

Sonja C. Grover



Prosecuting International Crimes and Human Rights Abuses Committed Against Children

Leading International
Court Cases



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Dedication

To the child victims of atrocity and all manner of human rights abuses
Those children named and unnamed, heard and unheard, past, present and sadly
those yet to be victimized
Justice can never be perfect enough to offer solace or recompense to those of you
lost or those who survived
But such measure of justice as the international community can muster is yet your
entitlement as imperfect as it undoubtedly is
In prosecuting some of the perpetrators, all of humanity is held to account
Light is shed on what surely could have and should have been done to prevent such
inhumanity
In the hopes that your suffering not be denied and such child victimization becomes
less and less the reality as time passes until it is no more

Preface

This casebook addresses selected precedent-setting rulings of various international human rights and international criminal courts with a focus on the child victims of international crimes and human rights abuses. The cases are analysed from the children's human rights perspective and the question is examined as to what extent the aforementioned courts are according these children justice. The scope of the book is thus limited to the consideration of these representative important cases concerning violations of (a) international human rights and humanitarian law and (b) international criminal law involving child victims and the judicial remedies accorded or denied these victims and their family members. This is not in any way to diminish the suffering and importance of the adult victims of violations of fundamental human rights and grave international crimes. Rather, the book is intended to deal with the restricted and largely neglected topic of to what extent international courts are attending to the implications of there being child victims with respect to the courts' addressing and handling of, among other matters, the following: (a) the confirmation of charges relating to child-specific international crimes (i.e. recruitment of child soldiers, forced child marriage etc.); (b) the assessment of the gravity of the child-related international crimes and abuses; (c) the issue of child witness participation; (d) the matter of child access to the court in terms of bringing the case in his or her own right or through a representative or in offering relevant information which might lead, for instance, to the Office of the Prosecutor or other official body bringing the case depending on the nature of the court; and (e) the determination of the appropriate severity of sentence to be imposed, given the presence of child victims of grave international crimes or human rights abuses.

The introductory chapter provides an overview of the structure and function of various international human rights and international criminal courts, namely: (a) the Inter-American Human Rights System including the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights; (b) the European Court of Human Rights; (c) The International Ad Hoc Criminal Court for Rwanda; (d) The International Ad Hoc Criminal Court for the Territory of the Former Yugoslavia; (e) the International Hybrid Criminal Court known as the Special

Court of Sierra Leone; and (f) the International Criminal Court in The Hague. Selected key aspects of the enabling statutes or conventions and jurisdiction of these various courts are reviewed in the introductory chapter including any geographic or temporal limitations regarding their scope of jurisdiction. The first part of the book concerns the international human rights courts which have as their mandate the holding to account of *States* which were unable or unwilling to prevent and/or end violations of the basic human rights guaranteed in certain international human rights instruments. More specifically, the Inter-American Court of Human Rights is concerned with violations of the American Convention on Human Rights (included in Appendix A-1) while the European Court of Human Rights (ECHR) addresses violations of the European Convention on Human Rights (included in Appendix B-1). Both of these are permanent international human rights courts which seek to provide an appropriate judicial remedy at the international level where such has not been forthcoming via the national courts. Such remedies may include, but are not limited to, an order for reparations to redress pecuniary and/or non-pecuniary damages, or an order for public apologies, an order for symbolic reparations to honour the dignity of the child victims deceased or surviving, the court's declaration regarding the culpability of the State which arose due to the actions or non-action of its agents, an order for public awareness campaigns regarding rights guarantees and State obligations in protecting those rights, and recommendations regarding the revisions necessary to strengthen legislative protections for human rights at the national level, as well as other remedies such as judicial notice of the need to hold perpetrators of grave human rights violations to account.

The second part of the book concerns the aforementioned selected international criminal courts. The international criminal courts have jurisdiction to prosecute those *individuals* charged with any or all of the following crimes under international criminal law: (a) genocide, (b) crimes against humanity, or (c) war crimes (the latter occurring in the international and/or non-international context); while the Special Court of Sierra Leone also has jurisdiction with respect to certain designated serious crimes under Sierra Leonean law as set out in the statute of the Special Court of Sierra Leone (for the full text of the enabling statutes of the various international criminal courts here discussed please see Appendix C-1, D-1, E-1 and F-1). Appendix F-2 includes the ICC legal document outlining the 'elements of the crimes' of genocide, crimes against humanity, and war crimes. The ICC document setting out the elements of these international crimes will no doubt be extraordinarily helpful as legal authority for other international criminal tribunals which, unlike the ICC, have a limited mandate and are set up to address specific situations. It should be understood that the International Criminal Court in The Hague (ICC), as per the enabling statute (The Rome Statute), and unlike the ad hoc tribunals of Rwanda and Yugoslavia and the hybrid Special Court of Sierra Leone, is a permanent court. Further, aside from the prosecution of defendants, unlike the other aforementioned international criminal courts, the ICC provides for pecuniary and non-pecuniary reparations where the court deems such to be appropriate in the circumstances of the particular case. Note that the foregoing is not by any means an exhaustive list of the international criminal courts past or present (i.e. there has been

recently established, for instance, the Extraordinary Chambers of the Courts of Cambodia (ECCC) which will prosecute those individuals charged with being most responsible in the slaughter of 1.7 million Cambodians, including children, during the rule of the Khmer Rouge from April 1975 to January 1979). Consideration of how the fact of there being child victims might, or should have influenced the court's assessment of the case against each defendant was not generally among the central concerns at the Nuremberg trials. The question arises then how far the international criminal courts have come in this regard since then.

It is to be emphasized that this book is not intended to be a compilation of most or all cases to date handled by the international courts examined here where child victims were involved. It is impossible in any case to provide more than a brief sampling of the work of these international courts in the context of this one volume. Notwithstanding the space constraint, however, the notes and questions provided for each of the cases presented here concern key issues that are largely generalizable to other cases handled by these courts as well. This book thus highlights many of the fundamental limitations as well as the promise of the international human rights and international criminal courts in achieving a measure of justice for child victims of fundamental human rights abuses and international crimes including genocide, crimes against humanity and war crimes.

Relevant international children's human rights instruments and documents, some referenced in the cases themselves, are provided in Appendix G including: (a) The African Charter on the Rights and Welfare of the Child (entry into force 1999) (see Appendix G-1); (b) the Cape Town Principles and Best Practice (1997) which concerns the issue of child soldiers (see Appendix G-2); (c) the U.N. Convention on the Rights of the Child (entry into force 1990) (see Appendix G-3); (d) the U.N. Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (entry into force 2002) (see Appendix G-4); (e) the Paris Commitments and the Paris Principles on Children Associated With Armed Forces or Armed Groups (2007) which concern the issue of child soldiers (see Appendix G-5 and G-6); and (f) the U.N. Security Council Resolution 1820 concerning sexual violence against women and girl children as an international crime (adopted June 19, 2008) (see Appendix G-7). Also included at Appendix H-1 are the Brussels Principles Against Impunity and For International Justice (2002).

The topics of truth and reconciliation commissions and amnesty are a complex study in themselves, which are beyond the scope of this book. Suffice it to say that the latter may have their place when dealing with child perpetrators who, in this author's view, cannot for various reasons be held culpable [i.e. see Grover (2008) Child soldiers as non-combatants: the inapplicability of the refugee convention exclusion clause. *International Journal of Human Rights* 12(1):53–65], and with those who played very minor roles in regard to violations of fundamental human rights, acting largely out of duress. However, justice for victims must not, and moreover cannot, be bartered away. This will require then, at a minimum, holding States accountable for abuses of the fundamental human rights of individuals or of identifiable groups (when committed in that State's area of territorial jurisdiction,

or by its citizens), and prosecuting those individuals over 18 most responsible for the grave international crimes of genocide, crimes against humanity and war crimes. History teaches us that peace must rest fundamentally on justice. Both defendants and victims after all are entitled to due process and a just outcome. There is, in the final analysis, no satisfactory remedy for the atrocities and human rights abuses committed by individual perpetrators and allowed, for whatever reason, to occur by the State (s) concerned. Nevertheless, there persists the need for public acknowledgement of the suffering of the victims, and affirmation by the international community of the victims' human dignity and their right to justice. Anything less than a just remedy for these victims is a relinquishing of our collective humanity.

Acknowledgement

I acknowledge my husband Roshan and my daughter Angeline whose love and support are my most vital source of power and who in their own ways have thus made this work possible. This book is written in honour of both the memory of my parents David and Gina Gazan who taught me that one's human dignity is a most precious possession and that justice is the birthright of all; young and old and of my brother Albert Gazan who worked to mitigate the suffering of children as an educator, psychologist and social worker. I extend my great thanks to Dr. Brigitte Reschke, Executive Editor for law with Springer for her invaluable advice and her faith in this book project and to Ms. Anke Seyfried for her most competent work in the final editing of the manuscript.

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Chapter 1

The Inter-American Human Rights System

The Inter-American human rights system has several bodies dedicated to the promotion and protection of human rights (i.e., the Inter-American Children's Institute). The focus of this discussion is, however, on the following two independent organs of the Organization of American States (OAS) namely:

- The Inter-American Commission on Human Rights
- The Inter-American Court of Human Rights

The Organization of American States (OAS). Before discussing the Inter-American Human Rights System, it is necessary to describe briefly the Organization of American States (OAS). The OAS was established in 1948 at the Ninth International Conference of American States in Bogotá, Colombia. All 35 independent countries of the Americas have ratified the OAS Charter and belong to the OAS (though Cuba's government has been excluded from participation in the OAS since 1962 even though the State is still a member). Since then there have been amendments to the OAS Charter by way of the 1967 Protocol of Buenos Aires and the 1985 Protocol of Cartagena de India. The Ninth International Conference accepted the international instrument known as the American Declaration of the Rights and Duties of Man in 1948 which preceded the Universal Declaration of Human Rights by several months. The American Declaration of the Rights and Duties of Man (aside from the section dealing with duties) sets out various civil and political rights of the individual while that individual is under the jurisdiction of a member State of the OAS. These rights exist as per the Declaration irrespective of whether or not that individual is, or is not a national of the State in question at the time. While the Declaration was originally viewed by the OAS member States as a non-binding instrument, it is today regarded by the OAS as a legally binding international treaty for the OAS member States. A number of resolutions were taken at the Ninth International Conference which ultimately led to Conventions that extended certain further rights to various groups such as workers and women.

The OAS is recognized under the United Nations Charter Article 52 as a regional organization dedicated to international peace and security (including the peaceful settlement of disputes among member States of the OAS), and as endorsing

principles consistent with the United Nations Charter. The objectives of the OAS include also, but are not limited to, the promotion of representative democracy in the region (while at the same time respecting the sovereignty of member States and the principle of non-intervention in the internal affairs of member States), the promotion of cultural, social and economic development of the region and the eradication of extreme poverty in member States; as well as the limitation of conventional weapons such that economic and socio-cultural development efforts might be prioritized. The OAS member States are committed via the OAS Charter for common action in the face of aggression as the need arises. Next is an examination of the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights; both essential OAS bodies for the protection and promotion of fundamental human rights in the Americas.

1.1 The Inter-American Human Rights Commission

1.1.1 History of the Inter-American Human Rights Commission

The Inter-American Human Rights Commission was created by resolution at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in Santiago, Chile, in 1959 and its original statute was approved in 1960 and in force until 1965. The objective was to have the Commission monitor compliance by the OAS member States with the fundamental rights and freedoms guaranteed in the organization's charter to all persons within those jurisdictions. In April 1966, the Commission, via amendments to its statute, extended its mandate to include the consideration of individual complaints and the responsibility of addressing those complaints with the relevant OAS member State(s) involved in the complaint. The Commission was designated in an amended Charter of the OAS in 1970 as a principal organ of the OAS and as the body responsible for the safeguarding of individual human rights until the American Convention of Human Rights came into force ("the American Convention"). As we shall discuss in a later section, the Commission in fact came to play a key role in administering the American Convention as well as the rights embodied in the American Declaration.

1.1.2 The Inter-American Commission on Human Rights Under the New Commission Rules

The original statute of the Inter-American Human Rights Commission was revised by the General Assembly of the OAS at its ninth regular session held in La Paz, Bolivia, in 1979 (and adopted by the Permanent Council of the OAS in September 1979). The revised Commission statute reflects the role of the Commission as specified in the American Convention on Human Rights. Under the new Commission statute which is currently in place, the Commission represents the full membership of the OAS.

The seven members of the Commission are, under the new statute, elected by the General Assembly of the OAS from a list of candidates suggested by the State members for a four-year term and may be re-elected once. Further, the Commission has a President, a First Vice-President and a Second Vice-President, each with a one-year term and eligible for re-election once every four years. The Commission is headquartered in the United States in Washington, D.C.

1.1.2.1 Commission Powers Regarding Non-State and State Parties to the American Convention on Human Rights

Article 18 of the new statute in regards to OAS members applies to both OAS members who are *not* States Parties to the American Convention on Human Rights, and those who are States Parties. Article 18 provides for Commission powers which include but are not limited to:

- Raising awareness of human rights issues,
- Communicating recommendations to the State on how to improve the human rights situation in their respective jurisdictions via legislative and constitutional changes, international human rights commitments and other measures;
- Doing on-site field visits with the consent of the OAS State member involved, or at the State's invitation to investigate and to advise on various human rights issues in that State;
- Preparing such reports on its work as the Commission deems advisable, i.e., reports on the general human rights situation in the OAS member State or reports regarding specific human rights issues within that State;
- Requesting that the OAS member State provide the Commission with official reports on progress toward achieving OAS human rights objectives (i.e., the OAS member States are to provide the Commission with, among other materials, the annual reports they submit to the Executive Committees of the Inter-American Social and Economic Council and the Inter-American Council for Education, Science and Culture in order that the Commission can monitor State member progress toward achieving OAS standards (as set out in the OAS Charter) with respect to economic, social, cultural, scientific and educational standards).

Several of the more recent Inter-American Conventions also require progress reports to be made to the Commission (the new Statute for the Commission is included in Appendix A.3).

1.1.2.2 Additional Commission Powers Regarding OAS Members Which Are State Parties to the American Convention on Human Rights (“the American Convention”)

In addition to the powers of the Commission discussed above under Article 18 of the new Commission statute, the Commission has additional jurisdiction in respect of States Parties to the American Convention on Human Rights. Those powers

include the authority to consider petitions concerning alleged violations of the “American Convention” (or of its additional protocols, or other applicable human rights treaties endorsed by the OAS; the more recent Convention(s) or additional protocols again only if ratified by the respondent State). The Commission may, under its statute, accept as admissible petitions meeting the admissibility requirements regardless whether submitted by an individual or individuals (victims or a third party), a non-governmental organization (NGO) which meets the requirements for legal standing, or an OAS State Party to the American Convention if that State Party has both ratified the American Convention *and* officially recognized the competence of the Commission to deal with inter-State petitions. Individual petitions may be brought by the petitioner or their legal representative.

All of the petitions involving *State Parties* to the American Convention generally concern alleged violations of the American Convention (or its additional protocols or other more recent inter-American Conventions ratified by the accused State) rather than the American Declaration of the Rights and Duties of Man. These additional Commission powers thus concern fostering State Party compliance with respect for, and protection of the rights set out in the American Convention on Human Rights or other applicable OAS endorsed instruments pertaining to human rights. In summary, under Article 19 of the new Commission statute in regards to State Parties to the American Convention, the Commission has the following powers:

- To accept and process regarding admissibility and merit (the latter where the petition is considered admissible) individual petitions by one or more victims or a third party; petitions by NGOs recognized as a legal entity in one or more OAS States and, where *both* the States involved accept the jurisdiction of the Commission in regards to inter-state petitions, also petitions from States regarding violations of the American Convention on Human Rights (or other applicable instruments) and communicate its findings to the respondent State (see the description of case processing before the Commission presented in further detail below at Sect. 1.1.5.1);
- To appear before the Inter-American Court of Human Rights in cases regarding alleged infringements of the American Convention on Human Rights or other applicable instruments where the Commission has ruled the case admissible and with merit *and* where the respondent State also has not only ratified the American Convention, but also accepted the jurisdiction of the Court;
- (Where the State concerned accepts the jurisdiction of the Court) to request the Inter-American Court of Human Rights to order the State to take certain measures to protect complainants whose case has not come as yet before the court but who require urgent protection from significant harms (i.e., the Commission may request the court to order the State to provisionally defer a deportation order, or to protect the physical safety of the complainant who is threatened with harm by State authorities seeking retribution for the complainants’ communication to the Commission of alleged Convention State violations, etc.);

- To consult the Inter-American Court of Human Rights for interpretation of certain of its judgments or an advisory opinion with respect to the proper interpretation and application of the American Convention on Human Rights or of other treaties for the protection of human rights applicable in OAS States or in regards to the interpretation of domestic law in an OAS member State;
- To submit to the General Assembly of the OAS draft additional protocols to the American Convention on Human Rights which extend the rights and freedoms covered therein; and
- To submit to the General Assembly of the OAS proposed amendments to the American Convention on Human Rights.

1.1.2.3 Additional Powers of the Commission Respecting OAS Members Which Are Non-State Parties to the American Convention with Respect to Fostering Compliance with the American Declaration on the Rights and Duties of Man

The Commission is empowered under Article 20 of the Commission statute to work toward the fostering of the rights stipulated in the American Declaration of the Rights and Duties of Man in non-State Parties to the American Convention on Human Rights. This with a particular but not exclusive focus on promoting in those non-State Parties the observance of the human rights referred to in the Declaration at Article I (the right to life, liberty and security), II (the right to equality before the law), III (the right to freedom of religion and practice of religion), IV (the right to access information freely, to freely have and express an opinion and to freely disseminate one's views); XVIII (the right to a fair trial), XXV (the right of protection from arbitrary arrest), and XXVI (the right to due process of law). The Commission to this end is authorized under its statute to examine communications (petitions) from an individual or group of individuals, non-governmental organizations, or a third party or their representatives regarding violations of the Declaration and any other available information relevant to the matter. The Commission may:

- Address its concerns regarding such alleged violations of the Declaration to the non-State Party,
- Request relevant information such as whether the petitioner has exhausted domestic remedies and whether those remedies were in practice effectively available, fairly applied and without undue delay and any other relevant information regarding the matters raised, and
- Make such recommendations as it deems necessary to that non-State Party in respect of the communication and in order to advance the cause of human rights in that non-State party as embodied in the American Declaration of the Rights and Duties of Man.

1.1.3 Conventions

1.1.3.1 The American Convention on Human Rights

The American Convention on Human Rights was adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November, 1969 and came into force 18 July, 1978 (The American Convention on Human Rights is included in Appendix A.1). The American Convention on Human Rights guaranteed the following rights and freedoms: the right to juridical personality (that is to be recognized as a person before the law) (Article 3); the right to life (Article 4). In respect of Article 4 note that the imposition of the death penalty for grave crimes as provided for by domestic law was permissible under the American Convention on Human Rights though, at the same time, various constraints were imposed including, but not limited to, the prohibition of the death penalty for political crimes or common crimes. The death penalty was later abolished under the Protocol to Abolish the Death Penalty (see Appendix A.5); an additional protocol to the American Convention except that States Parties could reserve the right to retain it for extremely serious military crimes in times of war); the right to humane treatment (Article 5); freedom from slavery (Article 6); the right to personal liberty (Article 7); the right to a fair trial (Article 8); freedom from ex post facto laws (Article 9) (i.e., Article 9 provides that no one will be convicted of a crime that was not an offence at the time it was committed; nor suffer a heavier penalty for an offence than what was provided for in law in terms of punishment at the time the offence was committed. However, if a lighter sentence is provided for in law subsequent to the commission of the offence than was the case previously, the guilty person will receive the lighter sentence); the right for persons to be compensated by the State as provided for in law if wrongly sentenced in a final judgment due to a miscarriage of justice (Article 10); the right to privacy in one's personal and family life (Article 11); freedom of conscience and religion (Article 12); freedom of thought and expression (Article 13); the right of reply (the right to correct the record with regard to injurious offensive and/or inaccurate statements communicated to the public by legally regulated communication media) (Article 14); the right of peaceful assembly without arms (Article 15); the right of free association for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes (Article 16); the right to form a family and to have it protected (Article 17); the right of every person to a given name and to the surnames of his parents or that of one of them as regulated by domestic law (Article 18); the rights of the child (Article 19); the right to nationality (Article 20); the right to the use and enjoyment of one's property (Article 21); the right to freedom of movement and residence within the State if lawfully present in the jurisdiction of that State (Article 22); the right to participate in government (Article 23); the right to equal protection before the law without discrimination (Article 24); the right to judicial protection (recourse before a competent court or tribunal) for protection of

fundamental rights recognized by the constitution or laws of the state concerned or by the American Convention on Human Rights (Article 25). Further, Article 26 stipulated the commitment of the State Parties to the Convention to take various measures to improve the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

1.1.3.2 Children's Rights and the American Convention on Human Rights

The American Convention on Human Rights itself contained but a few explicit mentions of minors and their child-specific rights and these occur in the following articles:

- Article 4(5): *Right to Life* – the prohibition of the death penalty being imposed on minors (persons under age 18);
- Article 5(5): *Humane Treatment* – the right of minors charged with a crime to be tried by tribunals specialized in dealing with minors and the right to be held in detention separate from adults while criminal proceedings are pending or ongoing;
- Article 17(5): *Rights of the Family* – equality before the law of children born within or outside of wedlock; and
- Article 19: *Rights of the Child* – the right to protection by the family, society and the State for every minor child on account of his or her status as a minor.

Note that no article in the American Convention on Human Rights specifically mentions the minor child's right to participate in decision-making affecting the child, i.e., the right of the minor child to participate in administrative or judicial proceedings in a manner consistent with the age and maturity of the child. Contrast this with Article 12 of the United Nations Convention on the Rights of the Child which does set out such participation rights for minors (the Convention on the Rights of the Child is included in Appendix G.3). However, every article in the American Convention guaranteeing various civil and political rights and freedoms is, in principle, applicable to minor children as well. Nevertheless, certain articles in the American Convention on Human Rights, such as that concerning democratic rights, make reference to unspecified age constraints in domestic law. For instance, regarding the right to participate in government Article 23(2) states: "The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph ... on the basis of age ..." and in regards to the right to marry Article 17(2) refers to "The right of men and women of *marriageable age* to marry and to raise a family ..." (emphasis added). Of course, once the minor (person under 18) reaches "marriageable age", he or she is regarded in domestic law as an adult for the purpose of marriage.

1.1.3.3 The Additional Protocols to the American Convention on Human Rights

Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Otherwise Referred to as the “The Protocol of San Salvador”)

The American Convention on Human Rights has additional protocols, including the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights otherwise known as the “Protocol of San Salvador” (entered into force 16 November, 1999), which recognize that economic, social, and cultural rights are inextricably linked (see Appendix A.4). The Protocol of San Salvador guarantees, among other things, certain worker rights such as acceptable conditions of work, the right to unionize, the right of trade unions to strike, etc., rights to social security, to health (i.e., right to primary health care, etc.), the right to a healthy environment, the right to adequate food and nutrition, the right to education, the right to an education that is respectful of all persons and promotes peace and tolerance, the right to the benefits of culture, the right to the formation and the protection of family, certain children’s rights and the right of special protections for the elderly and the disabled. The rights of the child as child included in the Protocol of San Salvador, while significant, are not as all encompassing as the wide range of civil, economic, political and socio-cultural rights specified in the United Nations Convention on the Rights of the Child. Further, the children’s rights articulated in the Protocol of San Salvador (as with the American Convention on Human Rights) do *not* include participation rights relating to the right to be heard (consistent with the child’s age and maturity) in administrative and judicial decision-making proceedings regarding decisions which will affect the child. Articles regarding children’s rights in the Protocol San Salvador additional to the American Convention on Human Rights include the following:

Article 7: Just, Equitable, and Satisfactory Conditions of Work

[...] e. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received.

Article 13: Right to Education

1. Everyone has the right to education.
2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:
 - a. Primary education should be compulsory and accessible to all without cost;
 - b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
 - c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;
 - d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
 - e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.

Article 15: Right to the Formation and the Protection of Families

1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions.
2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.
3. The States Parties hereby undertake to accord adequate protection to the family unit and in particular:
 - a. *To provide special care and assistance to mothers during a reasonable period before and after childbirth* (emphasis added);
 - b. *To guarantee adequate nutrition for children at the nursing stage and during school attendance years* (emphasis added);
 - c. *To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities* (emphasis added);
 - d. *To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility* (emphasis added).

Article 16: Rights of Children

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system (Article 16, the Protocol San Salvador).

Article 19(5) of the Protocol of San Salvador allows for individual petitions to the Commission regarding violations of individual rights and freedoms by States Parties to the Protocol in respect of Articles 8(a) and 13 of the Protocol (the right to form a trade union and join trade unions of one's choice and certain other rights relating to trade unions and the right to education respectively) which can be

advanced before the Inter-American Commission on Human Rights and, in some instances, might be heard also by the Inter-American Court of Human Rights depending on the determination of the Commission in that regard. (Note that in some developing countries, child laborers have formed worker's organizations though these may or may not be recognized in domestic law.) The ratification of the Protocol of San Salvador is open only to those OAS States that have ratified the American Convention.

Protocol to the American Convention on Human Rights to Abolish the Death Penalty

The second protocol additional to the American Convention on Human Rights is the Protocol to the American Convention on Human Rights to Abolish the Death Penalty. This additional protocol entered into force 28 August, 1991 (see Appendix A.5). The Protocol did provide that States Parties could at the time of ratification or accession stipulate that they reserved the right to use the death penalty in time of war for serious military crimes but only in accord with international law. *The protocol thus supplanted the American Convention on Human Rights on the issue of capital punishment which did not abolish the death penalty but merely limited its use.* Ratification of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty is only open to States that have ratified the American Convention.

1.1.3.4 Other Inter-American Conventions

The Inter-American Convention to Prevent and Punish Torture entered into force 28 February, 1987 (see Appendix A.6). This convention defines torture in great detail and prohibits torture as well as any cruel, inhuman or degrading treatment or punishment. It excludes alleged defenses such as superior orders or purported excuses such as a state of public emergency or some other situation requiring extraordinary measures. This convention provides that the offence of torture or cruel, inhuman or degrading treatment or punishment will be punished severely (including when the perpetrator or contributor to the crime is an agent of any State member of the OAS). This Convention also provides that measures will be taken by the State to help prevent the occurrence of these offences in the OAS member jurisdictions. In addition, the Convention mandates that member States will have extradition proceedings where an accused has fled to another OAS member State in an effort to elude justice. The *Inter-American Convention to Prevent and Punish Torture* can be relied upon before the Inter-American Court of Human Rights to further elaborate the scope and interpretation of Article 5(2) of the American Convention which itself prohibits torture, cruel, inhuman or degrading treatment or punishment. Ratification of the Inter-American Convention to Prevent and

Punish Torture is open to all member States regardless whether they are a party to the American Convention.

The Inter-American Convention on Forced Disappearance of Persons entered into force 28 March, 1996 and contains a very specific definition of the crimes related to “forced disappearance” (see Appendix A.9). The OAS members under this Convention agree not to practice, permit or tolerate this practice in their jurisdictions and to punish those (including agents of the State) who conspire to, or commit the crime of causing or conspiring to cause forced disappearances or otherwise contribute to such crimes whether involved directly, or indirectly as an accomplice or accessory to the crime. The offence of causing or contributing to forced disappearance is an extraditable offence in the OAS member States under this Convention. All OAS members are eligible to ratify the Inter-American Convention on Forced Disappearance of Persons whether or not they have ratified the American Convention.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (also known as the *Convention of Belém do Pará*) entered into force 5 March, 1995 and is open to ratification by any OAS member (see Appendix A.7). The definition of violence against women in this convention is broad and includes physical violence (sexual and/or non-sexual), and psychological violence creating injury and/or suffering whether or not perpetrated by someone with whom the female (adult or minor) resides; or by the community or agents of the State. The Convention provides for the punishment of those (including agents of the State) who engage in such practices and requires the OAS members to take measures to prevent the occurrence of such human rights abuses against women and girls via various policies, legislative actions and practices. The right of female minors to be protected from violence is specifically mentioned at Article 9 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women:

Article 9

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. *Similar consideration shall be given to women* subjected to violence while pregnant or who are disabled, *of minor age*, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.

In Article 8 of the same convention, the right of both women and children to be assisted when suffering the ramifications of domestic or other violence is set out:

Article 8

The States Parties agree to undertake progressively specific measures, including programs [...] (d) to provide appropriate specialized services for women who have been subjected to violence, through public and private sector agencies, including shelters, *counseling services for all family members where appropriate, and care and custody of the affected children;*

The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities which entered into force 14 September, 2001 guarantees disabled persons equal treatment under the law and full integration into society to their fullest potential (see Appendix A.8) This convention requires OAS members to promote equal rights for the disabled and take measures to prevent abuses of this right.

Other instruments under the Inter-American System of particular relevance to the rights of the child include the following:

- Inter-American Convention on Support Obligations;
- Inter-American Convention on the International Return of Children;
- Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors (see Appendix A.10) and
- Inter-American Convention on International Traffic in Minors.

1.1.4 The American Declaration of the Rights and Duties of Man

The American Declaration of the Rights and Duties of Man is regarded as a binding international treaty on all OAS members regardless of whether or not they are parties to the American Convention on Human Rights (see Appendix A.2). The Declaration has but a few child-specific articles. The Declaration sets out various civil, political rights, economic, social and cultural rights. The articles of the Declaration, as with the American Convention on Human Rights do *not* refer to children's right of participation (in accord with the child's age and maturity) in decision-making which will significantly affect their life and well-being. Rather, the articles focus exclusively on protection rights and the State provision of educational services:

Article VII *Right to protection for mothers and children*: "All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid."

Article XII *Rights to Education*: "Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity" (see also Article XXXI: Duty to Receive Instruction: "It is the duty of every person to acquire at least an elementary education").

Article XXX *Duties toward children and parents*: "It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honour their parents always and to aid, support and protect them when they need it."

All of the guarantees in the Declaration are in principle applicable to minor children insofar as they refer to inherent universal human rights and freedoms. However, certain guarantees are constrained in terms of reference in the Declarations to domestic law and its parameters.

1.1.5 Petitioning the Inter-American Commission on Human Rights Regarding Alleged Human Rights Violations of the American Convention on Human Rights (ACHR), the Additional Protocols to the ACHR and Other Applicable Conventions or the Declaration of the Rights and Duties of Man (Rules in Force as of January 1, 2003)

1.1.5.1 Basic Features of Case Processing Before the Commission

Ruling Petitions Inadmissible Vs. Suitable for Further Consideration

Petitions may be struck out at the outset on one or more of the formal technical grounds discussed in this section. Alternatively, they may be considered by the Commission for further processing as they meet formal requirements though this does not necessarily mean they will ultimately be determined to be admissible in a ruling on admissibility by the Commission when examined in further detail after submissions by all the parties.

Who May Petition the Commission

The Inter-American Commission on Human Rights may consider petitions from:

- Individual victims or groups of individual victims, or their official representatives;
- A third party (with or without the victim's knowledge), or that third party's legal representative;
- Any non-governmental organization (or its legal representative) that NGO being recognized as a legal entity in one or more of the OAS member States and petitioning as a victim itself or on behalf of other victims or
- (Under certain conditions) an OAS State Party to the American Convention alleging violations of the rights and/or freedoms of one or more victims by another State Party.

Petitions involving the same persons, facts or pattern of State conduct may be joined.

Additional Notes on Inter-State Petitions

In the case of an inter-State petition, the State making the complaint must have deposited with the Commission a declaration recognizing the competence of the Commission to examine such communications (that is, inter-State petitions). This declaration may be made conditionally or unconditionally (i.e., with or without a demand for reciprocity); with an applicable time frame specified or unspecified;

or for a specific case only. Hence, being a State Party to the American Convention on Human Rights does *not* automatically entail accepting the jurisdiction of the Commission to consider inter-State petitions.

Note that inter-State petitions received by the Commission may be transmitted by the Commission to an OAS State Party to the American Convention regardless of whether or not the accused (i.e., respondent) OAS State accepts the jurisdiction of the Commission to examine inter-State petitions. This is the case in that the Commission wishes to afford the respondent State the opportunity to choose to accept the competence of the Commission for the specific inter-State petition/case in question as per Article 45(3) of the American Convention (even if it has not to date accepted the competence of the Commission in general regarding examination of inter-State petitions). In this regard, Article 45 of the American Convention reads:

Article 45

1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.
2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.
3. *A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case* (emphasis added).
4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization.

The case can only be ruled admissible, however, if it meets all admissibility requirements and the respondent State accepts the jurisdiction of the Commission regarding inter-State petitions for that case at a minimum.

Subject Matter of the Petition to the Commission

Petitions Concerning State Parties to the American Convention on Human Rights

Petitions submitted to the Commission regarding violations by State Parties to the American Convention on Human Rights (“the American Convention”) must pertain to that Convention or the Protocols additional to the Convention, or another Convention adopted by the OAS and hence within the Commission’s jurisdiction or the Declaration of the Rights and Duties of Man (though normally petitions concerning the Declaration pertain only to Non-State Parties to the American Convention on Human Rights since State Parties are covered by the American Convention which also incorporates the rights in the

Declaration). Further, if the petition pertains to the American Convention on Human Rights or its Protocols or any other Convention under the Commission's jurisdiction, the respondent State must have ratified or acceded to that Convention and/or its additional protocols in order for the Commission to consider accepting the petition as admissible (assuming all other admissibility requirements are met) and the violations must have occurred after the State's ratification.

Petitions Concerning Non-State Parties to the American Convention on Human Rights

Note that all OAS member States once they ratify the OAS Charter are considered by the OAS as legally obligated to respect the guarantees of the Declaration of the Rights and Duties of Man (as per article 17 of the OAS Charter, article 20 of the Statute of the Commission, and article 29 of the Rules of Procedure of the Commission) whether or not they have ratified the American Convention on Human Rights. Hence, in regards to non-State Parties to the American Convention on Human Rights, petitions must pertain to the American Declaration of the Rights and Duties of Man. These applications will also be processed as to admissibility and merit by the Commission in essentially the same way as with petitions concerning State Parties to the American Convention on Human Rights. While there are no provisions in the Commission statute regarding friendly settlements in respect of non-State Parties, the Commission will make itself available for working toward such a settlement.

Inter-State Petitions

The Commission will only rule admissible inter-State petitions against OAS member State Parties to the American Convention if those petitions meet all admissibility requirements including recognition of the Commission's competence to examine such inter-State petitions (i.e., both the petitioning State and the respondent State must recognize the Commission's competence to consider inter-State petitions in order for the case to be potentially ruled admissible) Note that States are *not* legally obligated under the American Convention to file complaints against other OAS States that have allegedly violated the Convention.

The Commission Advancing the Case to the Inter-American Court of Human Rights

The Respondent State Party to the American Convention must have accepted the competence and jurisdiction of the Court if the case is to come before the Court (depending on the Commission's decision whether or not to refer the case to the

court). That is, a State could ratify the American Convention on Human Rights but may or may not have accepted the competence of the Inter-American Court of Human Rights. (The case could also be advanced before the Court by a State Party to the case once the Commission completes its processing provided the State(s) involved in the case accept the Court's jurisdiction.)

The Commission's Competence Regarding OAS Members that Are Not Parties to the American Convention on Human Rights

The Commission's competence regarding non-State Parties to the American Convention derives from the Charter of the OAS itself, and Commission practice historically. Article 106 of the OAS Charter provides that:

There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters.

State Actions and Inactions Giving Rise to Alleged Human Rights Violations

Petitions to the Commission may concern alleged human rights violations due to, for instance, the actions or inaction of the State authorities; the failure of the State to prosecute those officials responsible for the infringement and/or the failure of the State through a judicial or non-judicial vehicle to provide financial compensation for pecuniary or non-pecuniary damages arising directly from the violations of the Convention or the additional Protocols or other applicable Conventions or instruments. The Commission may, aside from individual petitions, also consider:

- "General petitions" concerning widespread human rights abuses that involve many incidents and no specific targeted group, or
- "Collective petitions" that do involve human rights abuses against a targeted group and a specific incident(s).

Note that the Commission may also, on its own initiative or as per the Commission statute, apart from any specific petitions and based on information from NGOs and individuals, issue reports regarding the human rights situation in a certain OAS State(s).

The Requirement for the Exhaustion of Domestic Remedies

The petitioner(s) in order not to have the case struck out on formal grounds must show that all *effectively accessible* domestic remedies were exhausted. If the domestic remedy was accessible in theory only, but not in practice, or if the remedy offered by the State does not reflect due process, or there is a denial of legal

representation (i.e., either due to the petitioner being indigent, or due to intimidation of counsel, or some other such untoward reason), or if there has been, or will be undue delay in providing the remedy, the Commission will, in those instances, treat the case as if all domestic remedies had been exhausted.

Time Limitations for the Petition to Be Considered

The petition by victims or their representatives, a third party or an NGO must normally be presented to the Commission within six months of the final judgment of the highest domestic body which the complainant(s) could, in practice, access. However, where the exhaustion of domestic remedies was in reality not possible due to the circumstances of the case (i.e., the petitioner was prevented from accessing the courts, etc.), or in certain cases where the petition to the Commission is filed by a Third Party, the petitioner is required to submit the petition within a reasonable time (as assessed by the Commission) given the specifics of the case.

Duplication of Petitions

In order to have the Commission consider the petition, the petition must not have been previously ruled inadmissible by the Commission while the new submission contains no new information of significance. In addition, the case may not duplicate a case previously submitted to the Commission and settled, nor may the case essentially duplicate a case already submitted by the same petitioner(s) and pending before the Commission. However, if:

- The case was previously submitted by a Third Party unbeknownst to the victim(s), or
- The other petition is a “general petition” that does not deal with the specific facts and victims in the new petition, and/or issues regarding settlement as pertains to these specific victims.

The subsequent petition to the Commission may still be considered if all other requirements are met.

Submissions to Other International Bodies

In order to have the petition considered, the petition may not now be pending and/or have been previously submitted to another international body for resolution and decided upon. However, the Commission may, under Article 32(2) of the Commission rules of procedure, still consider the case if:

- The other international body has considered, or will be considering only the general human rights situation in the respondent State. (The latter being in

contrast to examining the specific facts – the alleged violations as they pertain to specific individuals on specific dates and in particular instances – that comprise the petition filed to the Inter-American Commission on Human Rights.)

- The procedure before the other International body has not, or will not lead to a settlement (remedy), or
- The petitioner to the Commission is the direct victim of the human rights violation, or a family member of the direct victim, while the petitioner to the other international body is a third party, or an NGO who is not authorized by the alleged victim(s) who filed the petition to the Commission.

Article 28 of the Commission rules presented below summarizes the formal technical requirements for the petition (i.e., information to be provided and other requirements) in order that it be accepted for consideration regarding admissibility and not struck out as inadmissible at the outset. Note that the Commission may ask the petitioner to properly complete the formal requirements where this is feasible and then resubmit to meet the requirements in Article 28 of the Commission rules:

Article 28. Requirements for the Consideration of Petitions

Petitions addressed to the Commission shall contain the following information:

- a. the name, nationality and signature of the person or persons making the denunciation; or in cases where the petitioner is a nongovernmental entity, the name and signature of its legal representative(s);
- b. whether the petitioner wishes that his or her identity be withheld from the State;
- c. the address for receiving correspondence from the Commission and, if available, a telephone number, facsimile number, and email address;
- d. an account of the act or situation that is denounced, specifying the place and date of the alleged violations;
- e. if possible, the name of the victim and of any public authority who has taken cognizance of the fact or situation alleged;
- f. the State the petitioner considers responsible, by act or omission, for the violation of any of the human rights recognized in the American Convention on Human Rights and other applicable instruments, even if no specific reference is made to the article(s) alleged to have been violated;
- g. compliance with the time period provided for in Article 32 of these Rules of Procedure;
- h. any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure; and,
- i. an indication of whether the complaint has been submitted to another international settlement proceeding as provided in Article 33 of these Rules of Procedure.

Other Admissibility Issues

The allegation(s) will be ruled inadmissible if no facts are cited to support the case; the statements made by the petitioner or the State show the allegations to be frivolous or otherwise groundless; or other information or evidence submitted to the Commission shows the petition to be groundless or out of order.

1.1.5.2 Further Processing of Cases Not Struck at the Outset

If the case has not been entirely struck based on one or more of the more straight forward formal technical grounds stipulated in Article 28 of the Commission rules (i.e., respondent State is not a member of the OAS, no facts are cited to support the case, the time for submission has expired, no information regarding exhaustion of domestic remedies is provided, etc.), the Commission proceeds to examine the case further regarding admissibility (i.e., verifying the exhaustion of domestic remedies by submissions from both parties, etc.) as per the following rules of procedure as stipulated in Article 30 of the Commission Rules of Procedure:

Rule 1: All petitions not struck out on clear cut formal technical grounds will be further processed regarding admissibility.

Rule 2: The Commission (through its executive Secretariat) will notify the State of any petitions not struck out administratively as they did meet the Article 28 Commission information requirements and transmit to the State the relevant parts of the petition. The Commission will at this initial processing point *not* identify the petitioner(s) to the State unless the Commission has the complainant(s)' consent to do so. *This procedure in no way predicts whether the allegation(s) will ultimately be ruled admissible by the Commission.*

Rule 3: The State will be asked to respond to the allegation(s) and provide any relevant information regarding admissibility including whether there are any substantive grounds for the petition, or it is groundless in its view and why; the State's position regarding whether or not there has been exhaustion of domestic remedies by the petitioner etc. The State will normally be required to respond to this Commission request within two months as per the Commission Rules of Procedure. This will be the requirement unless a time extension is considered warranted by the Commission upon receiving an explanation from the State regarding the need for more time. However, the maximum extension is three months from the date of the first request. The petitioner will be provided the opportunity to respond to the State's submission.

Rule 4: Where the case is serious and urgent (for instance, the petitioner is at grave risk of serious imminent harm), the Commission will ask that the reply from the State be made as soon as possible.

Rule 5: The Commission may ask the parties to make additional submissions either in writing and/or at a hearing. Note that, in addition to receiving information from both parties, the Inter-American Commission is empowered under its rules of procedure to also make its own investigations and conduct field visits to the respondent State site(s) if it deems this necessary. This occurs, however, only when the respondent State invites the Commission to do so or consents to the on-site investigation. No member of the Commission who is a national of the respondent State, or who resides in that State may participate in such Commission on-site investigations.

Rule 6: If further submissions are made in accord with the time lines, or no further submissions are made in the time allotted, the Commission will then make a determination on admissibility.

Rule 7: If the case is serious and urgent, the Commission may try to expedite the matter by adopting a joint procedure. The Commission will thus request the State provide its submissions on *both* the admissibility and merit of each alleged allegation as soon as feasible, and within a reasonable period established by the Commission based on the

circumstances of the case. It may also in such cases do an on-site investigation (with the permission of the respondent State concerned) on the basis of a petition or a communication that meets the formal admissibility requirements such as naming of victims and the signature of the petitioner(s); stating what are the alleged human violations and the facts surrounding them etc. (i.e. exhaustion of domestic remedies and the admissibility requirement regarding time limits for submission of the petition to the Commission may be excused in such instances). The Commission will be available to negotiate a friendly settlement at any stage of case processing.

1.1.5.3 The Separate and the Joint Procedure for Case Processing

As with the European human rights system, petitions are adjudicated (in this case by a Commission), after all written and any oral submissions (where there are public hearings in the case) have been made by both parties in either a “separate” or a “joint procedure” process (as per Article 37 of the Inter-American Commission Rules of Procedure). In the inter-American system, unlike the European human rights system, during the merit determination phase, there may or may not be also an on-site investigation by the Commission in addition to the submissions by the parties.

Separate Procedure for Case Processing by the Inter-American Commission on Human Rights

- *Admissibility Decision:* In the separate procedure, a decision is made first on admissibility after all written submissions (and in some instances also oral submissions) from both parties have been considered. That admissibility decision is made public (whether the case is ruled admissible or inadmissible) in all but exceptional cases, and it is included in the annual report of the Commission to the Organization of American States (OAS). The admissibility decision will be issued under this separate procedure *before* a ruling, if any, is made regarding merit.

