affected the project?
The children's views assisted us in focusing on some of their priorities such as vocational training and qualified educators in reform centres.

How has their involvement affected them personally?

Juvenile offenders can now learn a vocation at the reform centre, take a special official exam run by the Ministry of Labour, and get a certificate. This has already helped some of them get a job and have a means of income once they are released.

What have been the achievements of this project to date?

- In 2000 UNICEF managed to gain the support of the powerful Head of the Judiciary to continue and expand activities in this field. This has resulted in setting up a joint technical committee to draft a Juvenile Code by 2001. This is the first joint committee ever set up by the judiciary and a UN agency in Iran.
- As a result of the training sessions held for more than 90 juvenile judges this year, there is now a better understanding of the CRC and other international principles among these judges. The workshops also led to a series of recommendations adopted by the participants, which will be shared with the Head of Justice and the drafting committee. These training sessions also provided a good opportunity to advocate for using alternative sentences even though they are not fully provided for in the current law.
- The Juvenile Courts have been re-established in the country. Last year there was only one juvenile court in Tehran. There are now more than 9 in Tehran, and at least one in each city.
- In summer 2000, a Tehran juvenile judge in a watershed decision for the first time sentenced a young offender to learn a vocation instead of sentencing him to jail. This alternative sanction, although not formally provided by the law, rests on the judge's sole authority. Another 20 similar alternative sentences have been given over the last three months. In addition to learning a vocation, young offenders can also be sentenced to stay at home under the supervision of their parents, or to community work.
- The support given to JCRC in Tehran in terms of educational/vocational equipment has had a strong positive impact on educational/vocational training services in this centre. The centre is now providing vocational courses such as barbering, masonry, carpentry, welding and gardening, and it is hoped that it can set a model for other centres to follow.
- The Government has included establishment of JCRCs in all provinces in its third National Development Plan, as a result of which there will be one such centre established in each province by 2004. This will help ensure complete separation of juvenile offenders from adults.
- The first girls' JCRC was established in Tehran, separating the female juvenile offenders from adult female offenders for the first time.

Has a formal evaluation been performed? Please elaborate.
No formal evaluation has been conducted as this is the start of the CP cycle. Yet, a study on juvenile judges' KAP on "CRC and international instruments" is ongoing.

What were the main constraints in meeting the project objectives?
There have been limitations in the achievement of optimum results due to administrative changes within the government, and particularly the judiciary. The project was also at its

start perceived as dealing with "sensitive" issues. However, the perception has now improved.

Lessons Learned/Recommendations/What would you do differently if you could do it over?

- Project progress has been very satisfactory so far. It is however too early to draw final conclusions.
- Prior to the start of the project, we conducted a solid SITAN combined to a "comparative study on CRC and internal laws" both of which provided the necessary insight and knowledge for the project.

What program support tools/resources were developed that can be used/adapted by other country offices?

- Documentation on the Sion and Vienna workshops (1999) is available in English.
- A number of documents including the UN Model Law on juvenile justice, the three international instruments (Beijing Rules, Riyadh Guidelines, and Juveniles Deprived of Liberty), the Austrian Juvenile Justice Law, Out of Court Settlement in Austria, and Innocenti Digests on "Ombudswork for Children" and "Juvenile Justice" were translated into Farsi and shared with the UNICEF Tajikistan country office.
- We benefited immensely from the technical assistance provided by Austrian Judge Renate Winter and would like to recommend her to other Country Offices.

Youth Perspective: An interesting quote from an adolescent involved in the project.

"Now I'm not labeled and my family and others don't look at me as a criminal."

- From a juvenile offender in Tehran, whose sentence was to learn a vocation (analternative sanction).

"I didn't know that the judge could help me!"

- From a juvenile offender in Tehran, whose sentence was to stay in the Juvenile Correction and Rehabilitation Center in Tehran only during the weekends for three months so that he wouldn't fall behind school and exams."

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IN THE APPEALS CHAMBER

Before:
Judge David Hunt, Presiding
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar:
Mr Hans Holthuis

Judgement of: 20 February 2001

PROSECUTOR

V.

Zejnil DELALIC,
Zdravko MUCIC (aka "PAVO"),
Hazim DELIC and Esad LANDŽO (aka "ZENGA")

("*CELEBICI* Case")

JUDGEMENT

Counsel for the Accused:

Mr John Ackerman and Ms Edina Rešidovic for Zejnil Delalic
Mr Tomislav Kuzmanovic and Mr Howard Morrison for Zdravko Mucic
Mr Salih Karabdic and Mr Tom Moran for Hazim Delic
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:

Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is seized of appeals against the Judgement rendered by Trial Chamber II on 16 November 1998 in the case of *Prosecutor v Zejnil Delalic, Zdravko Mucic also*

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known as "Pavo", Hazim Delic, Esad Landzo also known as "Zenga" ("Trial Judgement").[1]

Having considered the written and oral submissions of the Parties, the Appeals Chamber

HEREBY RENDERS ITS JUDGEMENT.

I. INTRODUCTION

1. The Indictment against *Zejnil Delalic, Zdravko Mucic, Hazim Delic* and *Esad Landzo*, confirmed on 21 March 1996, alleged serious violations of humanitarian law that occurred in 1992 when Bosnian Muslim and Bosnian Croat forces took control of villages within the Konjic municipality in central Bosnia and Herzegovina. The present appeal concerns events within the Konjic municipality, where persons were detained in a former Yugoslav People's Army ("JNA") facility: the Celebici camp. The Trial Chamber found that detainees were killed, tortured, sexually assaulted , beaten and otherwise subjected to cruel and inhumane treatment by Mucic, Delic and Landzo.[2] Mucic was found to have been the commander of the Celebici camp, Delic the deputy commander and Landzo a prison guard.

2. In various forms, Delalic was co-ordinator of Bosnian Muslim and Bosnian Croat forces in the Konjic area between approximately April and September 1992. He was found not guilty of twelve counts of grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war. The Trial Chamber concluded that Delalic did not have sufficient command and control over the Celebici camp or the guards that worked there to entail his criminal responsibility for their actions.[3]

3. Mucic was found guilty of grave breaches of the Geneva Conventions and of violations of the laws or customs of war for crimes including murder, torture, inhuman treatment and unlawful confinement, principally on the basis of his superior responsibility as commander of the Celebici camp, but also, in respect of certain counts, for his direct participation in the crimes.[4] Mucic was sentenced to seven years imprisonment.[5] Delic was found guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war for his direct participation in crimes including murder , torture, and inhuman treatment.[6] Delic was sentenced to twenty years imprisonment.[7] Landžo was found guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war, for crimes including murder, torture, and cruel treatment , and sentenced to fifteen years imprisonment.[8]

4. The procedural background of the appeal proceedings is found in Annex A, which also contains a complete list of the grounds of appeal. Certain of the grounds of appeal of the individual parties dealt with substantially the same subject matter , and certain grounds of appeal of Landzo were joined by Mucic and Delic. For that reason, this judgement considers the various grounds of appeal grouped by subject matter, which was also the way the different grounds of appeal were dealt with during oral argument.

II. GROUNDS OF APPEAL RELATING TO ARTICLE 2 OF THE STATUTE

5. Delic, Mucic and Landžo have raised two closely related issues in relation to the findings of the Trial Chamber based on Article 2 of the Statute. The first is the question of the legal test for

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determining the nature of the conflict, and the second, that of the criteria for establishing whether a person is "protected " under Geneva Convention IV. Delic has raised a third issue as to whether Bosnia and Herzegovina was a party to the Geneva Conventions at the time of the events alleged in the Indictment.

A. Whether the Trial Chamber Erred in Holding that the Armed Conflict in Bosnia and Herzegovina at the Time Relevant to the Indictment was of an International Character

6. Delic,[9] Mucic,[10] and Landzo[11] challenge the Trial Chamber's finding that the armed conflict in Bosnia and Herzegovina was international at all times relevant to the Indictment. Relying upon the reasoning of the majority in the *Tadic* and *Aleksovski* first instance Judgements, the appellants argue that the armed conflict was internal at all times. It is submitted that the Trial Chamber used an incorrect legal test to determine the nature of the conflict and that the test set out by the majority of the *Tadic* Trial Chamber, the "effective control" test, based on *Nicaragua*,[12] is the appropriate test. In the appellants' opinion, applying this correct test , the facts as found by the Trial Chamber do not support a finding that the armed conflict was international. Consequently, the appellants seek a reversal of the verdict of guilty on the counts of the Indictment based upon Article 2 of the Statute .[13]

7. The Prosecution submits that these grounds of appeal should be dismissed. It submits that the correct legal test for determining whether an armed conflict is international was set forth by the Appeals Chamber in the *Tadic* Appeal Judgement, which rejected the "effective control" test in relation to acts of armed forces or paramilitary units. Relying upon the *Aleksovski* Appeal Judgement , the Prosecution contends that the Appeals Chamber should follow its previous decision .

8. As noted by the Prosecution, the issue of the correct legal test for determining whether an armed conflict is international was addressed by the Appeals Chamber in the *Tadic* Appeal Judgement. In the *Aleksovski* Appeal Judgement , the Appeals Chamber found that "in the interests of certainty and predictability , the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice".[14] Elaborating on this principle, the Chamber held:

> Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."
>
> It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.
>
> What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases , or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to

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> follow previous decisions which may be distinguished for one reason or another from the case before the court.[15]

In light of this finding, the *Aleksovski* Appeals Chamber followed the legal test set out in the *Tadic* Appeal Judgement in relation to internationality .

9. Against this background, the Appeals Chamber will turn to the question of the applicable law for determining whether an armed conflict is international.

1. What is the Applicable Law?

10. The Appeals Chamber now turns to a consideration of the *Tadic* Appeal Judgement, and to the relevant submissions of the parties in this regard, in order to determine whether, applying the principle set forth in the *Aleksovski* Appeal Judgement, there are any cogent reasons in the interests of justice for departing from it.[16]

11. From the outset, the Appeals Chamber notes that the findings of the Trial Chamber majorities in the *Tadic* and *Aleksovski* Judgements, upon which the appellants rely, were overturned on appeal.

12. In the *Tadic* case, the Appeals Chamber was concerned with, *inter alia*, the legal criteria for establishing when, in an armed conflict which is *prima facie* internal, armed forces may be regarded as acting on behalf of a foreign power, thereby rendering the conflict international.

13. The Appeals Chamber saw the question of internationality as turning on the issue of whether the Bosnian Serb forces "could be considered as *de iure* or *de facto* organs of a foreign power, namely the FRY".[17] The important question was "*what degree of authority or control* must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal".[18] The Chamber considered, after a review of various cases including *Nicaragua* , that international law does not always require the same degree of control over armed groups or private individuals for the purpose of determining whether they can be regarded as a *de facto* organ of the State. The Appeals Chamber found that there were three different standards of control under which an entity could be considered *de facto* organ of the State, each differing according to the nature of the entity. Using this framework, the Appeals Chamber determined that the situation with which it was concerned fell into the second category it identified ,[19] which was that of the acts of armed forces or militias or paramilitary units.

14. The Appeals Chamber determined that the legal test which applies to this category was the "overall control" test:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields *overall control* over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity. [...] However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[20]

15. Overall control was defined as consisting of more than "the mere provision of financial assistance or military equipment or training".[21] Further, the Appeals Chamber adopted a flexible definition of this test, which allows it to take into consideration the diversity of situations on the field in

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present -day conflicts:

> This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[22]

16. The Appeals Chamber in *Tadic* considered *Nicaragua* in depth, and based on two grounds, held that the "effective control" test enunciated by the ICJ was not persuasive.

17. Firstly, the Appeals Chamber found that the *Nicaragua* "effective control " test did not seem to be consonant with the "very logic of the entire system of international law on State responsibility",[23] which is "not based on rigid and uniform criteria".[24] In the Appeals Chamber's view, "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities ".[25] Thus, regardless of whether or not specific instructions were issued, the international responsibility of the State may be engaged.[26]

18. Secondly, the Appeals Chamber considered that the *Nicaragua* test is at variance with judicial and State practice. Relying on a number of cases from claims tribunals, national and international courts, and State practice, the Chamber found that, although the "effective control" test was upheld by the practice in relation to individuals or unorganised groups of individuals acting on behalf of States, it was not the case in respect of military or paramilitary groups.[27]

19. The Appeals Chamber found that the armed forces of the Republika Srpska were to be regarded as acting under the overall control of, and on behalf of, the FRY , sharing the same objectives and strategy, thereby rendering the armed conflict international.

20. The Appeals Chamber, after considering in depth the merits of the *Nicaragua* test, thus rejected the "effective control" test, in favour of the less strict "overall control" test. This may be indicative of a trend simply to rely on the international law on the use of force, *jus ad bellum*, when characterising the conflict. The situation in which a State, the FRY, resorted to the indirect use of force against another State, Bosnia and Herzegovina, by supporting one of the parties involved in the conflict, the Bosnian Serb forces, may indeed be also characterised as a proxy war of an international character. In this context, the "overall control" test is utilised to ascertain the foreign intervention, and consequently , to conclude that a conflict which was *prima facie* internal is internationalised .

21. The appellants argue that the findings of the *Tadic* Appeal Judgement which rejected the "correct legal test" set out in *Nicaragua* are erroneous as the Tribunal is bound by the ICJ's precedent.[28] It is submitted that when the ICJ has determined an issue, the Tribunal should follow it, (1) because of the ICJ's position within the United Nations Charter, and (2) because of the value of

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precedent.[29] Further, even if the ICJ's decisions are not binding on the Tribunal, the appellants submits that it is "undesirable to have two courts (...) having conflicting decisions on the same issue".[30]

22. The Prosecution rebuts this argument with the following submissions: (1) The two courts have different jurisdictions, and in addition, the ICJ Statute does not provide for precedent. It would thus be odd that the decisions of the ICJ which are not strictly binding on itself would be binding on the Tribunal which has a different jurisdiction.[31] (2) The Appeals Chamber in the *Tadic* appeal made specific reference to *Nicaragua* and held it not to be persuasive.[32] (3) Judge Shahabuddeen in a dissenting opinion in an ICTR decision found that the differences between the Tribunal and the ICJ do not prohibit recourse to the relevant jurisprudence on relevant matters, and that the Tribunal can draw some persuasive value from the ICJ's decisions, without being bound by them.[33]

23. The Appeals Chamber is not persuaded by the appellants' argument. The Appeals Chamber in *Tadic*, addressing the argument that it should not follow the *Nicaragua* test in relation to the issue at hand as the two courts have different jurisdiction, held:

> What is at issue is not the distinction between two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a *de facto* organ of a State.[34]

24. The Appeals Chamber agrees that "so far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal. [...] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern".[35] However, this Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ"[36] within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.

25. An additional argument submitted by Landzo is that the Appeals Chamber in the *Tadic* Jurisdiction Decision accurately decided that the conflict was internal . The Appeals Chamber notes that this argument was previously raised by the appellants at trial. The Trial Chamber then concluded that it is "incorrect to contend that the Appeals Chamber has already settled the matter of the nature of the conflict in Bosnia and Herzegovina. In the *Tadic Jurisdiction Decision* the Chamber found that 'the conflicts in the former Yugoslavia have both internal and international aspects' and deliberately left the question of the nature of particular conflicts open for the Trial Chamber to determine".[37] The Appeals Chamber fully agrees with this conclusion.

26. Applying the principle enunciated in the *Aleksovski* Appeal Judgement , this Appeals Chamber is unable to conclude that the decision in the *Tadic* was arrived at on the basis of the application of a wrong legal principle, or arrived at *per incuriam*. After careful consideration of the arguments put forward by the appellants, this Appeals Chamber is unable to find cogent reasons in the interests of justice to depart from the law as identified in the *Tadic* Appeal Judgement.[38] The "overall control " test set forth in the *Tadic* Appeal Judgement is thus the applicable criteria for determining the existence of an international armed conflict.

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27. The Appeals Chamber will now examine the Trial Judgement in order to ascertain what test was applied.

2. Has the Trial Chamber Applied the "Overall Control" Test?

28. The Appeals Chamber first notes that the *Tadic* Appeal Judgement which set forth the "overall control" test had not been issued at the time of the delivery of the Trial Judgement. The Appeals Chamber will thus consider whether the Trial Chamber, although not, from a formal viewpoint, having applied the "overall control " test as enunciated by the Appeals Chamber in *Tadic*, based its conclusions on a legal reasoning consistent with it.

29. The issue before the Trial Chamber was whether the armed forces of the Bosnian Serbs could be regarded as acting on behalf of the FRY, in order to determine whether after its withdrawal in May 1992[39] the conflict continued to be international or instead became internal. More specifically , along the lines of *Tadic*, the relevant issue is whether the Trial Chamber came to the conclusion that the Bosnian Serb armed forces could be regarded as having been under the overall control of the FRY, going beyond the mere financing and equipping of such forces, and involving also participation in the planning and supervision of military operations after 19 May 1992.[40]

30. The Prosecution submits that the test applied by the Trial Chamber is consistent with the "overall control" test.[41] In the Prosecution's submission, the Trial Chamber adopted the "same approach" as subsequently articulated by the Appeals Chamber in *Tadic* and *Aleksovski* . Further, the Trial Judgement goes through the "exact same facts, almost as we found in the *Tadic* decision".[42] The Prosecution contends that the Appeals Chamber has already considered the same issues and facts in the *Tadic* appeal, and found that the same conflict was international after May 1992. In the Prosecution's opinion, the Trial Chamber's conclusion that "the government of the FRY was the [...] controlling force behind the VRS"[43] is consistent with *Tadic* .

3. The Nature of the Conflict Prior to 19 May 1992

31. The Trial Chamber first addressed the question of whether there was an international armed conflict in Bosnia and Herzegovina in May 1992 and whether it continued throughout the rest of that year, *i.e.*, at the time relevant to the charges alleged in the Indictment.[44]

32. The Trial Chamber found that a "significant numbers of [JNA] troops were on the ground when the [BH] government declared the State's independence on 6 March 1992".[45] Further, "there is substantial evidence that the JNA was openly involved in combat activities in Bosnia and Herzegovina from the beginning of March and into April and May of 1992."[46] The Trial Chamber therefore concluded that:

> [...] an international armed conflict existed in Bosnia and Herzegovina at the date of its recognition as an independent State on 6 April 1992. There is no evidence to indicate that the hostilities which occurred in the Konjic municipality at that time were part of a separate armed conflict and, indeed, there is some evidence of the involvement of the JNA in the fighting there.[47]

33. The Trial Chamber's finding as to the nature of the conflict prior to 19 May 1992 is based on a finding of a direct participation of one State on the territory of another State. This constitutes a

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plain application of the holding of the Appeals Chamber in *Tadic* that it "is indisputable that an armed conflict is international if it takes place between two or more States",[48] which reflects the traditional position of international law. The Appeals Chamber is in no doubt that there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict was international prior to 19 May 1992.

4. The Nature of the Conflict After 19 May 1992

34. The Trial Chamber then turned to the issue of the character of the conflict after the alleged withdrawal of the external forces it found to be involved prior to 19 May 1992.[49] Based upon, amongst other matters, an analysis of expert testimony and of Security Council resolutions , it found that after 19 May 1992, the aims and objectives of the conflict remained the same as during the conflict involving the FRY and the JNA prior to that date , *i.e.,* to expand the territory which would form part of the Republic. The Trial Chamber found that "StChe FRY, at the very least, despite the purported withdrawal of its forces, maintained its support of the Bosnian Serbs and their army and exerted substantial influence over their operations".[50]

35. The Trial Chamber concluded that "SdCespite the formal change in status, the command structure of the new Bosnian Serb army was left largely unaltered from that of the JNA, from which the Bosnian Serbs received their arms and equipment as well as through local SDS organisations".[51]

36. In discussing the nature of the conflict, the Trial Chamber did not rely on *Nicaragua*, noting that, although "this decision of the ICJ constitutes an important source of jurisprudence on various issues of international law", the ICJ is "a very different judicial body concerned with rather different circumstances from the case in hand".[52]

37. The Trial Chamber described its understanding of the factual situation upon which it was required to make a determination as being

> [...] characterised by the breakdown of previous State boundaries and the creation of new ones. Consequently, the question which arises is one of *continuity of control of particular forces*. The date which is consistently raised as the turning point in this matter is that of 19 May 1992, when the JNA apparently withdrew from Bosnia and Herzegovina.[53]

38. It continued:

> The Trial Chamber must keep in mind that the forces constituting the VRS had a prior identity as an actual organ of the SFRY, as the JNA. When the FRY took control of this organ and subsequently severed the formal link between them, by creating the VJ and VRS, the *presumption* remains that these forces retained their link with it, unless otherwise demonstrated.[54]

39. Along the lines of Judge McDonald's Dissenting Opinion in the *Tadic* case (which it cited), the Trial Chamber found that:

> [...] the withdrawal of JNA troops who were not of Bosnian citizenship, and the creation of the VRS and VJ, constituted a deliberate attempt to mask the continued involvement of the FRY in the conflict while its Government remained in fact the

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> controlling force behind the Bosnian Serbs. From the level of strategy to that of personnel and logistics the operations of the JNA persisted in all but name. It would be wholly artificial to sever the period before 19 May 1992 from the period thereafter in considering the nature of the conflict and applying international humanitarian law.[55]

40. The appellants submit that the Trial Chamber did not rely on any legal test to classify the conflict, *i.e.,* it failed to pronounce its own test to determine whether an intervening State has sufficient control over insurgents to render an internal conflict international.[56] On the other hand, the Prosecution submits that the Trial Chamber classified the conflict on the basis of whether the Prosecution had proved that the FRY/VJ was the "controlling force behind the Bosnian Serbs".[57]

41. The Appeals Chamber disagrees with the appellants' submission that the Trial Chamber did not rely on any legal test to determine the issue. The Trial Chamber appears to have relied on a "continuity of control" test in considering the evidence before it, in order to determine whether the nature of the conflict in Bosnia and Herzegovina, which was international until a point in May 1992, had subsequently changed. The Trial Chamber thus relied on a "control" test, evidently less strict than the "effective control" test. The Trial Chamber did not focus on the issuance of specific instructions, which underlies the "effective control" test.[58] In assessing the evidence, however, the Trial Chamber clearly had regard to all the elements pointing to the influence and control retained over the VRS by the VJ, as required by the "overall control" test.