- *Processing Regarding Merit of Admissible Cases:* If the case is ruled admissible *on one or more alleged violations*, the OAS State will be notified and the case will be registered as a case and considered regarding merit. The State will be asked to provide a response to the petitioner’s arguments and evidence on merit and the complainant will be given an opportunity to respond to the respondent State’s submission. A merit ruling is rendered on, and only on, any allegations of State violations found previously by the Commission to be admissible. A separate ruling on merit will be issued within a certain time frame with that decision normally also being made public. However, the Commission will attempt through confidential negotiation to have the parties reach a friendly settlement before the merit decision is due and if that occurs, the report will also detail the friendly settlement

arrangement regarding the petitioner's meritorious claims. The negotiations for a friendly settlement, however, continue only with the consent of the parties and, if unfruitful, may be terminated by the Commission.

Joint Procedure for Case Processing by the Commission

In the joint procedure (used only in exceptional circumstances), the Commission has received information from both parties. However, the Commission under this procedure defers its decision on admissibility until all submissions are made by both parties regarding merit as well. In such an instance, the Commission will notify the parties that it will be deferring the decision on admissibility and instead ruling on both merit and admissibility together. A single ruling addressing both admissibility and merit is issued and normally made public. Once again, the case may be struck if the parties reach a friendly settlement prior to the issuing of the ruling.

1.1.5.4 Procedure in Determining Merit (as per Article 38 of the Commission Rules of Procedure)

Selected General Rules of Procedure

Rule 1: The Parties (petitioner and respondent State) will be given an additional two months each to provide submissions on the merit issue in particular;

Rule 2: The Commission may, if it deems warranted, grant a time extension for submission not to exceed three months from the date of the first request for submissions on merit;

Rule 3: If the case is serious and urgent, the State will be asked to expedite its response and provide its submissions as soon as feasible within a reasonable period established by the Commission based on the circumstances of the case;

Rule 4: Prior to issuing its decision regarding merit, the Commission will try to encourage the parties to reach a friendly settlement;

Rule 5: If deemed necessary by the Commission, a public hearing may be called to receive submissions and listen to oral argument on the merit issue relating to each allegation in the petition (where admissibility has not yet been finally decided given the use of the 'joint procedure'), or only on each admissible allegation (where admissibility has already been finally decided under the separate procedure). There may also be onsite investigations conducted by the Commission.

Adverse Inference for the State Drawn When the State Does Not Timely Reply Within the Maximum Allotted Time: Note that as per Article 39 of the Commission Rules the facts alleged in the petition are assumed by the Commission to be true if:

- The respondent State does not timely respond, or does not respond at all to those allegations and facts within the maximum time allotted to the State by the

Commission in the circumstances of the case (those facts and allegations having been communicated to the State by the Commission), and

- No other evidence or information received by the Commission undermines the veracity of the alleged facts in the petition.

Report If a “Friendly Settlement” Is Reached

If the victim(s) of the alleged violation(s) and the State Party concerned have reached a friendly settlement *and* if, and only if, that settlement is consistent with respect for the human rights guarantees of the American Convention on Human Rights, or other applicable instruments at issue (i.e., the additional protocols or other inter-American Conventions), the Commission will adopt and publish a report which sets out the facts of the case and the content of the friendly settlement reached (as provided for under Article 41(5) of the Commission rules of procedure). Note that it has become the practice of the Commission to also offer non-State Parties to the American Convention on Human Rights the option of a friendly settlement regarding alleged infringements of the American Declaration of the Rights and Duties of Man.

Decision on the Merits

If no friendly settlement is reached, the Commission will consider:

- The submissions that have been made by the parties in writing,
- Oral submissions, if any, as well as
- The information gathered by the Commission via the on-site investigation, if any, or
- Any relevant additional public information. The Commission will decide confidentially and in private by majority vote on the merits and any member may append a dissenting opinion.

Report on the Merits (Article 43)

- *Finding of No Merit*: If the Commission determines that there was no violation it will state this in its report, transmit the report to both parties, publish it and also report on this finding of no merit in the case in its annual report to the OAS.
- *Finding of Merit and the First Report (That Report Being Confidential) (Article 43 of the Commission procedural rules)*: If the Commission determines there was a violation(s) on the admissible allegation(s), the Commission writes a confidential report with its conclusions on merit and recommendations based on this

information and this is communicated to the parties only. The State will be instructed not to publish the report. The OAS respondent State has three months from the date of transmittal of the report to resolve the complaint and implement the recommendations made by the Commission. If the case concerns a respondent State that accepts the jurisdiction of the Inter-American Court of Human Rights, the petitioner(s) may, within one month of notification of the finding of merit, request the Commission to submit the case to the Court. In that instance, the petitioner(s) must provide the Commission with any relevant testimonial, documentary and/or expert evidence as well as claims for reparations and costs if the petitioner(s) wishes the case to proceed to the Court. The Commission may decide to refer the case concerning a State Party to the American Convention to the Court (acting thus on behalf of the petitioner in filing the case with the Court). This, having considered the petitioner's request, and all other factors (i.e., lack of State compliance within three months of the transmittal of the first report). Alternatively the Commission may decide to issue a second report (see below for details on these alternative courses of action).

1.1.5.5 Referral of the Case to the Inter-American Court of Human Rights for Adjudication (Only Where the State Is a Party to the American Convention on Human Rights and Accepts the Jurisdiction of the Court)

If it is the case that:

- The respondent State is a party to the American Convention on Human Rights,
- The respondent State has accepted the jurisdiction of the Inter-American Court as per the American Convention, and
- The Commission considers that the State in question has not complied with the recommendations of the first report within the specified time.

The Commission must refer the case to the Court unless, by majority vote, the Commission, for a justifiable reason, decides not to advance the case before the Court.

This is critical in that petitioners may not bring the case themselves directly to the Court. In making the decision whether or not to advance the case to the Court, the Commission must determine what is in the best interest of obtaining justice for the victims, and, as per Article 44 of the Commission Rules of Procedures, consider among other factors, the following:

- The position of the petitioner;
- The nature and seriousness of the violation;
- The need to develop or clarify the case-law of the system;
- The future effect of the decision within the legal systems of the Member States;
- The quality of the evidence available.

If the Commission does bring the case before the Court on behalf of the victim(s) or other petitioner(s), the Commission will notify the parties. The Commission will notify the petitioner of all the elements necessary to provide the proper application to the Court. The Court will be provided with the original petition to the Commission and the Commission's initial report containing the Commission's statement of the facts of the case, and its conclusions and recommendations. The Commission may ask the Court in urgent and serious cases for a provisional Court order to ensure the safety of the alleged victim(s) in the interim and to prevent irreparable harm occurring to those alleged victims. The Commission if it decides to bring the case to the Court must do so within three months of its communication of the initial confidential report to the respondent State and the petitioner. If the case is brought before the Inter-American Court of Human Rights, the Commission, via one or more delegates, will appear at all proceedings of the court. The petitioner may ask the Commission to be included as a delegate of the Commission. The Commission may also under the rules of procedure of the Commission ask the Court to hear from other witnesses and experts and this will be decided by the Court in accord with the rules of Court.

1.1.5.6 Cases Still Unresolved After Three Months From the Initial Commission Report Regarding Merit and Not Advanced to the Inter-American Court of Human Rights Respecting Parties That Do Accept the Court's Jurisdiction

If the case is still unresolved within three months of the *initial* report on merit transmitted to the parties and the case has *not* been transferred to the Inter-American Court of Human Rights (for those parties that have accepted the jurisdiction of the Court), then a second report will be transmitted to the parties. (A second report procedure is also employed where the OAS State has not accepted the jurisdiction of the Court even though it has ratified the American Convention on Human Rights, and also for non-State Parties to the American Convention.) The second report also includes information on the extent of State compliance and once again the Commission's conclusions and recommendations. The Commission will afford the State another opportunity (a time extension) to comply with its recommendations. If at the end of this time extension, the State still has not complied with the Commission's recommendations, the Commission may or may not choose by majority vote to publish the second report and report the findings to the OAS in the Commission's annual report. The Commission generally does publish the second report in such instances and include it in the annual report to the OAS but it is not legally required to do so. Whether to make the second report public will be decided based on what is best for the promotion and protection of human rights as set out in the legal instruments within the jurisdiction of the Commission.

1.1.5.7 Follow-up on “Friendly Settlements” and Published Reports

If there is a “friendly settlement,” or the Commission published a second report regarding the finding of merit and with its conclusions and making recommendations, the Commission will ask the State for more information and/or hold hearings and ask for submissions to assess the extent of compliance after a certain designated period of time has elapsed. *However, the Commission recommendations are not legally binding.* Furthermore, the Commission itself has no power to enforce the “friendly settlement” or any of the Commission recommendations including those regarding any type of reparation (financial or other settlement).

1.1.5.8 Petitions Regarding OAS Member States that Are Not a Party to the American Convention on Human Rights

As mentioned, the Inter-American Commission on Human Rights will consider also petitions against non-State Parties to the American Convention on Human Rights if the petitions meet the requirements, and the communications relate to the American Declaration of the Rights and Duties of Man.

1.1.5.9 Further Details Regarding On-site Investigations

A Special Commission will be appointed to do any necessary on-site investigations, but only at the invitation of, or with the consent of the State where the investigation is to take place. No member of the Special Commission which will do the on-site investigation may be a national of or reside in the respondent State. The number of members of the Special Commission and the designation of its President is decided upon by the Inter-American Commission on Human Rights. If the case is urgent, such decisions may be made by the President of the Inter-American Commission on Human Rights subject to the approval of the Commission. Normally such on-site investigations concern widespread human rights abuses and individual cases only as illustrative of the former, but in rare cases may concern an individual matter.

1.2 Inter-American Court of Human Rights

1.2.1 Organization of the Court

The Inter-American Court of Human Rights was created via the adoption of the American Convention on Human Rights which establishes the Court. Article 1 of the Court Statute states that the Court is “an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on

Human Rights” (see Appendix A.11 for the Statute of the Inter-American Court of Human Rights). The Court which was established in 1979 was originally seated in Washington, D.C. but was moved to San Jose, Costa Rica where it is still today. However, the Court can with a majority vote of the Court convene in any OAS member State with the permission of that State whenever it considers this necessary. The Court issued its first judgment in 1981. The Court is comprised of seven nationals of OAS member States but no two judges are nationals of the same State. The judges are elected by OAS States Parties to the American Convention on Human Rights by majority secret ballot from amongst expert jurists in human rights of the highest reputation from amongst nominees provided by each OAS member State Party to the Convention. Each OAS State Party to the Convention may submit up to three nominees that are nationals of the State that proposed them or of another member State. When three candidates are proposed, at least one must be a national of a State Party other than the one that proposed the nomination. The judges serve not as representatives of their State but as independent impartial jurists. The Court’s judges serve for a six-year term and may be re-elected once. The President and Vice-President of the Court are elected by the Court by secret ballot for a period of two years and may be re-elected.

The official languages of the Court are the same as those of the OAS namely, Spanish, English, Portuguese and French. The language of the Court is decided upon by the Court each year. The working language in a case is the language of one of the Parties which must also be one of the official languages of the Court. Where a person appearing before the Court does not know one of the official languages, the petitioner may speak in his or her own language and an interpreter will be provided. The State is represented by an Agent of the State who may have his or her own representation as well. The Commission is represented by delegates chosen by the Commission who in turn may be represented or assisted by others (i.e., counsel).

The judgments of the Court are transmitted to the States Parties, the parties to the case, the Permanent Council of the OAS through the OAS President, the Secretary General of the OAS, and any other interested parties. The Court also provides each regular session of the General Assembly of the OAS with annual reports in which it makes specific note of States that have not complied with Court orders and makes any recommendations in this regard it deems fit. The General Assembly is comprised of a delegate from each member State; usually the foreign minister. The OAS General Assembly is the highest decision making body of the OAS. In addition, the OAS receives reports from the Inter-American Commission on Human Rights regarding individual cases, systemic human rights violation cases and on the general human rights situations in OAS member States. Hence, the OAS is made aware of the conduct of OAS States Parties regarding adherence to the requirements of the American Convention on Human Rights and *may* choose to apply political pressure to gain compliance of an OAS State with the Court’s order. However, there is no specific organ of the OAS which has been specifically designated with the ongoing responsibility of ensuring compliance of the member States with the orders of

the Inter-American Court of Human Rights (contrast this with the Council of Europe which has incorporated the Committee of Ministers of the Council as a body specifically charged with ensuring compliance with the orders of the European Court of Human Rights). Note that under Article 68 of the American Convention on Human Rights, however, the OAS States Parties to the Convention which have ratified or acceded to the Convention agree to regard the Court's judgments as legally binding:

Article 68

1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state (American Convention on Human Rights).

1.2.2 Adjudicative Function of the Court

1.2.2.1 Who May Bring a Case Before the Court and Against Which State

Only the Inter-American Commission on Human Rights and, States Parties to the American Convention on Human Rights *if they also accept the jurisdiction of the Court*, at least with respect to the specific case, may bring a case to the Inter-American Court of Human Rights. The Commission must have completed processing the case before either the Commission or the State may file the case to the Inter-American Court of Human Rights for adjudication. Contrast this with the fact that, (aside from States that recognize the competence of the Commission with respect to inter-State petitions), individual petitioners (victim(s) or their representatives) or a Third party or his or her official representative, may bring a case *directly* to the *Inter-American Commission on Human Rights*, the first level of the Inter-American Human Rights system. The fact that individual petitioner(s) must rely on the Commission to bring the case, on their behalf, to the Inter-American Court of Human Rights is unlike the European Court of Human Rights system. In the European system, individual victims, third parties and non-governmental agencies on behalf of victims or themselves may *directly* bring a case to the European Court of Human Rights against a State member of the Council of Europe (on their own behalf or through their official representatives rather than relying on a Commission or other such body to do so). Thus, in the European system, the individual petitioner's case is *not* first screened by a Commission for admissibility and merit and advanced to the Court by a Commission on behalf of the victims. *However, note that in the inter-American system, once the case is accepted by the Court, the Commission is no longer acting on behalf of the alleged victims(s).* Rather, the victims and the Commission are independent, separate parties with their own legal standing though their objectives and positions may and generally do greatly overlap.

1.2.2.2 An OAS State Party to the American Convention as Petitioner to the Court

It is noteworthy that an OAS member State Party to the American Convention may accept the binding jurisdiction of the Court unconditionally, or on condition of reciprocity, for a specified period or for specific cases only. Hence, being a State Party to the American Convention on Human Rights does not mean that State Party necessarily automatically accepts the competence and jurisdiction of the Court (either completely or with qualifications). Hence, various OAS member States that are a party to the American Convention on Human Rights may or may not accept the Court's jurisdiction with respect to inter-State petitions. An OAS member State may file an application to the Court *for adjudication* only if both that State and the respondent State have ratified the American Convention on Human Rights *and* accepted the competence/jurisdiction of the Inter-American Court of Human Rights in respect of the case at issue at a minimum. Such inter-State petitions to the Court for adjudication must be filed in the normal course within a maximum of three months of the release of the Commission report to the parties.

1.2.2.3 The Commission as Petitioner to the Inter-American Court of Human Rights

The Commission, if it decides to bring a case before the Inter-American Court of Human Rights concerning a violation of the American Convention on Human Rights or another instrument within the jurisdiction of the Court, will provide the following information to the Court:

- The Commission's findings regarding merit and the reparation and costs sought;
- The parties (*note that the name and identity of the petitioner will not be released to the Court except with the permission of the petitioner*);
- The Commission's findings regarding the facts of the case;
- A summary of how the case came before the Commission and was processed in regards to admissibility;
- The list of witnesses and experts and their submissions and the relevance of their submissions to the Court's consideration of the case;
- The Commission assessment of the legal grounds for the case and the Commission conclusions on the legal issues;
- Any available relevant information on the original complainant(s), petitioner(s), the alleged victim(s), their family members or duly accredited representatives *to the extent possible consistent with the need for protection of those persons*;
- The names of the Commission delegates to participate in the proceedings;
- A copy of the initial confidential report prepared by the Commission and originally transmitted to the State as well as to the petitioner outlining the

Commissions findings and recommendations and the State's non-compliance; as well as

- Any other certified document, evidence or information the delegates consider to be necessary for submission to the Court.

The Commission will *not* submit documents relating to unsuccessful attempts at a friendly settlement. Whether any particular documents are submitted to the Court will be subject to the Commission's decision in this regard as per Article 73 of the Commission's Rules of Procedure.

1.2.2.4 Notification of the Application to the Court

Notification of the Application to the Court is made to:

- The President and the judges of the Court;
- The respondent State;
- The Commission, when it is not the applicant;
- The original claimant, if known;
- The alleged victim, his next of kin, or his official representatives, if applicable.
- In addition, the other member States of the OAS, the Permanent Council of the OAS and its President are notified of the application by the Secretary of the Court. The Secretary of the Court requests that the Commission select its delegates and the State its agent within one month of notification. The Commission is represented by its President until the delegates are selected.

1.2.2.5 Reply of the Respondent State

Within four months of receiving a copy of the petition the respondent State must provide a written reply (there are no time extensions permitted) and must state whether it accepts the facts and claims or whether it contradicts them. The Court will consider as accepted any facts that have not been expressly denied or claims that have not been expressly challenged by the State.

1.2.2.6 Hearings and Judgments

Prior to the commencement of the oral proceedings, the Court may accept additional written submissions from the parties. Hearings are public. Decisions are taken by majority vote of the judges present in private deliberations with five judges being the quorum needed for deliberation. Any judge may append a separate dissenting or concurring opinion to the majority judgment. Ad hoc judges selected by the State within 30 days of notification may replace an elected judge unable to serve. All judgments of the Court on the admissibility and merits of the case are final and cannot be appealed. The Court judgments and reasons for judgment are made public as are normally all documents in the case filed with the Court unless the Court deems

it necessary not to publish certain documents. The Court may, under Article 63 of the American Convention on Human Rights, order a remedy which includes financial compensation for the harms resulting from the State Convention violations and court costs as well as certain other non-financial remedies such as, but not limited to, public acknowledgement by the State Party of the Convention violations; an order to bring domestic legislation and policy in line with the requirements of the American Convention on Human Rights, etc. The Court, however, is not empowered to award punitive damages.

1.2.2.7 The Right to Participation of Next of Kin of Victims at All Stages of the Proceedings

Initially, the rules of procedure of the Inter-American Court of Human Rights were modeled after those of the European Court of Human Rights, but as with the latter these rules underwent several revisions. The most recent revision to the Court's procedural rules provides that after, and only after, the Court's decision to hear the case, there is a grant, wherever requested, of independent legal standing before the Court to:

- The victims or their official representatives, and also
- The next of kin of the direct victims.

The next of kin are often indirect victims when another family member is directly victimized and these kin may also suffer serious psychological and/or physical harms as a result. Thus, all of the foregoing may make their own separate submissions and present their independent evidence to the court *at all stages of the proceedings* including the reparations stage. Hence, the victims are not entirely dependent on the Commission submissions as previously. When there are several alleged victims, next of kin or official representatives of the former, they are required to designate a common intervener who acts on their collective behalf and is the only person authorized to present pleadings, motions and evidence during the proceedings, including the public hearings. Note that when the victims or next of kin do not have legal representation:

the Commission shall act on behalf of the alleged victims and their next of kin in its capacity as guarantor of the public interest under the American Convention on Human Rights to ensure that they have the benefit of legal representation. (Article 33(3) of the Rules of Procedure of the Inter-American Court of Human Rights)

1.2.2.8 Provisional Measures

The Court may, on its own motion, or at the request of a Party (including the victim(s) or their official representatives) *for cases already submitted to the Court*, make provisional orders that will afford protection to participant(s) in urgent and grave cases where there is imminent foreseeable risk of irreparable harm (i.e., to victims,

next of kin of victims and/or their representatives or other participants in the case, etc.). (The Commission may also request such measures, as mentioned previously, for cases not yet before the Court, but the petitioner may not request such measures directly to the Court for a case not yet before the Court.)

1.2.2.9 Friendly Settlement

The Court may strike the case from the list when it is informed that there is a friendly settlement reached or another compromise solution or that such is likely to be reached.

1.2.3 The Advisory Function of the Court

The Court under its statute may provide an advisory function and provide advisory opinions on the interpretation and application of the Inter-American Convention on Human Rights, its additional protocols or other inter-American treaties endorsed by the OAS, or of the domestic law of OAS States in respect of human rights. All OAS member States or their agencies may consult the Court for its advisory opinion in regards to the aforementioned whether or not they are a party to the American Convention. Furthermore, the Court may give its advisory opinion on human rights issues pertaining to an OAS State regardless of whether or not that State accepts the adjudicative jurisdiction of the Court.

1.2.4 Summary of Selected Key Procedural Steps for Case Processing Under the Inter-American Human Rights System

Step 1. A case is submitted to the Inter-American Commission on Human Rights by an individual or individual(s), or their official representatives, or a Third Party (with or without the knowledge of the victim(s) of the alleged violation) or by his or her representative, by an NGO or an OAS State Party to the American Convention which also accepts the competence of the Commission to consider inter-State petitions. Inter-State petitions by State Parties to the American Convention can be filed only against OAS State Parties that accept the Commission's competence to examine such petitions by one State Party against another. For petitions against State Parties to the American Convention on Human Rights, the alleged violation may concern that Convention (or the protocols additional to that convention if the respondent State has ratified the relevant protocol) or an additional Convention endorsed by the OAS and ratified by the respondent State. In the case of petitions to

the Commission against a non-State Party to the American Convention, the petition will concern violations of the Declaration of the Rights and Duties of Man. The petition is assessed as to whether it meets formal requirements such as it is against an OAS State member, specifies the facts of the case, identifies the victims, meets the time limitation for filing, etc. If the case is not struck out during this preliminary screening, it is further examined regarding admissibility.

Step 2. The petition, if not struck out in the initial screening, is transmitted to the respondent State for a reply with the petitioner's identity concealed. The State has two months to reply although in certain instances a time extension may be granted. In other instances, the State will be requested to reply sooner than two months, i.e., if the case is grave and there is an urgency in terms of the status of the victim or for some other reason.

Step 3. In regards to OAS States that are parties to the American Convention on Human Rights, the Commission will attempt to negotiate a friendly settlement of the case if it has ruled the allegation(s) admissible. If a friendly settlement is reached, a report on the case and the contents of the friendly settlement will be published. There is no provision under the Commission rules of procedure for the Commission to attempt a friendly settlement for non-State Parties to the Convention, but this is nevertheless the general practice of the Commission.

Step 4. The Commission will choose either of two procedures in processing the case. In the "separate procedure" the Commission will first make the final decision on admissibility regarding each alleged violation and make the report on admissible and inadmissible cases public. Subsequently, the Commission will process the case regarding merit and make a decision on the merit of each admissible allegation in the case. Alternatively, the Commission may defer on the final admissibility decision in order to decide on admissibility and merit together (the joint procedure). If this is the case, the Parties will be notified that this is the procedure to be followed. Hence, the Parties' submissions to the Commission will address admissibility and merit at once rather than at different times in the case processing as would, in contrast, be the case with the separate procedure. The Commission may decide to use the joint procedure, for instance, in grave and urgent cases among others in order to expedite the case.

Step 5. In exploring the merit issue, the Commission may ask both parties for further submissions, and/or hold public hearings and receive oral submissions as well, and may, with the consent of the respondent State or at the State's invitation, do any on-site investigations deemed necessary by the Commission.

Step 6. If no merit is found, a report will be published to this effect. If merit is found, the Commission will first issue an initial confidential report and seek the compliance of the State within a specified period. The petitioner has one month from notification of the finding of merit to request that the Commission advance the case to the Court (this only applies where the respondent State is a State Party to the American Convention and accepts the Courts jurisdiction at least with respect to the specific case at issue). If the State's compliance with the Commission recommendations in the first report is not forthcoming, the Commission will either refer the case to the Inter-American Court of Human Rights (on the condition that the

case concerns a State Party to the American Convention which also accepts the competence of the Court), *or* issue a second report and seek compliance after a second period of time. If the respondent State is a Party to the American Convention on Human Rights *and* accepts the jurisdiction of the Court, the Commission is obligated to advance the case to the Court unless there is a strong and judicious reason why not to do so. If a second report is the option chosen, and compliance is still not forthcoming after the time extension elapses, the Commission may publish the second report if it deems this appropriate and in the interests of justice (a second report will be the option chosen where the State does not comply with the Commission recommendations in the first report and it is not a Party to the American Convention, or is a State Party to the Convention but does not accept the jurisdiction of the court).

Rule 1. If the case is brought by the Commission to the Inter-American Court of Human Rights, the Commission will participate in the proceedings through its delegates. The Commission will submit its initial report to the Court and will only identify the petitioner to the Court with the latter's permission. The alleged victim(s) of the OAS State Party's human rights abuses and their next of kin may participate in all stages of the court proceedings (once the case is before the Court) each with their own independent standing separate from each other and from the Commission.

Rule 2. State Parties to the American Convention on Human Rights may also file cases with the Court against other OAS State Parties to that Convention that have also accepted the competence of the Court (either conditionally, for an indefinite or a definite time period or with respect to the specific case in question). However, the State Party may file the case to the Court only once the case has reached the final stage of investigation by the Commission and if the case was referred to the Court within three months of the Commission's release of its original merit report to the Parties. If a friendly settlement is reached prior to judgment, the case will be struck from the Court's list. The Court will issue a public judgment on admissibility of each allegation, merit regarding admissible allegations and reparations which may include financial compensation for harms and court costs as well as certain non-financial remedies.

Chapter 2

European International Human Rights Court System

2.1 The Council of Europe and the European Court of Human Rights

The *European Court of Human Rights* located in Strasbourg, France was established in 1959 and operates as an international court on a full time permanent basis. The European Court of Human Rights is widely referred to as “the conscience of Europe.” Strasbourg is also the location of the *Council of Europe* which has as its governing body the Committee of Ministers. The Human Rights Commissioner of the Council is charged with raising awareness of, and promoting human rights in the 47 member States of the Council. The Committee of Ministers of the Council is comprised of the Foreign Ministers of the States which are members of the Council of Europe. The current 47 Council member States have, as per international legal agreement (The European Convention on Human Rights and Fundamental Freedoms which set out the guidelines for the creation and operation of the Court in 1950), agreed to be subject to the jurisdiction of the Court. Only members of the Council of Europe may be a party to the European Convention on Human Rights and Fundamental Freedoms. That Convention is the enabling legal instrument of the European Court of Human Rights, and most, but not all, human rights violations which come before the European Court of Human Rights concern violations of that convention (the European Convention on Human Rights and Fundamental Freedoms as amended by Protocol No. 11 which entered into force November 1, 1998 and Protocols No. 1, 4, 6, 7, 12 and 13 Additional to the Convention are included in Appendix B.1). The innovation in international law created by the European human rights system is that victims may bring a complaint of a human rights violation(s) directly to court themselves or through their legal representative (namely to the European Court of Human Rights) rather than relying on the State to do so. This is especially critical in that often it is the government through its agents that is the perpetrator of the abuse.

2.2 The European Convention on Human Rights and Fundamental Freedoms and the Rights of Minors

The European Convention on Human Rights and Fundamental Freedoms which first entered into force in 1953 (and as amended by Protocol 11, entry into force in 1998) guarantees a diverse set of civil and political rights and freedoms (see Appendix B.1). Certain of the prohibitions in the Convention including, but not limited to the prohibition against torture, slavery, forced labor and deportation of targeted groups of the States' own nationals, pertain to human rights abuses that may, depending on the particulars, rise to the level of a crime against humanity. This is especially the case when a specific identifiable group such as women, children or a certain ethnic group is targeted for systematic widespread human rights abuses by agents of the State.

The European Convention on Human Rights and Fundamental Freedoms does *not* address the minor child's right to participate in decision making affecting his or her life (i.e., the right to be heard, consistent with the child's age and maturity, in administrative or judicial proceedings regarding decisions affecting the child). Further, the latter Convention for the most part does *not* address the protection rights of children as children. This is in contrast to the United Nations Convention on the Rights of the Child (1989; entry into force 1990) which includes both child-specific protection and participation rights, and a broad range of civil, political, economic and socio-cultural rights as they relate specifically to children (the CRC and one of its protocols are included in Appendix G.3 and G.4). Almost none of the articles in the European Convention on Human Rights and Fundamental Freedoms makes reference to child-specific rights and freedom guarantees. An exception is the allowance for the exclusion of the public and press from all or part of a trial if deemed by the court necessary for the proper administration of justice in the trial of a juvenile (Right to a Fair Trial – Article 6). Notwithstanding the almost complete exclusion of child-specific guarantees of rights and freedoms in the European Convention on Human Rights and Fundamental Freedoms, all of the articles are, nevertheless, applicable to minor children as persons with inherent, universal rights. Cases have been brought before the European Court of Human Rights concerning the rights of children pertaining to alleged violations regarding a range of articles in the European Convention on Human Rights and Fundamental Freedoms.

Certain articles of the European Convention on Human Rights and Fundamental Freedoms, such as “the right to marry” (Article 12), defer to domestic law regarding at what age the right is to be conferred. Additional Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms includes a general “right to education” (Article 2) which is of particular though not exclusive relevance to children. This right to education, however, further includes “the right of parents to ensure . . . education and teaching in conformity with their own religious and philosophical convictions” which may or may not be in the best interests of a particular child in any specific set of circumstances.

Largely due to the fact that the European Convention on Human Rights and Fundamental Freedoms did not address children's human rights *in particular*, the Council of Europe adopted various Conventions to fill this gap in human rights protection for children in its member jurisdictions. These additional Conventions include the following:

- European Convention on the Exercise of Children's Rights (entry into force July 1, 2000) (see Appendix B.4)
- European Convention on the Legal Status of Children Born out of Wedlock (entry into force August 11, 1978) (see Appendix B.5)
- European Convention on the Adoption of Children (entry into force April 26, 1968) (see Appendix B.3)
- European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (entry into force June 1, 2000) (see Appendix B.2)
- European Convention on Nationality (entry into force March 1, 2000) (see Appendix B.6)
- European Convention on the Repatriation of Minors (not yet entered into force though adopted by the Council of Europe and opened for signature May 28, 1970)

A complete list of treaties of the Council of Europe is available at <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG>.

Child complainants may directly, or through their official representative advance cases before the European Court of Human Rights relating to the above European children's human rights conventions also.

2.3 The Structure of the European Court of Human Rights

The European Court of Human Rights has 47 judges in total as its full complement and includes one judge for every State Party to the European Convention on Human Rights and Fundamental Freedoms (one for every member State of the Council of Europe). The judges are elected by majority vote of the Parliamentary Assembly of the Contracting Party to the European Convention on Human Rights and Fundamental Freedoms from a list of three candidates nominated by the Contracting Party. The judges are expected to function as an unbiased and independent judiciary and not as representatives of any particular State or advocates for any State's interests in any particular case they are assigned. A judge elected by a particular State will not necessarily have the nationality of that State. The President of the Court, Vice-President(s) of the Court, and Section Presidents are elected by the plenary court (full court) while the Section Vice-Presidents are elected by the section (division of the Court into sections is explained below). The Registrar and two Deputy Registrars are also elected by the plenary court.

2.3.1 The Sections

Every judge of the European Court of Human Rights is assigned to one of five sections such that the section judges represent a balanced gender and geographic mix and represent a balanced mix of the various and differing domestic legal systems of the States Parties to the European Convention of Human Rights and Fundamental Freedoms. The objective is to ensure, to the extent possible, that all five of the Chambers of the European Court of Human Rights are equally broad in their representation on the aforementioned dimensions. This is intended then to increase the probability that every case which comes before one of the five Chambers (lower courts) will be dealt with fairly and have the same chance of success regardless of to which chamber the case is assigned.

Each of the five sections is comprised of seven judges and includes a Section President and Section Vice-President (two Section Vice-Presidents also serve as Vice Presidents of the Court as a whole) and, in addition, a Section Registrar and Deputy Section Registrar. Judges are assigned to a section for three years. The European Court of Human Rights as a whole also has an elected President. The judges are currently elected for six-year renewable terms by the Parliamentary Assembly of the Council of Europe and retire at the age of seventy. However, half of these judges are then randomly selected by lot by the Secretary of the Council of Europe to have their term expire in three years. There are also additional provisions in the Convention as modified by Protocol No. 11 to ensure that at least half of the judges will have their terms expire in three years should additional circumstances necessitate the use of such provisions. A new protocol (Protocol No. 14), introduced in 2004 (not yet in force at the time of writing), once endorsed by all Council members, will provide for a nine-year non-renewable term for the judges of the European Court of Human Rights. To date Protocol No. 14 has been ratified by 46 of the 47 States Parties to the European Convention on Human Rights.

2.3.2 The Chamber (Lower Court)

Most of the cases heard by the European Court of Human Rights are heard by “the Chamber” (lower court) comprised of the seven judges selected from the section to which the case was assigned. One of the seven judges is the President of the section to which the case was assigned. The lower Chamber also includes among its seven judges the judge elected by the respondent State party to the case (or another person chosen by that State Party in question who sits in the capacity of a judge in instances where the person elected is unable to serve).

2.3.3 *The Grand Chamber: Re-hears Selected Cases De Novo Post-chamber Judgment or Hears Selected Cases that Have Been Referred to It Directly by “the Chamber” (no Chamber Judgment)*

The upper chamber is named the “Grand Chamber” and it is empowered to re-hear cases de novo on request by one or both parties but will do so only in very selected cases. The cases will come before the Grand Chamber for re-hearing only if accepted by the five member Grand Chamber screening panel which considers the application for a re-hearing (that application being made by one or both of the parties to the case). Alternatively, the Grand Chamber may hear the case when the lower Chamber relinquishes its jurisdiction and the case concerns central questions regarding the Convention or its application or other important questions that require clarification. The Chamber may relinquish jurisdiction to the Grand Chamber at any point prior to rendering its judgment.

The Grand Chamber is comprised of 17 judges and at least three substitute judges who can serve as alternates if one of the 17 judges of the Grand Chamber is unable to serve. The Grand Chamber includes among the 17 judges the President and Vice-Presidents of the European Court of Human Rights, and the five section Presidents. (Any Vice-President of the Court or President of a Section who is unable to sit as a member of the Grand Chamber is replaced by the Vice-President of the relevant section.)

In cases to be re-heard on application for re-hearing by one or both parties (that application having been screened and accepted by a five member Grand Chamber screening panel), no judge who sat on the lower Chamber panel dealing with the case and rendered judgment will also be on the Grand Chamber panel which re-hears the case de novo *with the exception of*:

- The Section President of the lower Chamber that rendered the judgment
- The judge elected by the State that is a party to the case who previously sat as an ex officio member on the case in the lower Chamber that rendered a judgment (or the substitute judge from that State that sat on the Chamber panel that rendered judgment in the case in the lower Chamber)
- Any judge that sat in regard to the decision on admissibility of the case

Since the Grand Chamber is re-hearing the case de novo (afresh), the Grand Chamber is empowered to consider both admissibility and merit with respect to the allegation (s) of Convention violations it examines. The cases which are accepted by a screening panel of the Grand Chamber for re-hearing and come before the Grand Chamber must first have been ruled admissible by the lower Chamber (“the Chamber”) on one or more alleged Convention violations. It is important to understand that the Grand Chamber in re-hearing a case will consider only those alleged violations in the case that have been previously ruled admissible by the Chamber (lower Court). The Grand Chamber could reverse or affirm either or both the lower Courts rulings on admissibility or merit as regards to one or more of the alleged violations.

Where “the Chamber” has relinquished its jurisdiction over the case and referred the case to the Grand Chamber, the Grand Chamber will issue a ruling on admissibility of each alleged Convention/Protocol violations made in the case and, for those ruled admissible, a ruling on merit in the same judgment and a determination regarding just satisfaction (financial compensation) if any to be awarded. Rulings are by majority vote. The Grand Chamber in all cases before it will consider the legal issues *de novo* (afresh) thus considering everything again (that is issues regarding law or mixed law and fact) as pertains to admissibility and merit.

2.4 Jurisdiction

The European Court of Human Rights has jurisdiction to rule via binding judgments regarding:

- State Party violations of the European Convention on Human Rights and Fundamental Freedoms (the Court’s enabling legal instrument) as modified by Protocol No. 11; and
- State infringements of the additional protocol(s) to the European Convention on Human Rights and Fundamental Freedoms as set out in the most recent amended version of the Convention (where the State Party to the case has also ratified or acceded to the Protocol(s) in question); and
- State violations of such additional Conventions as agreed upon by the Council of Europe which are in force such as, for instance, those mentioned above regarding children’s rights (where the State Party in question has also ratified or acceded to the additional Convention(s) at issue in the case).

The European Court of Human Rights thus is not an appeal court for national courts. Therefore, the Court cannot reverse or in any way change any ruling by a national court, nor alter or quash any domestic laws of the States Parties to the European Convention on Human Rights. The European Court of Human Rights operates as a body that helps shed light on the extent of State compliance with the European Convention on Human Rights (and its Protocols) and certain other operative European Conventions adopted by the Council of Europe and ratified or acceded to by some or all of Council of Europe member States. This by hearing admissible cases brought by individuals, organizations or State Parties concerning alleged infringements, and by making declarations regarding alleged violations, and ordering, in the proper cases, just satisfaction and/or certain other remedies. In exceptional circumstances (i.e., where there is a risk of imminent serious physical harm to the complainant by agents of the State Party or Parties in question for whatever reason), the Court may act on behalf of the complainant to intercede with the government(s) in question to ask that certain protections be afforded the complainant by the government(s) involved as the case proceeds.

The geographical jurisdiction of the European Court of Human Rights extends only to the 47 States Parties to the European Convention on Human Rights and Fundamental Freedoms who, as mentioned, also comprise the Council of Europe.

However, the reach of the Court's jurisdiction is vast and, at present, includes the United Kingdom and every European state except Belarus. This then covers a combined population of 800 million citizens living in those States. However, it should be noted that both:

- Nationals of the States Parties to the European Convention on Human Rights and Fundamental Freedoms
- Any other persons (i.e., refugees, asylum seekers, displaced persons, stateless persons, etc.) present in the jurisdiction of one of the States Parties to the European Convention on Human Rights and Fundamental Freedoms, *or* in a territory under the control of that State Party at the time of the alleged State Convention infringement which caused them direct, personal harms,

are potentially covered by the guarantees of the Convention. Thus, State violations of the Convention may be addressed to the European Court of Human Rights by the latter individuals as well. This, provided that, among other admissibility criteria being met (which are discussed below), the State violations occurred *after* the respondent State ratified or acceded to the European Convention on Human Rights and Fundamental Freedoms, or if the violation is of the Convention Protocol(s), that the infringement occurred after the ratification by that State Party of the additional Protocol in question. (The same is true also with respect to petitions regarding State violations of any other Convention adopted by the Council of Europe and within the jurisdiction of the European Court of Human Rights.)

2.5 Enforcement

The Committee of Ministers of the Council of Europe, with the assistance of the Department for the Execution of Judgments of the European Court of Human Rights, is responsible for the enforcement of the judgments made by the European Court of Human Rights. This includes, but is not limited to, ensuring that any monetary compensation and or court costs (referred to as just satisfaction) ordered by the court is in fact paid to the complainant victim(s) of violations of the Convention and/or the Protocol(s) at issue. The ultimate sanction would be the State's expulsion from the Council of Europe for non-compliance with the Court's order for just satisfaction or any other remedy.

2.6 European Court of Human Rights Case Processing System

2.6.1 Petitioning the European Court of Human Rights

The European Court of Human Rights is charged with enforcing the provisions of the European Convention on Human Rights and Fundamental Freedoms and its

additional Protocols and certain other additional Conventions such as those concerning children's rights as mandated by the Council of Europe. Petitions to the Court seeking a remedy for alleged infringements of Convention provisions may be brought by:

- Individuals directly harmed, or others accepted by the Court as the official representatives of the harmed persons (i.e., parents as complainants on behalf of a minor child victim, NGOs on behalf of victims, etc.),
- Groups of individuals directly harmed, organizations such as NGOs considered as legal entities who have members victimized, or
- One Convention State Party against another (though the number of inter-State petitions to the Court are very few).

There is no bar against minors bringing cases forward to the European Court of Human Rights. However, the fact that applications to the Court are ruled inadmissible if not all domestic remedies have been exhausted poses special difficulties for minor children. This is the case in that minors generally do not have legal capacity to bring cases in their own name in the various European State Parties to the Convention, and the child may have no adult or organization to act on his or her behalf in advancing the case in their home country. Hence, children with legitimate cases under the European Convention on Human Rights and Fundamental Freedoms and/or the additional protocols or other Convention within the scope of the Court may have their cases ruled inadmissible on purely technical procedural grounds (i.e., due to their inability to exhaust all domestic remedies prior to seeking justice via the European Court of Human Rights).

2.6.2 The Admissibility Decision Made by Committee or by “the Chamber”

If a case is not dismissed on administrative grounds such as insufficient information (i.e., alleged violations of the Convention and/or Protocols not stipulated, or the form for the petition not being filled out, etc.), the case is assigned to one of the court's five sections. A judge rapporteur from one of the sections screens the case and decides if the case should be referred for the admissibility decision to either:

- A judicial committee comprised of three judges from that section (the judges in the committee sit for a fixed term and listen to the numerous cases as a committee for the duration of the committee's term), or
- “The Chamber” composed of seven judges (selected from the section to which the case has been assigned).

If the case proceeds to the chamber (either directly, or because it first went to the judicial committee and was not unanimously struck out there), the Chamber will render a decision on admissibility by majority vote.

2.6.3 The Separate Vs. Joint Procedure by “the Chamber”

The Chambers of the European Court of Human Rights must always decide on the admissibility of the case before reaching issues of merit. That is, *one or more* of the alleged Convention or Protocol violations must be ruled admissible and the case must succeed in this respect *before* the merits can be decided. The lower Chamber (“the Chamber”) of the Court will usually issue the admissibility decision first and, if the case is deemed admissible, it will then be considered on the merits and a separate judgment regarding merit rendered (*separate procedure*). The lower Chamber in its judgment regarding merit will consider the issue of remedy and whether just satisfaction should be awarded given all the circumstances of the case (just satisfaction – financial compensation for damages and/or court costs-may or may not be awarded in regards to a State Convention/Protocol violation). However, there are instances where the court adopts what is termed the *joint procedure* in which both admissibility and the merits can be considered together i.e., where the two are inextricably intertwined as when the State will not allow certain categories of persons access to the domestic courts thus:

- Effectively preventing the complainant from exhausting all domestic remedies, a requirement for admissibility, and
- Simultaneously violating the fundamental European Convention on Human Rights and Fundamental Freedoms guarantee to an effective remedy for harms perpetrated by the State (Article 13 of the Convention).

In such a case, the decision regarding admissibility and the decision regarding the merits of the case will be included in the same judgment. It is possible, however, that the respondent State, after being notified that a joint procedure will be adopted, on its own initiative offers a friendly settlement before the case is heard. In that instance, the case will be struck.

2.6.4 Negotiating a “Friendly Settlement”

If the case is ruled admissible under the *separate procedure* previously mentioned then the registrar’s office of the court will attempt, through confidential negotiation/mediation, to have the parties reach a “friendly settlement.” If a friendly settlement is reached, the case will be struck (to be reinstated only if new circumstances warrant). If the friendly settlement is not forthcoming, the Chamber will issue a separate decision on the merits after consideration of any further evidence and submissions by the parties and any public hearings in the case. (A case can also be struck if the complainant withdraws the complaint at any point in the process.)

2.6.5 Case Admissibility Criteria

The complainant may allege one, or more than one violation of the European Convention on Human Rights, its protocols and/or of another Convention within

the scope of the Court. Each alleged violation will be assessed in regards to admissibility. Hence, it is possible to have certain alleged violations considered admissible for adjudication by the Court, while others pertaining to the same case are determined to be inadmissible. The State is given the opportunity to make submissions on the issue of admissibility and the complainant to reply to the State's position prior to the lower Chamber issuing the admissibility decision as a separate ruling or as part of a judgment that also addresses merit (the latter being under the "joint procedure"). The State and the complainant may also make submissions on the admissibility issue to the Grand Chamber if the case comes before the upper Chamber as the latter will hear the case *de novo* as mentioned. The Grand Chamber will address the admissibility issue along with the merit issue in one judgment (i.e., ruling on merit for one or more of the alleged Convention violations it considers admissible).