42. The method employed by the Trial Chamber was later considered as the correct approach in *Aleksovski.* The *Aleksovski* Appeals Chamber indeed interpreted the "overall control" test as follows:

> The "overall control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control. Bearing in mind that the Appeals Chamber in the *Tadic* Judgement arrived at this test against the background of the "effective control" test set out by the decision of the ICJ in *Nicaragua*, and the "specific instructions" test used by the Trial Chamber in *Tadic,* the Appeals Chamber considers it appropriate to say that the standard established by the "overall control " test is not as rigorous as those tests. [59]

43. The Appeals Chamber finds that the Trial Chamber's assessment of the effect in reality of the formal withdrawal of the FRY army after 19 May 1992 was based on a careful examination of the evidence before it. That the Trial Chamber indeed relied on this approach is evidenced by the use of phrases such as "despite the attempt at camouflage by the authorities of the FRY",[60] or "despite the formal change in status"[61] in the discussion of the evidence before it.

44. An additional argument submitted by Landzo in support of his contention that the Trial Chamber decided the issue wrongly is based on the agreement concluded under the auspices of the ICRC on 22 May 1992. In Landzo's opinion, this agreement , which was based on common Article 3 of the Geneva Conventions, shows that the conflict was considered by the parties to it to be internal.[62] The Appeals Chamber fully concurs with the Trial Chamber's finding that the *Tadic* Jurisdiction Decision's reference to the agreement "merely demonstrates that some of the norms applicable to international armed conflicts were specifically brought into force by the parties to the conflict in Bosnia and Herzegovina, some of whom may have wished it to be considered internal, and does

not show that the conflict must therefore have been internal in nature".[63]

45. The appellants further argue that the Trial Chamber relied on a "presumption " that the FRY/VJ still exerted control over the VRS after 19 May 1992 to determine the nature of the conflict. The Trial Chamber thus used an "incorrect legal test " when it concluded that because of the former existing links between the FRY and the VRS, the FRY/VJ retained control over the VRS.[64] The Prosecution responds that it is unfounded to suggest that the Trial Chamber shifted to the Defence the burden of proving that the conflict did not remain international after the withdrawal of the JNA.

46. The Appeals Chamber is of the view that although the use of the term "presumption " by the Trial Chamber may not be appropriate, the approach it followed, *i.e.*, assessing all of the relevant evidence before it, including that of the previous circumstances, is correct. This approach is clearly in keeping with the Appeals Chamber's holding in *Tadic* that in determining the issue of the nature of the conflict, structures put in place by the parties should not be taken at face value. There it held:

> Undue emphasis upon the ostensible structures and overt declarations of the belligerents , as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in *de facto* control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.[65]

47. The Trial Chamber's finding is also consistent with the holding of the Appeals Chamber in *Tadic* that "SwChere the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place , and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold ".[66] The "overall control" test could thus be fulfilled even if the armed forces acting on behalf of the "controlling State" had autonomous choices of means and tactics although participating in a common strategy along with the "controlling State".

48. Although the Trial Chamber did not formally apply the "overall control" test set forth by the *Tadic* Appeal Judgement, the Appeals Chamber is of the view that the Trial Chamber's legal reasoning is entirely consistent with the previous jurisprudence of the Tribunal. The Appeals Chamber will now turn to an additional argument of the parties concerning the Trial Chamber's factual findings.

49. Despite submissions in their briefs that suggested that the appellants wished the Appeals Chamber to review the factual findings of the Trial Chamber in addition to reviewing its legal conclusion,[67] the appellants submitted at the hearing that they "just ask the Court to apply the proper legal test to the facts that were found by the Trial Chamber".[68] The Appeals Chamber will thus not embark on a general assessment of the Trial Chamber's factual findings.

50. The Trial Chamber came to the conclusion, as in the *Tadic* case, that the armed conflict taking place in Bosnia and Herzegovina after 19 May 1992 could be regarded as international because the FRY remained the controlling force behind the Bosnian Serbs armed forces after 19 May 1992. It is argued by the parties[69] that the facts relied upon in the present case are very similar to those found in the *Tadic* case. As observed previously, however, a general review of the evidence

before the Trial Chamber does not fall within the scope of this appeal. It suffices to say that this Appeals Chamber is satisfied that the facts as found by the Trial Chamber fulfil the legal conditions as set forth in the *Tadic* case.

51. The Appeals Chamber therefore finds that Delic's Ground 8, Mucic's Ground 5 , and Landzo's Ground 5 must fail.

B. Whether the Bosnian Serbs Detained in the Celebici Camp were Protected Persons Under Geneva Convention IV

52. Delalic, Mucic, Delic and Landzo[70] submit that the Trial Chamber erred in law in finding that the Bosnian Serbs detainees at the Celebici camp could be considered not to be nationals of Bosnia and Herzegovina for the purposes of the category of persons protected under Geneva Convention IV . They contend that the Trial Chamber's conclusions are inconsistent with international law and Bosnian law. The appellants request that the Appeals Chamber enter judgements of acquittal on all counts based on Article 2 of the Statute.

53. The Prosecution submits that the appellants' grounds of appeal have no merit and that the Appeals Chamber should follow its previous jurisprudence on the issue , as set out in the *Tadic* Appeal Judgement, and confirmed by the *Aleksovski* Appeal Judgement. It submits that it is now settled in that jurisprudence that in an international conflict victims may be considered as not being nationals of the party in whose hands they find themselves, even if, as a matter of national law, they were nationals of the same State as the persons by whom they are detained . Further, the Prosecution submits that the test applied by the Trial Chamber is consistent with the *Tadic* Appeal Judgement.

54. As noted by the Prosecution, the Appeals Chamber in *Tadic* has previously addressed the issue of the criteria for establishing whether a person is "protected " under Geneva Convention IV. In accordance with the principle set out in the *Aleksovski* Appeal Judgement, as enunciated in paragraph 8 of this Judgement, the Appeals Chamber will follow the law in relation to protected persons as identified in the *Tadic* Appeal Judgement, unless cogent reasons in the interests of justice exist to depart from it.

55. After considering whether cogent reasons exist to depart from the *Tadic* Appeal Judgement, the Appeals Chamber will turn to an analysis of the Trial Chamber's findings so as to determine whether it applied the correct legal principles to determine the nationality of the victims for the purpose of the application of the grave breaches provisions.

1. What is the Applicable Law?

56. Article 2 of the Statute of the Tribunal provides that it has the power to prosecute persons who committed grave breaches of the Geneva Conventions "against persons or property *protected under the provisions of the relevant Geneva Conventions* ".[71] The applicable provision to ascertain whether Bosnian Serbs detained in the *Celebici* camp can be regarded as victims of grave breaches is Article 4(1) of Geneva Convention IV on the protection of civilians, which defines "protected persons" as "those in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The Appeals Chamber in *Tadic* found that:

> [...] the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands

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> they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work, the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection....[72]

57. The Appeals Chamber held that "already in 1949 *the legal bond of nationality was not regarded as crucial* and allowance was made for special cases".[73] Further, relying on a teleological approach, it continued:

> [...] Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible . It therefore does not make its applicability dependent on formal bonds and purely legal relations. [...] In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.[74]

58. The Appeals Chamber in *Aleksovski* endorsed the *Tadic* reasoning holding that "Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors."[75]

59. The appellants submit that the Appeals Chamber decisions in *Tadic* and *Aleksovski* wrongly interpreted Article 4 of Geneva Convention IV, and that the *Tadic* and *Aleksovski* Trial Chamber Judgements are correct. It is essentially submitted that in order for victims to gain "protected persons" status , Geneva Convention IV requires that the person in question be of a different nationality than the perpetrators of the alleged offence, based on the national law on citizenship of Bosnia and Herzegovina. This interpretation is based on a "strict" interpretation of the Convention which is, in the appellants' view, mandated by the "traditional rules of treaty interpretation".

60. The Prosecution contends that the Appeals Chamber in *Aleksovski* already adopted the approach used in the *Tadic* Appeal Judgement,[76] and that the appellants in this case have not demonstrated any "cogent reasons in the interests of justice" that could justify a departure by the Appeals Chamber from its previous decisions on the issue.

61. Before turning to these arguments, the Appeals Chamber will consider an additional argument submitted by the appellants which goes to the status of the *Tadic* Appeal Judgement statement of the law and may be conveniently addressed as a preliminary matter.

62. The appellants submit that the *Tadic* statements on the meaning of protected persons are *dicta*, as in their view the Appeals Chamber in *Tadic* and *Aleksovski* cases derived the protected persons status of the victims from the finding that the perpetrators were acting on behalf of the FRY or Croatia.[77] The Prosecution on the other hand submits that the Appeals Chamber's statement in *Tadic* was part of the *ratio decidendi*.[78]

63. While the Appeals Chamber in *Tadic* appears to have reached a conclusion as to the status of the victims as protected persons based on the previous finding that the Bosnian Serbs acted as *de facto* organs of another State, the FRY ,[79] it set forth a clear statement of the law as to the applicable criteria to determine the nationality of the victims for the purposes of the Geneva Conventions. The Appeals Chamber is satisfied that this statement of the applicable law, which was endorsed by the Appeals Chamber in *Aleksovski*, falls within the scope of the *Aleksovski*

statement in relation to the practice of following previous decisions of the Appeals Chamber .