The complaint regarding any particular alleged violation(s) will, barring any other relevant factor, be ruled admissible if:

- It concerns an infringement of the Convention/Protocols by a State Party (or Parties) to the Convention/Protocols within the jurisdiction of the European Court of Human Rights; hence, the complaint is *not* against a private person or private company, but rather against the State Party or Parties concerned due to the actions or inactions of the agents of the State which constitute violations of the Convention or the Protocols ratified or acceded to by the State Party. Hence, the allegations are not an abuse of the right to file a complaint to the international Court;
- An *identified* individual victim has made the complaint either directly or through an official representative; a group of individuals, at least one or more of whom are identified in the application, has made the complaint on their own behalf, or through an official representative; an organization recognized in law as a legal entity has made the complaint as a victim, or a State Party to the Convention has made the complaint against another State Party;
- The individual victim or group of individual victims were in the jurisdiction of the State Party to the case at the time of the violation(s). Being "within the jurisdiction" of the State is generally understood to mean being in the territory of that State; or in a territory effectively controlled by that State and thus may arguably include also the victim being in the custody and control of the State in question even if not in the territory of that State;
- The violations took place *after* the State Party or Parties involved had ratified or acceded to the Convention/Protocol in question (hence the date after which Convention/Protocol violations must have occurred for potentially admissible complaints to the Court will vary for different State Parties);
- The individual or group of individuals or other party bringing the case is held by the European Court of Human Rights to be the direct victim(s) of the infringements, or are accepted as the proper and official representative(s) of those specifically identified direct victim(s) who for some reason are unable to advance the complaint in their own right;

- All domestic remedies within the State or States in question have been exhausted with no remedy or effectively no remedy; or such a significant delay in the administration of justice as to amount to an ineffective remedy forthcoming;
- The application to the European Court of Human Rights was made within six months of the final decision by the highest domestic court(s) accessible to the complainant (accessible not just in theory but in actual practice);
- The substantive issues *in the particular case* have not been previously already decided by the European Court of Human Rights or any other international court or body; and the complaint is not a re-submission of a previous complaint to the European Court of Human Rights which was ruled inadmissible and in the subsequent submission contains no substantive new information compared to the previous submission;
- The complainant(s) have previously raised before the highest accessible domestic court(s) the *substantive nature* of the human rights abuses they have suffered (due to the particular State actions/or inaction of the offending State Party or Parties; those abuses being prohibited under the European Convention on Human Rights or its Protocols or another Convention within the jurisdiction of the European Court of Human Rights).

Note that once the application is filed to the European Court of Human Rights, the complainant must specify not only the substantive nature of the alleged human rights abuses suffered, but also the specific articles of the European Convention on Human Rights and Fundamental Freedoms and/or its Additional Protocols or that of another Convention within the jurisdiction of the European Court of Human Rights alleged held to have been infringed.

2.6.6 Consideration of the Admissibility and the Merits in the Lower Chamber

2.6.6.1 The Procedure in Which Admissibility and the Merits Are Considered Separately by the Lower Chamber

The procedure in which admissibility and the merits are considered separately is the general practice in most cases before the lower Chamber. If the case is ruled admissible (based on majority vote of the lower chamber [“the Chamber”] as pertains to one or more alleged violations of the European Convention on Human Rights, its Protocols or another relevant Convention), the government of the State Party or Parties involved as well as the complainant will be notified of:

- That ruling and
- The reasons

all of which are normally also made public. Cases which are ruled inadmissible (and therefore will not be considered as to the merits) are *not* notified to the government

against which the case was filed. The State Party will be asked to provide a written response on the issue of admissibility with regard to one or more alleged violations and provide any further evidence or observations on the case relevant to the decision(s). The complainant will have a chance to further reply to the State's response brief. As previously mentioned, the court will first attempt to have the respondent State(s) and the complainant(s) reach a mutually agreed upon settlement referred to as a "friendly settlement" at the merit stage. If no settlement can be reached, the case proceeds to trial by one of the five section judicial panels (Chambers) to decide the issue of merit and any remedy if the case is ruled meritorious as to one or more alleged violations.

2.6.6.2 The Procedure in Which Admissibility and the Merits Are Considered Jointly by the Lower Chamber

In a joint proceeding, the State Party involved will be notified of the complaint and that the admissibility issue and merits will be decided jointly. The joint procedure is used only in exceptional cases where the court deems it necessary.

2.7 Re-hearing De Novo by the Grand Chamber on Petition by One or Both Parties (Post Lower Chamber Judgment)

Either the complainant (individual, or State in the case of an inter-State case), or the respondent State(s) or both may ask for a re-hearing by the Grand Chamber within three months of the judgment by the lower Chamber. As mentioned previously, the Grand Chamber can re-hear only matters pertaining to alleged violations that have been ruled admissible by the lower Chamber. Any such requests for a re-hearing from a party or both parties to the case will be considered by a Grand Chamber panel comprised of five judges. In certain exceptional instances, the Grand Chamber panel itself may ask for a re-hearing. The Grand Chamber screening panel will exclude the following:

- Any lower Chamber judge who participated in the admissibility or merits judgment of the case (to be replaced by a judge on rotation elected by the sections to serve on the panel for six months) as well as the Section President of the lower Chamber which heard the case,
- Any judge who is a national of a State Party concerned with the case or any judge elected by a State Party concerned with the case or chosen by the State as a substitute for the elected judge where the latter was unable to serve (to be replaced by a judge on rotation elected by the sections to serve on the panel for six months).

The decisions of the panel are final. The Grand Chamber screening panel will allow for re-hearing only cases with potentially broad implications for the States Parties to the European Convention on Human Rights and Fundamental Freedoms, or where there is a significant issue with regard to the interpretation or application of that

Convention and/or its additional protocols (or another Convention within the jurisdiction of the Court), or the lower Chamber's judgment may create inconsistencies with previous judgments. Thus, the applicant(s) for a re-hearing must specify in their application what important question or issue justifies a re-hearing. If the case is accepted by the Grand Chamber, the whole matter is reheard de novo. The Grand Chamber if it deems necessary may reconsider the admissibility once more of any alleged violation previously ruled admissible by the lower Chamber and will make rulings on merit (unless the Grand Chamber has now ruled the allegation(s) inadmissible even though the allegation(s) was/were ruled in the first instance admissible by the lower Chamber).

2.7.1 Hearing by the Grand Chamber via Relinquishment by the Lower Chamber of Its Jurisdiction Prior to the Chamber Issuing Its Final Judgment in the Case

Where the case raises significant questions of general relevance, the lower chamber itself may, with the permission of both parties, decide to refer the case to the Grand Chamber for a hearing by the much more extensive Grand Chamber judicial panel. This referral will occur at some point prior to the Chamber having issued its *judgment* on merit (in the separate case processing procedure) or its single judgment on admissibility and merit combined (joint case processing procedure). If the lower chamber wishes to refer the matter to the Grand Chamber (thus relinquishing its jurisdiction at some point prior to judgment), and one or both of the Parties is in disagreement, the party or parties has one month to file its objection with the Registrar (post notification of the lower chamber's relinquishment of its jurisdiction) and request that the case first be heard by the lower chamber stating the reason and rationale for the objection. If the lower Chamber rules the reason invalid, it will reject the objection and refer the case to the Grand Chamber. If the lower chamber is successful in relinquishing its jurisdiction, the Grand Chamber judges will include the lower chamber judges who would have heard the case in the lower chamber had it first gone forward there. The Grand Chamber will rule in all cases before it by majority vote on admissibility of each alleged violation, merit and whether just satisfaction should be awarded.

2.7.2 When the Lower Chambers Judgment Becomes Final

In instances where:

- No direct referral is made to the Grand Chamber by the lower chamber; or
- The application by a party for the re-hearing by the Grand Chamber is rejected by the five member Grand Chamber judicial panel (panel set up to consider whether the case will be accepted by the Grand Chamber for consideration), or
- The three-month deadline for a request by a party for a re-hearing by the Grand Chamber of the chamber judgment has expired,

the lower chamber judgment becomes final. The State will be expected to comply with the Chamber judgment. The Committee of Ministers of the Council of Europe will be charged with monitoring of State compliance with the Chamber's order for just satisfaction with the assistance of the Department for the Execution of judgments of the European Court of Human Rights.

2.7.3 Re-hearing by the Grand Chamber and Just Satisfaction

If the case is to be re-heard by the Grand Chamber on appeal by one or both parties, any decision by the lower chamber for just satisfaction will be reserved (the State will not yet be expected to execute the order and there will be no transfer to the Committee of Ministers for monitoring of State compliance as of yet). If there is a decision for just satisfaction by the Grand Chamber, then that order will be required to be implemented by the State Party or Parties concerned. The Committee of Ministers of the Council of Europe will be charged with monitoring of State compliance with the Grand Chamber order for just satisfaction with the assistance of the Department for the Execution of Judgments of the European Court of Human Rights. Note that the Grand Chamber judgment may affirm that of the lower court, or vary from it in certain or all respects. The Grand Chamber may or may not rule the case as meritorious, and may or may not provide a remedy (just satisfaction). All judgments of the Grand Chamber are final whether the case came before the Grand Chamber on appeal by one or both parties, or due to the lower Chamber relinquishing its jurisdiction.

2.8 Key Steps in Case Processing in the European Court of Human Rights System

- The application is filed and, if not struck out on administrative grounds, then assigned to one of five court sections.
- The case is assigned to a section committee of three judges from the section to which the case was assigned, or alternatively directly to the Chamber of seven judges from the section to which the case was assigned. A case assigned to the committee for screening, if not unanimously struck out, is sent to the same section Chamber for an admissibility decision.
- *The lower Chamber (the Chamber)* rules on admissibility and merit (including any just satisfaction to be awarded). In the "separate procedure," the Chamber makes the *admissibility decision* first and issues a ruling separate from the merit *judgment* (merit judgment occurring only if the case was ruled admissible in regards to one or more alleged Convention/Protocol State violations). The State concerned will be notified of the petition to the Court only if one or more alleged

State violations are ruled admissible. The registrar of the Court will attempt a “friendly settlement” if possible through confidential negotiations; otherwise the case will proceed to trial on the merits. Alternatively, in exceptional cases, a “joint procedure” is utilized by the Chamber in which admissibility and merit are considered together, and a single judgment addresses both matters including any remedy. The State is notified when the “joint procedure” is to be employed. There is the possibility for a “friendly settlement” at any time prior to the issuing of the judgment.

- *The “Grand Chamber”*: In exceptional cases, where there is an important issue with regard to the interpretation or application of the Convention or its Protocols or the Chamber ruling would create inconsistencies with previous rulings, the lower Chamber may, with permission of both parties, relinquish jurisdiction to the Grand Chamber at any point prior to the lower Chamber making a judgment (merit judgment or mixed admissibility / merit judgment). Either or both parties may, upon notification of an anticipated relinquishment of Chamber jurisdiction, file an objection with the Registrar, and request a Chamber hearing first. They must do so within one month of the notification of relinquishment of jurisdiction by the lower Chamber. If that objection and the reason as considered by the Chamber is unsuccessful, the case will be referred to the Grand Chamber. In addition, cases may come before the Grand Chamber for a re-hearing de novo on appeal by one or both parties within three months of the lower Chamber final judgment provided that a five member Grand Chamber screening panel accepts the case (on the allegations ruled admissible by the lower Chamber) for a re-hearing by the full Grand Chamber of 17 judges. The Grand Chamber will consider for re-hearing only cases that raise important questions regarding, for instance, the interpretation and/or application of the Convention or the Protocols. If the case comes before the Grand Chamber any just satisfaction award by the lower Chamber is reserved.
- The Grand Chamber order may affirm or reverse or otherwise modify any lower Chamber decision or judgment including just satisfaction on any aspect of the case.
- The respondent State is to execute the Grand Chamber judgment and compliance is monitored by the Committee of Ministers of the Council of Europe with the assistance of the Department for the Execution of Judgments of the European Court of Human Rights.

Interveners. The Court may during the Chamber and/or Grand Chamber proceedings, based on its determination that such is required for the proper administration of justice, grant intervener status to certain parties. This is possible also at the Grand Chamber level since the case is being re-heard de novo if it comes before the Grand Chamber. If the case is done completely by written submission, either Chamber may accept written submissions from any person, or contracting party to the European Convention on Human Rights; even if not a direct party to the issues in dispute if the court considers it proper to hear from that party. The contracting State of which the complainant is a national has intervener status as of right before both

the Chamber and Grand Chamber. If any public hearings are held in the case at either or both levels of the Court, the Court may also agree to give legal standing to such interveners to appear at the hearing and make oral representations. In some cases, there will be financial compensation or other remedies ordered by the lower Chamber and/or the Grand Chamber. In some instances, the very declaration by the court that there has been a violation by the State of a Convention/Protocol article(s) is itself considered by the Court as just satisfaction.

2.9 Public Proceedings and Judgments and Reasons for Judgment

Judgments and the reasons for judgment by the Court are usually public as are all court documents (but not necessarily in every case). Hearings (which are held in a minority of cases) may be instituted at any stage of the proceedings including the admissibility stage if the Court deems this to be appropriate. If hearings are held, these are almost always public. In rare cases, however, the Court may decide to exclude the public from all or part of a hearing in the interests of the proper administration of justice.

2.9.1 Representation

There is the possibility of applying for legal aid (under a scheme set up by the Council of Europe) where this is necessary for a complainant to be able to access legal representation once the application has been filed and ruled admissible. However, obtaining such aid is not assured. The complainant may, in certain instances, represent him or herself at any stage of the proceedings before the European Court of Human Rights (from admissibility proceedings to trial before the lower Chamber, or at the Grand Chamber re-hearing of the case). However, normally the Court expects and/or requires that the complainant have legal representation once the case proceeds to trial. The Court has the authority to decline to hear the case previously ruled admissible until or unless the complainant has legal counsel and the case still meets all admissibility requirements if it deems this would be in the interests of the administration of justice.

2.9.2 Expedited Cases

Where the complainant is at continuing imminent and/or irreversible risk of harm due to the human rights violations complained of, or as a result of advancing his or

her case before the European Court of Human Rights, it is possible for the Court to listen to the case on an expedited basis.

2.9.3 The Language of the Court

English and French are the official languages of the Court and must be used once the case proceeds (having been ruled admissible) unless the President of the Chamber or Grand Chamber has authorized the proceedings to occur in the language of the home State of the complainant (normally also the respondent contracting State to the Convention).

2.9.4 Compensation for Damages

The Court will consider the merits of the case and any demand for “just satisfaction” which may involve financial compensation and/or other remedies for pecuniary damages (financial losses due to the violations of the Convention and/or court costs) and/or non-pecuniary damages (i.e., pain and suffering, etc.).

2.9.5 Judgments and Their Implications

Judgments of the European Court of Human Rights at both the trial (Chamber) and appeal (Grand Chamber) level are made by majority vote and any judge may provide a separate concurring or dissenting opinion appending the majority opinion. The decision of the Chamber (or Grand Chamber in the case where the case proceeds to the Grand Chamber) is final and legally binding on the States Parties to the European Convention on Human Rights. While, as mentioned, the European Court of Human Rights has no jurisdiction to alter the national laws of the States Parties to the European Convention on Human Rights and Fundamental Freedoms, or interfere with State judicial rulings, its own rulings have, in certain instances, led to changes in national law. Those changes served to bring the domestic law of the contracting State more in line with the values and principles of the European Convention on Human Rights and Fundamental Freedoms.

2.9.6 Advisory Opinions by the Grand Chamber

The Grand Chamber of the Court may, at the request of the Committee of Ministers of the Council of Europe, issue advisory opinions on matters relating to the proper

interpretation and application of the European Convention on Human Rights and its Protocols. Those advisory opinions are based on the opinion of the majority and, as with judgments; any of the judges of the Grand Chamber may append a separate concurring or dissenting view with respect to the advisory opinion of the majority.

2.9.7 Caseload, and Breakdown of the Nature and Origin of Cases Heard by the Court

Since the Court came into operation almost 50 years ago, it has issued 10,000 judgments approximately 90% of which were rendered between 1998 and 2008 subsequent to a November 1, 1998 reform of the Convention system (which included but was not limited to the abolition of the European Commission of Human Rights). Interestingly and alarmingly, more than half of all complaints to the Court from 1998–2008 came from five countries; namely Turkey (19.7%), Italy (19.2%), France (6.6%), Poland (6.3%) and Russia (5.8%) with 42.4% of the applications to the Court coming from the remaining combination of States Parties to the Convention. In the period from 1998–2008, the subject matter of the judgments of the European Court of Human Rights broke down as follows: violations of Article 6 of the European Convention on Human Rights and Fundamental Freedoms regarding ensuring a fair legal process (21.2%) and no undue delay in determination of the case (28.9%) for persons criminally charged (total 50.1% relating to violation of Article 6 of the Convention); violations of Convention Protocol 1, article 1 concerned with protection of private property (14.8%), violation of the right to liberty and security of the person except as in accord with the law (Article 5 of the Convention) (9.8%) and violation of the right to an effective domestic remedy for violations of the Convention (Article 13 of the Convention). Note, in addition, that more than 7% of the Court's judgments concerned violations of Articles 2 and 3 of the Convention barring the State from the use of torture, and/or inhuman or degrading treatment or punishment or the deprivation of life except in the execution of a lawful sentence and then without undue suffering. (Reference for the aforementioned statistics is the European Court of Human Rights, <http://www.echr.coe.int/NR/rdonlyres/D72592AF-3DE0-4C42-A32E-3CEA1034D4BE/0/FactsAndFiguresENG10ansNov.pdf>.)

One difficulty that the European Court of Human Rights faces is its overwhelming caseload. There were 95,900 allocated cases pending before either a committee of three judges or the lower chamber as of November 1, 2008 with complainants waiting to learn whether the case will be ruled admissible or inadmissible.

Chapter 3

The International Ad Hoc Criminal Courts of Rwanda and the Territory of the Former Yugoslavia

The two ad hoc international criminal tribunals discussed in this section do not comprise an exhaustive list of such tribunals, but do give a sense of how such temporary international tribunals may serve to criminally prosecute the most grave of human rights abuses which rise to the level of international crimes against humanity, genocide or war crimes.

3.1 International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between January 1, 1994 and December 31, 1994 (ICTR)

3.1.1 History and Jurisdiction of the ICTR

The International Criminal Tribunal for Rwanda (ICTR) located in Arusha in the United Republic of Tanzania was established by means of United Nations Security Council Resolution 955 of November 8, 1994. That UN Security Council resolution also incorporates the Court's statute which governs the functioning of the Court (the text of the ICTR statute is available in Appendix C.1). Article 14 of that statute sets out the rules of procedure for the Court. The working languages of the ICTR are English and French. The ICTR has jurisdiction to prosecute persons (both nationals and non-nationals) responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between January 1, 1994 and December 31, 1994. The crimes are punishable whether the perpetrator(s) had an intentional direct or indirect role; were conspirators or in any way complicit.

The ICTR jurisdiction also extends to the prosecution of Rwandan citizens who committed genocide and other serious international crimes in neighbouring countries during that same time period. While the ICTR has concurrent jurisdiction with the relevant national courts over the prosecution of these crimes committed in the territories and for the time period under its jurisdiction, the ICTR will take precedence whenever it requests that the national court defer to its authority as provided for in the ICTR statute. Aside from prosecuting the perpetrators of genocide, the ICTR jurisdiction includes prosecution for serious violations of Common Article Three (concerning the protection of civilians in times of non-international armed conflict), and of Additional Protocol II of the 1949 Geneva Conventions (concerning international crimes committed in a non-international conflict). The crimes that may be prosecuted under the statute of the ICTR are stipulated in Articles 2, 3 and 4 of the statute as follows:

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
 - (a) Genocide;
 - (b) Conspiracy to commit genocide;
 - (c) Direct and public incitement to commit genocide;
 - (d) Attempt to commit genocide;
 - (e) Complicity in genocide.

Article 3: Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) Rape;
- (h) Persecutions on political, racial and religious grounds;
- (i) Other inhumane acts.

Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
- (h) Threats to commit any of the foregoing acts.

The ICTR statute sets out in Article 6 that perpetrators bear individual responsibility for the crimes outlined in Articles 2–4 and hence can be prosecuted as individuals. It is *not* a defence to the charges under the ICTR statute at Article 6 to:

- Be a government official regardless how high the rank or position even if head of State and rank of the perpetrator is not a mitigating factor for punishment; or
- That the acts were committed by a subordinate if the superior knew or should have known the acts were being committed, and that superior did not take all necessary and feasible means to prevent the acts and punish those responsible; or
- That the acts were committed by the accused under order (though the latter can be used in mitigation if the Court deems fit in the circumstances of the case):

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

The temporal period under the ICTR's jurisdiction covers the 1994 massacre of an estimated 800,000 Tutsis and moderate Hutus by the extremist Hutu militias in

an attempted genocide. The Court began hearing its first case in 1997 and was the first international court which was called upon to interpret the term “genocide” as set out in the Convention for the Prevention and Punishment of the Crime of Genocide (1948). The ICTR is not a permanent Court and the United Nations Security Council resolution 1503, adopted on August 28, 2003 set out the plan for the ICTR to have investigations completed by the end of 2004, all trials completed by the end of 2008 and all appeals and other work by 2010. It is noteworthy that to date Rwanda has not ratified the Rome Statute of the International Criminal Court (ICC) and hence is not subject to the power of the ICC. This though the ICTR was fully involved in the development of the ICC.

3.1.2 *Structure of the ICTR*

3.1.2.1 The Chambers

The ICTR is organized into three Trial Chambers and one Appeals Chamber. The ICTR has a President (elected by the permanent judges of the ICTR) and Vice-President of the Court as a whole, a Presiding Judge for each Trial Chamber (elected by the permanent judges of each respective trial chamber) and a Presiding Judge for the Appeal Chamber. There are a total of 16 permanent judges who are members of the ICTR and no two of them are from the same State. Since 2003 there are also a maximum of nine ad litem judges serving at any one time as members of the ICTR (this was increased from the original four stipulated in the ICTR statute). There is a total pool of 18 ad litem judges of the ICTR elected by the General Assembly of the United Nations from a list submitted by the Security Council. Hence, the total number of judges (permanent plus ad litem judges) on the ICTR roster at any one time is 25. There are three permanent judges hearing the cases at trial for each of the three Trial chambers for a total of nine permanent judges at the trial level. The Trial Chambers are further divided into sections comprised of both permanent and ad litem judges with three judges per section. The sections have the same powers as the full Trial Chamber and often hear pre-trial motions. Seven permanent judges serve as members of the Appeals Chamber which is located in The Hague in the Netherlands. For each appeal, five permanent judges hear the case. Note that the members of the Appeal Chamber of the International Criminal Tribunal for Rwanda also serve as the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia. The permanent judges are elected for a term of four years and may be re-elected. The judges originate from States with a variety of legal systems.

3.1.2.2 Registry

The Registry provides the legal administrative support and management services for the ICTR and the Registrar acts as the representative of the Secretary General of the United Nations.

3.1.2.3 The Prosecutor's Office

The Prosecutor's Office has two divisions. The first is an investigative section responsible for investigating cases which fall within the ICTR jurisdiction. The second is the Appeals and Legal Advisory Division (ALAD) which:

- Handles appeals by the Prosecutor from the final trial court judgment or sentence;
- Responds to defence appeals regarding the final trial judgment or sentence;
- Provides legal advice on international and national law, trial strategy etc., and
- Provides continuing legal education for legal staff of the Office of the Prosecutor.

The cases are brought before the Court by the Prosecutor's Office which works as an independent organ of the ICTR and independent of any State government. The Prosecutor presents an indictment and the court, if it accepts the indictment on a prima facie basis, may, at the request of the Prosecutor, issue an arrest warrant or other such court order as needed (i.e., relating to detention, transfer of the accused from another facility or territory, etc.). Note that various African Countries have arrested and extradited suspects to the custody of the tribunal in Arusha to be tried by the ICTR.

Judgments are provided in writing with reasons and announced in public. The judgment is decided upon by majority vote and any judge may append a concurring or dissenting separate written opinion. Penalties for the convicted are limited to:

- Imprisonment taking into consideration the practice of Rwandan Courts for serious offences, and
- An order for the return to the rightful owners of property or proceeds obtained through the criminal conduct of the convicted person(s).

However, there is no provision for the payment of reparations though, under the ICTR rules of procedure, the victims may initiate a new action before the national court to seek compensation. Appeals are based on purported errors of law and/or fact which have led to an alleged miscarriage of justice. Sentences are served in Rwanda or in any State from among a list of States held by the United Nations Security Council that has offered to provide correctional facilities to detain persons convicted by the ICTR. The detention is to be supervised by the ICTR to ensure that prisoners are treated humanely in accord with international law. Persons convicted by the ICTR are, with the exception of the foregoing caveat, imprisoned in a particular State in accord with the laws of that State. Further, if the convicted person becomes eligible for a pardon or commutation of sentence in the State where he or she is imprisoned, the State must notify the ICTR. In accord with the statute of the ICTR, the pardon or commutation of sentence will take place if and only if the President of the International Criminal Tribunal for Rwanda, in consultation with the judges of the ICTR, so decides having considered the relevant principles of law and the proper administration of justice.

3.1.2.4 ICTR Witness Support and Protection Unit

The ICTR has a Witness Support and Protection Unit with two sections; one for prosecution witnesses and one for defence witnesses. This unit is responsible for ensuring that all witnesses and victims who testify before the ICTR are provided with the protection and support, both psychological and physical, that they need. The protection that this unit provides is often not simply short-term but frequently involves arrangements for long term protection. This is the case since retribution (against witnesses for their testimony) by perpetrators of atrocities is frequently a foreseeable outcome not only for the witnesses but also their family members should such precautions not be taken. At times, this unit will ask the Court for an order which will help to ensure the protection of witnesses and victims before, during and/or after testimony as required. This usually means protecting the identity of the witness, and may include in-camera proceedings where necessary as well as other measures such as witness relocation after the conclusion of the participation of the witness in the case. The unit ensures the safe travel of the witnesses from their home area to the ICTR in Arusha Tanzania. In 2000, the ICTR established an outreach service to keep the Rwandan public informed about the court proceedings and judgments. Victims participate as witnesses but otherwise have no legal standing (i.e., victims are not granted the legal capacity to be heard by the ICTR on the issue of sentencing, cannot make claims regarding reparations for psychological and/or physical harms suffered, etc.).

3.1.3 *Summary*

The ICTR as has been mentioned is but a temporary tribunal and has been allotted but a very limited time to prosecute those leading figures involved in the 1994 Rwandan genocide. It has prosecuted and convicted several high ranking government officials including a former Rwandan Prime Minister (J. Kambanda who pleaded guilty and had judgment pronounced September 4, 1998), government ministers, military officers and others and in this way the prosecutions have served to reinforce the notion that none is above the law. In addition, the ICTR was the first international tribunal to recognize that systematic rape of a victimized target group designated, for instance, along national, ethnical, racial or religious criteria is a form of attempted genocide. This was established in the ICTR judgment in *Prosecutor v Akayesu*. The Court held that in the context of armed conflicts where grave international crimes are being committed, it is not necessary to prove lack of consent as an element of the crime of rape where there is systematic sexual violence (for a detailed discussion on this issue and the ICTR see MacKinnon, Catharine A (2008) *The recognition of rape as an act of genocide – “Prosecutor v. Akayesu,”* Guest Lecture Series of the Office of the Prosecutor, available at <http://www.icc-cpi.int/library/organs/otp/ICC-OTP-20081027-MacKinnon.pdf>). There has been extensive cooperation from other governments in arresting and extraditing the

accused and in helping to facilitate international travel for victims who may not have proper identity or travel documents (ICTR Newsletter February–April 2004). The Court continues to work towards its goal of fostering peace and reconciliation through the pursuit of justice for the victims of the 1994 genocide.

3.2 The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

3.2.1 History of the Conflict in the Former Yugoslavia

Up until its formal dissolution in 1992, the former territory of Yugoslavia was known as the “Socialist Federal Republic of Yugoslavia” and was comprised of the following six republics: Bosnia and Herzegovina; Croatia; Macedonia; Montenegro; Serbia (including the regions of Kosovo and Vojvodina) and Slovenia. As communist regimes disintegrated in Eastern Europe, there was a rise of nationalism in the area. Political and economic pressures and the move for independence by these various republics led to various armed conflicts in the former Yugoslavia including in, but not limited to, the following areas:

3.2.1.1 Croatia

There occurred atrocities in Croatia (1991–1995) such as a widespread campaign of “ethnic cleansing” by Serbs to rid the area of Croats and other non-Serbs. The large Serb minority in Croatia wished to remain within the former Yugoslavia (the Socialist Federal Republic of Yugoslavia) and resisted with armed force against the supporters of the newly formed independent Croatian State. This Serb minority was backed by Serbia and by the Yugoslav’s People’s Army (JNA). Croatia eventually reasserted its control over the area in the fall of 1995.

3.2.1.2 Bosnia-Herzegovina

In Bosnia-Herzegovina there had been a government comprised of various ethnic groups representative of the population in the area which was 43% Bosnian Muslims, 33% Bosnian Serbs, 17% Bosnian Croats and about 7% comprised of other nationalities. When 60% of the Bosnian Muslims voted in a referendum for independence in March 1992, they were met with fierce military opposition by Bosnian Serbs backed by the Yugoslav People’s Army and Serbia. The Bosnian Serbs regained 60% of the country and declared it a Serb republic within the

territory of Bosnia-Herzegovina. The Bosnian Croats backed by Croatia also resisted the Bosnian government in the region of Bosnia-Herzegovina and there ensued fighting among the three factions. During the conflict in Bosnia-Herzegovina (April 1992 – November 1995), it is estimated there were 100,000 deaths and at least two million displaced persons. The atrocities committed in Bosnia-Herzegovina included, but were not limited to, systematic rape of Bosnian women and girls, torture and the formation of concentration camps where prisoners were grievously victimized in various ways including being starved to death. The world viewed televised images of the victims in these concentration camps reminiscent of the scenes from the Nazi death camps of World War II as witnessed and documented by allied troops who had liberated those surviving victims in the camps. Emblematic of the atrocities committed in Bosnia-Herzegovina was that which occurred in July 1995 in the Bosnian town of Srebrenica. Srebrenica was in fact a UN-declared safe area, but this served to afford no protection whatsoever to the inhabitants. The area was attacked by Bosnian Serbs under the leadership of Commander Ratko Mladić. Within the span of just a few days, 8,000 Bosnian Muslim men and boys were executed by the Serb armed forces there while Srebrenica's women and remaining children were forcibly driven from the region.

3.2.1.3 Kosovo

The next area to experience mass atrocities in the former Yugoslavia was Kosovo. This was precipitated in 1998 when the minority Albanian community, backed by the Kosovo Liberation Army (KLA), attempted to declare independence from Serbian rule. Serb forces in their suppression of the Albanian's community's move to independence, committed the international crime of attacking civilians intentionally, targeting known civilian enclaves, and shelling these non-participants in the armed conflict and forcing some 750,000 Kosovo Albanians to leave their home territory as internally displaced refugees. Serbia agreed to international administration of Kosovo in June 1999, however, the final status of the province still unresolved.

3.2.1.4 Republic of Macedonia

The ICTY has also prosecuted international crimes committed in the Former Yugoslav Republic of Macedonia which declared independence in the fall of 1991. The majority population in the Former Yugoslav Republic of Macedonia is comprised of ethnic Macedonians and there is, in addition, a large Albanian minority. There had been relative peace in Macedonia in the early 1990s while the atrocities were being committed in several of the other break-away republics of the former Yugoslav territory; "the Socialist Federal Republic of Yugoslavia." However, certain international crimes did occur in 2001 when the Albanian National Liberation Army (NLA) attempted to free the Albanian regions of Macedonia from the control of the central

government and were suppressed by the government security forces. Fighting ended in a few months with a peace deal that provided for power sharing between the two ethnic groups and a NATO monitoring force overseeing the situation and enforcement of the peace arrangement. The ICTY was established to prosecute the perpetrators of the atrocities in the various aforementioned regions of the former Yugoslavia and help restore peace and security in all of the area.

3.2.2 *Jurisdiction of the ICTY*

The International Criminal Tribunal for the Former Yugoslavia (ICTY), located in The Hague, Netherlands, was formally established on May 25, 1993 by United Nations Security Council Resolution 827. That resolution included the ICTY statute and set out the jurisdiction, structure and operation of the Court. The ICTY was established as a war crimes tribunal under Chapter VII of the United Nations Charter with the objective of helping to restore peace and security in the region of the former Yugoslavia through the pursuit of justice and the application of international law. The ICTY is authorized to prosecute *individual persons* responsible for any or all of the following four categories of international crime:

- Grave breaches of the 1949 Geneva Conventions,
- Violations of the laws or customs of war,
- Genocide, and
- Crimes against humanity

committed on the territory of the former Yugoslavia since 1991 as part of the conflicts that ensued and to some degree continue following the breakup of the former Yugoslavia (the statute of the ICTY is included in Appendix D.1). This, as the national courts were unable or unwilling at the time of the establishment of the ICTY to carry out this mandate. The Statute of the ICTY thus stipulates that the following international crimes fall under its jurisdiction if committed in the former Yugoslavia post 1991:

Article 2: Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

Article 3: Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

Article 4: Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - (a) killing members of the group;
 - (b) causing serious bodily or mental harm to members of the group;
 - (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) imposing measures intended to prevent births within the group;
 - (e) forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
 - (a) genocide;
 - (b) conspiracy to commit genocide;
 - (c) direct and public incitement to commit genocide;
 - (d) attempt to commit genocide;
 - (e) complicity in genocide.

Article 5: Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, *whether international or internal in character*, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

The ICTY thus cannot prosecute any State or any organization such as an armed unit, or other military or non-military organization such as a political party which perpetrated or facilitated the commission of such crimes in the same jurisdiction

since 1991. The ICTY is a temporary international court. At present, the completion plan for the court is to finish all trials by 2009 and all appeal proceedings by the end of 2011. As with the ICTR, the ICTY focuses on the senior leadership responsible for the mass atrocities committed which are under its prosecutorial jurisdiction. The ICTY thus leaves it to the national courts of the relevant independent States in the region of the former Yugoslav territory to try perpetrators of the aforementioned international crimes who held less authority in the time period in question. This is accomplished either via:

- Transfer to the national courts of those latter cases initiated by the ICTY and under its jurisdiction; or
- The national system itself initiating the proceedings against the accused and assuming full responsibility also for all subsequent handling of the cases.

The United Nations and the international community, as well as the ICTY, have:

- Assisted in setting up mechanisms for war crimes prosecutions in various regions of the former Yugoslavia, and
- Provided guidance regarding how to support and assist witnesses in order that they can properly participate at trial at such *national* war crimes court proceedings.

Trials have been set up in Bosnia and Herzegovina, Serbia and Croatia.

3.2.3 Structure and Functioning of the ICTY

3.2.3.1 The Chambers

The ICTY is organized into three Trial Chambers and one Appeals Chamber. Each Trial Chamber consists of three permanent judges. The ICTY normally may have a maximum at any one time of twelve ad litem judges, however, a temporary increase in the number of ad litem judges to a maximum of 16 was approved by the UN Security Council in 2008 for that year. The ad litem judges are appointed to serve only on one or more specific cases in contrast to the permanent judges who may serve on multiple cases. Each case is heard at the trial by a maximum of three judges from one of the Trial Chambers where one member of the trial chamber judicial panel must be a permanent judge of the ICTY. As with the ICTR, the ICTY Trial Chamber may be divided into *sections* of three judges each, composed of both permanent and ad litem judges. Individual sections have the same powers and responsibilities as a Trial Chamber. Seven permanent judges are members of the ICTY Appeals Chamber total pool of judges and this group of seven appeal judges serves as the appeal panel for the International Criminal Tribunal for Rwanda. Five of these permanent appeal judges from the pool of seven serve on the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia while the other two are assigned exclusively as permanent judges of the International Criminal Tribunal for Rwanda. Hence, there are 14 permanent judges on the ICTY

judicial panels presiding over ICTY cases (five at the appeal level and nine at the trial chamber level across three trial chambers). Each appeal on the judgment or the sentence (either an appeal originating from the Prosecutor or the Defence) rendered by an ICTY Trial Chamber is heard by the five permanent judges on the ICTY Appeal Court. Appeals may be based on points of law, alleged factual errors or new evidence. It is noteworthy that much available evidence was not accessible to the ICTY until some considerable time after trial proceedings had already been well underway as the information was not released in a timely fashion for a variety of reasons from the archives of the former territory of Yugoslavia.

The President of the ICTY is elected by a majority of the votes of the permanent judges for a two-year term and is eligible for re-election once. The President, amongst other duties, presides over the Appeals Chamber proceedings and assigns the judges to the Appeals Chamber and Trial Chambers. The Vice-President of the ICTY is also elected from among the permanent judges by a majority of the votes of the permanent judges. The Vice-President's term coincides with the term of the President, and the Vice-President is also eligible for re-election once. The Vice-President substitutes for the President should the President be absent or unable to act and may sit as a member of the Trial or Appeals Chamber. The judges of the ICTY represent diverse legal systems.

3.2.3.2 Judgments

Judgments are rendered by the Chamber concerned separately on each count in the indictment. For co-accused tried together, the Court issues its judgment for each defendant separately. This judgment is based on the separate findings of fact by the Court regarding each accused on each individual count pertaining to that person. The ICTY must, in accord with its rules of procedure, consider the following in determining the just and fair sentence:

- The gravity of the offence,
- The individual circumstances of the convicted person and any and all aggravating or mitigating circumstances as well as
- The general practice regarding prison sentences in the courts of the former Yugoslavia and whether or not any time has already been served for the crime(s) in a national prison.

The maximum sentence which can be imposed by the ICTY is life imprisonment. Judgments are in writing with reasons given. The Court's decision is made based on majority vote of the judges. Any judge may append a separate concurring or dissenting opinion to that of the majority opinion. The judgment is pronounced in public.

3.2.3.3 The Office of the Prosecutor

The Office of the Prosecutor is responsible for investigating and bringing the case to the Court. Where the indictment is affirmed the case will be tried, and any

preliminary arrest or other court orders issued. The ICTY's Detention Unit (DU) is located within a Dutch prison complex in the Scheveningen neighborhood of The Hague far removed from the former territory of Yugoslavia. An appeals division within the Office of the Prosecutor handles the preparation of all appeals by the Prosecutor and responds to any appeals by the defendant.

3.2.3.4 The Registry

The registry of the ICTY provides administrative legal support and management services for the court and is comprised of three divisions. The "Division of Judicial Support Services" of the Registry, among other duties, provides support and protection for the trial witnesses and other victims connected to the case; assigns defence counsel for the accused as a form of legal aid (i.e., where the accused has been unable to arrange for such legal representation using his or her own contacts and resources); and handles the supervision of the detention unit. The Registry is responsible then also to ensure that all prisoners held in the ICTY detention unit awaiting trial are treated humanely in accord with international law. The "Office of the Registry" provides legal and policy advice to the ICTY and handles all communication matters. The Office of the Registry employs the legal support teams which assist the judges in legal research and preparing the court documents. Each chamber is assigned a legal support team. The Office has regional offices in various locales in the territory of the former Yugoslavia. The Division of Administration of the Registry handles finances, human resources and other such operational matters for the Court. The Trial Chambers and Appeal Chambers, the Registry and the Office of the Prosecutor are all independent organs of the ICTY. The working languages of the ICTY are English and French.

3.2.4 Summary

The ICTY has prosecuted many top ranking officials including the President of the former territory of Yugoslavia, Slobodan Milosevic. This has served to assist in restoring to a degree the rule of law to this region and the principle that international crimes cannot be excused based on the high official rank of the perpetrator or co-conspirator or otherwise complicit accused. The ICTY was instrumental in the development of the International Criminal Court (ICC) and the Special Court of Sierra Leone. The following States are parties to the ICC enabling statute (the Rome Statute) which were formerly republics in the former territory of Yugoslavia (dates of ratification are also provided):

- Croatia, 21 May, 2001
- Serbia, 6 September, 2001
- Slovenia, 31 December, 2001

- The Former Yugoslav Republic of Macedonia, 6 March, 2002
- Bosnia and Herzegovina, 11 April, 2002
- Montenegro, effective date of ratification, 3 June, 2006

The ICTY has also contributed to the development in international law in various ways including, for instance, determining that enslavement and persecution constitute crimes against humanity.

Chapter 4

The Special Court of Sierra Leone

4.1 The Civil War in Sierra Leone (1991–2002)

The Republic of Sierra Leone is on the west coast of Africa, bordered on the north and east by Guinea, on the south-east by Liberia and on the south-west and west by the Atlantic Ocean. Sierra Leone suffered a brutal eleven year civil war from 1991 to 2002. In 1991, the RUF (Revolutionary United Front) led by Foday Sankoh took control of the diamond mines of Sierra Leone using mass rape, amputations and other terror methods to control the civilian population. The RUF was backed by Charles Taylor, then President of Liberia who, in exchange for diamonds, provided military support to the RUF. The RUF with Taylor's armed support rapidly gained control of the Eastern portion of Sierra Leone (Taylor headed the National Patriotic Front of Liberia [NPFL] which had instigated the civil war in Liberia). In April 1992, the government of Sierra Leone was overthrown and until 1996 was ruled by the National Provisional Ruling Council (NPRC). The leadership of the NPRC was then overthrown in January 1996 and presidential elections held in February with Ahmed Tejam Kabbah elected as the new President. 25 May, 1997 elements of the Sierra Leone Army overthrew the Kabbah government and established the Armed Forces Revolutionary Council (AFRC). General Johnny Paul Koroma headed the new government which invited the RUF to form a government alliance with the AFRC. The United Nations, via various measures, re-installed the Kabbah government in 1998. It was not until 18 January, 2002, after the surrender of approximately 45,000 RUF rebels, Kamajor militias and armed gangs, that the United Nations peacekeeping force (led by commander General Daniel Opande) and Sierra Leone President Kabbah formally declared that the civil war in Sierra Leone had ended.

All three warring factions in the civil war; the Liberian Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the pro-government Civil Defense Forces (CDF) committed various international crimes including the recruitment and use of thousands of children as young as seven as soldiers; including girls who were targeted also for sexual exploitation. TRIAL (track impunity always) – a Swiss NGO under Swiss law with a network of lawyers

which brings cases to the Swiss courts and to the ICC on behalf of victims of international crimes – estimates that during the Sierra Leonean civil war 2.5 million people were made refugees or were internally displaced, 100,000–200,000 were killed and thousands were intentionally mutilated making it impossible for them to provide economically for themselves or their families.

4.2 Jurisdiction of the Special Court of Sierra Leone

4.2.1 Creation of the SCSL and Subject Matter Jurisdiction

The Special Court for Sierra Leone (SCSL) is located in Freetown, the capital of Sierra Leone. The SCSL is a *hybrid* court with jurisdiction over prosecuting perpetrators of grave international crimes and certain selected crimes under Sierra Leonean Law committed by nationals or non-nationals in the territory of Sierra Leone since 30 November, 1996. The area of Sierra Leonean law which falls under the SCSL jurisdiction in part has to do with sexual violence against girls and reflects the nature of certain of the systematic heinous crimes committed during the time period with which the SCSL is concerned. Furthermore, there is a hybrid nature to the SCSL in that, unlike the case with other international criminal courts, the host government (in this instance Sierra Leone) appoints a certain set number of the judges (while the Secretary-General of the United Nations appoints the rest) as per the statute of the SCSL (see Appendix E.1 for the text of the statute of the SCSL). Though the Court is located in Sierra Leone there are cases in which, due to the need for security or other pressing concerns, there may be a change of venue (i.e., the SCSL case of Charles Taylor ongoing at the time of this writing is being held in The Hague, the Netherlands). The creation of the Court was proposed in the United Nations Security Council resolution 1315 of 14 August, 2000 which was formulated at the request of the Government of Sierra Leone. The SCSL was established by an agreement between the United Nations and the Government of Sierra Leone signed 16 January, 2002. The mandate of the Court extends to the end of 2009.