64. The Appeals Chamber now turns to the main arguments relied upon by the appellants , namely that the Appeals Chamber's interpretation of the nationality requirement is wrong as it is (1) contrary to the "traditional rules of treaty interpretation "; and (2) inconsistent with the national laws of Bosnia and Herzegovina on citizenship .

65. The appellants submit that "the traditional rules of treaty interpretation" should be applied to interpret strictly the nationality requirement set out in Article 4 of Geneva Convention IV.[80] The word "national" should therefore be interpreted according to its natural and ordinary meaning.[81] The appellants submit in addition that if the Geneva Conventions are now obsolete and need to be updated to take into consideration a "new reality", a diplomatic conference should be convened to revise them.[82]

66. The Prosecution on the other hand contends that the Vienna Convention on the Law of Treaties of 1969[83] provides that the ordinary meaning is the meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.[84] It is submitted that the Appeals Chamber in *Tadic* found that the legal bond of nationality was not regarded as crucial in 1949, *i.e.*, that there was no intention at the time to determine that nationality was the sole criteria.[85] In addition, adopting the appellants' position would result in the removal of protections from the Geneva Conventions contrary to their very object and purpose.[86]

67. The argument of the appellants relates to the interpretative approach to be applied to the concept of nationality in Geneva Convention IV. The appellants and the Prosecution both rely on the Vienna Convention in support of their contentions . The Appeals Chamber agrees with the parties that it is appropriate to refer to the Vienna Convention as the applicable rules of interpretation, and to Article 31 in particular, which sets forth the general rule for the interpretation of treaties . The Appeals Chamber notes that it is generally accepted that these provisions reflect customary rules.[87] The relevant part of Article 31 reads as follows:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

68. The Vienna Convention in effect adopted a textual, contextual *and* a teleological approach of interpretation, allowing for an interpretation of the natural and ordinary meaning of the terms of a treaty in their context, while having regard to the object and purpose of the treaty.

69. In addition, Article 32 of the Vienna Convention, entitled "Supplementary means of interpretation", provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous and obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

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70. Where the interpretative rule set out in Article 31 does not provide a satisfactory conclusion recourse may be had to the *travaux préparatoires* as a subsidiary means of interpretation.

71. In finding that ethnicity may be taken into consideration when determining the nationality of the victims for the purposes of the application of Geneva Convention IV, the Appeals Chamber in *Tadic* concluded:

> Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, *not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose* suggest that allegiance to a Party to the conflict and, correspondingly , control by this Party over persons in a given territory, may be regarded as the crucial test.[88]

72. This reasoning was endorsed by the Appeals Chamber in *Aleksovski*:

> The Appeals Chamber considers that this extended application of Article 4 *meets the object and purpose of Geneva Convention IV*, and is particularly apposite in the context of present-day inter-ethnic conflicts.[89]

73. The Appeals Chamber finds that this interpretative approach is consistent with the rules of treaty interpretation set out in the Vienna Convention. Further, the Appeals Chamber in *Tadic* only relied on the *travaux préparatoires* to reinforce its conclusion reached upon an examination of the overall context of the Geneva Conventions. The Appeals Chamber is thus unconvinced by the appellants' argument and finds that the interpretation of the nationality requirement of Article 4 in the *Tadic* Appeals Judgement does not constitute a rewriting of Geneva Convention IV or a "re-creation" of the law.[90] The nationality requirement in Article 4 of Geneva Convention IV should therefore be ascertained within the context of the object and purpose of humanitarian law, which "is directed to the protection of civilians to the maximum extent possible ".[91] This in turn must be done within the context of the changing nature of the armed conflicts since 1945, and in particular of the development of conflicts based on ethnic or religious grounds.

74. The other set of arguments submitted by the appellants relates to the national laws of Bosnia and Herzegovina on citizenship, and the applicable criteria to ascertain nationality. The appellants contend that the term "national" in Geneva Convention IV refers to nationality as defined by domestic law. It is argued that according to the applicable law of Bosnia and Herzegovina on citizenship at the time relevant to the Indictment, the Bosnian Serbs were of Bosnian nationality. In the appellants' submission, all former citizens of the former Socialist Republic of Bosnia and Herzegovina (including those of Serbian ethnic origin), one of the constituent republics of the SFRY, became Bosnian nationals when the SFRY was dissolved and Bosnia and Herzegovina was recognised as an independent State in April 1992.[92] Further, FRY citizenship was limited to residents in its constituent parts, and the law of Bosnia and Herzegovina did not provide a possibility for its citizens of Serb ethnic background to opt for FRY citizenship.[93] Delalic submits that in addition, the Bosnian Serbs subsequently agreed to the Dayton Agreement, which provides that they are nationals of Bosnia and Herzegovina.[94]

75. The appellants' arguments go to the issue of whether domestic laws are relevant to determining the nationality of the victims for the purpose of applying the Geneva Conventions. As observed above, however, the nationality requirement of Article 4 of Geneva Convention IV is to be interpreted within the framework of humanitarian law.

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76. It is a settled principle of international law that the effect of domestic laws on the international plane is determined by international law. As noted by the Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia*, "SfCrom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[95] In relation to the admissibility of a claim within the context of the exercise of diplomatic protection based on the nationality granted by a State, the ICJ held in *Nottebohm* :[96]

> But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration . To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.[97]

77. The ICJ went on to state that "SiCnternational practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect".[98] To paraphrase the ICJ in *Nottebohm*, the question at issue must thus be decided on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Tribunal's own functions. Consequently, the nationality granted by a State on the basis of its domestic laws is not automatically binding on an international tribunal which is itself entrusted with the task of ascertaining the nationality of the victims for the purposes of the application of international humanitarian law. Article 4 of Geneva Convention IV, when referring to the absence of national link between the victims and the persons in whose hands they find themselves, may therefore be considered as referring to a nationality link defined for the purposes of international humanitarian law, and not as referring to the domestic legislation as such. It thus falls squarely within the competence of this Appeals Chamber to ascertain the effect of the domestic laws of the former Yugoslavia within the international context in which this Tribunal operates.

78. Relying on the ICRC Commentary to Article 4 of Geneva Convention IV, the appellants further argue that international law cannot interfere in a State's relations with its own nationals, except in cases of genocide and crimes against humanity.[99] In the appellants' view, in the situation of an internationalised armed conflict where the victims and the perpetrators are of the same nationality, the victims are only protected by their national laws.[100]

79. The purpose of Geneva Convention IV in providing for universal jurisdiction only in relation to the grave breaches provisions was to avoid interference by domestic courts of other States in situations which concern only the relationship between a State and its own nationals. The ICRC Commentary (GC IV), referred to by the appellants, thus stated that Geneva Convention IV is "faithful to a recognised principle of international law: it does not interfere in a State's relations with its own nationals".[101] The Commentary did not envisage the situation of an internationalised conflict where a foreign State supports one of the parties to the conflict, and where the victims are detained because of their ethnicity, and because they are regarded by their captors as operating on behalf of the enemy. In these circumstances, the formal national link with Bosnia and Herzegovina cannot be raised before an international tribunal to deny the victims the protection of humanitarian law. It may be added that the government of Bosnia and Herzegovina itself did not oppose the prosecution of Bosnian nationals for acts of violence against other Bosnians based

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upon the grave breaches regime.[102]

80. It is noteworthy that, although the appellants emphasised that the "nationality " referred to in Geneva Convention IV is to be understood as referring to the legal citizenship under domestic law, they accepted at the hearing that in the former Yugoslavia "nationality", in everyday conversation, refers to ethnicity.[103]

81. The Appeals Chamber agrees with the Prosecution that depriving victims, who arguably are of the same nationality under domestic law as their captors, of the protection of the Geneva Conventions solely based on that national law would not be consistent with the object and purpose of the Conventions. Their very object could indeed be defeated if undue emphasis were placed on formal legal bonds, which could also be altered by governments to shield their nationals from prosecution based on the grave breaches provisions of the Geneva Conventions. A more purposive and realistic approach is particularly apposite in circumstances of the dissolution of Yugoslavia, and in the emerging State of Bosnia and Herzegovina where various parties were engaged in fighting, and the government was opposed to a partition based on ethnicity, which would have resulted in movements of population, and where , ultimately, the issue at stake was the final shape of the State and of the new emerging entities.

82. In *Tadic*, the Appeals Chamber, relying on a teleological approach, concluded that formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds:

> This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance.[104]

83. As found in previous Appeals Chamber jurisprudence, Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of "the substance of relations"[105] and not based on the legal characterisation under domestic legislation. In today's ethnic conflicts, the victims may be "assimilated" to the external State involved in the conflict, even if they formally have the same nationality as their captors , for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the *Tadic* Appeal Judgement that "even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable".[106]

84. Applying the principle enunciated in *Aleksovski*, the Appeals Chamber sees no cogent reasons in the interests of justice to depart from the *Tadic* Appeal Judgement. The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State.

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85. It is therefore necessary to consider the findings of the Trial Chamber to ascertain whether it applied these principles correctly.

2. Did the Trial Chamber Apply the Correct Legal Principles?

86. As in the section relating to the nature of the conflict, the Appeals Chamber first notes that the *Tadic* Appeal Judgement, which set forth the law applicable to the determination of protected person status, had not been issued at the time of the issue of the Trial Judgement. The Appeals Chamber will thus consider whether the Trial Chamber, although having not, from a formal viewpoint, applied the reasoning of the Appeals Chamber in the *Tadic* Appeal Judgement, based its conclusions on legal reasoning consistent with it.

87. The issue before the Trial Chamber was whether the Bosnian Serb victims in the hands of Bosnian Muslims and Bosnian Croats could be regarded as protected persons , *i.e.,* as having a different nationality from that of their captors.

88. The appellants argue that the Bosnian Serb victims detained in the Celebici camp were clearly nationals of Bosnia and Herzegovina, and cannot be considered as FRY nationals. Thus, the victims could not be considered as "protected persons ". The Prosecution on the other hand contends that the test applied by the Trial Chamber was consistent with the *Tadic* Appeal Judgement.

89. It is first necessary to address a particular argument before turning to an examination of the Trial Chamber's findings. Delalic submits, contrary to the Prosecution's assertions, the *Tadic* Appeal Judgement does not govern the protected persons issue in this case, because the facts of the two cases are dramatically different .[107] The Appeals Chamber in *Aleksovski* observed that the principle that the Appeals Chamber will follow its previous decisions "only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision".[108]

90. In *Tadic* and *Aleksovski* the perpetrators were regarded as acting on behalf of an external party, the FRY and Croatia respectively, and the Bosnian Muslim victims were considered as protected persons by virtue of the fact that they did not have the nationality of the party in whose hands they found themselves. By contrast, in this case, where the accused are Bosnian Muslim or Bosnian Croat , no finding was made that they were acting on behalf of a foreign State, whereas the Bosnian Serb victims could be regarded as having links with the party (the Bosnian Serb armed forces) acting on behalf of a foreign State (the FRY). However, although the factual circumstances of these cases are different, the legal principle which is applicable to the facts is identical. The Appeals Chamber therefore finds the appellant's argument unconvincing.

91. The Trial Chamber found that the Bosnian Serb victims could be regarded "as having been in the hands of a party to the conflict of which they were not nationals , being Bosnian Serbs detained during an international armed conflict by a party to that conflict, the State of Bosnia and Herzegovina".[109] The Trial Chamber essentially relied on a broad and purposive approach to reach its conclusion, rejecting the proposition that a determination of the nationality of the victims should be based on the domestic laws on citizenship.

92. The Trial Chamber first emphasised the role played by international law in relation to nationality,[110] holding that "the International Tribunal may choose to refuse to recognise (or give

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effect to) a State's grant of its nationality to individuals for the purposes of applying international law".[111] It then nevertheless found that "[a]n analysis of the relevant laws on nationality in Bosnia and Herzegovina in 1992 does not, however, reveal a clear picture. At that time, as we have discussed , the State was struggling to achieve its independence and all the previous structures of the SFRY were dissolving. In addition, an international armed conflict was tearing Bosnia and Herzegovina apart and the very issue which was being fought over concerned the desire of certain groups within its population to separate themselves from that State and join with another".[112] The Trial Chamber also noted that "the Bosnian Serbs, in their purported constitution of the SRBH, proclaimed that citizens of the Serb Republic were citizens of Yugoslavia ".[113]

93. The Trial Chamber also declined to rely upon the argument presented by the Prosecution's expert Professor Economides that there is an emerging doctrine in international law of the right to the nationality of one's own choosing. Finding that the principle of a right of option was not a settled rule of international law, the Trial Chamber held that this principle could not be, of itself, determinative in viewing the Bosnian Serbs to be non-nationals of Bosnia and Herzegovina.[114]

94. The Trial Chamber discussed the nationality link in the light of the *Nottebohm* case and concluded:

> Assuming that Bosnia and Herzegovina had granted its nationality to the Bosnian Serbs, Croats and Muslims in 1992, there may be an insufficient link between the Bosnian Serbs and that State for them to be considered Bosnian nationals by this Trial Chamber in the adjudication of the present case. The granting of nationality occurred within the context of the dissolution of a State and a consequent armed conflict. Furthermore, the Bosnian Serbs had clearly expressed their wish not to be nationals of Bosnia and Herzegovina by proclaiming a constitution rendering them part of Yugoslavia and engaging in this armed conflict in order to achieve that aim. Such finding would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose. It would also be in the spirit of that law by rendering it as widely applicable as possible.[115]

95. In the light of its finding on the international character of the conflict, the Trial Chamber held that it is "possible to regard the Bosnian Serbs as acting on behalf of the FRY in its continuing armed conflict against the authorities of Bosnia and Herzegovina".[116] The Bosnian Serb victims could thus be considered as having a different nationality from that of their captors.

96. That the Trial Chamber relied upon a broad and purposive, and ultimately realistic , approach[117] is indicated by the following references which concluded its reasoning:

> [T]his Trial Chamber wishes to emphasise the necessity of considering the requirements of article 4 of the Fourth Geneva Convention in a more flexible manner. The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which ensue from such events. The Commentary to the Fourth Geneva Convention charges us not to forget that "the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests" and thus it is the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible. It would indeed be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it

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> had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law.[118]

97. The Appeals Chamber finds that the legal reasoning adopted by the Trial Chamber is consistent with the *Tadic* reasoning. The Trial Chamber rejected an approach based upon formal national bonds in favour of an approach which accords due emphasis to the object and purpose of the Geneva Conventions.[119] At the same time, the Trial Chamber took into consideration the realities of the circumstances of the conflict in Bosnia and Herzegovina, holding that "[t]he law must be applied to the reality of the situation".[120] Although in some respects the legal reasoning of the Trial Chamber may appear to be broader than the reasoning adopted by the Appeals Chamber, this Appeals Chamber is satisfied that the conclusions reached fall within the scope of the *Tadic* reasoning. As submitted by the Prosecution,[121] the Trial Chamber correctly sought to establish whether the victims could be regarded as belonging to the opposing side of the conflict.

98. The Appeals Chamber particularly agrees with the Trial Chamber's finding that the Bosnian Serb victims should be regarded as protected persons for the purposes of Geneva Convention IV because they "were arrested and detained mainly on the basis of their Serb identity" and "they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State".[122]

99. The Trial Chamber's holding that its finding "would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose"[123] also follows closely the Appeals Chamber's position that the legal test to ascertain the nationality of the victims is applicable within the limited context of humanitarian law, and for the specific purposes of the application of Geneva Convention IV in cases before the Tribunal. Landzo submitted in his brief that the Trial Chamber's finding suggests that a person can have one nationality for the purposes of national law, and another for purposes of international law, which, in his opinion, is contrary to international law. He also contended that the Trial Chamber's holding involuntarily deprives all Bosnian Serbs of their nationality. The argument that the Trial Chamber's findings have the consequence of regulating the nationality of the victims in the national sphere is unmeritorious. It should be made clear that the conclusions reached by international judges in the performance of their duties do not have the effect of regulating the nationality of these persons *vis à vis* the State within the national sphere. Nor do they purport to pronounce on the internal validity of the laws of Bosnia and Herzegovina. The Appeals Chamber agrees with the Prosecution that the Trial Chamber did not act unreasonably in not giving weight to the evidence led by the Defence concerning the nationality of the particular victims under domestic law.

100. The appellants submit arguments based upon the "effective link" test derived from the ICJ case *Nottebohm*.[124] In their view, the following indicia should be taken into consideration when assessing the nationality link of the victims with the FRY: place of birth, of education, of marriage, of vote, and habitual residence; the latter being, they submit, the most important criterion.

101. The *Nottebohm* case was concerned with ascertaining the effects of the national link for the purposes of the exercise of diplomatic protection, whereas in the instant case, the Appeals Chamber is faced with the task of determining whether the victims could be considered as having the nationality of a foreign State involved in the conflict, for the purposes of their protection under

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humanitarian law. It is thus irrelevant to demonstrate, as argued by the appellants, that the victims and their families had their habitual residence in Bosnia and Herzegovina, or that they exercised their activities there. Rather, the issue at hand, in a situation of internationalised armed conflict, is whether the victims can be regarded as not sharing the same nationality as their captors, for the purposes of the Geneva Conventions , even if arguably they were of the same nationality from a domestic legal point of view.

102. Although the Trial Chamber referred to the *Nottebohm* "effective link " test in the course of its legal reasoning, its conclusion as to the nationality of the victims for the purposes of the Geneva Conventions did not depend on that test. The Trial Chamber emphasised that "operating on the international plane, the International Tribunal may choose to refuse to recognise (or give effect to) a State's grant of its nationality to individuals for the purposes of applying international law".[125] Further, the Trial Chamber when assessing the nationality requirement clearly referred to the specific circumstances of the case and to the specific purposes of the application of humanitarian law.

103. Delalic further submitted that the Trial Chamber altered international law in relying upon the "secessionist activities" of the Bosnian Serbs to reach its conclusion, as the right to self-determination is not recognised in international law.[126]

104. It is irrelevant to determine whether the activities with which the Bosnian Serbs were associated were in conformity with the right to self-determination or not. As previously stated, the question at issue is not whether this activity was lawful or whether it is in compliance with the right to self-determination. Rather , the issue relevant to humanitarian law is whether the civilians detained in the Celebici camp were protected persons in accordance with Geneva Convention IV.

105. Delic also submits that the Trial Chamber's finding that the Bosnian Serb victims were not Bosnian nationals is at odds with its factual conclusions that Bosnian Serbs were Bosnian citizens for the purpose of determining the existence of an international armed conflict.[127] This argument has no merit. Contrary to the Appellant's contention, the findings of the Trial Chamber are not contradictory. In finding that the conflict which took place in Bosnia and Herzegovina was of an international character, the Trial Chamber merely concluded that a foreign State was involved and was supporting one of the parties in a conflict that was *prima facie* internal. This finding did not purport to make a determination as to the nationality of the party engaged in fighting with the support of the foreign State.

3. Conclusion

106. The Appeals Chamber finds that the legal reasoning applied by the Trial Chamber is consistent with the applicable legal principles identified in the *Tadic* Appeal Judgement. For the purposes of the application of Article 2 of the Statute to the present case, the Bosnian Serb victims detained in the Celebici camp must be regarded as having been in the hands of a party to the conflict, Bosnia and Herzegovina , of which they were not nationals. The appellants' grounds of appeal therefore fail.

C. Whether Bosnia and Herzegovina was a Party to the Geneva Conventions at the Time of the Events Alleged in the Indictment

107. Delic challenges the Trial Chamber's findings of guilt based on Article 2 of the Statute, which vests the Tribunal with the jurisdiction to prosecute grave breaches of the 1949 Geneva

Conventions. Delic contends that because Bosnia and Herzegovina did not "accede" to the Geneva Conventions until 31 December 1992, *i.e.*, after the events alleged in the Indictment, his acts committed before that date cannot be prosecuted under the treaty regime of grave breaches.[128] Delic also argues that the Geneva Conventions do not constitute customary law. Therefore , in his opinion, the application of the Geneva Conventions to acts which occurred before the date of Bosnia and Herzegovina's "accession" to them would violate the principle of legality or *nullem crimen sine lege*.[129] All counts based on Article 2 of the Statute in the Indictment should, he argues , thus be dismissed.

108. The Prosecution contends that regardless of whether or not Bosnia and Herzegovina was bound by the Geneva Conventions *qua* treaty obligations at the relevant time, the grave breaches provisions of the Geneva Conventions reflected customary international law at all material times.[130] Further, Bosnia and Herzegovina was bound by the Geneva Conventions as a result of their instrument of succession deposited on 31 December 1992, which took effect on the date on which Bosnia and Herzegovina became independent, 6 March 1992.[131]

109. The Appeals Chamber first takes note of the "declaration of succession" deposited by Bosnia and Herzegovina on 31 December 1992 with the Swiss Federal Council in its capacity as depositary of the 1949 Geneva Conventions.