4.2.2 SCSL Lack of Jurisdiction Over Peacekeepers and NGO Personnel

The SCSL is authorized under its statute at Article 1 to prosecute persons aged 15 and over *who bear the greatest responsibility* for international crimes constituting a violation of humanitarian law and/or the most serious crimes committed on the territory of Sierra Leone since 30 November, 1996. (Sierra Leone had wanted the Court to handle the prosecution of those who had committed atrocities in the Sierra Leonean civil war dating back to 1991.) Note that the ICTR and the ICTY, unlike the SCSL, did *not* contain the specification that only those who bore the greatest responsibility for the crimes over which the respective courts had jurisdiction

would be tried. The developers of the statute of the SCSL envisioned that the national courts would take jurisdiction over perpetrators who had less significant roles or that such cases would be handled by the Sierra Leone Truth and Reconciliation Commission (SLTRC). It was also agreed that the SLTRC would handle the cases involving persons under age 15 and those who were under age 15 at the time of commission of their acts of atrocity. The Court does not have jurisdiction over peacekeepers and related personnel such as NGO staff present in Sierra Leone by virtue of the agreement between Sierra Leone and the United Nations or agreements between the Sierra Leone Government and other governments or regional organizations or based on the consent of the Sierra Leone government. Prosecution of peacekeepers and related personnel for international crimes or other serious offences committed since 30 November, 1996 are to be handled by the State which sent that personnel. However, should the sending State be unwilling or unable to carry out an investigation with due diligence and competence and prosecute where warranted, the SCSL may take over jurisdiction with the permission of the UN Security Council on the proposal of any State.

4.2.3 Temporal Limitation on the SCSL Jurisdiction

Though the civil war lasted from 1991–2002, the Special Court of Sierra Leone only has jurisdiction over the crimes specified in the Court’s statute which occurred on Sierra Leone territory after 30 November, 1996. This means that many of the perpetrators for some of the worst atrocities committed during the war will not be brought to justice.

4.2.4 Detailed Description of the Crimes Under the Jurisdiction of the SCSL

The SCSL has the power to prosecute persons who committed one or more of the following three categories of crimes since November 1996 in the territory of Sierra Leone: crimes against humanity, crimes in violation of international humanitarian law and serious crimes under Sierra Leonean law. (The SCSL under its statute can only handle war crimes cases that are related to *non-international conflict* as is the case also with the ICTR but not the ICTY.) These crimes are explicitly defined in Articles 2–5 of the enabling statute of the SCSL as follows:

Article 2: Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;

- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
- (h) Persecution on political, racial, ethnic or religious grounds;
- (i) Other inhumane acts.

Article 3: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August, 1949 for the Protection of War Victims, and of Additional Protocol II thereto of June 8, 1977. These violations shall include:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- (h) Threats to commit any of the foregoing acts.

Article 4: Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 5: Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

- (a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):
 - (i) Abusing a girl under 13 years of age, contrary to section 6;
 - (ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;
 - (iii) Abduction of a girl for immoral purposes, contrary to section 12.
- (b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:
 - (i) Setting fire to dwelling - houses, any person being therein, contrary to section 2;
 - (ii) Setting fire to public buildings, contrary to sections 5 and 6;
 - (iii) Setting fire to other buildings, contrary to section 6.

Under Article 6 of the enabling statute of the SCSL, it is no defence to the charge that the perpetrator was a high government official at the time, or held some other official position. That person is still individually criminally liable for the conduct if he or she was complicit or participated in any way in the commission of these acts described in Articles 2–5 of the SCSL statute. Furthermore, the perpetrator’s position will not mitigate any sentence imposed. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the commission of such crimes as previously mentioned under Articles 2–5 is individually criminally responsible according to the SCSL statute. Hence, knowing involvement triggers individual criminal liability whether the involvement in the crime was direct or indirect. Superiors further do not have as an available defence that the acts were committed by a subordinate if:

- The superior knew, or should have known, that the crimes were to be committed and did nothing to prevent them and/or prevent their re-occurrence, and
- The superior knowing that the crimes were committed, nevertheless did nothing to punish those responsible.

If the perpetrator was ordered to commit these acts, this does not under the SCSL statute absolve him or her of individual criminal responsibility, but may be used as a factor in mitigation if the court deems it in the interests of justice in the particular circumstances of the case.

4.2.5 *Amnesty*

Under Article 10 of the statute of the SCSL, it is specified that an amnesty granted by the government of Sierra Leone to any individual perpetrator of the *international* crimes listed in the statute of the SCSL in Articles 2–4 is *not* a bar to the SCSL jurisdiction. Thus, the 7 July, 1999 Lome Peace Agreement which gave a blanket amnesty to the parties to the conflict and was signed by a special representative of the Secretary-General of the United Nations would apply only in respect of domestic and not international crimes committed by those accused prior to July 1999. The government of Sierra Leone thus was in agreement with this interpretation of Article 10 of the SCSL statute.

4.2.6 *Minors as Defendants*

During the conflict in Sierra Leone many children under and over age 15 were recruited as child soldiers using direct and indirect coercive means for that recruitment, i.e., abduction, threats, killing of family members by the abductors, etc. These children were often used directly in armed activities contrary to international humanitarian law (i.e., Article 4 of the Additional Protocol II to the Geneva Conventions of 12 August, 1949 which Protocol entered into force 7 December, 1978

which prohibits the recruitment or use of children under age 15 in armed hostilities) and international human rights law (i.e., the Convention on the Rights of the Child) which Sierra Leone ratified 18 June, 1990 which also included the same prohibition (note that “child” was defined in the 1973 Sierra Leone Citizenship Act at the time as a person under age 21). The entire civil war context in Sierra Leone (1991–2002) was coercive, i.e., given the fear and lack of resources for children to survive on their own many of whom had lost their parents, or were unaccompanied internally displaced persons, etc. These children then may be considered as coerced recruits of the non-governmental armed forces. The children were often in a position of having no choice but to participate in the commission of atrocities given that disobedience would be met with severe physical abuse or often certain death at the order of commanders or fellow members of the armed bands. Article 7 of the SCSL statute allows for prosecution of minors 15–18 unlike the Rome Statute of the International Criminal Court which does not confer jurisdiction of the ICC over persons under age 18. Article 7 of the statute of the SCSL sets out an approach to be taken by the Court with defendants who are minors aged 15–18 which is one which focuses on rehabilitation of these traumatized children and their re-integration into Sierra Leonean society:

Article 7: Jurisdiction over persons of 15 years of age

- (1) The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.
- (2) In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

4.2.7 Concurrent Jurisdiction

The SCSL shares concurrent jurisdiction with the national courts of Sierra Leone but will take precedence whenever it deems appropriate. Hence, the SCSL will, whenever it deems appropriate, request that the national court defer to its competence as permitted under the enabling statute of the SCSL.

4.3 Structure of the Special Court of Sierra Leone

The SCSL is comprised of four independent organs; the Office of the Prosecutor, the Office of the Defence; the Chambers (two Trial Chambers and one Appeal Chamber) and the Registry.

4.3.1 The Chambers

There are never less than eight or more than 11 judges on the Court. Each Trial Chamber is comprised of three judges; two of whom are appointed by the Secretary-General of the United Nations, and one of whom is appointed by the government of Sierra Leone. (There was in the case of Charles Taylor one additional judge appointed by the United Nations Secretary-General to serve as an alternate if needed.) The Appeals Chamber consists of five judges including two appointed by the Government of Sierra Leone and three by the United Nations Secretary-General. Each Trial Chamber elects a presiding judge. The presiding judge of the Appeals Court, elected by the judges in the Appeal Chamber, also serves as the President of the Special Court of Sierra Leone for a renewable one year term. All judges serve for a renewable term of three years. The judges are to act as independent, unbiased decision-makers and do not represent any State or the political interests of any other body or organization.

4.3.2 Office of the Prosecutor

The Prosecutor and Deputy Prosecutor are both appointed by the United Nations Secretary-General in consultation with the Sierra Leonean Government. The Office of the Prosecutor investigates and prosecutes the cases as an independent body rather than taking instruction from the Court, or the Sierra Leonean government, or any other body. That Office may question witnesses, suspects, do on-site investigations, etc., in order to collect relevant evidence on the case. Article 15 of the statute of the SCSL, in referencing the required qualifications of those employed by the Office of the Prosecutor, takes note of the fact that during the civil war in Sierra Leone 1991–2002 many children were victimized in various ways and that there was systematic sexual violence against women and girls. It is noteworthy thus that the SCSL statute itself acknowledges the special needs of, and the prevalence of child victims involved in the cases which will fall under the Court's jurisdiction.

Article 15

Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

The cases prosecuted, as mentioned, are brought against those who played a major role in committing or facilitating the commission of serious violations of international humanitarian law and certain crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November, 1996. The Office of the Prosecutor is responsible also to ensure the safety and privacy of witnesses and other sources who are at significant risk of harm due to their participation in the case. The Prosecutor will present an indictment to the SCSL and, if the indictment is affirmed

by the Court, the case will proceed once the defendant is in the custody of the Court. The SCSL is legally bound by procedural rules regarding the detention of defendants awaiting trial by the SCSL which require that they be treated humanely in accord with international humanitarian law. The International Committee of the Red Cross or other such bodies are given access to the facilities to regularly inspect the housing and treatment of the accused detainees to ensure compliance with international law.

4.3.3 Office of the Defence

The Office of the Defence headed by the SCSL Principal Defender came into effect in February 2003 as per Rule 45 of the Rules of Evidence and Procedure of the SCSL. The Office is unique in international criminal justice systems as the SCSL is the only such system that has an Office of Defence as a permanent independent organ of the court. However, all of the international criminal courts provide legal assistance where such is requested by the accused and/or required for the proper administration of justice and the accused is unable to arrange for counsel on his or her own. The prime duty of the SCSL Office of the Defence is to provide legal assistance as required in order to ensure the protection of the rights of the formally accused (the defendants) and of suspects. The Office may also bring in defence teams for a case, expert witnesses for the defence, national and international consultants on evidentiary matters, etc., as needed.

4.3.4 The Registry

The Registrar is appointed by the Secretary-General after consultation with the President of the Special Court for a three-year renewable term and is a staff member of the United Nations. The Registrar is responsible for the administration and support services for the SCSL and also for a Victims and Witnesses Unit within the Registry. This unit, in consultation with the Office of the Prosecutor of the SCSL, provides for all needed protection for witnesses and their family members or other associates at risk due to the victim testimony, security for those testifying in traveling to and back from Court, counseling and other support services as needed, etc. The Unit personnel are professionals in dealing with persons who have been traumatized including children and those who have suffered sexual violence.

4.4 Judgments and Penalties

The SCSL hearings are public and judgments are provided in writing with reasons and announced publicly. The judgment is decided based on majority vote and any judge may append a separate dissenting or concurring opinion to the majority opinion.

The penalty for adult offenders is imprisonment for a certain number of years. The number of years of imprisonment is decided upon by the Trial Chamber with reference to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone with respect to the particular crimes involved. Under Article 19 of the statute of the SCSL, the Trial Chamber is to consider the gravity of the offence and the individual circumstances of the convicted defendant. The Court is also empowered under Article 19 of the statute to order the return to the rightful owner of property, proceeds or other assets unlawfully acquired. Appeals on the Trial Chamber judgment or sentence may be heard based on an alleged error of law invalidating the decision, an alleged error of fact leading to a miscarriage of justice or a purported procedural error. The Appeal Chamber may affirm, reverse, or in some way revise the judgment and/or sentence of the Trial Court. The judges of the Appeals Chamber of the Special Court are as per Article 20 of the statute of the SCSL guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda when considering the interpretation and application of international law. In the interpretation and application of the laws of Sierra Leone, they are guided by the decisions of the Supreme Court of Sierra Leone. If a new material and significant fact comes to light which was not available at Trial and would have likely changed the Trial judgment, the Appeal Court may retain jurisdiction or order the Trial Court reconvened to re-hear the case with the new evidence. Sentences of convicted persons are served in Sierra Leone or in other States that have indicated to the Registrar of the SCSL their willingness to provide this assistance and have concluded agreements for enforcement of sentences with the International Criminal Tribunal for Rwanda and/or the International Criminal Tribunal for the Former Yugoslavia. The person convicted by the SCSL and imprisoned in a State other than Sierra Leone will be imprisoned according to the practice of the enforcing State but this practice must meet international humanitarian standards. If the person is, according to the practice of the State enforcing the sentence, eligible for a pardon or commutation of sentence, however, this will occur only if the President of the SCSL in consultation with the other judges of the Court decides this would be in the interests of justice and in accord with the general principles of law.

4.5 Concluding Comments

The SCSL is the first international criminal court to have tried perpetrators for violations of international humanitarian law (as incorporated also into the statute of the SCSL) as related to the recruitment of minors under age 15 as child soldiers or their used in armed conflict. Note that Sierra Leone has ratified the Optional Protocol to the Convention on the Rights of the Child (CRC-OPAC) on the involvement of children in armed conflicts in 2002. The CRC-OPAC protocol bans the use of children under age 18 directly in armed hostilities and bans both the recruitment and use of persons under 18 by non-State armed groups (see Appendix G.4 for the

text of the CRC-OPAC). Sierra Leone raised the age of voluntary or compulsory recruitment into the State armed forces to 18. In its 2007 report to the United Nations Committee on the Rights of the Child on progress in implementing the CRC-OPAC, Sierra Leone stated that it had disarmed and demobilized 6,845 children from the various warring factions (8% of whom were girls) and was working toward their re-integration into Sierra Leonean society (report available at http://www.essex.ac.uk/armedcon/themes/child_soldiers/index.html). As ex child soldiers who had reached age 18 at the time of the government's de-mobilization efforts were not included amongst this group, the numbers of ex child soldiers is likely seriously underestimated in the aforementioned Sierra Leonean government report. The Special Court for Sierra Leone was also the first international court to prosecute perpetrators of forced marriage and forced pregnancy (note that while the ICTY and ICTR Statutes list "rape" as a crime against humanity, the Statute of the Special Court lists "rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence" as crimes against humanity).

Chapter 5

The International Criminal Court

The International Criminal Court (the ICC) is an independent institution and the world's first *international permanent* criminal court. The ICC was created via a multi-lateral treaty; the Rome Statute adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court 17 July, 1998 in Rome (see Appendix F.1 for the text of the Rome Statute). This is unlike the situation with the other international criminal courts so far discussed; the ICTR, ICTY and SCSL. The latter courts have a mandate which ends after a defined period of time. The ICTR, ICTY and SCSL were set up by the United Nations Security Council in response to the need to respond to specific situations that occurred in those jurisdictions and avoid the perpetrators of international crimes involved in those particular situations escaping justice. The Assembly of States (comprised of the State Parties to the Rome Statute) is the body that has oversight over the ICC and is responsible for any legislative decisions affecting the legal instruments guiding the operation of ICC. The States Parties to the Rome Statute have a legal obligation under that treaty to cooperate with the International Criminal Court. As of 14 November, 2008, there were 108 States Parties (States which had ratified the Rome Statute), but these did not include a number of major powers such as the United States, Russia, and China. There is also an agreement between the United Nations and the ICC which sets out institutional co-operative relations that allows, for instance, for exchange of information, etc. (i.e., the United Nations may have confidential documents relevant to a case being prosecuted by the ICC which it will share with the ICC subject to certain confidentiality provisions. This in order that the Prosecutor may use the information provided by the United Nations to develop further evidence). However, the ICC is *not* part of the United Nations but rather a completely independent institution. The ICC makes an annual report to the United Nations on its activities. However, the ICC remains a fully independent institution.

The ICC normally holds its proceedings at its court facility in the Hague, The Netherlands though it is authorized to be seated in the territory of any State Party to its enabling statute with the consent of that Party. The ICC has the authority to prosecute individuals responsible for the grave international crimes of genocide,

crimes against humanity, war crimes and aggression provided certain jurisdictional requirements to be discussed are met. (The Court will however exercise its jurisdiction over the international crime of aggression only when a provision is adopted by the States Parties to the enabling statute of the ICC in that regard. That provision will define the international crime of aggression and set out the conditions under which the ICC will exercise its jurisdiction in respect of that crime.) Here follows those statutory provisions of the Rome Statute (the enabling statute of the ICC) which provide a detailed definition of the international crimes falling under the ICC jurisdiction:

Article 6: Genocide

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

Article 7: Crimes against humanity

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

- (c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Article 8: War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, “war crimes” means:
 - (a) Grave breaches of the Geneva Conventions of 12 August, 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
 - (b) Other serious violations of the laws and customs *applicable in international armed conflict*, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

- (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law

of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;

- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August, 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iii) Taking of hostages;
 - (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
- (d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs *applicable in armed conflicts not of an international character*, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - (ix) Killing or wounding treacherously a combatant adversary;
 - (x) Declaring that no quarter will be given;
 - (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- (f) Paragraph 2 (e) applies to armed conflicts not of an international character. It does not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Note that the elements for each international crime falling under ICC jurisdiction which must be proved in order that the defendant be convicted of committing that offence is included in a separate ICC legal text on “Elements of the Crime” (for the ICC legal text on the “Elements of the Crime” see Appendix F.2).

5.1 Individual Criminal Liability and ICC Jurisdiction

The enabling statute of the ICC is the Rome Statute which entered into force on July 1, 2002. All State Parties to the Rome Statute are required to accept the jurisdiction of the International Criminal Court with respect to the international crimes of genocide, crimes against humanity and war crimes (and will do so also with respect to the crime of aggression once the relevant provision is adopted). *When situations giving rise to cases are referred to the ICC by a State Party or by the ICC Prosecutor*, the ICC has jurisdiction to try individual perpetrators *aged 18 and over* (in respect of the aforementioned crimes): (a) who are nationals of a State Party to the Rome Statute, or (b) who are nationals *or* non-nationals of a State Party

(thus citizens of any country) *if* the aforementioned international crimes were (1) committed in the territory of a State Party to the Rome Statute, or (2) committed while in the territory of a non-State Party that accepts the ICC jurisdiction for that particular situation and for the international crimes connected to it. (Arguably, the ICC would also have jurisdiction if the international crimes were committed in non-State territories under the control of the State Party.) If the matter was referred by a State Party or the ICC Prosecutor, and a State ratified the Rome Statute sometime after the statute entered into force, then the ICC will, in most instances, have jurisdiction only for the aforementioned crimes that occurred after the Rome Statute entered into force for that particular State. This will be the case unless the State in question accepts ICC jurisdiction for the international crime(s) even though the crime(s) occurred when the Rome Statute was not yet in force for that particular State. *If the international crimes under the jurisdiction of the ICC occurred in the context of a situation referred to the ICC by the United Nations Security Council*, then those crimes can be prosecuted against individual perpetrators: (a) regardless of whether or not they are nationals of a State Party to the Rome Statute, and (b) regardless of whether or not they committed the crimes in the territory of a State Party, or a non-State Party to the Rome Statute which does, or does not accept the jurisdiction of the ICC (i.e., the situation in Darfur has been referred to the ICC). Hence, referral of a situation by the United Nations Security Council to the ICC comes closer to according the ICC universal jurisdiction than do the other modes of referral. Note that the UN Security Council, under Article 16 of the Rome Statute, can, via a resolution under Chapter VII of the UN Charter, defer the investigation or prosecution of a situation/case(s) for 12 months (or more if the resolution is renewed).

In each case in which the ICC assumes jurisdiction, regardless of the mode of referral, the crimes prosecuted (a) will be genocide, crimes against humanity and/or war crimes (whether in relation to international or non-international conflicts) (and in due course also crimes of aggression) **and** (b) the crimes will have occurred **after** the Rome Statute came into force. Hence, no international crime committed prior to 1 July, 2002 may be tried before the ICC no matter how heinous the crime. Note also that under Article 26 of the Rome Statute, the ICC has no jurisdiction over persons who, *at the time of the commission of the crimes outlined in the Rome Statute*, were under age 18. If all the jurisdictional requirements are met, the individual perpetrator – whether superior or subordinate and regardless of high ranking official position – is individually and/or jointly criminally liable for the international crimes falling under ICC jurisdiction. No immunity (relating to official capacity or on some other basis; whether under national or international law) is applicable which would bar the prosecution of the individual perpetrators of the grave international crimes falling under ICC jurisdiction. Further, there is no statute of limitations on the ability of the ICC to prosecute the grave international crimes under its jurisdiction which occurred after the Rome Statute came into force. The individual or joint criminal liability of perpetrators applies (a) whether the accused personally committed or attempted to commit the crime, or (b) intentionally facilitated its commission or attempted

commission in any way directly or indirectly and knew or *should have known* the foreseeable consequences (as per Article 30 of the Rome Statute), and regardless of whether the act was committed under order if there is no defence for the behavior under Article 31 of the Rome statute (i.e., such as self-defence or mental defect) or, as per Article 32 (i.e., there was a mistake of fact or law *that eliminated the mental element required for the crime*), or as per Article 33 (i.e., not knowing the act *ordered* was unlawful *and* the act was not manifestly unlawful unlike genocide or crimes against humanity which are manifestly unlawful, etc.):

Article 25: Individual criminal responsibility

[...] 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose [...]

5.2 The Principle of “Complementarity”

The ICC exercises jurisdiction according to the principle of “complementarity.” Hence, the ICC will intervene and exercise its jurisdiction only when it has been demonstrated that the State Party (or Parties) to the Rome Statute involved is/are unable or unwilling to investigate and/or properly and fairly prosecute individuals responsible for genocide, crimes against humanity or war crimes that were committed *after* 1 July, 2002 while the perpetrators were within the State's territory, or under the particular State Party's control. Otherwise, the national courts of the States Parties to the Rome Statute involved in the cases are empowered to handle

the cases concerning the aforementioned international crimes. Only a State Party to the Rome Statute, the ICC Office of the Prosecutor on its own initiative, or the United Nations Security Council may initiate proceedings before the ICC. The State Party and the UN Security Council initiate such proceedings by bringing the relevant evidence to the ICC Office of the Prosecutor and requesting the Prosecutor to do a pre-investigation preliminary examination of the situation which is said to involve the alleged international crimes falling within ICC jurisdiction. The Office of the Prosecutor will then make a decision as to whether that Office wishes to proceed to a full investigation which may lead to potential cases arising from the situation. Trial Chamber one in the case against Congolese suspect Thomas Lubanga Dyilo to be discussed ruled that complementarity means that in order for a specific case to be inadmissible, national proceedings ongoing or pending must encompass “both the person and the conduct which is the subject of the case before the Court” (ICC Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 38, 10 February, 2006). Hence, unless the national proceedings would completely duplicate the ICC potential case proceedings, and will be carried out with an independent and fair judiciary with due process and in a timely manner, the case will be admissible for the ICC.

5.3 Structure of the ICC

5.3.1 The Presidency

The Presidency is comprised of three judges that oversee the administration of the ICC except for the Office of the Prosecutor which functions as an independent organ of the ICC. The Presidency is comprised of the President and two Vice-Presidents of the ICC elected by the judges of the Court.

5.3.2 The Divisions of the Court

The Court is divided into the Pre-Trial, Trial and Appeal Division with a total of eighteen judges who are elected by the Assembly of States for a term of either three, six or nine years with no two judges being nationals of the same State. One-third is selected by lot to serve for three years, one-third for six years and the remainder for nine years (if elected for nine years the position is non-renewable except in limited circumstances defined by the enabling statute of the ICC). Pre-Trial and Trial judges each serve for three years but complete any cases for which they sit on the bench where the proceedings have already started. The judges represent a cross-section of the principle legal systems globally and are international

law experts. All the judges elected are nationals of the States Parties to the Rome Statute. Article 39 of the Rome Statute stipulates that the Appeals Division is to be composed of the President of the ICC and four other judges, the Trial Division of not less than six judges divided into two Chambers and the Pre-Trial Division of not less than six judges. The Trial and Pre-Trial Courts are comprised mostly of judges with criminal trial experience.

5.3.3 Other Independent Organs of the Court

The Court also includes the Office of the Prosecutor headed by the Prosecutor elected by the States Parties for a period of nine years and another organ of the Court; the Registry. The registry is responsible for the administration of the court and the registrar is elected by the judges of the ICC for a period of five years. There are also two offices that function as independent organs of the Court though they receive assistance from the registry: the Office of Public Counsel for Victims, and the Office of Public Counsel for Defence. Also within the registry is the Victim and Witness Unit which provides assistance in the form of counseling, etc., and security and protection to victims and witnesses who appear before the ICC. There is, in addition, a separate institution from the ICC set up by the Assembly of States that provides assistance to and advocates for victims namely; The Trust Fund for Victims. The Trust Fund for Victims can only run projects to assist victims in situations where the ICC has jurisdiction. The Fund, on order of the Court, may pay the reparations awarded by the ICC to individuals or groups of individuals after a successful prosecution, or may do so on direct application by the victims at the end of the case. In urgent cases, the Trust Fund for Victims may fund immediate medical, psychiatric or other support even before the case is concluded before the ICC. With the approval of the Board of the Fund, the Trust Fund for Victims may provide support to victims even in the absence of a prosecution by the ICC or before a prosecution has begun where there is a pressing need to do so in the Fund’s view.

5.4 Victims as “Participants” Vs. “Witnesses” During ICC Proceedings

Victims may appear as “participants” making independent submissions at any stage of the proceedings from pre-trial proceedings (i.e., on the jurisdiction of the court, the issue of whether an investigation will be authorized, confirmation of charges, etc.) to trial proceedings (involving the judgment of guilt or innocence of the accused on each charge, sentencing and reparations if any), to

appeals proceedings. The two potential roles for victims in ICC proceedings – “participant” vs. “witness” – are quite different. When the victim appears as a “participant,” he or she does so in order to make *independent* submissions to the ICC regarding matters that affect his or her interests and rights and does so entirely voluntarily. This right of participation is granted to victims under Article 68 of the Rome Statute. The content of submissions of the victim participants is not dictated by the Office of the Prosecutor or any other organ of the Court. In order to appear as a participant before the ICC, the victim must apply to participate prior to the commencement of the stage of the proceedings in which he or she wishes to appear. The victim does so by filing an application to the ICC Registry. That application will be considered and decided upon by the relevant ICC judges and a public decision issued (though the names of the victim(s) participant(s) may be held anonymous from the public where required for their security). The victim participant is entitled to have legal representation when participating in any ICC proceeding and may participate in person or through his or her legal representative (if there are several victim participants, the Court may order that they have one legal representative). The victim participant, though he or she has legal standing to make submissions to the Court, is not a full party to the proceedings. Victim participants, in addition to making submissions regarding their position on certain issues, may have their legal representative question (cross-examine) the accused, witnesses, or experts, and may present evidence, but the latter modes of participation can occur only with the permission of the Court. The Court will allow the legal representative of the victim participants to question witnesses and parties, etc., only if it deems it in the interests of the proper administration of justice and not inconsistent with due process for the accused. Victims who may become participants will normally be persons who have suffered direct harm due to the alleged international crimes and may also include organizations such as NGOs (i.e., which have suffered harm to their property or personnel as the result of international crimes such as systemic attacks on civilian targets by rebel or State forces). Victim participants may be victims in a “case” who have suffered harm due to the actions and/or inactions of individual perpetrators who have been identified through the Prosecutor’s investigation. In addition, victims of “situations” referred to the Office of the Prosecutor, where the formal investigation has not yet been done and individual perpetrators and cases not yet identified, may also participate, i.e., at the Pre-Trial hearings (i.e., on issues of the Court’s jurisdiction, etc.).

Victim witnesses who are required to testify are called by the Defence, the Prosecution or may be called by victim participants who wish that witness’ testimony to come before the Court given its relevance in support of the victim participants’ position. The testimony of the victim witness is evidence to be considered and weighed by the judges of the ICC. Victim witnesses must normally testify in person though steps may be taken to have them testify in-camera, or via electronic or other means where deemed necessary by the Court and not inconsistent with the proper administration of justice. These witnesses may or may not have counsel and must testify when called and normally at the time in the proceedings specified.

5.5 The Pre-trial Chamber Preliminary Decision on Admissibility Based on Prima Facie Evidence Presented by the Office of the Prosecutor

The ICC Pre-Trial Court is comprised of either a single judge or three judges. The Pre-Trial Court has evidence presented to it which has been collected by the Office of the Prosecutor's during the Prosecutor's preliminary examination of the referred situation (which examination was directed toward determining the gravity of the alleged offences, issues of complementarity, the circumstances of any potential accused, etc.). The preliminary examination by the Office of the Prosecutor may be conducted based on:

- Information received from victims about widespread and/or specific international crime incidents and from other sources such as NGOs concerning a situation in the territory of a State Party which involves alleged international crimes, or
- On referral of a situation which involves alleged international crimes to the Office of the Prosecutor by a State Party to the Rome Statute or by the United Nations Security Council.

The Office of the Prosecutor may in this preliminary examination of the information which serves an initial screening function seek further information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other sources including written or oral testimony received at the Court headquarters in The Hague. If the Office of the Prosecutor contends, based on this preliminary examination, that the situation appears to involve cases that fall within the jurisdiction of the ICC, and that it merits a complete and thorough investigation, that Office will notify the State Party with jurisdiction over the crimes. The State Party then has one month to notify the Pre-Trial Court that it is investigating or has investigated the case. Either the Prosecutor will defer to the State Party's authority over the matter where the circumstances warrant (this deferral being subject to review in six months or any time if the circumstances change), or where the Office of the Prosecutor (OTP) deems it necessary that the ICC exercise its jurisdiction (i.e., where the State is unable or unwilling to properly investigate the matter), the ICC Office of the Prosecutor will take the necessary steps to formally investigate.

The OTP will either:

- Seek authorization from the Pre-Trial Chamber to do the investigation (this occurs where information was received by the Office of the Prosecutor from NGOs, a U.N. body other than the U.N. Security Council or other sources regarding the situation, and the Prosecutor, based on his or her preliminary examination of the information, wishes to *proprio motu* [on his or her own initiative] proceed further to do a formal in-depth investigation), or
- Initiate the formal in-depth investigation without Pre-Trial authorization where the case was referred by a State Party or the UN Security Council.

If Pre-Trial authorization is sought by the Prosecutor, the Pre-Trial Chamber will decide, based on the preliminary information collected by the Office of the

Prosecutor (OTP), whether the case, on a *prima facie* basis, falls within the jurisdiction of the ICC and should be now thoroughly investigated by the OTP. The Prosecutor makes submissions in this regard and victims may also make submissions to the Pre-Trial Chamber respecting the need for the case to be thoroughly investigated by the OTP. If the Pre-Trial Chamber does find the case admissible on a *prima facie basis*, it is empowered to (a) authorize the Office of the Prosecutor to do an investigation (this includes also investigations within the territory of a State Party that is unable to execute a request for cooperation due to the absence of an authority or judicial body that could respond to the request); and to (b) issue warrants of arrest where needed (i.e., where the accused does not surrender voluntarily to the Office of the Prosecutor), issue summons to witnesses, and issue various other orders such as required, for instance, regarding ensuring witness protection and privacy while the investigation is proceeding and should the case proceed to a hearing, orders in regards to ensuring the preservation of evidence, etc. A finding of admissibility by the Pre-Trial Court does not prejudice the ICC Trial Court on the issue of admissibility (i.e., the Trial Court may decide to reverse the Pre-Trial Court finding regarding admissibility). If the Pre-Trial Court does not rule the case *prima facie* admissible, and authorize an investigation, the Prosecutor's Office may reapply to the Pre-Trial Chamber for a positive admissibility decision based on any *new* substantive facts or evidence or information which the Office receives which might reasonably cause the Pre-Trial Court to revise its previous ruling.

5.6 Procedure Where the Office of the Prosecutor Decides Not to Investigate

In some instances, the Office of the Prosecutor may decide not to do a preliminary investigation of a case referred to that Office by a State Party or the United Nations Security Council and will inform the Pre-Trial Chamber and the referring body of its decision. The Prosecutor may, however, reverse that decision if some new evidence or information comes to light which the Prosecutor determines demands such a reversal. The Pre-Trial Chamber, on request of a State Party to the Rome Statute, or on request by the United Nations Security Council, may, in addition, review any decision by the ICC Prosecutor *not* to pursue an investigation of a case. Victims may also make their independent submissions during such a review proceeding.

5.7 Inadmissibility Criteria

Inadmissibility Criteria are specified under Article 17 of the Rome Statute. Cases are ruled *inadmissible* by the Pre-Trial Court where:

- The State Party concerned is investigating or prosecuting the case *unless* that State is *unwilling* to do so using a fair and independent judicial procedure, or the

State is *unable* to do so (unable, for instance, due to the collapse of the State judicial system),

- The case is not of sufficient gravity to warrant further action by the ICC,
- The perpetrator of the international crime(s) has already been tried for the same conduct in an independent, impartial trial by the State with due process accorded the defendant and the trial in the national court was not one designed to shield that person from justice before the ICC and
- The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless that decision was due to the State's unwillingness or inability to prosecute.

5.8 The Pre-trial Hearing to Confirm or Reject the Charges

After a case has been ruled admissible by the Pre-Trial Chamber and an investigation authorized; the defendant may be brought before the Pre-Trial Court of the ICC on a warrant or may surrender to the Prosecutor voluntarily. The Pre-Trial Court will hold a public hearing with the Prosecutor, and also usually the Defendant and his or her counsel present. Victims may make submissions at the Pre-Trial proceedings as well (and where this occurs usually do so through their legal representative). In some instances, the Pre-Trial Hearing may proceed even if the accused is absent, i.e., the defendant has waived his or her right to be present, or has eluded capture, and failed to surrender, but all reasonable steps have been taken to notify the accused of the charges and of the hearing. In the latter case, there will be counsel representing the accused even though the defendant is not present. The result of that hearing will be that the Pre-Trial Court will reach a decision either affirming or rejecting the charges, or adjourn the hearing and request that the Prosecutor amend the charges and/or provide further evidence with respect to a particular charge. This based on written submissions by both parties and the oral submissions made at the hearing by the Prosecutor (which includes the evidence gathered through the investigation including any witness testimony gathered by the Prosecutor) and the evidence and arguments in reply, if any, presented by counsel for the defendant. At this point, the Prosecutor has a much higher standard to meet if the charges are to be affirmed by the Pre-Trial Court, and must show that there are *substantial grounds* to believe the accused has committed the offences charged. A decision of the Pre-Trial Chamber (i.e., on admissibility, confirmation or rejection of charges, etc.) may be appealed by the Prosecutor or the State Party with leave of the Pre-Trial Court.

5.9 Appeals of Pre-trial Judgments

Appeals may be filed by the Prosecutor; the Defence or State Party regarding the Pre-Trial judgments.

5.10 The Trial Division

Once the charges are affirmed by the Pre-Trial Court, the case proceeds to Trial. The President of the ICC selects the Trial Court which will hear the case. The Trial Court is comprised of three judges who hear the case. If the workload demands it, a judge from the Pre-Trial Division may be assigned to the Trial Division but only if that judge has *not* served on the particular case at hand during the Pre-Trial phase. Victims may participate directly or through their legal representative in the trial proceedings making submissions in reply to those made by the Defence or the Prosecution outlining their independent position on an issue. The accused is presumed innocent and accorded due process including a trial without undue delay. The Prosecutor carries the burden of proof which must meet the standard of proof beyond a reasonable doubt. The Trial Court may order a sentence of a maximum of 30 years or, in exceptionally grave cases, life imprisonment, and/or order reparations, including compensation, restitution such as the return of property or other assets unlawfully acquired in connection with the international crimes committed. The Trial Court may also order rehabilitation services be provided to the victims. The Court may make orders for reparations against the accused and/or an order for reparations and/or services to be arranged through the Trust Fund for Victims. Victims may make submissions on the issue of reparations even if they have not participated in any previous ICC proceedings in the case, i.e., at the pre-trial, trial and/or appeal proceedings.

5.11 The Appeal Division

Appeals are heard by five judges (the President of the ICC and four additional judges). The Prosecutor may make an appeal based on alleged error of fact, or law, or an alleged procedural error. Further, a concerned State Party, the Defence or the Prosecutor on behalf of the accused may make an appeal based on alleged error of fact or law, an alleged procedural error or any other basis which affects the fairness of the decision or reliability of the proceedings. Victims may also make their independent submissions during the Appeal process. The Appeal Court may affirm or reverse or otherwise modify the Trial Judgment or order a new trial by a newly constituted Trial Bench if there are factual issues. If an appeal is brought by the convicted person or by the Prosecutor on behalf of the accused, the Appeal Court may not, as per the Rome Statute Article 83, issue a judgment which is more severe than the original one appealed from. Appeals may also be filed by victims, the accused or bona fide property owners regarding orders of the Trial Court regarding reparations including issues pertaining to the return of property.

5.12 ICC Judgments

The official languages of the Court are Arabic, Chinese, English, French, Russian and Spanish and all judgments are translated into all of the official languages. All judgments of the ICC are announced in a public hearing and provided in writing with reasons. All judgments of the Court at every level are made by majority vote though any judge may append a separate written concurring or dissenting opinion.

Article 85: Compensation to an Arrested or Convicted Person

Any person unlawfully arrested and/or convicted and detained by the ICC has an enforceable right of compensation under the Rome Statute as per Article 85. Persons convicted and punished by the ICC, who then have their conviction reversed (based on *new evidence* demonstrating there has been a miscarriage of justice), are entitled to compensation under Article 85 also *unless* it is proved that the person accused and convicted him or herself is responsible, in part or in whole, for the non-disclosure of the previously unknown key fact(s) involved.

5.13 Concluding Comments

The first trial before the ICC will begin in January 2009 and involves Thomas Lubanga Dyilo, leader of one of Ituri's militias who is charged with the war crimes of enlisting, conscripting and using children under age 15 years to participate actively in armed conflict (the Lubanga case is discussed in a later section). The Prosecutor has commented as follows in regards to that case:

It is my hope that, beyond bringing Mr Lubanga Dyilo to justice, this case will help to draw the attention of the world to this illegal practice and stimulate co-operation to stop it. The lives and futures of thousands of children and their communities are being destroyed by these practices each year. The abuse of these children worldwide has gone largely unrecognised and unpunished for too long. . . . The Lubanga case is of historic magnitude for the fight against impunity and accountability for the commission of these crimes against children. This case will inevitably resonate far beyond the courtroom. (ICC Newsletter November, 2008 available at http://www.icc-cpi.int/library/about/newsletter/10/en_02.html)

It is this author's view that the degree to which the ICC is successful in the prosecution of the grave international crimes falling under its jurisdiction will be but one measure of the international community's confidence in, and commitment to humanity. We must not lose sight also of the daily reality of the surviving victims of international crimes and the obligation of the international community to do much more than it has to ease their ongoing suffering. This by providing required rehabilitative services and the basic necessities of survival and a decent life which are the entitlement of all; no more so than the largely heretofore forsaken.

Chapter 6

Inter-American Court of Human Rights

Case 1: Case of the Gómez-Paquiyaury Brothers v. Peru

For more information on the Case of the *Gómez-Paquiyaury Brothers v. Peru* please see the website of the Children's Information Network at <http://www.crin.org/Law/instrument.asp?InstID=1219>. The full judgment is available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_110_ing.doc (last accessed 22 June, 2009).

6.1 Excerpt from the Judgment of July 8, 2004 (Merits, Reparations and Costs)

[Author's note: internal footnotes have been omitted.]

In the case of the Gómez Paquiyaury brothers

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:

Sergio García Ramírez, President;
Alirio Abreu Burelli, Vice-President;
Oliver Jackman, Judge;
Antônio A. Cançado Trindade, Judge;
Cecilia Medina Quiroga, Judge;
Manuel E. Ventura Robles, Judge; and
Francisco José Eguiguren Praeli, Judge *ad hoc* [author's note: Peruvian judge]

[Author's note: Judge Diego García-Sayán excused himself from hearing the instant case];

also present,

Pablo Saavedra Alessandri, Secretary; and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 29, 56, 57 and 58 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), and Article 63(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), issues the instant Judgment.

I Introduction of the Case

1. On 5 February, 2002 the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) filed before the Court an application against the State of Peru (hereinafter “the State” or “Peru”), originating in complaint N° 11.016, received at the Secretariat of the Commission on 2 July, 1991.
2. The Commission filed the application based on Article 51 of the American Convention, for the Court to decide whether the State breached Articles 4 (Right to Life), 5 (Right to Humane Treatment), 7 (Right to Personal Liberty) and 19 (Rights of the Child) for the alleged detention, torture, and extra-legal execution of the brothers Emilio Moisés and Rafael Samuel Gómez Paquiyauri, as well as Articles 8 (Right to Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, to the detriment of their next of kin, all the above in combination with the obligation set forth in Article 1(1) (Obligation to Respect Rights) of that same Convention. Likewise, the Commission asked the Court to find that the State breached Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture (hereinafter “the Inter-American Convention against Torture”) to the detriment of the Gómez Paquiyauri brothers. Finally, the Commission asked the Court to order the State to make a number of pecuniary and non-pecuniary reparations, as well as to pay the costs generated by processing of the case under domestic venue and before the Inter-American System.
3. According to the Commission, on the morning of 21 June, 1991, in the midst of two police operations, the brothers Emilio Moisés and Rafael Samuel Gómez Paquiyauri, respectively 14 and 17 years old, were detained by agents of the National Police and placed in the trunk of a police patrol car. They were allegedly executed on the route followed by the policemen after their detention. The Commission stated that both their bodies entered the morgue approximately one hour after they were captured. The Commission pointed out that the Peruvian courts investigated the facts and established the individual liability of the direct perpetrators. The Inter-American Commission stated that the alleged mastermind was identified, but was at large and had not been tried or punished. Likewise, the Commission pointed out that the Peruvian courts ordered civil reparations to be paid by the direct perpetrators, but at the time the application was filed said reparations had not been paid to the next of kin of the alleged victims.

II Competence

4. The Court is competent to hear the instant case, pursuant to Articles 62 and 63(1) of the American Convention, as Peru has been a State Party to the convention since 28 July, 1978, and it accepted the adjudicatory jurisdiction of the Court on 21 January, 1981. The State also ratified the Inter-American Convention against Torture on 28 March, 1991.

III Proceeding Before the Commission

5. Case No. 11.016 was opened by the Inter-American Commission on 12 June, 1992, in response to a complaint filed by the Centro de Estudios y Acción para la Paz (hereinafter “CEAPAZ” or “the petitioners”) on 2 July, 1991.
6. On 1 May, 2000 the Commission sent a letter to the parties, offering its services to help attain a friendly settlement, pursuant to “Article 48(1)(f) [author’s note: “The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.”] of the Convention and Article 45(1) and 45(2) of its Rules of Procedure”.
7. On 5 May, 2001, during its 110th Regular Session, the Commission adopted Report No. 44/01 on admissibility of the case.
8. On 21 March, 2001 the Commission reiterated to the parties its willingness to contribute to a friendly settlement. On 23 April, 2001 the State answered that “it did not wish to submit[,] at the moment, to the friendly settlement procedure.” On 9 April, 2001 the petitioners stated that “they were willing to begin a friendly settlement process.”
9. On 11 October, 2001, during its 113th Regular Session, the Commission adopted Report No. 99/01 on the merits of the case and recommended that the State:
 1. [p]rovide adequate reparations to the next of kin of the Gómez Paquiyauri brothers, including both the moral and the material aspects, for the human rights violations established in the [...] report, and specifically,
 2. [c]onduct a complete, impartial, and effective investigation of the facts with the aim of establishing who ordered the crime and punishing whoever was responsible for the order in connection with the facts pertaining to the kidnapping, torture, and murder of the Gómez Paquiyauri brothers.
 3. [p]ay the next of kin of the Gómez Paquiyauri brothers a compensation estimated in accordance with international parameters, sufficient to redress both the pecuniary and the moral damages suffered by the next of kin of the Gómez Paquiyauri brothers due to their murder.
10. On 5 November, 2001 the Commission forwarded Report No. 99/01 to the parties, asked the State to submit a report on the steps taken to comply with the recommendations of the Commission within two months time, and asked

the petitioners, pursuant to Article 43(3) of the Rules of Procedure of the Commission, to submit information in connection with filing of the case before the Inter-American Court.

11. On 3 January, 2002 the State informed the Commission that “it [wa]s taking the necessary steps [...] to comply with the recommendations” made in Report No. 99/01.
12. On 8 January, 2002 the Commission, “in view of the non-compliance of the Peruvian State with the recommendations of the report on the merits,” decided to file the case before the Court.