110. Bosnia and Herzegovina's declaration of succession may be regarded as a "notification of succession" which is now defined by the 1978 Vienna Convention on Succession of States in Respect of Treaties as "any notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty".[132] Thus, in the case of the replacement of a State by several others, "a newly independent State which makes a notification of succession [...] shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.[133] The date of 6 March 1992 is generally accepted as the official date of Bosnia and Herzegovina's independence (when it became a sovereign State) and it may be considered that it became an official party to the Geneva Conventions from this date.[134] Indeed, the Swiss Federal Council subsequently notified the State parties to the Geneva Conventions that Bosnia and Herzegovina "became a party to the Conventions [...] at the date of its independence, i.e. on 6 March 1992".[135] In this regard, the argument put forward by the appellants appears to confuse the concepts of "accession" and "succession".

111. Although Article 23(2) of the Convention also provides that pending notification of succession, the operation of the treaty in question shall be considered "suspended " between the new State and other parties to the treaty, the Appeals Chamber finds that in the case of this type of treaty, this provision is not applicable. This is because, for the following reasons, the Appeals Chamber confirms that the provisions applicable are binding on a State from creation. The Appeals Chamber is of the view that irrespective of any findings as to formal succession, Bosnia and Herzegovina would in any event have succeeded to the Geneva Conventions under customary law, as this type of convention entails automatic succession, *i.e.*, without the need for any formal confirmation of adherence by the successor State. It may be now considered in international law that there is automatic State succession to multilateral humanitarian treaties in the broad sense, *i.e.*, treaties of universal character which express fundamental human rights.[136] It is noteworthy that Bosnia and Herzegovina itself recognised this principle before the ICJ.[137]

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112. It is indisputable that the Geneva Conventions fall within this category of universal multilateral treaties which reflect rules accepted and recognised by the international community as a whole. The Geneva Conventions enjoy nearly universal participation.[138]

113. In light of the object and purpose of the Geneva Conventions, which is to guarantee the protection of certain fundamental values common to mankind in times of armed conflict, and of the customary nature of their provisions,[139] the Appeals Chamber is in no doubt that State succession has no impact on obligations arising out from these fundamental humanitarian conventions. In this regard, reference should be made to the Secretary-General's Report submitted at the time of the establishment of the Tribunal, which specifically lists the Geneva Conventions among the international humanitarian instruments 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".[140] The Appeals Chamber finds further support for this position in the *Tadic* Jurisdiction Decision .[141]

114. For these reasons the Appeals Chamber finds that there was no gap in the protection afforded by the Geneva Conventions, as they, and the obligations arising therefrom , were in force for Bosnia and Herzegovina at the time of the acts alleged in the Indictment.

115. The Appeals Chamber dismisses this ground of appeal.

III. GROUNDS OF APPEAL RELATING TO ARTICLE 3 OF THE STATUTE

116. Delalic,[142] Mucic[143] and Delic[144] challenge the Trial Chamber's findings that (1) offences within common Article 3 of the Geneva Conventions of 1949 are encompassed within Article 3 of the Statute; (2) common Article 3 imposes individual criminal responsibility; and (3) that common Article 3 is applicable to international armed conflicts. The appellants argue that the Appeals Chamber should not follow its previous conclusions in the *Tadic* Jurisdiction Decision , which, it is submitted, was wrongly decided. That Decision determined that violations of common Article 3 were subjected to the Tribunal's jurisdiction under Article 3 of its Statute, and that, as a matter of customary law, common Article 3 was applicable to both internal and international conflicts and entailed individual criminal responsibility . The Prosecution submits that the appellants' grounds should be rejected because they are not consistent with the *Tadic* Jurisdiction Decision, which the Appeals Chamber should follow. The Prosecution contends that the grounds raised by the appellants for reopening the Appeals Chamber's previous reasoning are neither founded nor sufficient.

117. As noted by the parties, the issues raised in this appeal were previously addressed by the Appeals Chamber in the *Tadic* Jurisdiction Decision. In accordance with the principle set out in the *Aleksovski* Appeal Judgement, as enunciated in paragraph 8 of this Judgement, the Appeals Chamber will follow its *Tadic* jurisprudence on the issues, unless there exist cogent reasons in the interests of justice to depart from it.

118. The grounds presented by the appellants raise three different issues in relation to common Article 3 of the Geneva Conventions: (1) whether common Article 3 falls within the scope of Article 3 of the Tribunal's Statute; (2) whether common Article 3 is applicable to international armed conflicts; (3) whether common Article 3 imposes individual criminal responsibility. After reviewing the *Tadic* Jurisdiction Decision in respect of each of these issues to determine whether there exist cogent reasons to depart from it, the Appeals Chamber will turn to an analysis of the

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Trial Judgement to ascertain whether it applied the correct legal principles in disposing of the issues before it.

119. As a preliminary issue, the Appeals Chamber will consider one of the appellants' submissions concerning the status of the *Tadic* Jurisdiction Decision, which is relevant to the discussion of all three issues.

120. In their grounds of appeal, the appellants invite the Appeals Chamber to reverse the position it took in the *Tadic* Jurisdiction Decision concerning the applicability of common Article 3 of the Geneva Conventions under Article 3 of the Statute, and thus to revisit the issues raised. Delalic *inter alia* submits that the Appeals Chamber did not conduct a rigorous analysis at the time (suggesting also that there is a difference in nature between interlocutory appeals and post-judgement appeals) and that many of the issues raised now were not briefed or considered in the *Tadic* Jurisdiction Decision.[145] In the appellants' view, the Decision was rendered *per incuriam*.[146] Such a reason affecting a judgement was envisaged in the *Aleksovski* Appeal Judgement as providing a basis for departing from an earlier decision.[147]

121. As to the contention that the arguments which the appellants make now were not before the Appeals Chamber in *Tadic*, the Prosecution submits that it is not the case that they were not considered in the *Tadic* Jurisdiction Decision : the essence of most of the arguments now submitted by the appellants was addressed and decided by the Appeals Chamber in that Decision. In relation to the argument that the *Tadic* Jurisdiction Decision was not based on a rigorous analysis , the Prosecution submits that that Decision contains detailed reasoning and that issues decided in an interlocutory appeal should not be regarded as having any lesser status than a decision of the Appeals Chamber given after the Trial Chamber's judgement . Further, the Decision was not given *per incuriam*, as the Appeals Chamber focused specifically on this issue, the arguments were extensive and many authorities were referred to.[148] In the Prosecution's submission, there are therefore no reasons to depart from it.

122. This Appeals Chamber is of the view that there is no reason why interlocutory decisions of the Appeals Chamber should be considered, as a matter of principle, as having any lesser status than a final decision on appeal. The purpose of an appeal, whether on an interlocutory or on a final basis, is to determine the issues raised with finality.[149] There is therefore no basis in the interlocutory status of the *Tadic* Jurisdiction Decision to consider it as having been made *per incuriam.*

A. Whether Common Article 3 of the Geneva Conventions Falls Within the Scope of Article 3 of the Statute

1. What is the Applicable Law?

123. Article 3 of the Statute entitled "Violations of the Laws or Customs of War " reads:

> 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

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military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings , or buildings;

(d) seizure of, destruction or wilful damage done to institutions dedicated to religion , charity and education, the arts and science, historic monuments and works of art and science;

(e) plunder of public or private property.

124. Common Article 3 of the Geneva Conventions provides in relevant parts that:

> 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 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 recognised as indispensable by civilised peoples.
> >
> > (2) The wounded and the sick shall be collected and cared for.

125. In relation to the scope of Article 3 of the Statute, the Appeals Chamber in the *Tadic* Jurisdiction Decision held that Article 3 "is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 and 5".[150] It went on:

> Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2 , 4 or 5.

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> 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.[151]

126. The conclusion of the Appeals Chamber was based on a careful analysis of the Secretary-General's Report. The Appeals Chamber *inter alia* emphasised that the Secretary-General acknowledged that the Hague Regulations, annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, which served as a basis for Article 3 of the Statute, "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 the hostilities (prisoners of war), but also the conduct of hostilities".[152] The Appeals Chamber noted that, although the Secretary-General's Report subsequently indicated "that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions", Article 3 contains the phrase "shall include but not be limited to".[153] The Appeals Chamber concluded: "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."[154]

127. In support of its conclusion, the Appeals Chamber also relied on statements made by States in the Security Council at the time of the adoption of the Statute of the Tribunal, which "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".[155] The Appeals Chamber also relied on a teleological approach in its analysis of the provisions of the Statute. Reference was also made to the context and purpose of the Statute as a whole, and in particular to the fact that the Tribunal was established to prosecute "serious violations of international humanitarian law".[156] It continued: "Thus, if correctly interpreted, Article 3 fully realises 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".[157] The Appeals Chamber concluded that Article 3 is intended to incorporate violations of both Hague (conduct of war) and Geneva (protection of victims) law[158] provided that certain conditions, *inter alia* relating to the customary status of the rule, are met.[159]

128. The Appeals Chamber then went on to specify four requirements that must be met in order for a violation of international humanitarian law to be subject to Article 3 of the Statute.[160] The Appeals Chamber then considered the question of which such violations, when committed in internal conflicts, met these requirements. It discussed in depth the existence of customary international humanitarian rules applicable to internal conflicts, and found that State practice had developed since the 1930s, to the effect that customary rules exist applicable to non-international conflicts. These rules include common Article 3 but also go beyond it to include rules relating to the methods of warfare.[161]

129. The Appeals Chamber will now turn to the arguments of the appellants which discuss the *Tadic* Jurisdiction Decision conclusions in order to determine whether there exist cogent reasons in the interests of justice to depart from them .

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130. In support of their submission that violations of common Article 3 are not within the jurisdiction of the Tribunal, the appellants argue that in adopting Article 3 of the Statute, the Security Council never intended to permit prosecutions under this Article for violations of common Article 3,[162] and, had the Security Council intended to include common Article 3 within the ambit of Article 3, it would have expressly included it in Article 2 of the Statute, which deals with the law related to the protection of victims. In their opinion, an analysis of Article 3 of the Statute shows that it is limited to Hague law. A related argument presented by the appellants is that Article 3 can only be expanded to include offences which are comparable and lesser offences than those already listed, and not to include offences of much greater magnitude and of a completely different character. In support of their argument, the appellants also rely on a comparison of the ICTY and ICTR Statutes, as Article 4 of the ICTR Statute *explicitly* includes common Article 3.[163] The appellants further argue that the Security Council viewed the conflict taking place in the former Yugoslavia as international, and accordingly provided for the prosecution of serious violations of humanitarian law in the context of an international conflict only.[164] The Prosecution submits that the Appeals Chamber should follow its previous conclusion in the *Tadic* Jurisdiction Decision.

131. As to the appellants' argument based on the intention of the Security Council , the Appeals Chamber is of the view that the Secretary-General's Report and the statements made by State representatives in the Security Council at the time of the adoption of the Statute, as analysed in *Tadic*, clearly support a conclusion that the list of offences listed in Article 3 was meant to cover violations of *all* of the laws or customs of war, understood broadly, in addition to those mentioned in the Article by way of example. Recourse to interpretative statements made by States at the time of the adoption of a resolution may be appropriately made by an international court when ascertaining the meaning of the text adopted , as they constitute an important part of the legislative history of the Statute .[165] These statements may shed light on some aspects of the drafting and adoption of the Statute as well as on its object and purpose, when no State contradicts that interpretation, as noted in *Tadic* .[166] This is consistent with the accepted rules of treaty interpretation.[167]

132. The Appeals Chamber is similarly unconvinced by the appellants' submission that it is illogical to incorporate violations of common Article 3 which are "Geneva law" rules, within Article 3 which covers "Hague law" rules. The Appeals Chamber in *Tadic* discussed the evolution of the meaning of the expression "war crimes ". It found that war crimes have come to be understood as covering both Geneva and Hague law, and that violations of the laws or customs of war cover both types of rules. The traditional law of warfare concerning the protection of persons (both taking part and not taking part in hostilities) and property is now more correctly termed "international humanitarian law" and has a broader scope, including, for example, the Geneva Conventions.[168] The ICRC Commentary (GC IV) indeed stated that "the Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are commonly called war crimes".[169] Further, Additional Protocol I contains rules of both Geneva and Hague origin.[170]

133. Recent confirmation that a strict separation between Hague and Geneva law in contemporary international humanitarian law based on the "type" of rules is no longer warranted may be found in Article 8 of the ICC Statute. This Article covers "War crimes" generally, namely grave breaches and "other serious violations of the laws and customs of war applicable in international armed conflict"; violations of common Article 3 in non-international armed conflicts; and "other serious violations of the laws and customs of war applicable in non-international armed conflict". The Appeals Chamber thus confirms the view expressed in the *Tadic* Appeal Judgement that the expression "laws and customs of war" has evolved to encompass violations of Geneva law at the

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time the alleged offences were committed, and that consequently , Article 3 of the Statute may be interpreted as intending the incorporation of Geneva law rules. It follows that the appellants' argument that violations of common Article 3 cannot be included in Article 3 as they are of a different fails.

134. Turning next to the appellants' argument that common Article 3 would more logically be incorporated in Article 2 of the Statute, the Appeals Chamber observes that the Geneva Conventions themselves make a distinction between the grave breaches and other violations of their provisions. The offences enumerated in common Article 3 may be considered as falling into the category of other serious violations of the Geneva Conventions, and are thus included within the general clause of Article 3. There is thus no apparent inconsistency in not including them in the scope of Article 2 of the Statute. This approach based on a distinction between the grave breaches of the Geneva Conventions and other serious violations of the Conventions , has also later been followed in the ICC Statute.[171]

135. As will be discussed below, the appellants' argument that the Security Council viewed the conflict as international, even if correct, would not be determinative of the issue, as the prohibitions listed under common Article 3 are also applicable to international conflicts. It is, however, appropriate to note here that the Appeals Chamber does not share the view of the appellants that the Security Council and the Secretary-General determined that the conflict in the former Yugoslavia at the time of the creation of the Tribunal was international. In the Appeals Chamber's view, the Secretary-General's Report does not take a position as to whether the various conflicts within the former Yugoslavia were international in character for purposes of the applicable law as of a particular date. The Statute was worded neutrally. Article 1 of the Statute entitled "Competence of the International Tribunal " vests the Tribunal with the power to prosecute "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991", making no reference to the nature of the conflict.[172] This supports the interpretation that the Security Council in adopting the Statute was of the view that the question of the nature of the conflict should be judicially determined by the Tribunal itself, the issue involving factual and legal questions .

136. The Appeals Chamber thus finds no cogent reasons in the interests of justice to depart from its previous jurisprudence concerning the question of whether common Article 3 of the Geneva Conventions is included in the scope of Article 3 of the Statute.

2. Did the Trial Chamber Follow the *Tadic* Jurisdiction Decision?

137. The Trial Chamber generally relied on the *Tadic* Jurisdiction Decision as it found "no reason to depart" from it.[173] That the Trial Chamber accepted that common Article 3 is incorporated in Article 3 of the Statute appears clearly from the following findings. The Trial Chamber referred to paragraphs 87 and 91 of the *Tadic* Jurisdiction Decision to describe the "division of labour between Articles 2 and 3 of the Statute".[174] The Trial Chamber went on to hold that "this Trial Chamber is in no doubt that the intention of the Security Council was to ensure that all serious violations of international humanitarian law, committed within the relevant geographical and temporal limits , were brought within the jurisdiction of the International Tribunal."[175]

138. In respect of the customary status of common Article 3, the Trial Chamber found :

> While in 1949 the insertion of a provision concerning internal armed conflicts into the

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> Geneva Conventions may have been innovative, there can be no question that the protections and prohibitions enunciated in that provision have come to form part of customary international law. As discussed at length by the Appeals Chamber, a corpus of law concerning the regulation of hostilities and protection of victims in internal armed conflicts is now widely recognised.[176]

139. The Appeals Chamber therefore finds that the Trial Chamber correctly adopted the Appeals Chamber's statement of the law in disposing of this issue.

B. Whether Common Article 3 is Applicable to International Armed Conflicts

1. What is the Applicable Law?

140. In the course of its discussion of the existence of customary rules of international humanitarian law governing internal armed conflicts, the Appeals Chamber in the *Tadic* Jurisdiction Decision observed a tendency towards the blurring of the distinction between interstate and civil wars as far as human beings are concerned .[177] It then found that some treaty rules, and common Article 3 in particular, which constitutes a mandatory minimum code applicable to internal conflicts, had gradually become part of customary law . In support of its position that violations of common Article 3 are applicable regardless of the nature of the conflict, the Appeals Chamber referred to the ICJ holding in *Nicaragua* that the rules set out in common Article 3 reflect " elementary considerations of humanity" applicable under customary international law to any conflict.[178] The ICJ in *Nicaragua* discussed the customary status of common Article 3 to the Geneva Conventions and held:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character . There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22; paragraph 215).[179]

Thus, relying on *Nicaragua*, the Appeals Chamber concluded:

> Therefore at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.[180]

141. The Appeals Chamber also considered that the procedural mechanism, provided for in common Article 3,[181] inviting parties to internal conflicts to agree to abide by the rest of the Conventions, "reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict."[182] The Appeals Chamber also found that General Assembly resolutions corroborated the existence of certain rules of war concerning the protection of civilians and property applicable in both internal and international armed conflicts.[183]

142. Referring to the *Tadic* Jurisdiction Decision, which the Trial Chamber followed, Delalic argues that the Appeals Chamber failed to properly consider the status of common Article 3, and in particular failed to analyse state practice and *opinio juris*, in support of its conclusion that it was, as a matter of customary international law, applicable to international armed conflicts. Further, in

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his opinion, the findings of the ICJ on the customary status of common Article 3 and its applicability to both internal and international conflicts are *dicta*.[184] The Prosecution is of the view that, as stated by the ICJ in *Nicaragua*, it is because common Article 3 gives expression to elementary considerations of humanity , which are applicable irrespective of the nature of the conflict, that common Article 3 is applicable to international conflicts.[185]

143. It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles.[186] These principles were codified in common Article 3 to constitute the minimum core applicable to internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts.[187] In the words of the ICRC, the purpose of common Article 3 was to "ensur(e) respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself".[188] These rules may thus be considered as the "quintessence" of the humanitarian rules found in the Geneva Conventions as a whole.

144. It is these very principles that the ICJ considered as giving expression to fundamental standards of humanity applicable in *all* circumstances.

145. That these standards were considered as reflecting the principles applicable to the Conventions in their entirety and as constituting substantially similar core norms applicable to both types of conflict is clearly supported by the ICRC Commentary (GC IV):

> This minimum requirement in the case of non-international conflict, is *a fortiori* applicable in international armed conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built.[189]

146. This is entirely consistent with the logic and spirit of the Geneva Conventions ; it is a "logical application of its fundamental principle".[190] Specifically, in relation to the substantive rules set out in subparagraphs (1) (a)-(d) of common Article 3, the ICRC Commentary continues:

> The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser", as one might say.[191]

147. Common Article 3 may thus be considered as the "minimum yardstick"[192] of rules of international humanitarian law of similar substance applicable to both internal and international conflicts. It should be noted that the rules applicable to international conflicts are not limited to the minimum rules set out in common Article 3, as international conflicts are governed by more detailed rules. The rules contained in common Article 3 are considered as applicable to international conflicts because they constitute the core of the rules applicable to such conflicts . There can be no doubt that the acts enumerated in *inter alia* subparagraphs (a), violence to life,

and (c), outrages upon personal dignity, are heinous acts "which the world public opinion finds particularly revolting".[193] These acts are also prohibited in the grave breaches provisions of Geneva Convention IV, such as Article 147. Article 75 of Additional Protocol I, applicable to international conflicts, also provides a minimum of protection to any person unable to claim a particular status. Its paragraph 75(2) is directly inspired by the text of common Article 3.

148. This interpretation is further confirmed by a consideration of other branches of international law, and more particularly of human rights law.

149. Both human rights and humanitarian law focus on respect for human values and the dignity of the human person. Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity. The ICRC Commentary on the Additional Protocols refers to their common ground in the following terms: "This irreducible core of human rights , also known as 'non-derogable rights' corresponds to the lowest level of protection which can be claimed by anyone at anytime [...]".[194] The universal and regional human rights instruments[195] and the Geneva Conventions share a common "core" of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted. The object of the fundamental standards appearing in both bodies of law is the protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances.[196]

150. It is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts , in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber's view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader. The Appeals Chamber is thus not convinced by the arguments raised by the appellants and finds no cogent reasons to depart from its previous conclusions.

2. Did the Trial Chamber Follow the *Tadic* Jurisdiction Decision?

151. The Trial Chamber found:

> 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 conflicts. 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 conflicts . 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.[197]

152. The Trial Chamber therefore clearly followed the Appeals Chamber jurisprudence .

C. Whether Common Article 3 Imposes Individual Criminal Responsibility

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1. What is the Applicable Law?