IV Proceeding Before the Court

13. The Commission filed the application and its appendixes before the Inter-American Court on 5 February, 2002.
14. The Commission appointed Marta Altolaguirre and Santiago Canton as its delegates before the Court, and Ignacio Álvarez, Elizabeth Abi-Mershed and Ariel Dulitzky as its legal advisors.
15. On 19 February, 2002, after a preliminary examination of the application by the President, the Secretariat forwarded it, together with its appendixes, to the State and to the representatives of the alleged victims and their next of kin [author’s note: “In their 5 March, 2002 letter, the next of kin of the alleged victims informed the Court of the appointment of Mónica Feria Tinta as their representative for the proceeding before the Inter-American Court. The application, its appendixes and the other documents were forwarded to Mónica Feria Tinta on 7 March, 2002. Said representative requested an extension to submit her written brief containing pleadings, motions, and evidence, and the extension was granted until 10 April, 2002, given the specific circumstances of the instant case,” internal footnote], and it informed both of the deadlines to reply to the application and to appoint their representatives in the proceeding, as well as to submit the written brief containing pleadings, motions, and evidence, respectively. The Secretariat also informed the State that it had the right to appoint an *ad hoc* judge to participate in the hearing of the case.
16. On 5 March, 2002 the parents of the alleged victims and Mónica Feria Tinta (hereinafter “the representative of the alleged victims and their next of kin”) sent a copy of the power of attorney granted by the former for the latter to represent them in the proceeding before the Inter-American Court. On March 22, 2002 the representative of the alleged victims and their next of kin also sent a copy of the power of attorney granted to her by the siblings of the alleged victims to process the case before the Court.
17. In its 21 March, 2002 note, the State informed the Court that it appointed Francisco José Eguiguren Praeli as Judge *ad hoc*. It also informed the Court of the appointment of Julio Quintanilla Loaiza as its agent.

18. On 15 April, 2002, the representative of the alleged victims and their next of kin, after two extensions granted, submitted her written brief containing pleadings, motions, and evidence, together with its appendixes.
19. On 22 April, 2002 the State sent its brief replying to the application.
20. On 10 May, 2002 the Secretariat forwarded the written brief containing pleadings, motions, and evidence, together with its appendixes, to the State and to the Inter-American Commission and it informed them that they had 30 days time to submit whatever observations they deemed pertinent regarding the requests made by the representative of the alleged victims and their next of kin.
21. On 21 October, 2002 the representative of the alleged victims and their next of kin sent a letter reporting that “the [Gómez Paquiyauri] family [wa]s being harassed by the Agent of the Peruvian State”.
22. On 18 November, 2002 the Court issued an Order in which it “[d]eclare[d] that Francisco José Eguiguren has no impediment to act as judge ad hoc in the instant case”, in connection with the questions raised by the representative of the alleged victims and their next of kin regarding the role of the judge *ad hoc*.
23. On 14 May, 2003 an *amicus curiae* brief was filed in the instant case.
24. On 1 March, 2004 the President of the Court issued an Order for Bent Sorensen and Ole Vedel Rasmussen to submit their expert opinions by means of statements rendered before a notary public (*affidavit*), which should be sent to the Court no later than 22 March, 2004 and would be forwarded to the Inter-American Commission and to the State for them to submit whatever observations they deem pertinent. The President also summoned the Commission, the State, and the representative of the alleged victims and their next of kin to a public hearing that would be held at the seat of the Inter-American Court, beginning on 5 May, 2004, to hear their final oral pleadings on the merits, reparations, and costs, as well as the testimony and expert opinions of the individuals listed below (*infra* para. 28). In this Order, the President also informed the parties that they had until 7 June, 2004 to submit their final written pleadings on the merits, reparations, and costs.
25. On 22 March, 2004 the representative of the alleged victims and their next of kin forwarded the statement made in English by Bent Sorensen before a notary public (*affidavit*).
26. On 19 April, 2004 the Inter-American Commission reported that it had no observations to make on the statement rendered by Bent Sorensen before a notary public. On 28 April, 2004 the State sent its observations to said statement.
27. On 1 May, 2004 the representative of the alleged victims and their next of kin sent a video pertaining to the facts of the case.
28. On 5, 6 and 7 May, 2004, at a public hearing on the merits, reparations, and costs, the Court heard the statements of the witnesses and the expert opinions of the expert witnesses proposed by the Inter-American Commission and by the representative of the alleged victims and their next of kin. The Court also heard

the final oral pleadings of the Commission, of the representative of the alleged victims and their next of kin, and of the State.

There appeared before the Court:

on behalf of the Inter-American Commission on Human Rights:

Freddy Gutiérrez, delegate;

Santiago Canton, delegate;

Ignacio J. Álvarez, advisor;

Lilly Ching, advisor; and

Marisol Blanchard, advisor.

on behalf of the alleged victims and their next of kin:

Mónica Feria Tinta, representative; and

Zoe Harper, legal assistant.

on behalf of the State of Peru:

Julio Quintanilla Loaiza, agent.

Witnesses offered by the Inter-American Commission on Human Rights:

Marcelina Paquiyauri Illanes de Gómez;

Ricardo Samuel Gómez Quispe;

Lucy Rosa Gómez Paquiyauri; and

Ángel del Rosario Vásquez Chumo.

Witnesses offered by the representative of the alleged victims and their next of kin:

Miguel Ángel Gómez Paquiyauri;

Víctor Chuquitaype Eguiluz; and

Jacinta Peralta Allcarima.

Expert witnesses offered by the representative of the alleged victims and their next of kin:

Inge Genefke; and

Hans Petter Houguen.

Even though he was summoned by the President, one witness did not appear before the Court to render his testimony.

29. During the public hearing both the State and the representative of the alleged victims filed various documents (*infra* para. 46).
30. On 7 June, 2004 the Commission and the State submitted their final written pleadings. The representative did so on 11 June, 2004.
31. On 14 June, 2004 the Secretariat, under instructions by the President, asked the State and the representative of the alleged victims and their next of kin to submit, no later than 21 June, 2004, certain documents as evidence to facilitate adjudication of the case regarding the merits and reparations and costs.

32. On 21 June, 2004 the representative of the alleged victims and their next of kin submitted the documentary evidence that had been requested as evidence to facilitate adjudication of the case, under instructions by the President.
33. At the time the instant judgment was rendered, the State had not submitted the evidence requested (*supra* para. 31).

V Provisional Measures

34. During the public hearing (*supra* para. 28), witness Ángel del Rosario Vásquez Chumo stated that:

[I] was intimidated, subjected to pressure, [...] I was threatened so that I would not tell the truth about the facts, but [...] I wanted the hearing of the oral trial to begin once and for all to say how the events happened. When the oral trial took place after two years, I said everything about how the events happened, when I left the penitentiary to reenter society, the doors were closed, as they simply identified me as “vaca’e chumbo” and closed the doors on me [...].

[I] ask you [to] help [me] to avoid reprisals against my family and against myself, because there was intimidation long before and now, well to hide the things that have happened, afterwards they may take reprisals against me and my family.

35. During the public hearing (*supra* para. 28), witnesses Lucy Rosa Gómez Paquiyaui, Marcelina Paquiyaui Illanes de Gómez, Ricardo Samuel Gómez Quispe, Miguel Ángel Gómez Paquiyaui, and Jacinta Peralta Allccarima, all next of kin of the alleged victims in the instant case, also stated that they have suffered persecution and harassment after the facts of the case.
36. On 7 May, 2004, the representative of the alleged victims and their next of kin asked the Court to “take whatever measures it deem[ed] appropriate for [...] the members of the Gómez Paquiyaui family [...] not to suffer reprisal due to their position as [alleged] victims in this case, or harassment with pressures and threats at their domicile” to urge them to “accept” friendly settlements, by the Agent of the Peruvian State or other agents of the State in this proceeding.
37. On that same day, under instructions by the Court, the Secretariat asked the State to cooperate by not having its agents contact the Gómez Paquiyaui family or their representative, not even to seek a friendly settlement in this case, as said approaches were being interpreted by said family as “harassment with pressure and threats at their domicile”.
38. On 7 May, 2004 the Court also issued an Order in which it decided:
 1. To order the State to adopt, forthwith, such measures as may be necessary to protect the life and the right to humane treatment of the members of the Gómez Paquiyaui family who testified before the Court, Ricardo Samuel Gómez Quispe, Marcelina Paquiyaui Illanes de Gómez, Lucy Rosa Gómez Paquiyaui, Miguel Ángel Gómez Paquiyaui, and Jacinta Peralta Allccarima, and those who are in Peru: Ricardo Emilio, Carlos Pedro, and Marcelina Haydeé, all of them Gómez Paquiyaui, and minor Nora Emely Gómez Peralta.

2. To order the State to adopt, forthwith, such measures as may be necessary to protect the life and the right to humane treatment of Ángel del Rosario Vásquez Chumo and the members of his family.

[...]

In that same Order, the Court ordered the State to allow the beneficiaries of the provisional measures to participate in planning and implementation of said measures, and it set deadlines for the State to submit reports on the provisional measures, and for the Inter-American Commission and the representative of the beneficiaries of the provisional measures who were members of the Gómez Paquiyauri family to submit their observations on said reports.

VI The Evidence

[...]

VII Proven Facts

67. Based on the facts set forth in the application, the documentary evidence, the testimony of the witnesses, the expert opinions of the expert witnesses, and the arguments of the Commission, of the representative of the alleged victims and their next of kin and of the State, the Court finds the following facts proven:

Regarding to the situation of the country

67 a) Between 1984 and 1993 there was a conflict in Peru between armed groups and agents of the police and military forces, in the midst of a systematic practice of human rights violations, including extra-legal executions, of persons suspected of belonging to armed groups. These practices were carried out by State agents following orders of military and police commanders.

67 b) The state of emergency was declared several times during this period, including the Province of El Callao.

67 c) Specifically, a plan known as the “Cerro Noventiuno”, designed to capture and execute the principals of terrorist acts, was carried out in 1991.

Regarding to Rafael Samuel and Emilio Moisés Gómez Paquiyauri

67 d) Rafael Samuel Gómez Paquiyauri was born on 7 February, 1974 in San Miguel, Lima. His brother, Emilio Moisés Gómez Paquiyauri, was born on 6 February, 1977 in San Miguel, Lima. Both were students at the time of the facts, and they occasionally helped their father in various tasks, including ship reparation.

67 e) On the morning of 21 June, 1991, Rafael Samuel and Emilio Moisés Gómez Paquiyauri were going to their mother's workplace in the province of El Callao, when they were intercepted and detained by agents of the Peruvian National Police who were searching for persons involved in alleged terrorist acts, in the course of implementation of the "Cercos Noventiuno" plan.

67 f) After their detention, Rafael Samuel and Emilio Moisés Gómez Paquiyauri were thrown to the ground, kicked, and a policeman stepped on their backs. The policemen then covered their head and dragged them to the trunk of a patrol car. These actions were recorded by television cameras of the Noticiero "90 segundos" newscast on Channel 2 of the Peruvian national television.

67 g) The brothers Rafael Samuel and Emilio Moisés Gómez Paquiyauri were then taken, under police custody, to a place called "Pampa de los Perros", where they were beaten with the butt of a shotgun and subsequently murdered by firearm shots to the head, thorax, and other parts of the body.

67 h) Approximately one hour after their detention, the bodies of Rafael Samuel and Emilio Moisés Gómez Paquiyauri entered the morgue of the San Juan hospital, currently called "Daniel Alcides Carrión", as NN (Unidentified).

67 i) Before they died, Rafael Samuel and Emilio Moisés Gómez Paquiyauri suffered torture inflicted on them by agents of the Peruvian National Police.

67 j) At the morgue, the bodies of Rafael Samuel and Emilio Moisés Gómez Paquiyauri were full of blood and dirt, soiled, wet; there was encephalic mass on their hair, and one of Emilio's fingers was missing. The eyes were empty in both of them.

67 k) The State agents involved in the facts sought to present Rafael Samuel and Emilio Moisés Gómez Paquiyauri before public opinion as if they had been terrorists, and as if their death had taken place in an armed confrontation.

Regarding to domestic actions

67 l) The parents of the alleged victims filed a complaint regarding the facts on 25 June, 1991 before the Provincial Prosecutor of the Fifth Criminal Prosecutor's Office.

67 m) On the other hand, the Peruvian National Police conducted an investigation of the facts, which generated police record No. 281-IC-H-DDCV of 26 June, 1991.

67 n) Based on the application filed by the Gómez Paquiyauris and on police record No. 281-IC-H-DDCV, on 27 June, 1991, the Fifth Criminal Prosecutor's Office formalized a criminal complaint before the trial judge on duty, against several agents of the Peruvian National Police, including Sergeant Francisco Antezano Santillán, noncommissioned officer Ángel del Rosario Vásquez Chumo and Captain César Augusto Santoyo Castro, for the crime of aggravated homicide against Rafael Samuel and Emilio Moisés Gómez Paquiyauri, processed as file 227-92.

67 o) On 2 September, 1992 the Fifth Criminal Court of El Callao issued the final pronouncement of the preliminary stage.

67 p) On 9 November, 1993 the Third Criminal Chamber of El Callao issued a judgment (hereinafter “the 9 November, 1993 judgment”), in which:

67 p.1) it convicted Sergeant Francisco Antezano Santillán as the perpetrator of the crime of aggravated murder against Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, and for the crime against the jurisdictional function of the legal system, to the detriment of the State, sentencing him to eighteen years in prison and two years of disenfranchisement;

67 p.2) it convicted noncommissioned officer Ángel del Rosario Vásquez Chumo as an accomplice, for the crime of aggravated homicide against Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, and for the crime against the jurisdictional function of the legal system to the detriment of the State, to six years in prison and two years of disenfranchisement;

67 p.3) it ordered that the convicts pay to the next of kin of the alleged victims a civil reparation of twenty thousand nuevos soles;

67 p.4) it established that there was a mastermind of the facts, Captain César Augusto Santoyo Castro of the Peruvian National Police, who “told operator Antezano Santillán to take the detainees in the trunk of the car [...] with the aim of killing them and that this order was confirmed over the radio during the trip to the appointed place.” In this regard, the judgment ordered that the trial of indicted César Augusto Santoyo Castro be postponed, and that new orders be issued to locate, capture and incarcerate him in a public jail; and

67 p.5) it granted the extraordinary remedy of ex officio nullity, and it ordered that the case file be forwarded to the Supreme Court of Justice of the Republic.

67 q) On 9 June, 1994 the Transitory Criminal Chamber of the Supreme Court of Peru issued a judgment, in which it found that there was no nullity in the 9 November, 1993 judgment (supra para. 67.p), and it upheld the sentences imposed by the judgment reviewed.

67 r) On 10 November, 1995 Francisco Antezano Santillán received the benefit of semi-liberty and, on 18 November, 1994, Ángel del Rosario Vásquez Chumo was granted parole.

67 s) The State has issued several arrest warrants against Captain César Augusto Santoyo Castro, but to date he has not been arrested.

Regarding to the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyauri

67 t) The next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyauri are: Marcelina Paquiyauri Illanes de Gómez, their mother; Ricardo Samuel Gómez Quispe, their father; and Marcelina Haydeé, Ricardo Emilio,

Carlos Pedro, Lucy Rosa and Miguel Ángel, all of them Gómez Paquiyauri, their siblings.

67 u) Rafael Samuel Gómez Paquiyauri had a daughter from his relationship with Jacinta Peralta Allccarima, whose name is Nora Emely Gómez Peralta, born on 27 February, 1992;

67 v) Nora Emely Gómez Peralta has not been registered as the daughter of Rafael Samuel Gómez Paquiyauri, due to her mother's fear.

67 w) After the death of the minors, the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyauri were harassed several times by the DINCOTE. Officers of the DINCOTE visited the Gómez Paquiyauri family's house several times, breaking furniture and tearing mattresses in search of evidence to show that the youths were subversives. The DINCOTE also sent summons for the family to appear at their offices for interrogation; they constantly followed the members of the family and at night they parked police cars in the area. They offered the family money several times, apparently sent by the heads of the police and other authorities.

67 x) Several members of the Gómez Paquiyauri family were affected by the facts. The parents of the alleged victims went to various places in search of justice, and received no response. The health of Mrs. Marcelina Paquiyauri, the mother of the alleged victims, deteriorated. In the days after the death of their children, the Gómez Paquiyauri couple left their work activities for some time, the father for three weeks and the mother for a year. The older sister of the minors, Marcelina Haydeé Gómez Paquiyauri, who was nine months pregnant at the time of the facts, suffered a nervous ailment and lost her baby a few days later. In the days after the execution, Miguel Ángel was afraid to be alone at home and had problems sleeping. Also, when he completed secondary schooling he was unable to continue studying due to the financial difficulties faced by the family. Like her next of kin, Lucy Rosa Gómez Paquiyauri suffered physical health problems as a consequence of the facts.

67 y) On 29 October, 1992 the sister of the alleged victims, Lucy Rosa Gómez Paquiyauri, who at the time was 16 years old, was detained, and set free four years later.

67 z) Partial impunity in this case continues to cause suffering to the next of kin of Rafael Samuel and Emilio Moisés Gómez Paquiyauri.

Regarding to representation of the next of kin before the inter-American system for protection of human rights and the expenses pertaining to said representation

67 aa) CEAPAZ represented the alleged victims and their next of kin before the Inter-American Commission, and for this it incurred a number of expenses. Mónica Feria Tinta represented the alleged victims and their next of kin before the Inter-American Court, and for this she too incurred various expenses.

[...]

VIII Operative Paragraphs

253. Now therefore,

THE COURT,

FINDS THAT:

Unanimously,

1. the State violated the Right to Life set forth in Article 4(1) of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri, under the terms set forth in paragraphs 124 to 133 of the instant Judgment.

Unanimously,

2. the State violated the Right to Personal Liberty set forth in Article 7 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri, under the terms set forth in paragraphs 81 to 100 of the instant Judgment.

Unanimously,

3. the State violated the Right to Humane Treatment set forth in Article 5 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, and the obligations set forth in Articles 1, 6 and 9 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri. The State also violated Article 5 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Marcelina Paquiyauri Illanes de Gómez, Ricardo Samuel Gómez Quispe, Marcelina Haydeé Gómez Paquiyauri, Ricardo Emilio Gómez Paquiyauri, Carlos Pedro Gómez Paquiyauri, Lucy Rosa Gómez Paquiyauri, Miguel Ángel Gómez Paquiyauri and Jacinta Peralta Allcarima, under the terms set forth in paragraphs 106 to 119 of the instant Judgment.

By six votes to one,

4. the State violated the rights to Right to Fair Trial and to Judicial Protection enshrined in Articles 8 and 25, respectively, of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri, Ricardo Samuel Gómez Quispe, Marcelina Paquiyauri Illanes de Gómez, Ricardo Emilio Gómez Paquiyauri, Carlos Pedro Gómez Paquiyauri, Marcelina Haydeé Gómez Paquiyauri, Lucy Rosa Gómez Paquiyauri, and Miguel Ángel Gómez Paquiyauri, under the terms set forth in paragraphs 140 to 156 of the instant Judgment.

Judge Medina Quiroga partially dissenting.

Unanimously,

5. the State violated the obligations set forth in Article 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri, under the terms set forth in paragraphs 153 to 156 of the instant Judgment.

Unanimously,

6. the State violated Article 19 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri under the terms set forth in paragraphs 161 to 173 of the instant Judgment.

Unanimously,

7. the State violated Article 11 of the American Convention on Human Rights, in combination with Article 1(1) of this same Convention, to the detriment of the members of the family of Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, mentioned in paragraphs 67.t and 67.u of this ruling, under the terms set forth in paragraphs 178 to 182 of the instant Judgment.

Unanimously,

8. this Judgment is per se a form of reparation, as set forth in paragraph 215 of the instant Judgment.

AND, UNANIMOUSLY, ORDERS THAT:

9. The State must, within a reasonable term, effectively investigate the facts of the instant case, with the aim of identifying, trying, and punish[ing] all the perpetrators of the violations against Rafael Samuel and Emilio Moisés Gómez Paquiyauri. The outcome of this proceeding must be made known to the public, under the terms set forth in paragraphs 227 to 233 of the instant Judgment.

10. The State must carry out a public act of acknowledgment of its responsibility in connection with the facts of this case and of apology to the victims, under the terms set forth in paragraph 234 of the instant Judgment.

11. The State must publish once in the official gazette, *Diario Oficial* and in another national coverage daily the chapter of this Judgment on proven facts, without the respective footnotes, and the operative paragraphs of this Judgment, under the terms set forth in paragraph 235 of the instant Judgment.

12. The State must officially name a school in the province of El Callao after Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, in a public ceremony and in the presence of the next of kin of the victims, under the terms set forth in paragraph 236 of the instant Judgment.

13. The State must establish a scholarship up to university level, in favor of Nora Emely Gómez Peralta, and facilitate her registry as the daughter of Rafael Samuel Gómez Paquiyauri, under the terms set forth in paragraphs 237 and 238 of the instant Judgment.

14. The State must pay the total sum of US\$ 240,500.00 (two hundred and forty thousand five hundred United States dollars) or its equivalent in Peruvian currency, for pecuniary damages, under the terms set forth in paragraphs 206, 208 and 210 of the instant Judgment, distributed as follows:

- a) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyauri Illanes de Gómez, as parents of Emilio Moisés Gómez Paquiyauri, US\$ 100,000.00 (one hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraphs 206 and 199 of the instant Judgment;
- b) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyauri Illanes de Gómez, as parents of Rafael Samuel Gómez Paquiyauri; and to Nora Emely Gómez Peralta, as daughter of Rafael Samuel Gómez Paquiyauri, US\$ 100,000.00 (one hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraphs 206 and 200 of the instant Judgment; and
- c) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyauri Illanes de Gómez, US\$ 40,500.00 (forty thousand five hundred United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraph 208 of the instant Judgment.

15. The State must pay US\$ 500,000.00 (five hundred thousand United States dollars) or their equivalent in Peruvian currency, as compensation for non-pecuniary damages, under the terms set forth in paragraphs 217, 219 and 220 of the instant Judgment, distributed as follows:

- a) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyauri Illanes de Gómez, as parents of Emilio Moisés Gómez Paquiyauri, US\$ 100,000.00 (one hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraphs 217 and 199 of the instant Judgment;
- b) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyauri Illanes de Gómez, as parents of Rafael Samuel Gómez Paquiyauri; and to Nora Emely Gómez Peralta, as daughter of Rafael Samuel Gómez Paquiyauri, US\$ 100,000.00 (one hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraphs 217 and 200 of the instant Judgment;
- c) to Ricardo Samuel Gómez Quispe and Marcelina Paquiyauri Illanes de Gómez, US\$ 200,000.00 (two hundred thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraph 219 of the instant Judgment;

- d) to Jacinta Peralta Allcarima, US\$ 40,000.00 (forty thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraph 220 of the instant Judgment; and
 - e) to Nora Emely Gómez Peralta, US\$ 60,000.00 (sixty thousand United States dollars) or their equivalent in Peruvian currency, under the terms set forth in paragraph 220 of the instant Judgment.
16. The State must pay US\$ 30,000.00 (thirty thousand United States dollars) or their equivalent in Peruvian currency, which must be given to Ricardo Samuel Gómez Quispe and Marcelina Paquiyaury Illanes de Gómez, for costs and expenses in the domestic proceeding and in the international proceeding before the inter-American system for protection of human rights, under the terms set forth in paragraph 243 of the instant Judgment.
17. The State must deposit the compensation ordered in favor of the child Nora Emely Gómez Peralta in a banking investment in her behalf at a solid Peruvian institution, in United States dollars, within one year's time and under the most favorable financial conditions allowed by banking practices and legislation while she is a minor, under the terms set forth in paragraph 248 of the instant Judgment.
18. The State must pay the total amount ordered as compensation for pecuniary damages, non-pecuniary damages, costs and expenses established in the instant Judgment, without any of its items being subject to existing taxes, levies or charges, or any that may be decreed in the future.
19. The State must carry out the measures of reparation and of reimbursement of expenses listed in operative paragraphs 10 to 17 of the instant Judgment within one year's time, counted from the date this Judgment is notified, under the terms set forth in paragraph 244 of the instant Judgment.
20. If the State were to be in arrears, it must pay interest on the amount owed, and the interest will be at the banking rate in Peru, under the terms set forth in paragraph 251 of the instant Judgment.
21. If due to causes attributable to the beneficiaries of the compensations it were not possible for them to receive those compensations within the one-year term that has been set, the State will deposit those amounts on behalf of the beneficiaries in a deposit certificate or account at a solid Peruvian banking institution, under the terms set forth in paragraph 247 of the instant Judgment.
22. The Court will oversee execution of this Judgment and will close this case once the State has fully complied with its provisions. Within one year from the date when notice is served of this Judgment, the State must submit a report to the Court on steps taken to comply with it, pursuant to paragraph 252 of the instant Judgment.

Judge Cançado informed the Court of his Separate Opinion, Judge Medina Quiroga informed the Court of her Partially Dissenting Opinion, and Judge Eguiguren Praeli informed the Court of his Separate Opinion. These opinions are attached to the instant judgment.

[...]

6.2 Notes and Questions

6.2.1 *Who Were the Child Victims (Persons Under Age 18 Years) in the Gómez-Paquiyaui Brothers v. Peru Case?*

In the instant case there were in fact several child victims first and foremost of whom were Emilio Moisés and Rafael Samuel Gómez Paquiyaui, respectively 14 and 17 years old, the children who were tortured and murdered by the State police. In addition, their sister Lucy Rosa Gómez Paquiyaui who was 15 at the time of her brothers' murders is also a victim. The IAC (refers to Inter-American Court unless otherwise specified) accepted the evidence of the experts that Lucy had also suffered physical and mental torture and a nervous condition due to the knowledge that her brothers had met such a horrific fate and due to the interrogations and deprivations that she herself had suffered at the hands of the State authorities tasked to investigate terrorism and who attempted to coerce her to make statements favorable to the State. In fact, in October 1992, when Lucy was 16 she was taken to an adult prison where she was subsequently detained for four years initially in maximum security.

She was beaten, put into a car – just like her brothers –, blindfolded, and feared that she was going to be murdered. They also threatened her saying that they would throw her from a helicopter or that she would be stripped and beaten. Then, she remained in prison four years; the first part of this time she was in a maximum security prison. (majority judgment, para. 49(h))

The court judgment describes Lucy's hopes for the IAC process in this way:

She wants to find justice and wants the State to "vindicate" what they did to her brothers, for having dishonored their names; she wants the truth about what happened to be known. (majority judgment, para. 49(b))

When the facts took place on 21 June, 1991, Miguel Ángel Gómez Paquiyaui, brother of the victims (Emilio Moisés and Rafael Samuel Gómez Paquiyaui) was 8 years old and up until then had been psychologically normal. After the events, and after seeing his brothers' bodies, he suffered a mental breakdown according to expert testimony accepted by the IAC and was unable to resume a normal life staying instead at home. His mental anguish is described thus in the IAC judgment:

The event left its mark on the child and harmed him "a lot"; he had nightmares, he dreamt of them, and his nerves were in very bad shape. After he saw the bodies and the photographs, he felt deep grief. "I have no words to describe, it was something that truly hurt me deeply to see them like that." He felt that he was left practically alone, because Emilio and Rafael were the ones who defended him if something happened to him. If he needed something, Rafael, who was working, bought it for him, they were "like my parents [...] they cared for me as if they were my parents, and overnight I was left alone, with no one." Regarding the memory of the event, the witness stated that he preferred "to bury it but it cannot be done, it is something that cannot be erased and is always going to be there if justice is not found." (majority judgment, para. 49(e))

In addition, another older sister Marcelina Haydeé Gómez Paquiyauri lost her baby as the court notes “due to the emotion” (majority judgment, para. 49(e)).

Nora Emely is the daughter of the 17 year old child murder victim Raphael Samuel Gómez Paquiyauri. She was 12 years old at the time of the IAC final judgment and not yet born at the time of her father’s torture and murder. Nora grew up with her grandfather’s surname and not that of the father. This was due to the stigma attached unjustly to the father’s name (arising from the State’s false accusation against the father claiming he was a terrorist), and her mother’s fear relating to the persecution the family continued to suffer at the hands of State authorities.

Note that Carlos Pedro and Ricardo Emilio Gómez Paquiyauri; brothers of the murder victims were imprisoned for an extended period without trial. The parents had not seen them for a lengthy period at the time the IAC rendered its final judgment in the instant case. It appears that the IAC declined to comment on those alleged facts even though, as part of the remedy, the plaintiffs had asked for the release of Carlos and Ricardo. Given the entire context in the case, and the systematic abuses and persecution of this family, was it justifiable that the IAC did not address the situation of Carlos Pedro and Ricardo Emilio Gómez Paquiyauri; brothers of the murder victims (presumably on the contention that their imprisonment was not contemporaneous with the events surrounding the fate of their brothers at the hands of State agents)?

6.2.2 Did International Justice in This Case Affirm Respect for the Human Rights of the Child?

6.2.2.1 Were the Child Victims in *Gómez-Paquiyauri Brothers v. Peru* Regarded as Having Juridical Personality, or Were the Children’s Rights Subsumed Under Those of the Parents or Other Adult Family Members?

The IAC describes in the statement of facts; the harms and suffering that each of the minors in the case endured at the hands of agents of the State (i.e., the murdered brothers aged 14 and 17, the sister; aged 15 at the time of the events, a younger brother aged eight at the time of his siblings’ murders and the daughter of one of the murdered boys aged 12 at the time of the IAC judgment). The State conceded, and the Court affirmed, the minors’ right to a judicial remedy as independent legal persons:

Regarding to the aforementioned article, the State pointed out that “it is, in fact, [under] the obligation to ensure measures for the protection for minors and adolescents, to safeguard their rights and liberties that they are entitled to for the mere [fact] of being legal persons.” (majority judgment, para. 161)

The Court acknowledged each child’s status as a separate independent person though, at the same time, a Gómez Paquiyauri family member. The IAC judgment further acknowledged particular offences under international human rights law committed by the State against surviving child siblings of the Gómez Paquiyauri brothers, and the judgment calculated reparations with reference, in part, to the

harms the surviving child victims suffered as separate persons due to the actions or inactions of the State in the instant case.

6.2.2.2 Was There an Acknowledgement of Offences Under International Law Committed by the State Against Minors in the Case?

Acknowledgement of offences under international human rights law committed by the State against Rafael and Emilio and the surviving siblings of the Gómez Paquiyauri brothers, including those who were minors at the time of the international crimes committed against their brothers, is reflected in the following excerpts from the majority judgment (para. 196 and 197):

- (a) [...] the Court finds Rafael Samuel and Emilio Moisés Gómez Paquiyauri to be “injured parties,” given that they were the direct victims of the violations of the rights enshrined in Articles 4, 5, 7, 8, 19 and 25 of the American Convention, in combination with Article 1 (1) of that same treaty, as well as in Articles 1, 6, 8 and 9 of the Inter-American Convention against Torture, for which reason they will be entitled to the reparations set by the Court, both for pecuniary and for non-pecuniary damages.
- (b) Ricardo Emilio Gómez Paquiyauri, Carlos Pedro Gómez Paquiyauri, Marcelina Haydeé Gómez Paquiyauri, Lucy Rosa Gómez Paquiyauri, Miguel Ángel Gómez Paquiyauri, their siblings, will be entitled to the reparations ordered by the Court as direct victims of the violations of the rights enshrined in Articles 5, 8, 11 and 25 of the Convention, in combination with Article 1(1) of this same Convention [...]. Likewise, Nora Emely Gómez Peralta will be entitled to the reparations ordered by the Court as a direct victim of the violations of the rights enshrined in the aforementioned Article 11 of the Convention. Said next of kin will also be entitled to the reparations set by the Court as injured parties as a direct consequence of the death of Rafael Samuel and Emilio Moisés Gómez Paquiyauri.

6.2.3 *What Was the Nature of the Reparations Ordered by the Court (IAC), to Whom Were They to Be Paid, and Is There Any Potential Significance of Certain of the Reparations in Terms of Promoting the Rights of the Child?*

Reparations were awarded by the Inter-American Court to surviving victims of the Gómez Paquiyauri family; including those who were minors at the time of the events. This constituted then recognition also of the minor children’s status as persons in their own right who had suffered their own harms from the date of the torture and murder of the Gómez-Paquiyauri brothers and subsequently. The reparations awarded included the following:

Pecuniary and non-pecuniary reparations awarded for each of the murdered boys to be distributed as stipulated by the parents with due accord given to any children or other relations of the deceased. In addition, awards were made to the individual victims who were minors at the time the State failed to protect Rafael Samuel

and Emilio Moisés Gómez Paquiyauri from becoming the victims of crimes against humanity. The reparations thus cover both the compensation for being an injured party as the result of the murder of the brothers, and for injuries suffered directly. The reparations came in several different forms also aside from money damages. For instance, the Court (majority judgment, para. 253 (12 and 13)) ordered that:

The State must officially name a school in the province of El Callao after Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, in a public ceremony and in the presence of the next of kin of the victims, under the terms set forth in paragraph 236 of the instant Judgment.

The State must establish a scholarship up to university level, in favor of Nora Emely Gómez Peralta, and facilitate her registry as the daughter of Rafael Samuel Gómez Paquiyauri, under the terms set forth in paragraphs 237 and 238 of the instant Judgment.

The naming of the school in honor of the murdered boys in a public ceremony, and the facilitation of the registration of Nora along with a State funded education for Nora (up to, but not including university) presumably were intended to remove the stigma from the family name and from the memory of the boys falsely accused of terrorism. The school naming is especially symbolic in that it could be a reminder to children who attend there of the child's right to protection under international law which the State is obligated to provide. However, this would occur only if the students are educated on the issue of children's human rights and the history regarding the school name. No provisions were made in the IAC judgment ordering, or at least recommending, that Peruvian schools introduce a curriculum component to educate children about their rights under the American Convention and the Convention on the Rights of the Child. Note that Article 29(1) of the Convention on the Rights of the Child (which Peru ratified in 1990) stipulates that:

States Parties agree that the education of the child shall be directed to [...] the respect for human rights and fundamental freedoms and [...] the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance [...] and friendship among all peoples [...]

Recall also that Raphael had finished secondary school, and was planning to enter university in the near future, and that his siblings also wished to, and had a good possibility to go to university. The school named in the murdered boys honor thus becomes emblematic of the lost future of the murdered boys and their siblings.

Consider the grave nature of the crimes committed against Rafael Samuel and Emilio Moisés Gómez Paquiyauri, and the suffering it caused and continued to cause the siblings. Consider also the offences committed directly against the surviving family members in terms of unlawful interrogations, intimidation and harassment, damage to their property and the like, the loss of Marcelina Haydeé Gómez Paquiyauris' baby due to psychological stress arising from the State actions and inaction and Lucy's incarceration as a minor in an adult prison for four years. Given the aforementioned facts, accepted as true by the IAC, was the reparation fair compensation for the five surviving siblings? Was the failure to provide Lucy Gómez Paquiyauri extraordinary damages legally supportable considering the

severity of the injuries she had suffered directly at the hands of State agents when she herself was tortured and falsely imprisoned, and the predictable ongoing long-term consequences of such injuries and trauma?

6.2.4 Was the International Obligation to Afford Children Special Protection Acknowledged, and the Nature of the Offence Considered “Aggravated” by the Fact that the Victims Were Children?

The IAC held that Peru, in the instant case, had violated Article 19 (Rights of the Child) of the American Convention (cited at para. 173 of the majority judgment) which states:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

There was evidence that the crimes were considered “aggravated” as pertains to Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri because they were minors (aged 14 and 17 respectively when they were unlawfully detained, tortured, and extra-judicially executed by agents of the Peruvian National Police). This acknowledgement of the added gravity of offences when the victims are minor children is reflected, for example, in the following excerpts from the majority judgment:

The Court deems that cases in which the victims of human rights are children are especially grave, as their rights are reflected not only in the American Convention, but also in numerous international instruments, broadly accepted by the international community – notably in the United Nations’ Convention on the Rights of the Child – that “establish the duty of the State to adopt special protection and assistance measures in favor of children under their jurisdiction”. (para. 162, emphasis added)

Also, as the Court analyzed the matter in the chapter on abridgment of Article 5 of the Convention and the provisions of the Inter-American Convention against Torture (supra para. 117), *the fact that the alleged victims were children requires applying the highest standard in determining the seriousness of actions that violate their right to humane treatment.* (para. 170, emphasis added)

Based on the above, the Court finds that *the State violated the right to special measures of protection for minors*, set forth in Article 19 of the American Convention, to the detriment of Rafael Samuel and Emilio Moisés Gómez Paquiyauri. (para. 173, emphasis added)

However, were the findings of the IAC of State violations regarding the special protections owed the minors in the instant case and its statements regarding the added gravity of fundamental human rights abuses when committed against children undermined by its failure to make any specific finding as to the adequacy, or lack of adequacy of the relatively light sentences imposed upon the perpetrators in the instant case who had been captured (those perpetrators being amongst the very agents of the State who ought to have been tasked with protecting the civilian population; especially the most vulnerable such as children)? In this regard

consider the following excerpt from the majority judgment (para. 145, emphasis added):

The Court will not analyze the penitentiary benefits established in Peruvian legislation nor those granted to Francisco Antezano Santillán and Ángel del Rosario Vásquez Chumo. However, without excluding any category of convicts, the Court deems that the State must carefully consider applying those benefits in cases of grave violations of human rights, as in the instant case, since granting them unduly may lead to a form of impunity.

More generally, does the IAC's failure to forthrightly address the adequacy of the sentences, and the early release of two of the perpetrators in the Gómez-Paquiyaui Brothers v. Peru case undermine the international human rights principle of the child's right to special assistance and protection?

6.2.5 Was There Any Public Acknowledgement of the Violation of International Human Rights Law in Gómez-Paquiyaui Brothers v. Peru?

The IAC ordered that the State acknowledge *publicly* that international human rights violations had been perpetrated against child victims in the instant case (Rafael Samuel Gómez Paquiyaui and Emilio Moisés Gómez Paquiyaui, both minors, and their surviving family members). However, there was no specific strong stipulation that the State publicly acknowledge the "aggravated" nature of the offences arising due to the fact that Rafael and Emilio were minors as were several of the siblings at the time of the originating events in the case. This is especially noteworthy in that international human rights abuses against minors – given their right to special protections by the State at the outset-highlight the more general international human rights law principle that the State's international responsibility occurs at the moment that the individual within its jurisdiction becomes the victim of an international human rights offence. Note that the State agents had intentionally misrepresented the ages of the murdered brothers when in fact it would be expected that the children's correct ages of 14 and 17 would be at first either undetermined or later apparent to a medical examiner (Lucy's testimony, majority judgment, para. 49(b), and Marcelina Paquiyaui Illanes de Gómez, mother's testimony, majority judgment para. 49(c)):

Both bodies [author's note: at the hospital] had a sign that said "NN [Unidentified], light build, olive-skinned, approximate age" 24 years on Emilio's card and 27 years on Rafael's, "arrived as a corpse."

Rafael's body was identified as: "approximately 27, NN [unidentified], arrived as a corpse," and Emilio's as: "approximately 24 years old, unidentified, arrived as a corpse." Due to her desperation she began to scream and to ask why they gave them that age if they were children.

Consider then the initial State misrepresentations regarding the ages of the murdered brothers (which may have remained thus had the parents and other family

members not been so courageous and persistent in seeking to correct the record in every respect and to obtain a modicum of justice for the child victims). In light of these facts, was it a serious error that the Inter-American Court did not require the State to publicly acknowledge the aggravated nature of the State human rights violations given the fact that the victims were children?

6.2.6 Were the Principles of the Convention on the Rights of the Child (CRC) Reflected in the Treatment of the Case and the Remedy Afforded the Victims?

Reference was made in the instant case to the CRC (majority judgment, para. 166):

Both the American Convention and the Convention on the Rights of the Child are part of a broad international *corpus juris* for protection of children that aids this Court in establishing the content and scope of the general provision defined in Article 19 of the American Convention [author's note: Rights of the Child].

The IAC judgment in *Gómez-Paquiyaury Brothers v. Peru* affirmed:

- the right of minors to special additional protections as children (especially in a time of internal armed conflict as was the situation in Peru at the time of the human rights offences committed by agents of the State in the instant case);
- children's affirmative rights; such as the right to participation (i.e., in the instant case, the right of the Gómez-Paquiyaury brothers to have participated in a fair trial and defended themselves against the charges (though it is to be recalled that the IAC had found that the arrest and detention of the brothers had been completely unlawful and arbitrary in the first instance));
- the dignity of children as separate human beings in their own right (majority judgment, para. 163):

Regarding the matter of protecting the rights of the child and adopting measures to attain said protection, the principle of the best interests of the child prevails, based "on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential".

6.2.7 Did the Alleged Primacy of the National Court in the Instant Case Hinder or Facilitate the State's International Accountability for the International Crimes Committed Within Its Jurisdiction?

The perpetrators of the crimes of torture, and murder of the minors Emilio and Raphael Gómez Paquiyaury committed these acts as agents of the State and the acts were part of a pattern of extra-legal arrests and executions occurring in Peru at the time. Hence, the acts of these agents of the State clearly constituted international crimes. The perpetrators, however, were convicted by the domestic

courts of the domestic crimes of “aggravated murder” against Rafael Samuel Gómez Paquiyauri and Emilio Moisés Gómez Paquiyauri, and crime “against the jurisdictional function of the legal system, to the detriment of the State” with no mention of the international dimension of the crimes (majority judgment, para. 67. p.1–p.4, citing from the 9 November, 1993 judgment of the Peruvian domestic court; the Third Criminal Chamber of El Callao). The IAC did not challenge the original light sentences and subsequent complete or partial parole given to the two perpetrators who had been captured and convicted for these egregious international crimes. This on the theory that the IAC is but subsidiary to the domestic court:

- in the inter-American system for protection of human rights the international responsibility of the State arises when an act that violates human rights takes place; however, said system is a subsidiary one, and the State has the authority and the duty to try to solve the matter at the domestic level, that is, to investigate, punish, and provide compensation;
- in this regard, if the State investigates and punishes all those responsible for the facts and adequately compensates the [alleged] victims or their next of kin, “it discharges its international responsibility, which arose when the facts occurred and it is no longer internationally responsible before the inter-American system [for protection] of human rights due to non-compliance with its obligation;” and
- in studying whether or not [the] responsibility is applicable, it is necessary to take into account the subsidiary nature of the inter-American system and to ascertain the outcome of the domestic proceedings; otherwise, the Inter-American system would practically become a main and original Court and it would lose [the] subsidiary nature given to it by the Inter-American convention (majority judgment, para. 68).

The IAC thus ordered further investigation of the case by domestic authorities with a view to capturing the captain of police who had ordered the torture and murder of the children (the Gómez-Paquiyauri brothers). The State was also required to publicly acknowledge its complicity due to its failure to protect the minor children in the instant case from torture and murder carried out by agents of the State. Is this acknowledgement by the State sufficient given the relatively light sentences (with subsequent early release) carried out by the domestic courts against the perpetrators? Did the State adequately punish the perpetrators such as to fashion a penalty which properly reflected the gravity of the crimes committed against the Gómez Paquiyauri brothers (i.e., the fact that the brothers were the victims of crimes against humanity as defined under Article 7 of the Rome Statute)? If not, what questions does the case raise regarding the adequacy of the notion of the IAC as simply subsidiary to the domestic court? Is it possible to have the international human rights system as a watchdog or check of the national court system to ensure the prosecution of international crimes (for instance, if the domestic penal code does not incorporate the recognition of such international crimes, nor delineate how they are to be penalized if committed within that State’s jurisdiction or by persons who have

taken refuge in that State's jurisdiction)? One example of domestic federal law pending which addresses international crime offences is the United States "Child Soldiers Accountability Act" which, if incorporated into the US federal criminal code would enable the United States to prosecute military commanders who recruit child soldiers under the age of 15 abroad and who then seek refuge in the United States, and prosecute those who attempt to recruit children from the United States to actively participate in foreign conflicts. The US federal statutes (Chapter 113c of Title 18, the Crimes and Criminal procedure of the US Code) already, for instance, provide for prosecution of any perpetrator who commits torture if that perpetrator is in the United States and regardless of the nationality of the victim or the offender (see Testimony by Tom Malinowski, Washington Advocacy Director Human Rights Watch [8 April, 2008] in support of "The Child Soldier Accountability Act of 2007" before the US House Judiciary Subcommittee [retrieved 18 February, 2009 from <http://hrw.org/english/docs/2008/04/08/usint18473.htm>]).