153. The Appeals Chamber in the *Tadic* Jurisdiction Decision, in analysing whether common Article 3 attracts individual criminal responsibility first noted that "common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions".[198] Referring however to the findings of the International Military Tribunal at Nuremberg [199] that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches, provided certain conditions are fulfilled, it found:

> 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 conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognised as the mandatory minimum for conduct in armed conflict of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition .[200]

154. In the Appeals Chamber's opinion, this conclusion was also supported by "many elements of international practice (which) show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts".[201] Specific reference was made to prosecutions before Nigerian courts,[202] national military manuals,[203] national legislation (including the law of the former Yugoslavia adopted by Bosnia and Herzegovina after its independence),[204] and resolutions adopted unanimously by the Security Council.[205]

155. The Appeals Chamber found further support for its conclusion in the law of the former Yugoslavia as it stood at the time of the offences alleged in the Indictment :

> 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.[206]

156. Reliance was also placed by the Appeals Chamber on the agreement reached under the auspices of the ICRC on 22 May 1992, in order to conclude that the breaches of international law occurring within the context of the conflict, regarded as internal by the agreement, could be criminally sanctioned.[207]

157. The appellants contend that the evidence presented in the *Tadic* Jurisdiction Decision does not establish that common Article 3 is customary international law that creates individual criminal responsibility because there is no showing of State practice and *opinio juris*.[208] Additionally, the appellants submit that at the time of the adoption of the Geneva Conventions in 1949, common Article 3 was excluded from the grave breaches system and thus did not fall within the scheme providing for individual criminal responsibility .[209] In their view, the position had not changed at the time of the adoption of Additional Protocol II in 1977. It is further argued that common Article 3 imposes duties on States only and is meant to be enforced by domestic legal systems.[210]

158. In addition, the appellants argue that solid evidence exists which demonstrates that common Article 3 is *not* a rule of customary law which imposes liability on natural persons.[211] Particular

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emphasis is placed on the ICTR Statute and the Secretary-General's Report which states that common Article 3 was criminalised for the first time in the ICTR Statute .[212]

159. The Prosecution argues that the *Tadic* Jurisdiction Decision previously disposed of the issue and should be followed. The Prosecution submits that, if violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why once those laws came to be extended to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of clear indications to the contrary.[213] It is further submitted that since 1949, customary law and international humanitarian law have developed to such an extent that today universal jurisdiction does not only exist in relation to the grave breaches of the Geneva Conventions but also in relation to other types of serious violations of international humanitarian law .[214] The Prosecution contends that this conclusion is not contrary to the principle of legality, which does not preclude development of criminal law, so long as those developments do not criminalise conduct which at the time it was committed could reasonably have been regarded as legitimate .[215]

160. Whereas, as a matter of strict treaty law, provision is made only for the prosecution of grave breaches committed within the context of an international conflict, the Appeals Chamber in *Tadic* found that as a matter of customary law, breaches of international humanitarian law committed in internal conflicts, including violations of common Article 3, could also attract individual criminal responsibility.

161. Following the appellants' argument, two different regimes of criminal responsibility would exist based on the different legal characterisation of an armed conflict. As a consequence, the same horrendous conduct committed in an internal conflict could not be punished. The Appeals Chamber finds that the arguments put forward by the appellants do not withstand scrutiny.

162. As concluded by the Appeals Chamber in *Tadic*, the fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule. The IMT indeed followed a similar approach, as recalled in the *Tadic* Jurisdiction Decision when the Appeals Chamber found that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.[216] The Nuremberg Tribunal clearly established that individual acts prohibited by international law constitute criminal offences even though there was no provision regarding the jurisdiction to try violations: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[217]

163. The appellants argue that the exclusion of common Article 3 from the Geneva Conventions grave breaches system, which provides for universal jurisdiction, has the necessary consequence that common Article 3 attracts no individual criminal responsibility. This is misconceived. In the Appeals Chamber's view, the appellants' argument fails to make a distinction between two separate issues, the issue of criminalisation on the one hand, and the issue of jurisdiction on the other. Criminalisation may be defined as the act of outlawing or making illegal certain behaviour.[218] Jurisdiction relates more to the judicial authority to prosecute those criminal acts. These two concepts do not necessarily always correspond. The Appeals Chamber is in no doubt that the acts enumerated in common Article 3 were intended to be criminalised in 1949, as they were clearly intended to be illegal within the international legal order. The language of common Article 3 clearly prohibits fundamental offences such as murder and torture. However, no

jurisdictional or enforcement mechanism was provided for in the Geneva Conventions at the time.

164. This interpretation is supported by the provisions of the Geneva Conventions themselves, which impose on State parties the duty "to respect and ensure respect for the present Conventions in all circumstances".[219] Common Article 1 thus imposes upon State parties, upon ratification, an obligation to implement the provisions of the Geneva Conventions in their domestic legislation . This obligation clearly covers the Conventions in their entirety and this obligation thus includes common Article 3. The ICJ in the *Nicaragua* case found that common Article 1 also applies to internal conflicts.[220]

165. In addition, the third paragraph of Article 146 of Geneva Convention IV, after setting out the universal jurisdiction mechanism applicable to grave breaches, provides :

> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

166. The ICRC Commentary (GC IV) stated in relation to this provision that "there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention".[221] It then concluded:

> This shows that all breaches of the Convention should be repressed by national legislation . The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches. Furthermore, under the terms of this paragraph, the authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention.[222]

167. This, in the Appeals Chamber's view, clearly demonstrates that, as these provisions do not provide for exceptions, the Geneva Conventions envisaged that violations of common Article 3 could entail individual criminal responsibility under domestic law, which is accepted by the appellants. The absence of such legislation providing for the repression of such violations would, arguably, be inconsistent with the general obligation contained in common Article 1 of the Conventions.

168. As referred to by the Appeals Chamber in the *Tadic* Jurisdiction Decision , States have adopted domestic legislation providing for the prosecution of violations of common Article 3. Since 1995, several more States have adopted legislation criminalising violations of common Article 3,[223] thus further confirming the conclusion that States regard violations of common Article 3 as constituting crimes. Prosecutions based on common Article 3 under domestic legislation have also taken place.[224]

169. The Appeals Chamber is also not convinced by the appellants' submission that sanctions for violations of common Article 3 are intended to be enforced at the national level only. In this regard, the Appeals Chambers refers to its previous conclusion on the customary nature of common Article 3 and its incorporation in Article 3 of the Statute.

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170. The argument that the ICTR Statute, which is concerned with an internal conflict , made violations of common Article 3 subject to prosecution at the international level, in the Appeals Chamber's opinion, reinforces this interpretation. The Secretary -General's statement that violations of common Article 3 of the Geneva Conventions were criminalised for the first time, meant that provisions for international jurisdiction over such violations were *expressly* made for the first time. This is so because the Security Council when it established the ICTR was not creating new law but was *inter alia* codifying existing customary rules for the purposes of the jurisdiction of the ICTR. In the Appeals Chamber's view, in establishing this Tribunal, the Security Council simply created an international mechanism for the prosecution of crimes which were already the subject of individual criminal responsibility .

171. The Appeals Chamber is unable to find any reason of principle why, once the application of rules of international humanitarian law came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context could not be criminally enforced at the international level. This is especially true in relation to prosecution conducted by an international tribunal created by the UN Security Council, in a situation where it specifically called for the prosecution of persons responsible for violations of humanitarian law in an armed conflict regarded as constituting a threat to international peace and security pursuant to Chapter VII of the UN Charter.

172. In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.[225]

173. The Appeals Chamber is similarly unconvinced by the appellants' argument that such an interpretation of common Article 3 violates the principle of legality. The scope of this principle was discussed in the *Aleksovski* Appeal Judgement , which held that the principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime.[226] It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations."

174. The Appeals Chamber is unable to find any cogent reasons in the interests of justice to depart from the conclusions on this issue in the *Tadic* Jurisdiction Decision.

2. Did the Trial Chamber Apply the Correct Legal Principles?

175. The Appeals Chamber notes that the appellants raised before the Trial Chamber the same arguments now raised in this appeal. The Trial Chamber held:

> Once again, this is a matter which has been addressed by the Appeals Chamber in the *Tadic Jurisdiction Decision* and the Trial Chamber sees no reason to depart from its findings. In its Decision, the Appeals Chamber examines various national laws as well as practice, to illustrate that there are many instances of penal provisions for violations of the laws applicable in internal armed conflicts. From these sources , the Appeals Chamber extrapolates that there is nothing inherently contrary to the concept of individual criminal responsibility for violations of common Article 3 of the Geneva Conventions and that, indeed, such responsibility does ensue.[227]

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176. It then concluded:

> The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of common Article 3 clearly does not in itself preclude such liability. Furthermore, identification of the violation of certain provisions of the Conventions as constituting "grave breaches" and thus subject to mandatory universal jurisdiction, certainly cannot be interpreted as rendering all of the remaining provisions of the Conventions as without criminal sanction. While "grave breaches" *must* be prosecuted and punished by all States, "other" breaches of the Geneva Conventions *may* be so. Consequently , an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions.[228]

177. In support of this conclusion, which fully accords with the position taken by the Appeals Chamber, the Trial Chamber went on to refer to the ILC Draft Code of Crimes against the Peace and Security of Mankind and the ICC Statute.[229] The Trial Chamber was careful to emphasise that although "these instruments were all drawn up after the acts alleged in the Indictment, they serve to illustrate the widespread conviction that the provisions of common Article 3 are not incompatible with the attribution of individual criminal responsibility".[230]

178. In relation to the ICTR Statute and the Secretary-General's statement in his ICTR report that common Article 3 was criminalised for the first time, the Trial Chamber held: "the United Nations cannot 'criminalise' any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above, this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the Statute of the ICTR".[231] This statement is fully consistent with the Appeals Chamber's finding that the lack of explicit reference to common Article 3 in the Tribunal's Statute does not warrant a conclusion that violations of common Article 3 may not attract individual criminal responsibility.

179. The Trial Chamber's holding in respect of the principle of legality is also consonant with the Appeals Chamber's position. The Trial Chamber made reference to Article 15 of the ICCPR,[232] and to the Criminal Code of the SFRY, adopted by Bosnia and Herzegovina,[233] before concluding:

> 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.[234]

180. The Appeals Chamber fully agrees with this statement and finds that the Trial Chamber applied the correct legal principles in disposing of the issues before it .

181. It follows that the appellants' grounds of appeal fail.

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