6.2.8 *Would Justice Have Been Better Served by Advancing the Gómez-Paquiyaui Brothers v. Peru Case Before an Alternative International System (in This Case the ICC) Had That Been Possible?*

In this case, the ICC was not yet established at the time the case went forward, nor even at the time that the final IAC decision was released. However, recall that the IAC did not consider the light sentence and early release of two of the perpetrators as tantamount to impunity given the grave crimes they had committed against the two minors. Rather, the IAC regarded only the failure to prosecute the mastermind who was still free as an instance of impunity (majority judgment, para. 228, emphasis added):

The Court recognizes that impunity of those responsible has not been total in the instant case, as two direct perpetrators have been tried and found guilty of the facts [...]. However, at the time of the instant Judgment, after more than thirteen years, the mastermind or masterminds of the facts have not yet been tried or punished. Therefore, this constitutes a situation of grave impunity, which is an infringement of the duty of the State to investigate and punish those responsible for the acts that abridged human rights in the instant case, injuring the next of kin of the victims and fostering chronic recidivism of the human rights violations involved.

Recall also that the Rome Statute provides under Article 20: *Ne bis in idem* 3(b) that with respect to crimes against humanity – as occurred in the instant case – the perpetrator may be tried by the International Criminal Court even if he or she has been tried for the same offence by another court if that former prosecution was intended in any way to shield the defendant from the full measure of justice. Thus, had the victim plaintiffs had access to the ICC, and given the nature of the justice meted out by the Peruvian judicial system in the case to the perpetrators who were tried, is it likely that the International Criminal Court would have ruled the case

admissible, or inadmissible respecting the two perpetrators tried by the Peruvian Courts and the mastermind still not in captivity at the time?

6.2.9 *Were the Victims and Their Family in Gómez-Paquiyaury Brothers v. Peru Accorded Justice Under International Law?*

6.2.9.1 What Delays Occurred in the Case?

Judgment in this case was rendered by the Inter-American Court 8 July, 2004, fully 13 years after the crimes took place. The Inter-American Commission on Human Rights had not filed the case before the Inter-American Court until 5 February, 2002. The originating complaint was filed by the victims with the Inter-American Commission on Human Rights 2 July, 1991. However, it was not until 5 November, 2001 that the Commission had forwarded its report to the parties and though in 3 January, 2002 the State communicated it would comply with the Commission's recommendations, that did not occur. Is this delay in the IAC process itself a denial of full justice given the suffering of the surviving family members due to the torture and murder of two child members of the family? Is the delay in judgment all the more egregious given that in the interim the surviving family members were persecuted by authorities of the State as conceded by the State (this persecution necessitating an order from the IAC requesting that the State ensure that the State agents terminate their harassment and intimidation of the plaintiff family members)? Alternatively, is the delay in receiving the final IAC judgment justified and unavoidable?

6.2.9.2 What Was the Settlement / Mediation Process?

In the instant case, on 1 May, 2000 the Commission sent a letter to the parties, offering its services to help attain a "friendly settlement," pursuant to "Article 48(1) (f) of the Convention and Article 45(1) and 45(2) of its Rules of Procedure". After the case was ruled admissible, that offer was again extended to the State 21 March, 2001. In April, 2001, the victims had indicated that they wished to enter into such negotiations but the State indicated it did not wish to do so at that time. Given the gravity of the crimes committed by agents of the State and the international aspect of the crimes (here crimes against humanity) is the notion of a "friendly settlement" a viable one in this context, or does such a notion demean the victims and the international justice process (i.e., is there a risk that victims, for instance surviving family members, in some instances at least, may be subtly pressured to accept less than the full measure of justice due to the necessity of their having to endure "friendly settlement" negotiations (though formally either party may reject a settlement offer)? Is the State being given the opportunity to lessen its accountability and barter its way to offering a reduced remedy to the victims even of grave international crimes given the friendly settlement provisions in the Inter-American human rights system?

6.2.9.3 What Remedy Was Recommended by the Inter-American Commission on Human Rights?

In addition to the reparations “recommended” in its report, the Commission (majority judgment, para. 9(2), citing the Commission) also recommended that the State:

conduct a complete, impartial, and effective investigation of the facts with the aim of establishing who ordered the crime and punishing whoever was responsible for the order in connection with the facts pertaining to the kidnapping, torture, and murder of the Gómez Paquiyauri brothers.

Was such a recommendation as the aforementioned (accepted by the Inter-American Court) sufficient to secure justice, i.e., ensure that the individual perpetrators who commit such grievous international human rights abuses do not do so with impunity? Consider that two of the convicted perpetrators in the instant case who had only been sentenced to 18 years imprisonment and 6 years respectively were released after two years with a full or partial parole under the domestic judicial system. Further the nominal reparations ordered by the Peruvian Court (20,000 nuevos soles or in today’s rates US\$ 7,211.24) had not been paid to the victims at the time the case went forward before the IAC system. The Inter-American Court, as reflected in the majority judgment, however, as mentioned, awarded substantial sums to the parents and certain other surviving family members; including those who were minors at the time of the State’s victimization of the Gómez-Paquiyauri brothers. Those *surviving victims* had established the harms they had suffered directly as victims themselves persecuted due to the State’s allegations of family members being involved in terrorist anti-government activity, and harms suffered as “injured parties” with those harms arising as a consequence of the psychological and physical damage suffered due to the victimization of other family members namely; the unlawful detention, torture and killing of the Gómez-Paquiyauri brothers who were the original victims in the case (see para. 253 of the majority judgment above).

Case 2: Case of the Yean and Bosico Children v. Dominican Republic

Judgment and related documents are available on the website of the “International Network for Economic, Social & Cultural Rights”: http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=409688&country=13521&focus=13673 (last accessed July 22, 2009).

6.3 Excerpt from the Judgment of September 8, 2005

[Author’s note: internal footnotes have been omitted.]

In the case of the *Yean and Bosico children*, the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”), composed of the following judges:

Sergio García Ramírez, President
Alirio Abreu Burelli, Vice President
Oliver Jackman, Judge
Antônio A. Cançado Trindade, Judge, and
Manuel E. Ventura Robles, Judge

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and Articles 29, 31, 37(6), 56 and 58 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), delivers this judgment.

I Introduction of the Case

1. On 11 July, 2003, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the Court an application against the Dominican Republic (hereinafter “the Dominican Republic” or “the State”), originating from petition No. 12,189, received by the Secretariat of the Commission on 28 October, 1998.
2. The Commission submitted the application based on Article 61 of the American Convention, for the Court to declare the international responsibility of the Dominican Republic for the alleged violation of Articles 3 (Right to Juridical Personality), 8 (Right to a Fair Trial), 19 (Rights of the Child), 20 (Right to Nationality), 24 (Right to Equal Protection) and 25 (Right to Judicial Protection) of the American Convention, in relation to Articles 1(1) (Obligation to Respect

Rights) and 2 (Domestic Legal Effects) thereof, to the detriment of the children Dilcia Oliven Yean and Violeta Bosico Cofi [...] with regard to the facts that have occurred and the rights that have been violated since 25 March, 1999, the date on which the Dominican Republic accepted the contentious jurisdiction of the Court.

3. In its application, the Commission alleged that the State, through its Registry Office authorities, had refused to issue birth certificates for the Yean and Bosico Children [author's note: thus they could not receive identity documents or passports], even though they were born within the State's territory and that the Constitution of the Dominican Republic (hereinafter "the Constitution") establishes the principle of *ius soli* [author's note: right to nationality based on birthplace barring any non-discriminatory exceptions made out in domestic law] to determine those who have a right to Dominican citizenship. The Commission indicated that the State obliged the alleged victims to endure a situation of continued illegality and social vulnerability, violations that are even more serious in the case of children, since the Dominican Republic denied the Yean and Bosico children their right to Dominican nationality and let them remain stateless persons until 25 September, 2001. According to the Commission, the child Violeta Bosico was unable to attend school for one year owing to the lack of an identity document. The Commission also alleges that the absence of a mechanism or procedure for an individual to appeal a decision of the Registry Office before a judge of first instance, and also the discriminatory acts of the Registry Office officials, who did not allow the alleged victims to obtain their birth certificate, violate specific rights embodied in the Convention. The Commission requested the Court to order the State to grant reparations that make full amends for the alleged violations of the children's rights. It also requested that the State adopt the legislative and other measures necessary to ensure respect for the rights embodied in the Convention and establish guidelines that contain reasonable requirements for the late registration of births and do not impose excessive or discriminatory obligations, so as to facilitate the registration of Dominican-Haitian children. Lastly, the Commission requested the Court to order the State to pay the reasonable costs and expenses arising from processing the case in the domestic jurisdiction and before the organs of the Inter-American System.

II Competence

4. The Court has jurisdiction to hear the preliminary objections and possible merits, reparations and costs in this case, in the terms of Articles 62 and 63(1) of the Convention, because the Dominican Republic has been a State Party to the American Convention since 19 April, 1978, and accepted the contentious jurisdiction of the Court on 25 March, 1999 [...]

[...]

VIII Proven Facts

[...]

Background

Social Context

[...]

109(2) Most of the Haitians and Dominicans of Haitian origin in the Dominican Republic live in conditions of poverty in areas known as “bateyes”, which consist of settlement of agricultural workers located around the sugar cane plantations. There are few basic public services in these places and the roads are not maintained so that, during the rainy season, communication between the bateyes and the towns can be cut for several days.

109(3) In 2005, the Office of the United Nations Development Programme in the Dominican Republic indicated that:

Haitians live in the country in very precarious conditions of extreme poverty. Furthermore, most of them are undocumented and must face a generally hostile political and social situation, without the possibility of legal assistance and with limited access to health, sanitation and education services, and this includes the children of Haitians, who have been born in the country. It should be noted that the constraints to access to public services and the problem of lack of documentation are general among the poorest segments of the Dominican population. [...] Regarding Haitian immigration, our information confirms the conditions of their incorporation into sectors of the labor market assigned to this group of immigrants... characterized by low salaries and appalling working conditions with low technology, known internationally as the three Ds: dirty, dangerous, demanding. Evidently, these are not precisely acceptable conditions from a human development perspective. [...]

[...]

The Children Dilcia Yean and Violeta Bosico

109(6) Dilcia Yean was born on 15 April, 1996, in the “local health center”, in the Municipality of Sabana Grande de Boyá, Province of Monte Plata, the Dominican Republic. She grew up in this municipality and, in 2003, attended the Alegría Infantil School. Her mother is Leonidas Oliven Yean, of Dominican nationality. Her father is Haitian and is not in communication with his daughter. Her maternal grandparents are Dos Oliven, Haitian, and Anita Oliven Yean. Dilcia Yean is of Haitian origin through her father and her maternal grandfather.

109(7) Violeta Bosico was born on 13 March, 1985, in the Dominican Republic. Her mother is Tiramén Bosico Cofi, of Dominican nationality. Her father is Delima Richard, of Haitian nationality, and he is not in communication with his daughter. Her maternal grandparents are Anol Bosico, who is Haitian, and Juliana Cofi. Violeta Bosico is of Haitian origin through her father and maternal grandfather.

109(8) Violeta Bosico lived with her mother and siblings in Batey Las Charcas, until 1992, when she went to live with her sister, Teresa Tucent Mena, in Batey Verde, also called Batey Enriquillo. In 1993, she moved, together with her sister to Batey

Palavé, outside Santo Domingo, where she lives now. Violeta Bosico has grown up in the Dominican Republic, attended the Palavé School and, in 2005, went to secondary school.

109(9) *Owing to their Haitian ancestry, the children Dilcia Yean and Violeta Bosico, form part of a vulnerable social group in the Dominican Republic* [author's note: emphasis added].

The Request Made by the Children Dilcia Yean and Violeta Bosico for Late Birth Registration in the Civil Status Registry Office

109(10) *Most Haitians and Dominicans of Haitian origin use the late declaration of birth procedure to declare their children born in the Dominican Republic.* The mothers usually give birth at home, given the difficulty of traveling from the bateyes to the hospitals in the cities, their limited financial resources, and their fear of making themselves known to the hospital officials, the police and officials of the office of the auxiliary mayor and being deported. *The Dominican Republic has deported Haitians and Dominicans of Haitian origin irrespective of their migratory status in the country.* In such cases, the decisions have been taken without any prior investigation procedure. In some cases in the 1990s, these deportations included many thousands of persons [author's note: emphasis added].

109(11) *In the Dominican Republic there have been cases in which the public authorities have placed obstacles in the way of Dominican children of Haitian origin obtaining birth certificates.* Consequently, these children have had difficulty in obtaining an identity card or a Dominican passport, attending public schools, and having access to healthcare and social assistance services [author's note: emphasis added].

109(12) *The Constitution of the Dominican Republic stipulates that all those born on its territory are Dominicans.* The State adopted the principle of *ius soli* to grant Dominican nationality, except for the children of foreign diplomats resident in the country or the children of those in transit.

109(13) In the Dominican Republic, there are a series of requirements for late birth registration that vary according to the age of the applicant. There are different requirements for children under 13 years of age and for children over 13 years of age, which are indicated on lists issued by the Central Electoral Board or by any of the different Registry Offices. The requirements may vary according to the location of the Registry Office or the registrar applying them [...].

109(14) On 5 March, 1997, when Dilcia Yean was 10 months old and Violeta Bosico was 12 years old, Genaro Rincón Miesse, who was the MUDHA lawyer at the time, Tiramen Bosico Cofi, who accompanied her daughter, Violeta Bosico, and Martha Remigio, a cousin of Dilcia Yean's mother, who accompanied this child, went to the Registry Office of Sabana Grande de Boyá to request late registration of the birth of Dilcia Yean and Violeta Bosico, among other children.

[...]

109(16) In 1997, children under 13 years of age were required to present a birth certification, the parents' identity cards and, if the latter were married, their marriage certificate, when requesting late registration of birth.

[...]

109(18) While the case was being processed before the Commission, the State presented a communication signed by Thelma Bienvenida Reyes, and attached a list issued by the Central Electoral Board, with the *eleven documents* required for late registration of birth [...] [author's note: emphasis added].

109(19) On 11 September, 1997, MUDHA and the Comité Dominicano de Derechos Humanos (CDH), through its lawyers, Genaro Rincón Miesse and Marcelino de la Cruz Nuñez, filed a "petition requesting authorization for late declarations," before the Public Prosecutor of the court of first instance of the Judicial District of the Province of Monte Plata, in favor of a specific group of children, including the children Dilcia Yean and Violeta Bosico.

109(20) On 20 July, 1998, the Public Prosecutor of the Judicial District of Monte Plata, Julio César Castro Castro, decided "to refuse [...] the request for late declaration of birth, because it was not accompanied by the appropriate documentation and procedure, [and] to refer the parties concerned to the Civil Status Registrar of Sabana Grande de Boyá, so that the application could be made in keeping with the ordinary procedure" [...]

109(21) In a communication of 15 November, 2001, addressed to the Inter-American Commission, the representatives attached a document with seven requirements for "late declarations and their ratification by a ruling," required by the "Civil Status Registry office of the Second Circumscription [National District]," for children over 13 years of age, and indicated three requirements for children under 13 years of age [...] [author's note: subsequently there were several other submissions by the State with varied specified required documents and number of documents purportedly required for late birth registration of children under age 13].

[...]

The Granting of Birth Certificates to the Yean and Bosico Children

109(29) On 25 March, 1999, when the Dominican Republic accepted the contentious jurisdiction of the Inter-American Court, the children Dilcia Yean and Violeta Bosico did not have birth certificates of Dominican nationality.

109(30) On 8 September, 1999, *owing to the precautionary measures ordered by the Inter-American Commission in favor of the children Dilcia and Violeta*, the State ordered the Directorate General of Migration to issue "temporary certificates of residence in the country [to the alleged victims] until their migratory status in the Dominican Republic ha[d] been examined and defined" [author's note: emphasis added].

109(31) On 21 September, 2001, after communicating with officials of the Ministry of Foreign Relations, Leonidas Oliven Yean and Tiramen Bosico Cofi, accompanied by Genaro Rincón Miesse, went to the Registry Office of the First Circumscription to register the birth of their daughters, Dilcia Yean and Violeta Bosico, respectively. They were not asked to pay any fees in the Registry Office, or to sign documents or to make a public declaration.

109(32) On 25 September, 2001, the State granted the child Dilcia Oliven Yean a birth certificate issued by the Civil Status Registry Office of the First Circumscription of the National District of the Dominican Republic.

109(33) On 25 September, 2001, the State granted the child Violeta Bosico a birth certificate issued by the Civil Status Registry Office of the First Circumscription of the National District of the Dominican Republic.

The Education of the Child Violeta Bosico

109(34) During her early years, Violeta Bosico was admitted to school without a birth certificate. In 1991, Violeta entered primary school in Batey Las Charcas. In 1994, having interrupted her studies, she returned to school and began to attend the Palavé School up until third grade.

109(35) In September and October 1998, when trying to enroll for fourth grade, the State did not allow Violeta Bosico to enroll in day school because she did not have a birth certificate. For the 1998–1999 school year, the child had to enroll in the school for adults during the evening, which is for those over 18 years of age. She attended fourth and fifth grades there.

109(36) *The main purpose of evening school is to teach adults to read and write and they adopt a “compressed” type of education, in which pupils do two grades in one year. This method makes fewer demands than day school. Most of those attending the evening session are from 20 to 30 years of age; exceptionally, there are adolescents. The classes in the evening are shorter, usually two and a half hours a day, and there is no break [author’s note: emphasis added].*

109(37) In 2001, Violeta Bosico reverted to attending school during the day, completed sixth grade, and was enrolled for seventh grade in day school.

[...]

IX Violation of Articles 19, 20, 24, 3 and 18 of the American Convention in Relation Article 1(1) Thereof

(Rights of the Child, Right to Nationality, Right to Equal Protection, Right to Juridical Personality, Right to a Name, and Obligation to Respect Rights)

[...]

Considerations of the Court

126. Article 20 of the American Convention establishes that:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

126. Article 24 of the American Convention stipulates that:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

127. Article 19 of the American Convention stipulates that:

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

128. Article 3 of the American Convention establishes that:

Every person has the right to recognition as a person before the law.

129. Article 18 of the American Convention stipulates that:

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

130. Article 1(1) of the American Convention establishes that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

[...]

132. The Court considers it necessary to emphasize that, although the rejection of the application for late registration of birth in the Registry Office took place on 5 March, 1997, and the decision of the Public Prosecutor confirming this rejection was issued on 20 July, 1998, both facts determined that *the children Dilcia Yean and Violeta Bosico had no nationality until 25 September, 2001. Consequently, this denial persisted after 25 March, 1999, the date on which the Dominican Republic accepted the contentious jurisdiction of the Court; and this is the reason why this Court affirms that it is competent to consider the refusal [...]* [author's note: emphasis added].

133. The Court notes that when the State accepted the Court's contentious jurisdiction, Dilcia Yean and Violeta Bosico were children who, as such, had special rights corresponding to specific obligations of the family, society and the State that required the special protection of the State, and this should be understood as an additional and complementary right.

134. *This Court has stated that the cases in which the victims of human rights violations are children are particularly serious.* The prevalence of the child's superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case refers to children. *Moreover, the State must pay special attention to the needs and the rights of the alleged victims owing to their condition as girl children, who belong to a vulnerable group* [author's note: emphasis added].
135. In view of the above, the Court will not rule on the alleged violation of Article 19 of the American Convention in isolation, but will include its decision in this regard together with the examination of the other articles that are relevant to this case.
136. With regard to the right embodied in Article 20 of the Convention, the Court understands that nationality is a juridical expression of a social fact that connects an individual to a State. Nationality is a fundamental human right enshrined in the American Convention, and other international instruments, and is non-derogable in accordance with Article 27 of the Convention.
137. The importance of nationality is that, as the political and legal bond that connects a person to a specific State, it allows the individual to acquire and exercise rights and obligations inherent in membership in a political community. As such, nationality is a requirement for the exercise of specific rights.
138. The Court has established that:

It is generally accepted today that nationality is an inherent right of all human beings. *Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity.* Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, *contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.* [...]

The classic doctrinal position, which viewed nationality as an attribute granted by the State to its subjects, has gradually evolved to a conception of nationality which, in addition to being the competence of the State, is a human right [author's note: emphasis added].

[...]

140. The determination of who has a right to be a national continues to fall within a State's domestic jurisdiction. However, its discretionary authority in this regard is gradually being restricted with the evolution of international law, in order to ensure a better protection of the individual in the face of arbitrary acts of States. *Thus, at the current stage of the development of international human rights law, this authority of the States is limited, on the one hand, by their obligation to provide individuals with the equal and effective protection of the*

law and, on the other hand, by their obligation to prevent, avoid and reduce statelessness [author's note: emphasis added].

141. The Court considers that the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights. Moreover, States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals.
142. States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality, when an individual does not qualify to receive this under the State's laws, owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective. Statelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability.
143. The Convention on the Reduction of Statelessness, which was signed by the Dominican Republic on 5 December, 1961, was ratified by 26 States, and entered into force on 13 December, 1975. Its Article 1 establishes that States shall grant nationality to a person born in their territory who would otherwise be stateless. This Convention establishes that nationality shall be granted at birth, by operation of law, or upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law, and that this application may not be rejected unless the person concerned does not comply with the following list of conditions, to which the State may subordinate the granting of its nationality:
 - (a) That the application is lodged during a period, fixed by the Contracting State, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years, so, however, that the person concerned shall be allowed at least one year during which he may himself make the application without having to obtain legal authorization to do so;
 - (b) That the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all;
 - (c) That the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge;
 - (d) That the person concerned has always been stateless.
144. According to the facts of the instant case, the children Dilcia Yean and Violeta Bosico were born in the Dominican Republic on 15 April, 1996, and March 13, 1985, respectively, and they have grown up and lived there.

Also, their mothers, Leonidas Oliven Yean and Tiramén Bosico Cofi, are of Dominican nationality and have lived in the Dominican Republic, and the children's fathers are Haitians [...].

145. On 5 March, 1997, when Dilcia Yean was 10 months old and Violeta Bosico was 12 years old, the children applied for late registration of their births before the Civil Status Registry Office of Sabana Grande de Boyá. These applications for late registration were rejected by the Registrar, who considered that the documents presented by the children were insufficient for late registration, based on a list of eleven requirements... On 11 September, 1997, the children had recourse to the Public Prosecutor of the Judicial District of Monte Plata, who confirmed the Registrar's decision on 20 July, 1988, and ratified the rejection, because the late registration "was not supported by the documentation and procedure established for this course of action," based on a list containing twelve requirements for late registration of birth [...].
146. To register their births in the Registry Office, the children Dilcia Yean and Violeta Bosico were asked to comply with the eleven requirements listed in the attachment to the State's communication to the Inter-American Commission of 30 September, 1999, or the twelve requirements indicated in the decision issued by the Public Prosecutor of the Judicial District of Monte Plata on 20 July, 1998 [...]. In other words, the birth certificates were not granted owing to the children's failure to comply with the presentation of the eleven or twelve requirements demanded by the said State officials. However, in its final written arguments, the State indicated that they should have presented three documents to the Registrar on 5 March, 1997, and they did not do this. *From the foregoing we can conclude that the State adopted different positions regarding the requirements the children had to fulfill while the case was being processed before the Inter-American System for the protection of human rights.* This situation shows that there are no standard criteria for demanding and applying the requirements for late birth registration of children under 13 years of age in the Dominican Republic [author's note: emphasis added].
147. Following the meeting held by the Commission in the Dominican Republic on 24 August, 2001, in the exercise of its jurisdiction, the State informed Leonidas Oliven Yean and Tiramén Bosico Cofi that they should register the births of their daughters, and on 25 September, 2001, the Dominican Republic granted birth certificates to the Yean and Bosico children and, consequently, on this date it granted them Dominican Nationality [...].
148. In the Dominican Republic, nationality is regulated in the Constitution promulgated on 14 August, 1994, in force at the time of the facts. Article 11 of the Constitution establishes that Dominicans are:

All persons who were born in the territory of the Republic, except for the legitimate children of foreign diplomats resident in the country or foreigners who are in transit. [...]

149. Also, article 9 of the Civil Code stipulates

Dominicans are:

First – All persons who have been born or will be born on the territory of the Republic, whatsoever the nationality of their parents. For the effects of this provision, the legitimate children of foreigners resident in the country either representing or serving their own country shall not be considered as having been born in the territory of the Republic. [...]

150. As can be inferred from article 11 of the Constitution, the Dominican Republic has established the principle of *ius soli* to determine those who have a right to nationality. Nevertheless, in order to acquire this nationality by birth, the child may *not* be included in one of the constitutional exceptions, which refer to the children of diplomats or foreigners who are in the country in transit [author's note: emphasis added].

[...]

152. With regard to the exception concerning foreigners in transit, both the Commission and the representatives alleged that the State authorities had taken the position, and made it effective in the practice, that children of Haitian origin born in the Dominican Republic, such as the children Dilcia and Violeta, would not be Dominican nationals, because their fathers are Haitian migratory workers and are considered to be in transit.

153. Regarding the Dominican authorities' interpretation of the condition of person in transit, in its 1999 Report on the Situation of Human Rights in the Dominican Republic the Inter-American Commission observed that:

[...] Around 500,000 undocumented Haitian workers live in the Dominican Republic. In many cases, these are people who have lived there for 20 or 40 years and many of them have been born on Dominican territory. *Most of them face a situation of permanent illegality, which they transmit to their children, who cannot obtain Dominican nationality because, according to the restrictive interpretation that Dominican Authorities give to article 11 of the Constitution, they are children of 'foreigners in transit.'* It is not possible to consider that people are in transit when they have lived for many years in a country where they have developed innumerable connections of all kinds. [author's note: emphasis added]

154. Judgment No. 453 of the Civil Chamber of the Appeals Court of the National District, delivered on 16 October, 2003, concerning the registration in the Civil Status Registry Office of two children whose fathers are Haitian and live in the Dominican Republic, established that:

[...] It is not possible to equate the situation of a foreigner's illegality to the notion of transit, because they are different concepts; also, in neither the regulations for the application of the Migration Law nor the report issued by the [Inter-American] Commission on Human Rights [on the Situation of Human Rights in the Dominican Republic in 1999], is the condition of legality established as a

requirement for having the right to the nationality of the place of birth; [...] that, in the instant case, there is no possibility that the parents of the children who are applying for their birth to be registered can be considered in transit because, from the documents in the case file, it is clear that they have lived in the country for several years [...], and] that, although it is true that the parents of the child live in the country illegally, it is no less true that this situation of illegality cannot in any way affect the children, who can benefit from Dominican nationality merely by proving that they were born on Dominican territory, and that their parents are not diplomats in the country and are not in transit in it [...].

155. *The Court considers it should mention that the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of a person's migratory status in a State.* In other words, States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause [author's note: emphasis added].
156. In view of the above, and considering the right to nationality of the children of migrants in the Dominican Republic according to the pertinent constitutional provision and the international principles concerning protection for migrants, the Court considers that:
 - (a) The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights;
 - (b) The migratory status of a person is not transmitted to the children, and
 - (c) The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born.
157. In addition to the foregoing, the Court considers it opportune to refer to Section V of the Migration Regulations of the Dominican Republic No. 279 of 12 May, 1939, in force at the time of the request for late registration of birth in this case. This establishes clearly that the purpose of the person in transit is merely to pass through the territory and, to this end, it establishes a temporal limit of no more than ten days. The Court observes that, to consider that a person is in transit, irrespective of the classification used, the State must respect a reasonable temporal limit and understand that a foreigner who develops connections in a State cannot be equated to a person in transit.
158. The Court considers that, under no circumstances, could the State have applied the exception referring to the children of a person in transit to the Yean and Bosico children, because the mothers of the alleged victims are Dominican and the children were born in the Dominican Republic, the latter being the condition established in article 11 of the Constitution for granting Dominican nationality.

[...]

160. In the Dominican Republic the birth registration procedure is regulated in articles 39, 40 and 41 of Act No. 659 on Civil Status Acts of 17 July, 1944. This law establishes that in the case of late declaration of birth, the civil status registrar may register it or not in the corresponding register, after investigating the truth of the declaration. The truth is verified by the presentation of a series of documents that are considered requirements for late declaration of birth, to be established by the Central Electoral Board [...].
161. In the Dominican Republic the lists of requirements have been drawn up based on the age of the child to be registered, but distinctions have also been made involving the number and type of requirements for the same age group, according to the competent authority who applies them, without any objective criteria being followed.

[...]

163. The Court considers that by appearing before the Civil Status Registrar and making a request for late registration, the children claimed their right to nationality. To this end, they presented their birth certifications and the identity cards of their mothers, which were the two requirements that should be applied according to the pertinent domestic legislation and their ages [...]. Despite this, the State rejected the request and denied Dominican nationality to the alleged victims [...].
164. The Court observes that the request for late registration of birth was denied based on failure to comply with the presentation of 11 or 12 requirements that were not needed in the case of children under 13 years of age, and that were applied to the children, even though at the time of the request Dilcia Yean was 10 months old and Violeta Bosico was 12 years old [...].
165. It should be observed that age is the legal norm used in the Dominican Republic to make a distinction in the application of requirements for late registration of birth. Under the applicable laws, the circumstances of the Yean and Bosico children did not differ from other Dominican children under 13 years of age in a way that could justify increasing the requirements for registering their birth. By applying to the alleged victims requirements that, as children under 13 years of age, did not correspond to them, the pertinent domestic norms were violated and a disproportionate and undue burden of proof was imposed on them.
166. The Court considers that, by applying to the children requirements that differed from those requisite for children under 13 years of age in order to obtain nationality, the State acted arbitrarily, without using reasonable and objective criteria, and in a way that was contrary to the superior interest of the child, which constitutes discriminatory treatment to the detriment of the children Dilcia Yean and Violeta Bosico. *This situation placed them outside the State's juridical system and kept them stateless, which placed them in a*

situation of extreme vulnerability, as regards the exercise and enjoyment of their rights [author's note: emphasis added].

167. Bearing in mind that the alleged victims were children, the Court considers that the vulnerability arising from statelessness affected the free development of their personalities, since it impeded access to their rights and to the special protection to which they are entitled.
168. Furthermore, the Court considers that the discriminatory treatment imposed by the State on the Yean and Bosico children is situated within the context of the vulnerable situation of the Haitian population and Dominicans of Haitian origin in the Dominican Republic, to which the alleged victims belong [...].
169. In this regard, the United Nations Committee on the Rights of the Child expressed its deep concern “at the discrimination against children of Haitian origin born in the territory [of the Dominican Republic] or belonging to Haitian migrant families, especially their limited access to housing, education and health services, and note[d] in particular the lack of specifically targeted measures to address this problem.” The Committee, specifically in relation to birth registration, indicated that “in particular, concern [was] expressed about the situation of children of Haitian origin or belonging to Haitian migrant families whose right to birth registration has been denied in the State [...] and, as [a] result of this policy, those children have not been able to enjoy fully their rights, such as to access to health care and education.”
170. The United Nations Commission on Human Rights, through an independent expert, issued a report entitled “Human rights and extreme poverty,” in which it referred to the situation of Haitians in the Dominican Republic as follows:

The issue of racism [...] is sometimes manifested among Dominicans themselves, but above all it is evident towards Haitians or those of Haitian origin whose families have, at times, been established for several generations and who continue entering the country. [...] *There are very few Haitians, even those who have been living in the Dominican Republic since 1957, [...] who obtain naturalization.* This is the strongest discrimination that the independent expert has met throughout her mission. *The authorities are very aware of this problem [...]. The fact that Haitians do not have legal existence in the Dominican Republic is based on a deep-rooted phenomenon of lack of recognition [...]* [author's note: emphasis added].

[...]

172. The Court finds that, owing to the discriminatory treatment applied to the children, the State denied their nationality and left them stateless, which, in turn, placed them in a situation of continuing vulnerability that lasted until 25 September, 2001; in other words, after the date on which the Dominican Republic accepted the Court's contentious jurisdiction.
173. The Court considers that the Dominican Republic failed to comply with its obligation to guarantee the rights embodied in the American Convention, which implies not only that the State shall respect them (negative obligation),

but also that it must adopt all appropriate measures to guarantee them (positive obligation), owing to the situation of extreme vulnerability in which the State placed the Yean and Bosico children, because it denied them their right to nationality for discriminatory reasons, and placed them in the impossibility of receiving protection from the State and having access to the benefits due to them, and since they lived in fear of being expelled by the State of which they were nationals and separated from their families owing [to] the absence of a birth certificate.

174. The Court finds that for discriminatory reasons, and contrary to the pertinent domestic norms, the State failed to grant nationality to the children, which constituted an arbitrary deprivation of their nationality, and left them stateless for more than four years and four months, in violation of Articles 20 and 24 of the American Convention, in relation to Article 19 thereof, and also in relation to Article 1(1) of the Convention, to the detriment of the children Dilcia Yean and Violeta Bosico.
175. The situation of extreme vulnerability of the children Dilcia Yean and Violeta Bosico, owing to lack of nationality and the condition of statelessness, had consequences on their rights to juridical personality and to a name.
176. Article 3 of the American Convention, as well as other international instruments, embodies the right to juridical personality, regarding which the Inter-American Courts has stated that:

Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights. The right to the recognition of juridical personality implies the capacity to be the holder of rights (capacity and exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of such rights and obligations.

177. Regarding exercise of the entitlement to human rights, the Court has indicated that:

Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations and conduct other personal or patrimonial acts. Children do not have this capacity, or lack this capacity to a large extent. Those who are legally disqualified are subject to parental authority, or in its absence, to that of guardians or representatives. But they are all subjects of rights, entitled to inalienable and inherent rights of the human person.

178. A stateless person, *ex definitione*, does not have recognized juridical personality, because he has not established a juridical and political connection with any State; thus nationality is a prerequisite for recognition of juridical personality.
179. The Court considers that the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals.

180. In this specific case, the State maintained the Yean and Bosico children in a legal limbo in which, even though the children existed and were inserted into a particular social context, their existence was not recognized juridically; in other words they did not have juridical personality.
181. With regard to the alleged violation of the right to a name established in Article 18 of the American Convention, it should be noted that, although this was not alleged by the Inter-American Commission, the Court has established that the alleged victims, their next of kin or their representatives can invoke different rights from those included in the Commission's application, based on the facts presented by the latter.
182. The right to a name, embodied in Article 18 of the American Convention, constitutes a basic and essential element of the identity of each individual, without which he cannot be recognized by society or registered before the State. This right is also established in several international instruments.
183. Under Article 18 of the Convention, States are obliged not only to protect the right to a name, but also to provide the necessary measures to facilitate the registration of an individual, immediately after birth.
184. The State must also ensure that the individual is registered under the name that he or his parents have chosen, according to the moment when registration occurs, without any type of restriction to the right or interference in the decision of choosing the name. Once an individual is registered, the possibility of preserving and reestablishing the given name and surname must be ensured. The given name and surname are essential to establish formally the connection that exists between the different members of the family with society and with the State, and this was not ensured to the Yean and Bosico children by the Dominican Republic.
185. In addition to the above, the Court considers that the vulnerability to which the children were exposed as a result of the lack of nationality and juridical personality was also reflected, in the case of the child Violeta Bosico, by the fact that she was prevented from attending day school at the Palavé School during the 1998–1999 school year. It was precisely because she had no birth certificate that she was forced to study at evening school, for individuals over 18 years of age, during this period. This fact also exacerbated her situation of vulnerability, because she did not receive the special protection, due to her as a child, of attending school during appropriate hours together with children of her own age, instead of with adults (*supra* paras. 109(34), 109(35) and 109(36)). It is worth noting that, according to the child's right to special protection embodied in Article 19 of the American Convention, interpreted in light of the Convention on the Rights of the Child and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, in relation to the obligation to ensure progressive development contained in Article 26 of the American Convention, the State must provide free primary education to all children in an appropriate environment and in the conditions necessary to ensure their full intellectual development.

186. The Court observes that the violation of the right to nationality of the Yean and Bosico children, the situation of statelessness in which they were kept, and the non-recognition of their juridical personality and name, denaturalized and denied the external or social projection of their personality.
187. Based on the above, the Court considers that by depriving the children of their nationality, the Dominican Republic violated the rights to juridical personality and to a name embodied in Articles 3 and 18 of the American Convention, in relation to Article 19 thereof, and also in relation to Article 1 (1) of the Convention, to the detriment of the children Dilcia Yean and Violeta Bosico
188. The representatives and the Commission alleged that the domestic laws of the Dominican Republic on birth registration and the granting of nationality are applied discretionally and produce discriminatory effects on children of Haitian origin, such as the Yean and Bosico children.
189. The State argued that the Constitution and the migration and civil registration laws offer the necessary guarantees to protect the rights embodied in the American Convention.
190. In this regard, the Court considers that the domestic norms establishing the requirements for late birth registration must be coherent with the right to nationality in the Dominican Republic and with the terms of the American Convention and other international instruments; namely, they must accredit that the person was born on the State's territory.
191. In accordance with the obligation arising from Article 2 of the American Convention, the Court considers that the requirements for obtaining nationality must be clearly and objectively established previously by the competent authority. Likewise, the law should not provide the State officials applying it with broad discretionary powers, because this creates opportunities for discriminatory acts.
192. The requirements for late declaration of birth cannot be an obstacle for enjoying the right to nationality, particularly for Dominicans of Haitian origin, who belong to a vulnerable sector of the population in the Dominican Republic.

X Article 17 of the American Convention

(Rights of the Family)

Arguments of the representatives

193. With regard to the alleged violation of the rights of the family, embodied in Article 17 of the American Convention, the representatives argued that:
 - a) The State is obliged to adopt basic measure to protect family unity. In this case, the State has not instituted the necessary measures to guarantee the rights of the child (especially in relation to the right not to be forcibly separated from its family) and to ensure the right of the child to reside in

the country. The State has violated the rights of the family of the children Dilcia and Violeta by refusing to grant birth certificates to children of Haitian origin; and

- b) Although the Dominican Republic has not attempted to separate the children Dilcia and Violeta from their families as yet, there is a real threat of separation, given that the State systematically carries out collective expulsions of Haitians and Dominicans of Haitian origin.

Arguments of the Commission

- 194. The Commission did not submit any arguments concerning Article 17 of the American Convention.

Arguments of the State

- 195. With regard to the alleged violation of Article 17 of the American Convention, the State indicated that it cannot be accused of violating the rights of the family when this violation does not exist. In addition, the State mentioned that the families were responsible for the failure to register the Yean and Bosico children.

Considerations of the Court

- 196. Article 17(1) of the American Convention stipulates:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
[...]

- 197. In this regard, the Court considers that the alleged facts concerning the alleged violation of this article have already been examined in relation to the condition of vulnerability of the children Dilcia Yean and Violeta Bosico [...].

VI Articles 8 and 25 of the American Convention

(Right to a Fair Trial and Right to Judicial Protection)

[...]

Considerations of the Court

- 201. *The Court will not refer to the alleged violations of Articles 8 and 25 of the American Convention, because it lacks jurisdiction to rule on possible violations based on facts or acts that occurred prior to 25 March, 1999, the date on which the Dominican Republic accepted the contentious jurisdiction of the Inter-American Court* [author's note: emphasis added].

VII Articles 5 and 12 of the American Convention*(Right to Humane Treatment and Freedom of Conscience and Religion)*

[...]

203. With regard to the alleged violations of Articles 5 and 12 of the American Convention, which the representatives only indicated in the final part of the brief with final arguments, and which were not included in the brief with requests and arguments, this Court considers that these allegations are time-barred; however, nothing prevents it from examining them, under the *iura novit curia* principle.
204. In this case, the Court acknowledges the situation of vulnerability of the Yean and Bosico children when they did not obtain Dominican nationality. Also, owing to the lack of a birth certificate, the child Violeta Bosico was unable to enroll in day school, but was obliged to enroll in evening classes, during the 1998–1999 school year. This caused her suffering and uncertainty; the Court will therefore assess these circumstances when establishing the pertinent reparations, and will not refer to the alleged violation of Article 5 of the American Convention to the detriment of the children.
205. With regard to the next of kin of the children Dilcia Yean and Violeta Bosico, based on the American Convention and in light of the said *iura novit curia* principle, the Court considers that Leonidas Oliven Yean and Tiramén Bosico Cofi, the children’s mothers, and Teresa Tucent Mena, the child Violeta’s sister, were also caused uncertainty and insecurity by the situation of vulnerability that the State imposed on the Yean and Bosico children, owing to the very real fear that they could be expelled from the Dominican Republic, of which they were nationals, owing to the lack of birth certificates, and to the various difficulties they faced to obtain these documents.
206. Based on the above, the Court considers that the State violated the right to humane treatment embodied in Article 5 of the American Convention, in relation to 1(1) thereof, to the detriment of Leonidas Oliven Yean, Tiramén Bosico Cofi and Teresa Tucent Mena.
207. Regarding Article 12 of the American Convention, the Court considers that the facts of the instant case are not adapted to it, so the Court will not rule on it.

[...]

Operative Paragraphs

260. Therefore,
THE COURT [...] DECLARES:
Unanimously that:

2. The State violated the rights to nationality and to equal protection embodied, respectively, in Articles 20 and 24 of the American Convention, in relation to Article 19 thereof, and also in relation to Article 1(1) of the Convention, to the detriment of the children Dilcia Yean and Violeta Bosico [...].
3. The State violated the rights to a name and to juridical personality embodied, respectively, in Articles 3 and 18 of the American Convention, in relation to Article 19 [author's note: rights of the child] thereof, and also in relation to Article 1(1) of the Convention [author's note: obligation to respect rights], to the detriment of the children Dilcia Yean and Violeta Bosico [...].
4. The State violated the right to humane treatment embodied in Article 5 of the American Convention, in relation to 1(1) [author's note: obligation to respect rights] thereof, to the detriment of Leonidas Oliven Yean, Tiramen Bosico Cofi and Teresa Tucent Mena [author's note: the single mothers of the child victims] [...].
5. This judgment constitutes *per se* a form of reparation [...].

AND ORDERS,

Unanimously that:

6. The State should publish at least once, within six months of notification of this judgment, in the official gazette and in another newspaper with national circulation in the Dominican Republic, both the section entitled "Proven Facts", without the corresponding footnotes, and also the operative paragraphs of this judgment [...].
7. The State should organize a public act acknowledging its international responsibility and apologizing to the victims Dilcia Yean and Violeta Bosico, and to Leonidas Oliven Yean, Tiramen Bosico Cofi and Teresa Tucent Mena, within six months, in the presence of State authorities, the victims and their next of kin, and also the representatives and this shall be disseminated in the media (radio, press and television). The purpose of this act is to provide satisfaction and to serve as a guarantee of non-repetition [...].
8. The State should adopt within its domestic law, within a reasonable time, in accordance with Article 2 of the American Convention, the legislative, administrative and any other measures needed to regulate the procedure and requirements for acquiring Dominican nationality based on late declaration of birth. This procedure should be simple, accessible and reasonable since, to the contrary, applicants could remain stateless. Also, an effective remedy should exist for cases in which the request is rejected in the terms of the American Convention, in accordance with paragraphs 239 to 241 of this judgment.
9. The State should pay, as compensation for non-pecuniary damage, the amount established in paragraph 226 of this judgment to the child Dilcia Yean and the amount established in the same paragraph to the child Violeta Bosico [author's note: US \$8,000].

10. The State should pay the amount established in paragraph 250 of this judgment [author's note: US \$6,000.00 or the equivalent in the currency of the Dominican Republic] to Leonidas Oliven Yean and Tiramen Bosico Cofi for costs and expenses arising in the domestic sphere and in the international sphere before the Inter-American System for the protection of human rights; and they should make the payments to the *Movimiento de Mujeres Dominicano Haitianas* (MUDHA), the Center for Justice and International Law (CEJIL), and the International Human Rights Law Clinic, Boalt Hall School of Law, University of California, Berkeley, to compensate the expenses they incurred.
 11. The Court shall monitor implementation of this judgment and will deem the case closed when the State has fully complied with the terms of this judgment. Within one year of notification of this judgment, the State shall provide the Court with a report on the measures adopted to comply with it [...].
- [...]

6.4 Notes and Questions

6.4.1 *Who Were the Child Victims in the Case of the Yean and Boscio Children v. Dominican Republic?*

In this case, the court acknowledged that Dilcia Yean and Violeta Bosico, (“The Yean and Bosico children”), both under age 13 years, were denied their name and nationality (citizenship of the Dominican Republic). The Yean and Bosico children, hence, were rendered stateless for a period of 4 years due to the refusal of the State to issue them birth certificates during that period. On 25 March, 1999, the date on which the State accepted the Court’s contentious jurisdiction, Dilcia Yean was 2 years old and Violeta Bosico was 14 years old).

The State claimed that the mothers had not filed all of the appropriate documents for late birth registration of the children in question. Without a birth certificate, the children could not have their late birth registrations completed. In March 1997, when the mothers applied for late birth registration of the children, the State required only three documents for late birth registration of children under age 13 (a birth certification, the parents’ identity cards and, if the latter were married, their marriage certificate). Violeta was 12 at the time and Dilcia 10 months old. Yet, in their case, the State demanded many more documents than normally required for late birth registration, and certain documents that the mothers could not produce. Without birth registration, the

children were not recognized as persons before the law in the Dominican Republic, and, hence, the children were denied their “juridical personality” by the State. This denial of a birth certificate and of the late birth registration as well as of Dominican nationality occurred despite: (a) the children having been born in the Dominican Republic; and (b) the children having resided there since birth and living there permanently and (c) the fact that the parents had resided in the country for many years though the fathers were foreign workers and the fathers at least were in the country illegally. The State maintained that the children in the instant case were not Dominicans since their biological fathers were migratory workers in transit. The children in the instant case were of Haitian–Dominican descent, i.e., their fathers were Haitian nationals, while the mothers were Dominican nationals (the mothers were single parents at the time of the case and the fathers had no communication with the children). The Inter-American Court held, however, that the children were entitled to Dominican nationality given that they were born in the Dominican Republic and would be stateless otherwise and that, in any, case the children could not inherit their parents’ migratory status. Further, the children and the parents had many and longstanding connections to the Dominican Republic and the children had resided in that State their whole lives. The fact that the Haitian biological fathers were foreign workers did *not* equate thus to their being “in transit” according to the Inter-American Court (the term “in transit” prior to 2004 under Dominican law had meant being in the country less than 10 days such that the term was *not* synonymous during that period with being a foreign worker who had been in the country for a long period as had the fathers of the children in the instant case).

Violeta Bosico was unable to attend regular school for one year due to not having her birth certificate. She had attended the early primary grades having been admitted without a birth certificate, but was denied enrollment in day school in grade four due to her not having the birth certificate. In 1998–1999 she attended fourth and fifth grade with adults over age 18 at evening school for adults. Both children were at risk of being expelled from the territory as stateless persons during the time in which they had no birth certificates. In addition, Teresa Tucent Mena, (Violeta Bosico’s sister with whom Violeta had resided since 1992), was also undocumented and at risk of deportation and considered a victim by the Inter-American Court. The Inter-American Court considered Teresa Tucent Mena as also a victim in that she too experienced great fear regarding her own fate given that Dilcia and Violeta could not obtain late birth registration and were at risk of deportation as a result. It was not until September 2001 that Dilcia and Violeta were issued birth certificates and permitted to have their late birth registrations processed and, hence, achieved recognition in law as Dominicans. In 2001, having now received a birth certificate, Violeta was able to enroll in day school with others her own age where she completed sixth grade and enrolled in grade seven.

6.4.2 *Did International Justice in This Case Affirm Respect for the Human Rights of the Child?*

6.4.2.1 **Was the Yean and Bosico Children's Right to "Juridical Personality" Recognized Despite Their Status as Stateless?**

The Inter-American Human Rights Commission in this case affirmed the human rights of the children who were stateless by taking the preliminary precautionary step, in the best interests of the children, to order that the State issue the children temporary certificates of residence in the country. This in order to protect the children from deportation while the case was still pending in the Inter-American Human Rights System and the children's migratory status was still to be determined. This order was complied with by the State. This is an example of the interplay between international and national legal systems with respect to fundamental human rights issues (in this case concerning the right to nationality). Can an argument be made then that the fact that the Inter-American Commission made the order, and the State complied, affirms that, in actuality, the children did have *inherent* juridical personality even though stateless? Further, can it be argued that the State cannot, in principle at least, effectively continue to block stateless children's access to judicial process? This being the case since ultimately the international human rights system will affirm both: (a) the children's juridical personality, and (b) their right to a fair effective remedy (i.e., such that the orders of an international human rights commission or international human rights court guaranteeing the children's right to nationality will override those of the domestic court where *effective access* to a fair remedy via the national courts or an administrative or quasi-judicial body has been illegitimately denied?).

Article 25 of the American Convention on Human Rights states:

Right to Judicial Protection

(1) *Everyone* has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. [author's note: emphasis added]

There is then no age limitation in *international human rights law*, such as the American Convention on Human Rights, regarding: the right to be recognized as a person in law, and the right to have access to judicial or other remedies, and indeed no suggestion that stateless persons lack the inherent right to juridical personality. Thus, can it be argued that it is erroneous to automatically attribute the status of lack of juridical personality to stateless persons by virtue of their being stateless? This being the case whether or not the stateless person is *de facto* stateless as in the instant case (where the child victims were blocked from obtaining recognition of their nationality even though they were legally entitled to be considered

Dominicans according to Dominican and international law), or the person is in fact properly considered stateless in law (the latter not in any way mitigating the responsibility of the international community to arrange nationality for such persons rather than leaving them stateless, and potentially also the succeeding generations stateless in perpetuity). Might it be that since juridical personality is an *inherent* human right, that the Inter-American Court (hereafter referred to as the IAC) erred in suggesting that juridical personality, in practice, is legitimately to be considered conditional on first being assigned a nationality: “Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual’s legal capacity” (para. 138 of the majority opinion in the Inter-American Court judgment in the Case of the Yean and Bosico Children). Recall that the Inter-American Court in the instant case, at the same time, and in what appears perhaps somewhat contradictory fashion, affirmed that the right to nationality and juridical personality are inherent human rights and as such are *not* entirely under State control. Consider then whether juridical personality is in fact more fundamental than nationality in that all inherent human rights are embodied in the former. Is it the case then that juridical personality is dependent in actuality only on being a human being and not on the State’s willingness to acknowledge any other right (i.e., such as the right to nationality in that particular State)? This though juridical personality may, in practice, be unlawfully and arbitrarily denied based on any variety of factors (such as age, ethnicity, statelessness, etc.) as was the situation in the instant case. On this analysis, then the oft heard expression that nationality is “the right to have rights” is in principle erroneous insofar as fundamental human rights are concerned (though States may unlawfully act in accord with that view by denying stateless persons their basic human rights).

6.4.2.2 Were the Child Victims in *Yean and Bosico Children v. The Dominican Republic* Regarded as Each Having an Independent Juridical Personality, or Were the Children’s Human Rights Subsumed Under Those of the Parents or Other Adult Family Members?

Did the Child Plaintiffs Have a Right to Nationality?

In the instant case, the court recognized that the *children’s right to nationality* (as per Article 20 of the American Convention on Human Rights [ACHR]) was *independent* of the parents’ ethnic origin, migratory status or right to nationality in that particular State. Thus, the fact that the parents were stateless, or the fact that the fathers were not Dominican, and had been Haitian migrants, had no bearing on the children’s right to Dominican nationality. Further, the children’s *independent* right to have their birth officially registered, and hence officially have a name (identity) (as per Article 18 of the American Convention), was not to be impacted by the parent’s migratory status or nationality given that the children were born in the Dominican Republic. In the instant case, the minor children were born in the

Dominican Republic and hence entitled to Dominican nationality on that basis alone. Moreover, the children had resided permanently in the country as well thus further establishing their connection to the State. In any case, the Court held that the migratory status of the parent could not be transmitted to the child and that migratory status could not be used to deprive a person of nationality who would otherwise be stateless (as would be and was the case for the Yean and Boscio Children for four years). Hence, the children were regarded as separate legal persons in their own right. As such, they had an independent legal right to nationality and to legal redress for violation of their right to nationality.

Did the Child Plaintiffs Have a Right to Education?

The children's independent right to education (as an aspect of the Rights of the Child as per Article 19 of the ACHR) was treated as separable from the parent's right to have their children educated as an aspect of the parent's personal liberty and family privacy rights (which encompasses the right to make decisions concerning one's personal life such as those concerning the children's education and upbringing as per Article 17 Rights of the Family and Article 11(2) Right to Privacy). Thus, Violeta received compensation in part due to the fact that she had been deprived of attending day school with her peers for a full year due to her stateless status (having no birth certificate). Note that the *parental liberty right* in regards to control over aspects of the education of their children is distinguished in the Universal Declaration of Human Rights (UDHR) from everyone's (including children's) independent right to education (Article 26(3) and 26(1) of the UDHR respectively):

Article 26

(1) *Everyone has the right to education.* Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) *Parents have a prior right to choose the kind of education that shall be given to their children* (Universal Declaration of Human Rights, Adopted and proclaimed by the U.N. General Assembly resolution 217 A (III) of 10 December, 1948) (emphasis added).

Did the Child Plaintiffs Have a Right to Have Their Own Rights Claims Assessed Independently?

The Inter-American Court in the instant case affirmed that the illegal actions of the parents cannot lawfully affect the status of the child via a denial of the child's ability to enjoy exercise of his or her fundamental human rights:

although it is true that the parents of the child live in the country illegally, it is no less true that this situation of illegality cannot in any way affect the children, who can benefit from

Dominican nationality merely by proving that they were born on Dominican territory, and that their parents are not diplomats in the country and are not in transit in it [. . .]. (para. 154 of the Inter-American Court judgment, Case of the Yean and Bosico Children, emphasis added)

The same general conclusion was reached by the Supreme Court of the United States in *Plyer v. Doe*, 457 U.S. 202 (1982) in which the Court held that:

A Texas statute which withholds from local school districts any state funds for the education of children who were not “legally admitted” into the United States, and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Fourteenth Amendment.

In the *Plyer v Doe* United States case, however, the children were brought to the country illegally by the parents whereas in the Yean and Bosico Children’s Inter-American human rights system case, the children were born in the country (namely the Dominican Republic where they were trying to access their rights). Nonetheless, in both instances these respective courts held that children cannot be penalized or deprived of their rights due to their parents illegally residing in the country in question. Contrast this approach with that of Canada where, in certain instances at least, the child is being also held accountable for the parent’s illegal acts in the immigration context. For instance, if a *parent* lies about the familial status or existence of a non-accompanying adoptive or biological child when applying for immigration to Canada, that child can never be sponsored by the parent under the “family class” category for immigration to Canada (Immigration and Refugee Protection Act http://www.irb-cisr.gc.ca/en/about/publications/irpa/index_e.htm).

Did the Child Victims Have a Right to Independent Legal Standing (Legal Capacity)?

The Inter-American Court in the instant case did *not* recognize the right of child victims to independent legal standing (i.e., inherent legal capacity, the right to initiate legal actions in their own name, the right to personally and directly retain and instruct counsel). Rather, the Court affirmed that the children could access judicial remedies through the courts only through their parents, other legal guardians or legally recognized representatives as intermediaries who could then enlist the assistance of counsel on the children’s behalf. Regarding the “exercise of the entitlement to human rights” by minors the Court in the instant case held that:

Adulthood brings with it the possibility of fully exercising rights, also known as the capacity to act. This means that a person can exercise his or her subjective rights personally and directly, as well as fully undertake legal obligations and conduct other personal or patrimonial acts. Children do not have this capacity, or lack this capacity to a large extent. Those who are legally disqualified are subject to parental authority, or in its absence, to that of guardians or representatives. But they are all subjects of rights, entitled to inalienable and inherent rights of the human person. (para. 177 of the Inter-American Court majority judgment in the Case of the Yean and Bosico Children, emphasis added)

The issue of children’s right to independent legal standing (legal capacity) thus arose given that the children’s right to juridical personality was a central matter

addressed by the Inter-American Court of Human Rights in the case. The Court in its judgment in the instant case made reference to its advisory opinion: “Juridical Status and Human Rights of the Child” (Advisory Opinion OC-17/02, 28 August, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002), available at http://www1.umn.edu/humanrts/iachr/series_A_OC-17.html) in which the Inter-American Court affirmed that the rights articulated in the American Convention are inherent and belong to *all human beings* including minors. Thus, the Court held that children, like adults, are rights holders who are *subjects* of those rights and guarantees and not simply passive recipients of the discretionary grant of such rights by adults in positions of authority, or by adults who allegedly are the exclusive holders of protection rights. Yet, at the same time, the Court held in its advisory opinion, in arguably contradictory fashion, that children, even if mature minors, do not have legal capacity to exercise those rights on their own. The Inter-American Court hence endorsed the following position stated in the Inter-American Institute of Children 7 August, 2001 brief and cited in the court’s aforementioned 28 August, 2002 advisory opinion on juridical status and children’s human rights:

The American Convention on Human Rights establishes that the rights set forth therein pertain to all human beings and, therefore, their full enjoyment and exercise by children are also guaranteed (Articles 3 and 1(2) of the American Convention). *In this regard, the ability to enjoy rights, inherent to the human person and which is a jus cogens rule, must not be confused with the relative or absolute inability of children under 18 to exercise certain rights on their own.* (“Juridical Status and Human Rights of the Child”, Advisory Opinion OC-17/02, 28 August, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002), para. 15, available online at http://www1.umn.edu/humanrts/iachr/series_A_OC-17.html) (emphasis added)

Could it be argued, however (as does Grover, S.C. in *The Child’s Right to Legal Standing*. Sandstone Academic Press, Melbourne (2007)), that legal capacity (or independent legal standing) is itself a fundamental inherent human right which is part and parcel of the right to juridical personality; the latter being a right which the Inter-American Court considers to be inherent and universal? Can the mature minor truly enjoy equal protection of the law, and the full exercise of his or her civil, political and other basic human rights if there is a blanket legal requirement that forces minors, in every circumstance, to rely on an intermediary to access the courts (i.e., even where the child is cognitively and emotionally competent to hire counsel directly and proceed with the case in his or her own name)? Might children’s fundamental human rights be denied, and a judicial remedy for the State’s rights violations blocked, where children have no intermediary to assist them, or where that intermediary is not truly acting in the child’s best interest? Might access to a remedy via an international human rights court be blocked where the child is unable to exhaust domestic remedies, having no intermediaries to act on his or her behalf, and at the same time the State not according the child legal capacity? If this in fact be the case, then denying children’s legal capacity is tantamount to denying their juridical personality. Should children have the legal capacity to initiate legal actions in their own name where the children involved contend that they are competent to do so (with that competence being considered a rebuttable presumption that would have to be assumed unless contested and successfully challenged in a judicial

process)? This would still allow for the minor's exercise of legal capacity through a law guardian where necessary, i.e., where the child is too young to be able to initiate the action without an intermediary who would be responsible for hiring counsel to act on the child's behalf if the intermediary was not him or herself counsel? Under the latter scenario, any person under 18 who was able could then access the courts on their own in his or her own name; while the younger child would do so through a law guardian where necessary. Recall that all courts have a mechanism to deal with frivolous cases (i.e., summary dismissal of a groundless case), and thus there is no reason to believe that meritless cases would flood the courts if minors were accorded the rebuttable presumption of having independent legal capacity. In the instant case, the court makes the statement that:

The Court considers that the failure to recognize juridical personality harms human dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals. (para. 179 of the majority opinion in the Inter-American Court Case of the Yean and Bosico Children, emphasis added)

Yet, the Inter-American Court accepts without question the legal disqualification of children (that is, the *blanket denial* of minor children's right to *independent* legal standing such that they can exercise the rights guaranteed under the American Convention on their own and independently seek remedies for violations of those rights). This being the case regardless of the child's specific age under 18, or his or her level of maturity. Thus, the Inter-American Court treats legal capacity as if it were separable from juridical personality which arguably it is not. Some, such as Grover (*The Child's Right to Legal Standing* (2007)) have argued that the denial of legal standing in their own right to "mature minors" (i.e., a *blanket* legal disability statutorily imposed on all children denying the right to initiate actions in their own name, etc.) is in fact a denial of juridical personality and an affront to children's human dignity. Note that ironically, according to the reasoning of the Inter-American Court, minor children of any age, (including mature minors aged 16 and over but under 18, no matter their competence), would have no independent legal standing before the international courts to challenge the blanket age restrictions imposed by any State on legal capacity. Without some adult's cooperation then as an intermediary such a challenge to children's legal incapacity as a fundamental human rights violation could not be launched.

What Did the Inter-American Court Rule Regarding the Issue of Violations of the Right to a Fair Trial and the Right to Judicial Protection?

The Inter-American Court declined to rule on the issue of the alleged State violations of the American Convention on Human Rights Article 8 (Right to a Fair Trial) and Article 25 (Right to Judicial Protection). The Court declined to do so on the ground that the relevant events with regard to those infringements occurred *prior* to 25 March, 1999 – the latter date being the point in time at which the Dominican Republic accepted the jurisdiction of the Inter-American Court. However, could it

be justifiably argued that since the children were still stateless after 25 March, 1999, their *lack of access* (due to their statelessness) to judicial protection and to any fair process continued post 25 March, 1999; even *after* the State had accepted the jurisdiction of the Inter-American Court? Hence, even if proper administrative and judicial review or appeal procedures had been in place, the child victims would not have been able to access them as stateless children –whether through an intermediary or directly – either before or after 25 March, 1999. Can it be argued further that Article 3 of the American Convention regarding the right to a juridical personality, which *was addressed* by the Inter-American Court, is *not* separable from the right to a fair trial or to judicial protection? If the foregoing is correct, then is it the case that: (a) the issue of the children’s right to due process (Article 8: Right to a Fair Trial) and of the right to judicial protection (Article 25) were in fact alive both prior to, and after 1999 (as was the issue of juridical personality) and (b) these rights violations should therefore also have been addressed by the Inter-American Court?

In this regard, consider the following excerpts on the issue of temporal limitations on the court’s jurisdiction which indicates that where the underlying facts give rise to a human rights violation which persists, the Court may assume jurisdiction:

Consequently the Court has jurisdiction to hear and declare violations to the Convention in two different situations: when the facts that produced a violation are subsequent to the date of acceptance of its jurisdiction, *or in the case of a continuing or permanent violation that persists after the acceptance, even though it began before it.* (para. 106, majority judgment in *Yean and Bosico Children v. The Dominican Republic*, *emphasis added*)

The Court considers it necessary to emphasize that, although the rejection of the application for late registration of birth in the Registry Office took place on 5 March, 1997, and the decision of the Public Prosecutor confirming this rejection was issued on 20 July, 1998, both facts determined that the children Dilcia Yean and Violeta Bosico had no nationality until 25 September, 2001. Consequently, this denial persisted after 25 March, 1999, the date on which the Dominican Republic accepted the contentious jurisdiction of the Court; and this is the reason why this Court affirms that it is competent to consider the refusal [. . .]. (para. 132, majority judgment in *Yean and Bosico Children v. The Dominican Republic*)

6.4.3 Was the Full Scope of the State Violations of International Human Rights Law Set Out by the Inter-American Court in Yean and Bosico Children v. The Dominican Republic?

Was There Age Discrimination Regarding Access to Late Birth Registration in the Dominican Republic in the Instant Case?

The Inter-American Court found that the Dominican Republic had discriminated against the child victims in the instant case. This in that the State had (in regard to the documentary support for the children’s application for late birth registration) demanded several pieces of documentation from these children of Haitian–Dominican ethnic origin who were *under* age 13 that are *not* normally required to be presented for

children in this age group (and the State also kept changing its requirements). In this regard, the Court noted that:

In a communication of November 15, 2001, addressed to the Inter-American Commission, the representatives attached a document with seven requirements for “late declarations and their ratification by a ruling,” required by the “Civil Status Registry office of the Second Circumscription [National District],” for children over 13 years of age, and indicated three requirements for children under 13 years of age, as follows:

1. Certification from the clinic or hospital where the child was born.
2. Certification issued by the Central Electoral Board (CEB) on whether or not the applicant has an identity document (for applicants over 16 years of age).
3. The parents’ identity cards (if the applicant is legitimate or recognized; to the contrary, only the mother’s identity card. If they do not have identity cards, they should obtain a CIE form from the CEB). If one of the parents is under 16 years of age, he/she should also present a birth certificate.
4. Marriage certificate of the parents (if the child is legitimate).
5. Certification of non-declaration issued by all the registry offices in the National District:

1st District: Calle José Gabriel García, corner of El Número, Ciudad Nueva

2nd: Calle Barahona, corner of Abreu

3rd: Pedro Livio Cedeño near Av. Duarte

4th: Calle 17 No. 3, Ens. Ozama

5th: Villa Mella, in front of the park

6th: Calle Ramón Cáceres, almost on the corner of Pedro Livio Cedeño

7th: La Victoria

8th: Guerra

9th: Boca Chica

6. Baptism certificate. Certification from the school or copy of school report.
7. Sworn statement signed by three witnesses, over 50 years of age on the DC-25 form, provided by the Registry Office.

NOTE: In the case of children under 13 years of age, it is sufficient to present the documents indicated in Nos. 1, 3 and 4 (the latter if the child is legitimate). When the person has already been declared, document No. 1 can be substituted by the certification of identity, with seven witnesses, that has been registered. [...]. (para. 109(21) judgment of the Inter-American Court in *Yean and Bosico Children v. The Dominican Republic*)

However, notwithstanding the foregoing, the Inter-American Court did *not* address the issue of whether there was an unjustified discriminatory practice relating also to *age* with regard to the late birth registration process. That discrimination arguably arising due to the considerable *additional* burden on parents - often undocumented themselves - to produce the numerous required extra documents for children over age 13 in applying for their child’s late birth registration (hence, consequently perhaps often reducing especially the chances of the older children acquiring their late birth registration). Those additional required documents likely presented a significant barrier to a parent attempting to exercise, on his or her child’s behalf, the child’s right to nationality (dependent ultimately on the issuance of a birth certificate). Thus, while the Inter-American Court held that the regulatory scheme for granting nationality in the Dominican Republic at the time was not consistent with international human rights law (see excerpts below), it did not comment on the

disproportionate negative impact of the especially onerous aspect of the regulations for children over age 13:

[...] the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights. [...] (i.e. using a discriminatory set of requirements for late birth registration to block Haitian-Dominican children under or over age 13 from becoming Dominican nationals despite their being born in that country and having resided and grown up there) (para. 141, judgment of the Inter-American Court in *Yean and Bosico Children v. The Dominican Republic*)

States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality, when an individual does not qualify to receive this under the State's laws, owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective. Statelessness deprives an individual of the possibility of enjoying civil and political rights and places him in a condition of extreme vulnerability (para. 142, judgment of the Inter-American Court in *Yean and Bosico Children v. The Dominican Republic*)

In the Yean and Bosico Children Case, Did the Dominican Republic Impose Discriminatory Practices on the Ground of Age Which Were Unconstitutional Under Its Domestic Law?

It is relevant to consider the State's degree of compliance with its own domestic legislation. In this regard, consider the extent of legitimacy, if any, of the statutory distinctions for documentary requirements for late birth registrations depending on age of the child. Note that Haitian-Dominican children over age 13 *whose birth-place was the Dominican Republic* are as entitled to Dominican nationality under international human rights law and the constitution of the Dominican Republic as are younger children of Haitian-Dominican ancestry born in the Dominican Republic. Yet, the documentary requirements for older children's late birth registration were considerably more onerous.

In the Yean and Bosico Children Case, Did the Inter-American Court Address the Dominican Republic's Imposition of Age-Related Discriminatory Practices in the Grant of Nationality?

There can be no statutory limit on fundamental human rights such as the right to nationality as recognized under international human rights law:

[...] Nationality is a fundamental human right enshrined in the American Convention, and other international instruments, and is non-derogable in accordance with Article 27 of the Convention. (para. 136, Inter-American Court majority judgment in *Yean and Bosico Children v. The Dominican Republic*)

[...] contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; *those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights*. [...] *The classic doctrinal position, which viewed nationality as an attribute granted by the State to its subjects, has gradually evolved to a conception of nationality which, in addition to being the competence of the State, is a human right*. (para. 138, Inter-American Court judgment in *Yean and Bosico Children v. The Dominican Republic*, emphasis added)

The Inter-American Court thus recognized as fundamental the need for State statutory schemes regulating the grant of nationality which did not discriminate against a certain segment of the domestic population. It applied this principle to its analysis of the facts and law in the instant case with respect to children under age 13 applying for late birth registration. However, the Court failed to object to the strenuous burden placed on parents applying for late birth registration of their children *over* age 13 (that burden resulting from the numerous additional documents required to be produced when compared to such applications for children *under* 13). In failing to address this age distinction in the regulations and its implications, the Inter-American Court in fact undercut the notion that domestic statutory requirements may not limit access to basic human rights codified in international law for *any* group (i.e., based on age or any other ground of prohibited discrimination which reflects a devaluing of human dignity).

What Was the Actual Status of the Yean and Bosico Children with Regard to Nationality Under International Human Rights Law and a Fair Reading of Dominican Law at the Time?

In *Yean and Bosico Children v. The Dominican Republic*, the Inter-American Court found that the State's requirements for attaining nationality, as applied to children under age 13 years who were of Haitian–Dominican ancestry differed from those normally requisite for children under 13 years of age (even though both the child victims in the instant case were under age 13), and that this “placed them [author's note: the children] outside the State's juridical system and kept them stateless which placed them in a situation of extreme vulnerability, as regards the exercise and enjoyment of their rights” (para. 166, Inter-American Court judgment in *Yean and Bosico Children v. The Dominican Republic*). It is important, however, to point out that though the children were treated as *de facto* stateless (due to their inability to access the public service which would have provided them with a birth certificate and late birth registration and hence recognition of their nationality), they were in law in actuality not stateless. This was the case in that they were in fact Dominicans in the eyes of the international community (persons born in a State are to be granted the nationality of that State if they would otherwise be stateless) and also, for that matter, based on a fair non-discriminatory reading of Dominican law (since (1) their mothers were

Dominican; (2) the children were born in the Dominican Republic; (3) the children had lived in the Dominican Republic all their lives; and (4) the children's fathers, though migratory undocumented workers in the Dominican Republic, could *not* be considered to have been "in transit" through the State when the children were born. (Hence, the facts did *not* fit any Dominican constitutional exception to the requirement to grant Dominican nationality to persons born in that State). Note that the Dominican constitution stipulates that children born in that country were to be regarded as having Dominican nationality (with the exception of children born to foreign diplomats or to persons in transit):

[...] the Constitution of the Dominican Republic (hereinafter "the Constitution") establishes the principle of *ius soli* to determine those who have a right to Dominican citizenship. (para. 3, Inter-American Court majority judgment in *Yean and Bosico Children v. The Dominican Republic*)

Do Children Have an Inherent Juridical Personality Regardless of Whether They Have the Competence, or the Opportunity to Exercise the Right to Juridical Personality as a Basic Human Right?

It is a principle of international human rights law that basic human rights *cannot be extinguished* by unlawful and arbitrary blocking of their realization. This is due to the fact that fundamental human rights are *inherent* and universal such that all persons are subjects of those rights based solely on their being human beings. Can it be argued then that it was *not possible* for the State in actuality to *extinguish* the inherent juridical personality of the child victims in this case (by failing to acknowledge that they did in fact have Dominican nationality and keeping them in legal limbo and *not recognizing* their juridical personality)? This retention of their basic human rights in principle being the case then though, in practice, the child victims could not *exercise* their inherent right to nationality, or their right to juridical personality. As a consequence of the very denial of these fundamental human rights, furthermore, the child victims could not defend against the violation of those rights through the Dominican courts either on their own behalf or through a representative (i.e., since they were not recognized as persons in law in the Dominican Republic given their lack of birth registration). In any case, there was no appeal available to the domestic court once the Public Prosecutor had declined the request for late birth registration as occurred in this case. Moreover, the victims could not themselves, through their representatives, under Dominican law at the time, bring a legal action to reverse the negative administrative decision since the regulations did not allow for this. The Inter-American Court made a similar point in regards to the fact that the juridical personality of children (i.e., the fact that they are rights holders) exists even if they have no legal capacity to defend those rights in court (that statutorily defined legal incapacity as minors requiring children to depend on adult intermediaries to act on their behalf in any legal action).

6.4.4 Was There an Acknowledgement by the Court of Offences Under International Law Committed by the State?

Was There Unlawful Denial of Nationality and of Juridical Personality to the Children?

The State refused to acknowledge that it had violated international human rights law (i.e., various Articles of the American Convention as discussed). Rather, the State maintained that the parents had not properly filed applications for the children's late birth registration and therefore that the domestic legal requirements had not been complied with. Further, the State held that the petitioners had not fully exhausted the domestic remedies. The Inter-American Court affirmed, however, that the State had, to the contrary, violated the American Convention on Human Rights. That is, the State had created discriminatory requirements for late birth registration of children of *Haitian descent* paternally aged under 13 years who had been born in the Dominican Republic compared to the requirements for late birth registration of those children of *non-Haitian descent* under 13 years born in the Dominican Republic; and failed to provide effective access to any possible fair administrative or judicial domestic remedy for the child victims for the denial of late birth registration (which registration would lead to recognition by the State of the children's Dominican nationality). The Inter-American Court in the instant case with respect to this issue affirmed that all persons as per Article 3 of the American Convention are entitled to a juridical personality:

Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights. The right to the recognition of juridical personality implies the capacity to be the holder of rights (capacity and exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of such rights and obligations. (para. 176, Inter-American Court judgment, in *Yean and Bosico Children v. The Dominican Republic*)

Did the Inter-American Court Articulate Contradictory Positions on the Basis for Recognition of Juridical Personality?

The Inter-American Court tied legal capacity (to exercise one's juridical personality as a rights holder) to having a nationality (being a person recognized in law):

A stateless person, *ex definitione*, does not have recognized juridical personality, because he has not established a juridical and political connection with any State; *thus nationality is a prerequisite for recognition of juridical personality*. (para. 178, Inter-American Court judgment in *Yean and Bosico Children v. The Dominican Republic*, emphasis added)

However, can it be argued that stateless persons (i.e., persons whose state no longer exists, or those properly regarded as having no nationality in law for other reasons, or *de facto* stateless persons) too must have their inherent right to a juridical personality acknowledged insofar as basic human rights such as the right to seek

judicial remedies is concerned? Consider in this regard, for instance, Article 16 of the United Nations Convention relating to the Status of Stateless Persons (adopted on September 28, 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 526 A(XVII) of April 26, 1954, entry into force June 6, 1960, available at http://www.unhchr.ch/html/menu3/b/o_c_sp.htm):

Article 16 (Access to Courts)

- (1) A stateless person shall have free access to the Courts of Law on the territory of all Contracting States.
- (2) A stateless person shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from caution judicatum solvi.
- (3) A stateless person shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Recall that Article I of the American Convention stipulates that States Parties may not fail to recognize any of the rights embodied in that Convention based on the person's social status of any kind (consider that statelessness is a social status). Put differently, is it the case that it is not properly within the legal authority of any State to deny recognition of juridical personality to any person, *stateless or not*, within their jurisdiction, and thus that nationality *cannot* be considered a prerequisite for the recognition of juridical personality? More specifically, must the State afford stateless persons within its geographic jurisdiction, or under its control, the legal capacity also to seek a judicial or administrative remedy for harms resulting from the directives of that State carried out by its agents; or from the failure of that State to protect the victims from harm at the hands of its State agents, or even private individuals residing within that State? Would such a State obligation to accord stateless persons recognition of their juridical personality be especially important where there is a systemic pattern of harms being inflicted on a targeted group of stateless persons within the State's jurisdiction (for instance, harms being perpetrated on stateless persons of a particular ethnicity within the territory, such as children of mixed Haitian–Dominican ancestry, regardless whether the harms inflicted are, or are not due to state-sanctioned policy or practice)? Do such harms due to specific State directives, or the failure of a particular State to protect a vulnerable group, not in themselves create “a juridical and political connection” to the particular State and give rise thus to the obligation of that State to recognize the juridical personality of the persons so victimized? Is it discriminatory, and contrary to the notion of the primacy of national courts, relative to international human rights courts, that stateless persons would have recourse for judicial remedies for gross human rights abuses only through the international human rights courts? Since the international courts afford stateless persons the opportunity to be heard (where the State has created them harm through deliberate State initiatives, or due to a failure to protect and then provides no domestic remedy), is the inherent juridical personality of the stateless victims not affirmed (recognized) despite the absence of a state-recognized nationality? The Inter-American Court judgment in the

instant case appears to suggest the opposite; namely that the denial of nationality results *by definition* in the negation of the possibility for *recognition* of juridical personality and, hence, the inability to exercise the rights associated with recognized juridical personality. In this regard, the judgment in the instant case appears to be contrary to the Court's advisory opinion on recognition of children's juridical personality and its imperfect relationship with legal capacity. (Juridical Status and Human Rights of the Child, Advisory Opinion [OC-17/02, 28 August, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002)] holds that the child's inherent juridical personality as a rights holder is to be *recognized* notwithstanding his or her legal incapacity to seek judicial remedies in his or her own name due to being a minor.)

What Is the Status of Children with Stateless Parents?

Consider further that often children's migratory status has been erroneously considered by the State as inherited due to the migratory status of the parent(s) despite the children meeting international legal requirements for nationality (i.e., the children having been born in the State in question and having no other possibility for acquiring nationality), and the fact that migratory status of the parents is *not* a basis for a denial of nationality to their children as pointed out by the Inter-American Court in the instant case. Hence, arguably there is no legally supportable basis for denying children recognition of their juridical personality, or nationality even if the parents are stateless or undocumented illegals in the country (though children born to stateless parents or to parents illegally in the country are most often treated also as, at a minimum, *de facto* stateless by the State). Note that the children in the instant case in fact in law did have Dominican nationality (though the State refused to acknowledge that reality) and the children were entitled legally to have their juridical personality recognized even if nationality were a prerequisite for the same:

[...] considering the right to nationality of the children of migrants in the Dominican Republic according to the pertinent constitutional provision and the international principles concerning protection for migrants, the Court considers that:

- (a) The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights;
- (b) The migratory status of a person is not transmitted to the children, and
- (c) The fact that a person has been born on the territory of a State is the only fact that needs to be proved for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born. (para. 156, Inter-American Court judgment in *Yean and Bosico Children v. The Dominican Republic*).

Can it be contended that legal existence as a person with rights (juridical personality) is, however, an inherent universal right belonging to everyone and must therefore be recognized throughout regardless of that person's status as stateless?

6.4.5 *What Was the Nature of the Reparations Ordered by the Court, to Whom Were They to Be Paid and Is There Any Special Significance of the Reparations that Ought to Be Recognized in Terms of Promoting the Rights of the Child?*

The financial reparations ordered for the non-pecuniary and pecuniary damages were as follows:

The State should pay, as compensation for non-pecuniary damage, the amount established in paragraph 226 of this judgment to the child Dilcia Yean and the amount established in the same paragraph to the child Violeta Bosico. [US \$ 8,000] (para. 260(9), Inter-American Court judgment in *Yean and Bosico Children v. The Dominican Republic*)

The State should pay the amount established in paragraph 250 of this judgment [6,000.00 US \$ or the equivalent in the currency of the Dominican Republic] to Leonidas Oliven Yean and Tiramén Bosico Cofi *for costs and expenses* arising in the domestic sphere and in the international sphere before the Inter-American System for the protection of human rights; and they should make the payments to the Movimiento de Mujeres Domínico Haitianas (MUDHA), the Center for Justice and International Law (CEJIL), and the International Human Rights Law Clinic, Boalt Hall School of Law, University of California, Berkeley, to compensate the expenses they incurred. (para. 260(10), Inter-American Court judgment, *Yean and Bosico Children v. The Dominican Republic*, emphasis added)

Was recognition of the children's entitlement to special protections (discussed in detail next) sufficiently reflected in the amount and type of reparations ordered?

6.4.6 *Was the International Obligation to Afford Children Special Protection Acknowledged by the Inter-American Court and the Nature of the Offense Considered Aggravated by the Fact that the Victims Were Children?*

In the Yean and Bosico Children Case, Did the Inter-American Court Take Account of the Special Vulnerabilities of Girl Children?

The court affirmed that the victims in the case were female children and hence owed special rights by the State both as children and also being girls and hence doubly vulnerable:

The Court notes that when the State accepted the Court's contentious jurisdiction, Dilcia Yean and Violeta Bosico were *children who, as such, had special rights* corresponding to specific obligations of the family, society and the State that required the *special protection of the State*, and this should be *understood as an additional and complementary right*. (para. 133, emphasis added)

This Court has stated that the cases in which the victims of human rights violations are children are particularly serious. The prevalence of the child's superior interest should be understood as the need to satisfy all the rights of the child, and this obliges the State and affects the interpretation of the other rights established in the Convention when the case

refers to children. Moreover, the State must pay special attention to the needs and the rights of the alleged victims owing to their condition as girl children, who belong to a vulnerable group. (para. 134)

This holding by the Court is in accord with Article 19 of the American Convention

Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

and also with the Convention on the Rights of the Child and the Universal Declaration of Human Rights under Article 25(2) which states: “Motherhood and childhood are entitled to special care and assistance”.

Did the Inter-American Court in the Instant Case Consider the Heightened Vulnerability of the Yean and Bosico Children as Haitian–Dominicans?

The court recognized further that the children in the instant case were vulnerable not only as children, and as girls, but as members of an especially marginalized and socially excluded group within the Dominican Republic namely; the children of Haitian–Dominicans or Haitian parents who may or may not themselves have been documented. In recognizing the child victims as members of an especially vulnerable group characterized by ethnic origin, the Court acknowledged that all children are deserving of the special protection of the law which are accorded children under the American Convention and the Convention on the Rights of the Child (CRC) including the most marginalized of children. This is consistent with non-discriminatory principle articulated in Article 1 of the American Convention on Human Rights:

Article 1: Obligation to Respect Rights

(1) The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

6.4.7 *Was There Any Requirement for a Public Acknowledgement of the State’s Violations of Its International Human Rights Obligations to the Child Victims in Yean and Bosico Children v. The Dominican Republic?*

There was a requirement for a public acknowledgement of the State infringements of the rights of the children in the instant case in that the State was ordered to publish within six months of notification of judgment the proven facts and the remedy ordered by the court, and organize a public act acknowledging its international

responsibility and apologizing to the victims in the presence of State authorities with the event being widely disseminated in the press, on radio and on television.

6.4.8 Were the Principles of the Convention on the Rights of the Child Reflected in the Treatment of the Case and the Remedy Afforded the Victims?

In accord with the Convention on the Rights of the Child, the Inter-American Court judgment in the instant case acknowledged the right to special protections for children (i.e., Article 3 of the CRC); the children's right to nationality and a name (Article 7 of the CRC) and their right to juridical personality (i.e., Article 12 of the CRC) (though the Inter-American Court held that juridical personality did not include independent legal capacity in their own right).

6.4.9 Did the Alleged Primacy of the National Court in the Instant Case Hinder or Facilitate the State's International Accountability for the Violations of International Human Rights Law Committed Within Its Jurisdiction?

What Did the Inter-American Court Rule Regarding Reasonable and Effective Opportunities to Exhaust Domestic Remedies?

Interestingly in the instant case, it was exclusively within the relevant Public Prosecutor's authority to either bring the case forward to the requisite national court of the Dominican Republic or decline to do so and he chose the latter option:

The Commission also stated that, according to the Dominican laws it was aware of, *the alleged victims did not have legal standing to bring an action*, since it was the Public Prosecutor who should do so [...] and that, in the instant case, the Public Prosecutor did not empower the judge of first instance to initiate an investigation in order to allow the late declaration of birth of the alleged victims. (para. 63, *Yean and Bosico Children v. The Dominican Republic*, emphasis added)

With regard to the alleged violation of Articles 8 and 25 of the Convention, the representatives indicated that:

- (a) The State has not established a mechanism or procedure for appeal before a competent judge or court against a decision not to register an individual. Despite several reasonable attempts by the mothers of the children Dilcia and Violeta, the negative decision of the Civil Status Registrar was never reviewed by a competent and independent court;
- (b) There are two procedures for reviewing the decisions of a civil status registrar: (1) the review established in Act No. 659, and (2) review by the administrative authority responsible for recording the registrations, in this case the Central Electoral Board. The Central Electoral Board is not regulated by formal procedures and has not published regulations or issued procedures that applicants may use to request a review of the adverse decisions of the civil status registrars. *Consequently, the*

State does not offer an effective remedy that would allow the children Dilcia and Violeta to contest the Civil Status Registrar's refusal;

- (c) The resolution of remedies of amparo and unconstitutionality can take up to two years; accordingly, in the Dominican Republic, *there is no simple recourse*, and this constitutes a violation of Article 25 of the Convention, and
- (d) *The State deprived the children of the procedural guarantees embodied in Article 8 of the Convention by not granting them the right to be heard in a judicial proceeding on the denial of birth certificates.* Under the former legislation and the new decision of the Central Electoral Board, when a civil registrar refuses to issue a birth certificate, this official must immediately request the Central Electoral Board to review the case, without providing the applicants with any type of document. (para. 199, Inter-American court judgment, *Yean and Bosico Children v. The Dominican Republic*, emphasis added)

Such a State system then might effectively block access to international human rights remedies for the system itself creates *the illusion* that the petitioners had not exhausted domestic remedies. The Inter-American Court in the instant case recognized, however, that the petitioners should be held responsible for pursuing only *all reasonable and feasible domestic remedies*. This provides an important lesson to States regarding the feasibility of cases proceeding to an international court forum when States effectively prevent access to the courts and where there are triable issues related to fundamental human rights infringements left unresolved.

What Are the Implications of International Human Rights Law on Traditional State Jurisdiction Over the Issue of the Grant of Nationality?

Note that the justice who wrote a separate opinion in the instant case was of the view that any matter could, under the right circumstances, become one for consideration by the international courts:

*Over the past three decades, I have been indicating that there is no issue that belongs intrinsically to the sphere reserved to the State or to its exclusive national jurisdiction. The locus classicus for examining the question continues to be the celebrated obiter dictum of the former Permanent Court of International Justice in Advisory Opinion on the Nationality Decrees in Tunis and Morocco (1923). According to this, determination of whether or not a matter falls within the jurisdiction of a State is a relative matter, dependent on the development of international relations. In fact, in regard to the right to nationality, this development has effectively removed the matter from exclusive national competence and, for some time, has raised it to the level of the international juridical system. (Separate opinion of Justice Cancado Trindade at point 2, Inter-American Court Case of *Yean and Bosico Children v. The Dominican Republic*, emphasis added).*

On the perspective of Justice Trindade any matter that traditionally has been considered exclusively to fall within the State's jurisdiction could potentially fall into the competence of an international court such as the IAC given the proper circumstances and issues. This since having access to the courts impacts on protection of the individual and it is the case, according to Justice Trindade, that international human rights law has *denationalized protection* thus affording every individual, even stateless persons, equal protection under the law. Consider then the

debates in the academic literature on international human rights and humanitarian law concerning where State sovereignty ends and transnational justice begins and whether in fact the two are mutually reinforcing rather than forces which are inevitably in tension with one another.

6.4.10 Would Justice Have Been Better Served by Advancing the Case Before an Alternative International System (in this case the ICC) Had That Been Possible?

What Type of Reparations Were Awarded by the Inter-American Court of Human Rights in the Yean and Bosico Children Case, and Were the State Government Bureaucrats Involved Held Individually Accountable for Their Implementation of the Discriminatory Policies and Practices?

The Inter-American Court judgment ordered reparations to be provided by the *State* to the victims in the instant case. However, the Court is *not* mandated with holding individual agents of the State accountable, i.e., for participating in the systemic discrimination against children of Haitian–Dominican ancestry. Recall that the behavior of these State agents/employees appears to have been, in the first instance, State authorized. Though this may not serve as an excuse, it may be considered as a mitigating factor if it equates to duress. The victims were given a civil remedy which assured them and children similarly situated in the Dominican Republic Dominican nationality while the victims in the instant case were also awarded money and certain further non-pecuniary reparations for the human rights violations they had suffered (i.e., a public apology by the State).

Was the Problem of Statelessness for Haitian–Dominican Children Born and Residing in the Dominican Republic Resolved After the Inter-American Court of Human Rights Judgment in the Yean and Bosico Children Case?

Note that the Convention on the Reduction of Statelessness – which sets out that persons are to be granted the nationality in the State in which they were born if they would otherwise be stateless – was signed by the Dominican Republic on 5 December, 1961, but as of 1 October, 2008 was not yet ratified by that State. Since the 2005 Inter-American Court decision in the instant case (which held that children born in the Dominican Republic are automatically nationals of that State regardless of their parent’s migratory status if they would otherwise be stateless), the Dominican Republic has retroactively applied its 2004 migration law. That 2004 law held that children born in the Dominican Republic to persons who were not legal residents would be denied Dominican nationality. As a consequence, many persons who were issued birth certificates and identity papers (Dominican

nationality) as a result of the *Yean and Bosico Children v. The Dominican Republic* Inter-American Court decision are now having their documents “investigated”. This is making it impossible for these persons to access services which require proof of citizenship (see “Dominican Republic: Time to move forward to resolve statelessness” Refugee International Bulletin [28 May, 2008, Report by the Robert F. Kennedy Memorial Centre for Human Rights] available at http://www.refugeesinternational.org/sites/default/files/DRstateless_052808.pdf).

Does the Issue of Forced Deportation Arise in the Case of Haitian–Dominican Children Born in, and Residing in the Dominican Republic Who Have Been Declared Stateless in Violation of International Human Rights Law?

Note that the State’s unlawful and arbitrary failure to issue birth certificates to Haitian–Dominican children born in the Dominican Republic put them at risk of deportation as stateless illegals from the only home they had ever known. This arguably might be considered to be a crime against humanity as it involves persecution of a group based on ethnicity and links it to the issue of forced deportation or conspiracy to commit forced deportation by unlawfully designating the children as stateless. However, even if this be the case, the individual State agents responsible could *not* have been prosecuted in the International Criminal Court as the events in the instant case took place prior to the coming into force of the Rome Statute (the enabling statute of the ICC) 1 July, 2002.

6.4.11 *Can Undue Delay in the Possibility to Seek a Domestic Remedy Facilitate Access to an International Human Rights Court?*

In this instance, the Public Prosecutor in the relevant region of the Dominican Republic refused to advance the case for judicial review before the domestic court and chose rather to dismiss the case as without merit himself. The parents had no administrative or judicial recourse, as mentioned, to his decision. It was for that reason, and given that the children continued to be without nationality, that the Inter-American Commission had jurisdiction and could legitimately be seized of the case. However, the question can be raised that given the already 4-year period with the children being treated as *de facto* stateless with all the significant adverse ramifications of that status whether it would have been just to have the children and their families endure a domestic trial even if the Public Prosecutor had brought the case forward in a Dominican court (as opposed to allowing them ready access to the Inter-American human rights system). In fact, undue delay in ability to seek a domestic remedy due to State imposed restrictions is considered a form of lack of due process under international human rights law.

6.4.12 *Were the Yean and Bosico Children and Their Parents and Other Children of Dominican–Haitian Ancestry Born in and Residing in the Dominican Republic and Denied Their Nationality Accorded Justice Under International Law as a Consequence of This Case?*

What Are Some of the Consequences for Children Who Are Denied Nationality?

The longstanding failure to acknowledge the nationality of children born in the country and whose family has resided in the State for several generations is not confined to Dominican children of Haitian-Dominican ancestry. The same has been true, for example, for Roma children in various Eastern and Western European countries. Through rendering the children de facto stateless, the State in fact shuns some or all responsibility for the well-being of these marginalized children and often blocks access to essential services such as an education or an adequate education (i.e., see Grover, S.C. (2007). Mental Health Professionals as Pawns in Oppressive Practices: A Case Example Concerning Psychologists' Involvement in the Denial of Education Rights to Roma/Gypsy Children. *Ethical Human Psychology and Psychiatry*, Vol. 9(1), 15–25).

Does the Convention on the Rights of the Child Impose a Positive Duty on the State to Protect All Children Especially Those at High Risk Given, for Instance, that They Are Members of a Marginalized Ethnic Group?

The expectation under international human rights law is that the State assume a *positive duty* to protect especially vulnerable children and this includes taking proactive measures to ensure their protection and access to rights and equal treatment under the law:

[...] the United Nations Committee on the Rights of the Child expressed its deep concern “at the discrimination against children of Haitian origin born in the territory [of the Dominican Republic] or belonging to Haitian migrant families, especially their limited access to housing, education and health services, and noted in particular the lack of specifically targeted measures to address this problem.” [...]. (para. 169 Inter-American Court judgment, *Yean and Bosico Children v. The Dominican Republic*)

Did the Inter-American Court of Human Rights Affirm the Positive Duty of the Dominican Republic to Protect Children of Haitian–Dominican Descent Who Were Born in, and Residing in That State?

In the instant case, the authorities were well aware of the very longstanding problem of persons of Haitian ancestry having lived considerable periods in the Dominican

Republic but not being able to obtain citizenship for themselves or their children, yet the State did nothing to ameliorate their situation:

The authorities are very aware of this problem [. . .]. The fact that Haitians do not have legal existence in the Dominican Republic is based on a deep-rooted phenomenon of lack of recognition [. . .]. (para. 170, Inter-American Court judgment, *Yean and Boscio Children v. The Dominican Republic*)

The Court hence found that the State must adopt all feasible “positive measures” to ensure that children of Haitian origin born in the Dominican Republic have equitable access to late birth registration; are guaranteed all the rights embodied in the American Convention on Human Rights given their especially vulnerable status as a group with a history of being persecuted in the Dominican Republic; and that the children can in actuality fully exercise those rights associated with Dominican nationality:

Considering that it is the State’s obligation to grant nationality to those born on its territory, the Dominican Republic must adopt all necessary positive measures to guarantee that Dilcia Yean and Violeta Bosico, as Dominican children of Haitian origin, can access the late registration procedure in conditions of equality and nondiscrimination and fully exercise and enjoy their right to Dominican nationality. The requirements needed to prove birth on Dominican territory should be reasonable and not represent an obstacle for acceding to the right to nationality. (para. 171 Inter-American Court judgment, *Yean and Bosico Children v. The Dominican Republic*) (emphasis added).

The Court considers that the Dominican Republic failed to comply with its obligation to guarantee the rights embodied in the American Convention, which implies not only that the State shall respect them (negative obligation), but also that it must adopt all appropriate measures to guarantee them (positive obligation), owing to the situation of extreme vulnerability in which the State placed the Yean and Bosico children, because it denied them their right to nationality for discriminatory reasons and placed them in the impossibility of receiving protection from the State and having access to the benefits due to them, and since they lived in fear of being expelled by the State of which they were nationals and separated from their families owing [to] the absence of a birth certificate. (para. 173, Inter-American Court judgment, *Yean and Bosico Children v. The Dominican Republic*) (emphasis added)

What Were the Inter-American Court Orders Regarding Reparations and Implementation of Those Remedies?

The Court ordered the following:

6. The State should publish at least once, within six months of notification of this judgment, in the official gazette and in another newspaper with national circulation in the Dominican Republic, both the section entitled “Proven Facts”, without the corresponding footnotes, and also the operative paragraphs of this judgment, in the terms of paragraph 234 thereof.
7. The State should organize a public act acknowledging its international responsibility and apologizing to the victims Dilcia Yean and Violeta Bosico, and to Leonidas Oliven Yean, Tiramén Bosico Cofi and Teresa Tucent Mena, within six months, in the presence of State authorities, the victims and their next of

kin, and also the representatives and this shall be disseminated in the media (radio, press and television). The purpose of this act is to provide satisfaction and to serve as a guarantee of non-repetition, in the terms of paragraph 235 of this judgment.

8. The State should adopt within its domestic law, within a reasonable time, in accordance with Article 2 of the American Convention, the legislative, administrative and any other measures needed to regulate the procedure and requirements for acquiring Dominican nationality based on late declaration of birth. This procedure should be simple, accessible and reasonable since, to the contrary, applicants could remain stateless. Also, an effective remedy should exist for cases in which the request is rejected in the terms of the American Convention, in accordance with paragraphs 239 to 241 of this judgment.
9. The State should pay, as compensation for non-pecuniary damage, the amount established in paragraph 226 of this judgment to the child Dilcia Yean and the amount established in the same paragraph to the child Violeta Bosico.
10. The State should pay the amount established in paragraph 250 of this judgment to Leonidas Oliven Yean and Tiramen Bosico Cofi for costs and expenses arising in the domestic sphere and in the international sphere before the Inter-American System for the protection of human rights; and they should make the payments to the Movimiento de Mujeres Dominicó Haitianas (MUDHA), the Center for Justice and International Law (CEJIL), and the International Human Rights Law Clinic, Boalt Hall School of Law, University of California, Berkeley, to compensate the expenses they incurred.
11. The Court shall monitor implementation of this judgment and will deem the case closed when the State has fully complied with the terms of this judgment. Within one year of notification of this judgment, the State shall provide the Court with a report on the measures adopted to comply with it, in the terms of paragraph 259 of this judgment. (para. 260 Inter-American Court judgment, 'operative paragraphs' *Yean and Bosico Children v. The Dominican Republic*)

Given that children and other persons of Dominican–Haitian ancestry in the Dominican Republic who were given their identity papers (nationality) consequent to the decision in the *Yean and Bosico Children v. The Dominican Republic* case now once again find themselves in legal limbo (i.e., with their documents “under investigation”), what improvements are needed in the Inter-American human rights system? What modifications to the Inter-American human rights system can be made to ensure State compliance and continued compliance with the orders of the Inter-American Court? Is there a need for an Organization of American States body charged specifically with monitoring compliance such that sanctions – including expulsion from the OAS for serious ongoing non-compliance with the orders of the Inter-American Court of Human Rights – is an option?

Chapter 7

European Court of Human Rights

Case 3: Case of Isayeva, Yusupova and Bazayeva v. Russia

The full judgment is available at <http://www.unhcr.org/refworld/country,ECHR,RUS,422340c44,0.html> (accessed February 19, 2009).

7.1 Excerpt from the Judgment of February 24, 2005 (Final: 06/07/2005)

[Author's note: internal footnotes have been omitted.]

In the case of Isayeva, Yusupova and Bazayeva v. Russia

The European Court of Human Rights (Former First Section), sitting as a Chamber composed of:

Mr C.L. Rozakis, *President*,
Mr P. Lorenzen,
Mr G. Bonello,
Mrs F. Tulkens,
Mrs N. Vajić,
Mr A. Kovler,
Mr V. Zagrebelsky, *judges*
and Mr S. Nielsen, *Section Registrar*,

Having deliberated in private on 14 October, 2004 and 27 January, 2005,
Delivers the following judgment, which was adopted on the last-mentioned date:

Procedure

1. The case originated in three applications (nos. 57947/00, 57948/00 and 57949/00) against the Russian Federation lodged with the Court under Article 34 of

the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Russian nationals, Medka Chuchuyevna, Isayeva, Zina Abdulayevna Yusupova and Libkan Bazayeva (“the applicants”), on 25, 27 and 26 April 2000 respectively.

[...]

3. *The applicants alleged, in particular, that they were victims of indiscriminate bombing by Russian military planes of a civilian convoy on 29 October, 1999 near Grozny. As a result of the bombing, two children of the first applicant were killed and the first and the second applicants were wounded* [author’s note: emphasis added]. The third applicant’s cars and possessions were destroyed. The applicants alleged a violation of Articles 2, 3 and 13 of the Convention and of Article 1 of Protocol No. 1.

[...]

7. By a decision of 19 December, 2002, the Court declared the applications admissible.
8. The applicants and the Government each filed observations on the merits (Rule 59 § 1).
9. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 October, 2004.

[...]

The Facts

I. The Circumstances of the Case

[...]

A. The facts

11. The facts surrounding the bombing of the civilian convoy and the ensuing investigation were partially disputed. In view of this fact, the Court requested the Government to produce copies of the entire investigation files opened in relation to the bombing. The Court also asked the applicants to produce additional documentary evidence in support of their allegations.
12. The submissions of the parties on the facts concerning the circumstances of the attack on the convoy and the ensuing investigation are set out in Sections 1 and 2 below. A description of the materials submitted to the Court is contained in Part B.

1. The attack on the civilian convoy

13. The first and third applicant lived in the city of Grozny, and the second applicant in Staraya Sunzha, which is a suburb of Grozny. In the autumn of 1999 hostilities began in Chechnya between the federal military forces and Chechen fighters. The city and its suburbs were the targets of wide-scale attacks by the military. *The applicants allege that at some date after 25 October 1999 they learned from radio and television announcements, including on the all-Russian channels RTR and ORT, that on October 29, 1999 a “humanitarian corridor” would be arranged for civilians to escape from the fighting in Grozny* [author’s note: emphasis added].
14. Because of the attacks the third applicant and her family left Grozny on 26 October, 1999 and went to stay with relatives in the village of Gekhi. The first applicant and her relatives tried to cross the border with Ingushetia on 28 October, but were told by the military at a roadblock that the corridor for civilians would be open the next day.
15. Early in the morning of 29 October, 1999 the first and the second applicants and their relatives – about a dozen persons in a RAF mini-van – left Grozny along the road towards Nazran, also known as the Rostov – Baku highway, or the “Kavkaz” highway. Around 8 a.m. they reached the military roadblock “Kavkaz-1” on the administrative border between Chechnya and Ingushetia. There was already a line of cars about one kilometre long. The first applicant and some relatives walked to the roadblock and the military informed them that they were expecting an order from their superiors to open the road, and that the order should arrive at about 9 a.m. The weather was bad at that time, it was cloudy and raining.
16. The family of the third applicant left the village of Gekhi at about 5 a.m. on 29 October, 1999 in three cars, a Zhiguli, a Niva and a blue GAZ-53, and travelled along the road to Nazran. When they reached the queue in front of the roadblock, they were assigned numbers 384 and 385 in the line. The line of cars grew very quickly, and there were three or four times as many cars behind them as in front. The third applicant estimated that there were over 1,000 cars in the column, including trucks, vans and buses.
17. People started asking the servicemen about the opening of the border. At first they were told that it should be opened after 9 a.m., and that the soldiers were expecting an order to that effect. The first applicant estimated that about 11 a.m. a senior officer came out and told the people that the “corridor” would not be opened that day and that he had no information as to when it would be opened. According to the applicants, he also ordered everyone to clear the space in front of the roadblock and to return to Grozny. The column started to turn around, but progress was very slow because there were several lanes of cars and little space.
18. The applicants turned around and were slowly moving with the convoy away from the roadblock. According to the second applicant, there was a large number of cars, and the column stretched over about 12 kilometres. Sometime

later the clouds cleared and the applicants saw two planes in the sky. The planes turned over the column and fired missiles.

19. The driver of the first and the second applicants' minivan stopped and the passengers started to get out. The first applicant's children, Ilona (also spelled Elona) Isayeva (born in 1983) and Said-Magomed Isayev (born in 1990) and her sister-in-law Asma Magomedova (born in 1954) were the first to get out. The first applicant saw them thrown to the side of the road by a blast. She recalled that the planes circled around the convoy and dropped bombs several times. The first applicant's right arm was hit by a fragment of a shell and she fainted. When she regained consciousness and ran to her relatives, all three were dead from shell-wounds. Another woman, Kisa Asiyeva, who was in the minivan, was also killed. After the attacks were over, the first applicant was taken by car with other wounded person to a hospital in Atagi. The doctors treated the wounds and sent her home, because there was no room in the hospital. One week later the first applicant travelled to Nazran, Ingushetia, where she had an operation on her right arm. She needs another operation on her arm.
20. The second applicant recalls that, as their mini-van was nearing Shaami-Yurt, they saw two planes in the sky launching rockets. In a few minutes a rocket hit a car immediately in front of theirs. The second applicant thought the driver was hit, because the car turned around abruptly. When they saw this, everyone started to jump out of the minivan, and then the second applicant was thrown over by another blast. She fainted, and when she regained consciousness, she realised that two of the first applicant's children, Ilona Isayeva and Said-Magomed Isayev, were dead. The second applicant believes that there were eight explosions after the first one. She was dragged to the side of the road by others, but later she returned to the road to help the first applicant to collect the bodies. Said-Magomed had a wound to the abdomen and Ilona's head had been torn away, and one leg was crushed. The second applicant was wounded by shells in the neck, arm and hip. Their minivan was not hit, and they used it to leave the scene afterwards. On 7 November, 1999 she was taken to Ingushetia by ambulance for further treatment.
21. The third applicant was in a Zhiguli car with her husband and his friend. Her son and two of her husband's nephews, one with his wife, were in the GAZ car behind them. She recalled that the rain stopped and the sky cleared when they passed the village of Khambirzi and were nearing the village of Shaami-Yurt. Then there was a powerful blast, and their car was thrown to the left side of the road. All its windows were broken. The third applicant realised that there had been a blast behind, and she ran over to see if her son and his cousins were alive. She believes that in the 50–60 metres she ran along the road to find her son's car, she saw several destroyed cars, vans and trucks and 40–50 dead bodies, disfigured and mutilated, some of them in vehicles, some thrown around by the blasts. She recalled a bus with the rear side totally destroyed and a Kamaz truck with human and cattle bodies inside.

22. The third applicant, her husband and their friend picked up some people who needed help. Their Zhiguli car had flat tyres [author's note: tires], but they reached Shaami-Yurt, where they changed tyres [author's note: tires]. They then travelled back to Gekhi where their relatives lived. In the meantime, the applicant's son picked up the wounded and took them to a hospital in Achkhoy-Martan, the district centre. He later returned to the place of the bombing, as he was not sure if the third applicant had been able to leave it. The planes were still flying over the remains of the convoy and struck again. Their GAZ car with all the family possessions was destroyed by a direct hit, as well as their Niva car. The applicant's son and his cousins ran on foot through neighbouring villages, and in the evening reached Gekhi. They later fled to Ingushetia.
23. The applicants are not certain about the exact timing of the attack, as they were in a state of shock. They accepted the timing of the attack given by the Government. They submitted transcripts to the Court of interviews with other witnesses of the attack. In their testimonies these witnesses described the bombing of a convoy of refugees from Grozny near the village of Shaami-Yurt on 29 October, 1999, confirming that after the strikes they saw numerous burned and damaged cars, including at least one Kamaz truck filled with civilians and at least one bus. They also confirmed that there were dozens of victims, killed and wounded. Several testimonies concerned the deaths of the first applicant's relatives (see Part B below for a description of the testimonies).
24. The applicants submitted that they saw only civilians in the convoy, and that they did not see anyone from the convoy attempting to attack the planes.
25. According to the Government, on 29 October, 1999 the representative of the Chechen Committee of the Red Cross decided to evacuate the office to Ingushetia. As he did not co-ordinate the move with the military authorities, when he and a convoy of vehicles reached the check-point "Kavkaz-1" on the administrative border with Ingushetia, they had to turn back as the check-point was closed.
26. The Red Cross could have used the opportunity to inform the security and military authorities in advance about their travel, which would have made it possible for them to ensure a safe evacuation route. The checkpoint was closed because it could not supervise the passage of a "fair quantity of refugees". On the way back to Grozny the convoy was joined by a Kamaz truck carrying rebel Chechen fighters.
27. At that time the military authorities were planning and conducting counter-terrorist operations in the Achkhoy-Martan district, aimed at preventing supplies and personnel of the rebel fighters being brought to Grozny by heavy transport, as well as identification and suppression of any other persons, supporting networks or command centres offering armed resistance to the authorities.
28. As part of that mission, on 29 October, 1999 two military SU-25 aeroplanes, flown by military pilots identified for security reasons as "Ivanov" and "Petrov", were on a mission to conduct reconnaissance and to suppress such movements.

At around 2 p.m., when flying over the village of Shaami-Yurt, they saw vehicles moving towards Grozny. The planes were attacked from a Kamaz truck with large-calibre infantry fire-arms. The pilots reported the attack to an air-traffic controller identified as “Sidorov” at the command headquarters, and were granted permission to use combat weapons. At about 2.15 p.m. the planes fired four rockets each from a height of about 800 metres at the Kamaz, which they estimated carried at least 20 fighters, and destroyed it. They then located a second Kamaz truck on the same road on an intersection with a road to the village of Kulary, from which they were also attacked. The pilots retorted by launching two missiles each at the target. They then returned to their deployment aerodrome. In their submissions on the admissibility of the applications, the Government indicated the timing of the attack as 2.05–2.20 p.m. and 3.30–3.35 p.m.

29. The Government conceded that apart from the two Kamaz trucks targeted, other vehicles were destroyed or damaged. From the observations on the merits submitted by the Government, it appears that 14 civilian vehicles were damaged. This resulted in 16 civilians being killed and 11 wounded. Among the killed were two employees of the local Red Cross Committee and the first applicant’s three relatives. Among the wounded were the first and the second applicant. The Government did not submit any information about the number or names of wounded or killed fighters in the Kamaz trucks.
30. At the same time, the Government submitted that the pilots had not foreseen and could not have foreseen the harm to the civilian vehicles, which appeared on the road only after the rockets had been fired. In the Government’s view, the fighters were deliberately using the convoy, which had been moving without authorisation, as a human shield. The radius of damage of the rockets is 600 – 800 metres, which explained the casualties.
31. In connection with the incident, the International Committee of the Red Cross (ICRC) in Geneva issued a press release on 30 October, 1999. It stated that, according to the local branch of the Red Cross, on 29 October 1999 a convoy of vehicles, among them five vehicles of the Chechen Committee of the Red Cross, had tried to cross the border into Ingushetia but had been turned back at the check-point and were returning to Grozny. All five cars were clearly marked with the Red Cross sign, and the truck displayed a red cross on its roof. They were attacked by missiles from aeroplanes, as a result of which two Red Cross workers were killed and a third was wounded. A number of other vehicles were also hit, resulting in some 25 civilian deaths and over 70 injured.
32. The Russian military air force issued a press release which stated that on 29 October, 1999 at 2 p.m. a column of trucks with fighters and ammunition was moving along the road from Nazran towards Grozny. A SU-25 plane flying over the convoy was shot at with automatic weapons and called a second plane for support. The planes hit the convoy with missiles at an interval of five minutes, as a result of which two trucks full of fighters were destroyed. The press service denied that civilians could have been hit by the air strikes.

33. On 2 December, 1999 the Committee to Protect Journalists (CPJ), New York, stated that on 29 October 1999 two TV journalists, one working for a Moscow-based company, and the other for a local station in Grozny, were killed during a military attack on a convoy of refugees fleeing Grozny near the village of Shaami-Yurt. According to the statement, the two journalists were covering the movement of a convoy, and when the first rocket hit a bus with refugees, they went out to film the scene. As another rocket hit a nearby vehicle, both were fatally injured.
34. The attack on the convoy was reported in the Russian and international media.

2. The investigation of the attack

35. *On 20 December, 1999, at the first applicant's request, the Nazran District Court of Ingushetia certified the deaths of Ilona Isayeva, born on 29 May, 1983, and Said-Magomed Isayev, born on 30 October, 1990, "due to shell-wounds received as a result of bombing of a convoy of refugees from Grozny by fighter planes of the Russian military air force on the "Kavkaz" road between the villages of Shaami-Yurt and Achkhoy-Martan on 29 October, 1999, around 12 noon" [author's note: emphasis added].*
36. In September 2000 the Ingushetia Republican Prosecutor introduced a request for supervisory review to the Presidium of the Supreme Court of Ingushetia, by which he sought to quash the decision of 20 December 1999. On 17 November, 2000 the request was granted, and the decision was quashed. The case was remitted to the District Court. The Government submitted that the first applicant failed to appear at the District Court for a new consideration and that her place of residence was unknown. On 18 March, 2002 the Nazran District Court adjourned the case due to the first applicant's failure to appear on summonses.
37. *On 3 May, 2000 the military prosecutor of the Northern Caucasus military circuit [...] military unit no. 20102, located in Khankala, the Russian federal military headquarters in Chechnya, opened a criminal investigation, no. 14/33/0205-00, concerning the aerial bombardment of a refugee convoy near the village of Shaami-Yurt on 29 October, 1999 [author's note: emphasis added].*
38. *The investigation confirmed the fact of the bombardment, the deaths of the first applicant's relatives and the wounding of the second applicant [author's note: emphasis added].* It also identified several witnesses and relatives of other victims of the bombardments, who were questioned. Some of them were granted victim status and recognised as civil plaintiffs. The investigation identified a number of individuals who had died as a result of the strikes and who were wounded. It also identified two pilots who had fired at the convoy and the control tower operator who had given permission to use combat weapons. The pilots, who were questioned as witnesses, stated that their targets had been two solitary Kamaz trucks with armed men, who fired at the planes. In response, the pilots used eight S-24 air-to-ground missiles against the first truck and four such missiles against the second truck. No one was charged with having committed a crime [...].

39. On 7 September, 2001 the criminal investigation was closed due to lack of *corpus delicti* in the acts of the pilots. This decision was appealed to the military court by a victim of the attack, Ms Burdynyuk. Following her complaint of 6 June, 2002, the Bataysk Garrison Military Court quashed the investigator's decision on 14 March, 2003 and remitted the case for a new investigation to the military prosecutor of the Northern Caucasus military circuit.
40. After the hearing of 14 October, 2004 the Government submitted a document of 5 May, 2004 issued by a military prosecutor of the Northern Caucasus military circuit. By this decision the criminal investigation was again closed due to the absence of *corpus delicti* in the acts of the pilots [...] [author's note: alleged absence of evidence arising from the acts of the pilots that a crime had been committed].
41. The applicants stated in their submissions that they were not aware of any adequate steps taken by the authorities to conduct an efficient and meaningful investigation and to ensure their participation in it. The first applicant submitted that some time after her complaint to the Court had been communicated to the Russian Government, her elder brother, Aslanbek Vakhobov, was twice visited at his house in Chechnya by the military prosecutors, who were looking for her. After the second visit the prosecutors left a note for the first applicant, instructing her to appear at the Khankala military base for questioning. The first applicant failed to do so. She submitted that Khankala was the main military base of the federal forces in Chechnya, was not freely accessible to civilians and was heavily guarded and surrounded by numerous check-points. It would be very difficult and unsafe for her to attempt to get there on her own, and she believed that the prosecutors could have found her either in Ingushetia, where she was staying, or in Chechnya, where she travelled. The first applicant was also aware that prosecutors from the Chechen town of Achkhoy-Martan were once looking for her in Ingushetia, while she was in Grozny.
42. The second and third applicants were never called for questioning. They were not given any official information in relation to the incident. None of the applicants was officially informed that they had been granted the status of crime victims [...] as provided by Article 53 of the Code of Criminal Procedure.

B. Documents submitted

43. The parties submitted numerous documents concerning the investigation into the killings. The main documents of relevance are as follows:

1. Documents from the investigation file

44. The Government submitted a copy of the investigation file in the criminal case, divided into two volumes. No list of documents was provided, but it is apparent from the numbering of the pages that there were initially at least three volumes and that a certain part of the file is missing. According to the documents

submitted, the investigation made some attempts to locate the first applicant and, to a lesser extent, the second applicant. Although some of their relatives were questioned and granted victim status (it is not clear whether they were informed of this), *the investigators did not contact the first and the second applicant directly. It does not appear that the third applicant was ever sought* [author's note: emphasis added]. The documents contained in the case-file present a coherent and detailed account of the attack of which the applicants complain.

45. The most important documents contained in the file are as follows:

a) Documents from the Red Cross

46. The Moscow Office of the International Committee of Red Cross (ICRC) addressed the Main Military Prosecutor's Office in Moscow in relation to the attack on the convoy on 29 October, 1999. On 29 October, 1999 the ICRC urgently informed the Ministry of Internal Affairs that, due to a rapid deterioration of the security situation in Grozny, the local personal [author's note: personnel] of the ICRC and of the Chechen Committee of the Red Cross were being evacuated from Grozny by a convoy of five trucks and six passenger vehicles. The letter stated that the vehicles would not be marked by any emblem.
47. Later on 29 October, 1999 the ICRC again urgently informed the Ministry of the Interior that the Red Cross personnel were unable to cross the border with Ingushetia. The road between Ingushetia and Grozny was under fire and one of the Red Cross trucks had been damaged.
48. On 16 November, 1999, in reply to a request from the Main Military Prosecutor's Office of 9 November, 1999, Mr Ruslan Isayev, chairman of the Chechen Committee of the Red Cross and Red Crescent, submitted his account of the attack. He submitted the following:

"I have been the Chairman of the Chechen Committee of the Red Cross since January 1995. We worked together with the ICRC, taking care of 15,000 elderly and disabled persons in Chechnya. . . From 1 October, 1999 we had to close the food centres since electricity and gas had been cut off, but we continued to bake bread using diesel fuel and to distribute it to 12,000 elderly persons. . . Starting from 20 October, 1999 Grozny came under heavy air bombardment, and on October 27 we stopped all programmes, because it was impossible not just to work, but to stay there. We started to prepare to evacuate, and I informed the ICRC Office in Nalchik [Kabardino-Balkaria] of this fact. Because all public media were declaring that an exit route to Ingushetia would be opened for refugees on 29 October, 1999, we decided to evacuate on 29 October, 1999, together with the ICRC staff. In order to evacuate we needed special permission, and on October 29 we brought all our transport to the [rebel] commandatura, which issued a permit to travel. I went ahead of the convoy to check the road, and saw several craters from explosions on the road, so I personally ensured that we had flags with red crosses on the roofs of our three trucks. [. . .].

To sum up, on 29 October, 1999 between 12 and 4 p.m. on the bridge near the village of Shaami-Yurt, military planes attacked a civilian convoy containing refugees five times; consequently, dozens of cars were destroyed, about 25 persons were killed and about 75 were wounded [author's note: emphasis added]. I believe that many victims were hurt because numerous refugees followed our convoy, having noticed the Red Cross sign.

I and my colleagues categorically deny that the planes were allegedly shot at from the convoy. Starting from the cross-roads with the road to Urus-Martan, not only we did not see any cars with an anti-aircraft gun, but we did not see not a single armed person [author's note: emphasis added]. While in Chechnya we ourselves suffered from the [Chechen] fighters, who accused us on many occasions of working for the Russians, and our office and staff had been attacked, so we were very cautious. I cannot state that the pilots deliberately aimed at the Red Cross convoy, but they could not have failed to see our trucks with the crosses on the ill-fated bridge, and afterwards they were striking at the civilian convoy for four hours."

49. To this statement were appended copies of the identity documents of the two drivers who had been killed, Aslanbek Barzayev and Ramzan Bitilgiriyeu. There was also a travel permit for six vehicles, issued by an "independent Chechen authority" – the Aldy *commandatura* – on 29 October 1999.
50. Three other testimonies were collected from the Red Cross workers in April 2000. They confirmed Isayev's statements as regards the timing and the circumstances of the attack and the identity of the victims who had been Red Cross employees.

b) Decision to start the criminal investigation

51. On 27 April, 2000 a military prosecutor from military unit no. 20102 in Khankala issued a decision not to open a criminal investigation into the complaint by the Red Cross Committee. The decision said that a review of the complaint established that the Red Cross convoy was travelling on 29 October, 1999 to Ingushetia, and that it could not cross the administrative border because the check-point had not been prepared. The convoy movements were not coordinated with the headquarters of the United Group Alignment (UGA). When returning to Grozny, the convoy, together with other vehicles, was attacked at the bridge near the village of Shaami-Yurt by "unidentified airborne devices". The decision further referred to information from the headquarters of the UGA that, according to the operations record book, on 29 October, 1999 the UGA aviation forces had not conducted flights in the vicinity of Shaami-Yurt. The investigator concluded that there was no proof that the servicemen from federal forces had been involved in the air bombardment of the Red Cross convoy and refused to open a criminal investigation because of the absence of a *corpus delicti* in the actions of servicemen of the armed forces.
52. On 3 May, 2000 a prosecutor of the Military Prosecutor's Office for the Northern Caucasus in Rostov-on-Don quashed the decision of 27 April, 2000 and ordered an investigation. On 10 May, 2000 the military prosecutor of military unit no. 20102 accepted the case no. 14/33/0205-00 for investigation. On 28 June, 2000 the case-file was transferred to another investigator within the same military unit.
53. After communication of the case by the Court to the Russian Government in June 2000, the Prosecutor's Office for the Northern Caucasus requested information about the case from the Chechnya Republican Prosecutor's Office. On 13 September, 2000 the Achkhoy-Martan District Prosecutor's Office opened

criminal investigation no. 26045 into the killing of the first applicant's three relatives and the wounding of the first and the second applicants. In November 2000 the criminal case was forwarded for investigation to military unit no. 20102. On 4 December, 2000 a military prosecutor in the same military unit joined it with the investigation no. 14/33/0205-00.

54. It appears that at some point in 2001 the criminal case was transferred for further investigation to the North Caucasus Military Prosecutor's Office in Rostov-on-Don.

c) Documents related to the Burdynyuk family

55. Among the victims of the attack were Nina and Boris Burdynyuk, residents of Grozny. The husband was killed in the attack, and the wife was wounded. On 6 December, 1999 Nina Burdynyuk wrote to the local military prosecutor in Anapa, Krasnodar Region, where she was staying. She stated that on 29 October, 1999 she and her husband travelled along the "humanitarian corridor" that had been declared for Grozny residents. Through a local transport agency, they had arranged in advance for a truck to collect them and their movable property. As the roadblock was closed, they had to go back to Grozny. At 1.10 p.m. near the village of Shaami-Yurt they were attacked by military planes. Their car was thrown to the side by a blast, which killed her husband, and wounded her and the driver. Ms Burdynyuk was taken away by passers-by for first aid, but returned for her husband's body, which had in the meantime been taken to a village mosque. With the assistance of a local resident, she took her husband's body to a roadblock near Achkhoy-Martan and buried it in a shallow grave. On 4 November she reached Anapa, where her daughter lived. She was treated in hospital for head trauma and concussion. Upon release from the hospital, on 2 December, 1999, she returned to Chechnya to collect her husband's body. On 5 December, 1999 she placed it in the Anapa town morgue. She requested the military prosecutor of the Novorossiysk Garrison to open a criminal investigation into the attack and to order a forensic expert report on her husband's body.
56. On 8 December, 1999 a forensic report on the body of Boris Burdynyuk concluded that he had died of a shell wound to the chest, possibly in the circumstances indicated in his wife's statement. On 8 December, 1999 the Anapa civil registration office issued a death certificate for Boris Burdynyuk, who had died on 29 October, 1999 in the village of Shaami-Yurt, Chechnya.
57. The documents pertaining to the case were forwarded to the military prosecutor of military unit no. 20102, who on 7 February, 2000 issued a decision not to start criminal investigation because no crime has been committed. There were no grounds to conclude that military pilots could have been involved in the death of Boris Burdynyuk.
58. On 23 October, 2000 that decision was quashed by a military prosecutor of military unit no. 20102. The investigation was joined to investigation of criminal case no. 14/33/0205-00, which concerned the attack on the Red Cross convoy.

59. On 1 September, 2000 Ms Burdynyuk was questioned as a witness. On the same day an investigator of the Anapa Prosecutor's Office, acting upon directions from the military prosecutors, issued a decision to recognise her as a victim and as a civil plaintiff in the case.

d) Questioning of the first applicant's relatives

60. On 11 August, 2000 two of the first applicant's relatives – her brother Aslanbek Vakhobov and nephew Alikhan Vakhobov – were questioned as witnesses. Aslanbek testified that his wife and son, the first and the second applicants and other relatives (he named 12 persons) had left Grozny on the morning of 29 October, 1999 for Ingushetia. The witness had remained at home, and at about 5 p.m. his relatives had returned with the same minibus. Four of the people inside had been killed and the rest were wounded, as a result of an air strike at the convoy. The first applicant's two children, Ilona Isayeva and Said-Magomed Isayev, were buried in the Chernorechye cemetery near Grozny. *Alikhan Vakhobov, a teenager who was in the minibus, testified about the circumstances of the attack and about his splinter wound in the left shoulder* [author's note: emphasis added]. He was treated in the Atagi hospital immediately after the incident, and then stayed for some time in the Nazran hospital in Ingushetia.
61. On 18 October, 2000 the investigators questioned Zhalavdi Magomadov, a relative of the Vakhobovs, who was in the minivan on 29 October, 1999 and who gave a detailed account of the events. He submitted that there were 15 passengers in the minibus, himself included, plus the driver. He estimated the timing of the attack between 12 and 1 p.m., because some people had stopped by the road for the midday prayer (*namaz*). He recalled that first he heard an explosion in front of their car, where a Mercedes truck had been travelling. Their minivan stopped and everyone started to get out of the car and ran towards the shoulder of the road. At that point a second explosion occurred on the right side of the road. The witness was wounded by shrapnel in both legs, one arm and his back and he was in a state of shock, but he recalled two other explosions somewhere nearby. He further recalled being brought by his relatives to the hospital in Staraya Sunzha, where he was operated on and shrapnel were extracted from his body. Six passengers in the van were killed: the witness's mother (Asma Magomedova) and two sisters, the first applicant's two children and another woman. The witness submitted that no forensic examinations were performed on the bodies before burial and that he objected to exhumation of the bodies of his mother and two sisters. Seven passengers in the minivan, including himself and the driver, received shrapnel wounds of varying severity. When asked if he had heard anyone shooting from the convoy at the planes, the witness denied it and said that he did not see any armed men in the convoy. He also produced a detailed drawing of the site, with an indication of the placement of the cars on the road and the explosions.
62. The investigators attempted to find the first and the second applicants. In September 2001 they questioned a resident of Nazran, who stated that in September 1999 – autumn 2000 two families of refugees, the Yusupovs and

Isayevs had lived in his house. He did not know anything of the attack in October 1999 and did not know where they had gone afterwards.

e) Examination of the site

63. On 15 August 2000 the investigators of military unit no. 20102, together with two employees of the Red Cross who had witnessed the attack, travelled to the site. They found the damaged carcass of the Mercedes truck about 30 metres from the bridge and photographed it and the fresh asphalt patch on the road where the witnesses stated the crater had been. The Red Cross submitted their own photographs of the destroyed truck and of the explosion craters on the road.

f) Documents related to identification of other victims

64. The investigation attempted to identify and question other victims of the attack or their relatives and to collect medical records and death certificates. Requests were sent to the local departments of the interior in Chechnya, to the district prosecutors' offices and to the five largest refugee camps in Ingushetia.

65. On several occasions in 2000 and 2001 six workers from the Chechen Committee of the Red Cross were questioned about the circumstances of the attack. They gave detailed explanations, accompanied by drawings of the site. Relatives of the two deceased Red Cross drivers were questioned. They testified about the deaths and identified the graves. An order for exhumation and a forensic report was issued, but the relatives objected and the order was not carried out. The father of one driver was granted victim status in the proceedings in July 2001.

66. In addition to the relatives of the first and the second applicants, Ms Burdynyuk and Red Cross staff, the investigators identified other victims. Two correspondents of local TV stations, Ramzan Mezhidov and Shamil Gegayev, were killed during the attack. The investigators questioned Mezhidov's mother and widow, who objected to his exhumation. They submitted his death certificate and medical documents about his wounds. It does not appear that Gegayev's relatives were questioned.

67. The relatives of Sadik Guchigov, driver of the truck in which the Burdynyuk family had been travelling, testified that he had died from his wounds one month after the events. His widow was questioned and granted victim status in the proceedings. She also produced her husband's medical documents and death certificate and objected to his exhumation.

68. Five other persons who were killed during the attack on the convoy were identified, their relatives were questioned and some were granted victim status. In addition, one local resident from the village Valerik was killed not far from the road when he was washing his car by a pond, apparently by the same air strikes. His brother was also granted victim status.

69. *The investigation established a total of 18 deaths* [author's note: emphasis added].

70. The witnesses also consistently referred to a PAZ bus (a 25-seater), which received a direct hit and where at least 12 persons were killed. They also referred to a Kamaz truck containing refugees – mostly women and children – and cattle which was directly hit and burned down, apparently with no survivors. It does not appear that the passengers of these two vehicles or their relatives were ever established.
71. On 6 September, 2001 the investigators questioned a woman, whose name was not submitted to the Court, identified as “Raisa”. She testified that on 29 October, 1999, together with three other persons, she tried to leave in their car for Ingushetia through the “humanitarian corridor”. After they were refused permission to cross at the checkpoint, they turned back at about noon and reached Grozny safely. Later she learned that the refugees had been attacked from the air, and that many people were killed and wounded. She submitted that on the road back she had seen a group of four or five men on the edge of the Samashki forest, dressed in camouflage and with machine-guns. Their car, a mud-splattered all-terrain UAZ vehicle, was nearby. The witness presumed that these were Chechen fighters, who could have provoked the military planes, circling in the skies, to strike at the refugees on the road. When asked, the witness said that she did not see a Kamaz or any other trucks with fighters.
72. Through witnesses testimonies and medical documents the investigators also identified several persons who had been wounded, among them the first and second applicants.
73. In summer 2001 ten medical records of the wounded on 29 October, 1999 were sent from the Urus-Martan hospital for forensic reports. The reports concluded that the injuries – shrapnel wounds, traumatic amputations of limbs, concussion, head traumas – could have been received in the circumstances described by the victims, i.e. during an air strike. Two of the wounded died later and their relatives were granted victim status in the proceedings. One was Ramzan Mezhidov, a local TV reporter. It appears that other wounded persons or their relatives were not found by the investigators, despite certain attempts to that effect.
74. On 27 August, 2001 the investigator issued nine decisions to grant victim status to persons whose relatives had been killed or wounded, among them the first and second applicants. These decisions were not countersigned by the victims, as prescribed by the Code of Criminal Procedure, and there is no indication that they were sent to the applicants or to their relatives whose addresses had been established.

j) Testimonies of local residents and medical personnel

75. The investigators questioned eight residents of Shaami-Yurt. They testified that there were air-strikes on the road and that dead bodies had been brought to the village mosque on 29 October, 1999. They also testified about giving first aid to the victims.

76. In 2000 and 2001 the investigators questioned medical personnel from the hospitals in Achkhoy-Martan, Staraya Sunzha (Grozny), Urus-Martan and Nazran (Ingushetia). They testified about the wounded who had been brought to the hospitals on 29 October, 1999. It appears that the majority of the victims were brought to the Achkhoy-Martan hospital, which was the closest to the site. However, no records were made that day because the large number of victims meant that all the staff was busy providing first aid for the heavy wounds. At least ten wounded persons were brought to the Urus-Martan hospital and six to the Staraya Sunzha hospital, where a nurse recalled treating the second applicant and Zhalaudi Magomadov for shrapnel wounds.

k) Information from the military

77. In November 2000 in the course of the investigation into the applicants' complaints, the District Prosecutor's Office in Achkhoy-Martan requested the commander of the UGA and the military commandant of Chechnya to submit information about flights on 29 October, 1999 in the vicinity of Achkhoy-Martan and Shaami-Yurt. It is unclear if any answers were submitted, and ten days later the criminal investigation was transferred to the military prosecutor of military unit no. 20102.
78. In October 2000 the military investigators questioned two military pilots and an air controller. They were questioned as witnesses and their real names were not disclosed to the Court.
79. The air controller identified as "Sidorov" submitted that on the evening on 28 October, 1999 he was informed, in accordance with procedure, about an aviation mission for the following day. The mission was to prevent the movement along the road towards Grozny of heavy vehicles, possibly carrying weapons, fighters and other supply equipment for the "illegal armed groups" defending the city. On the same evening he informed two pilots of the mission. Neither on 28–29 October, 1999, nor later, until the questioning, had he been informed of a "humanitarian corridor" for civilians, about the movement of a Red Cross convoy on the road or about civilian casualties. He was not aware whether the "Kavkaz-1" roadblock was functioning or not and received no information from that roadblock.
80. The witness further submitted that on 29 October, 1999 the pilots left for the mission without airborne forward controllers, because the mission was not perceived to be taking place close enough to the federal troops. The forward air controllers remained on the ground in the control tower. At about 2 p.m. one air-crew reported a solitary Kamaz truck on the road near the village of Shaami-Yurt, not far from the Samashki forest, from which they were being fired at. The air controller, knowing from the reconnaissance information about the presence of fighters in the Samashki forest and in view of the mission's purpose, permitted them to open fire. The pilots did not report any other vehicles on the road or the Red Cross signs on the truck. Neither did they report any errors in hitting the targets.

81. On 10 October, 2000 a pilot identified as “Ivanov” testified that on 29 October, 1999 he was performing a mission to prevent the movement of heavy vehicles towards Grozny. On the road near Shaami-Yurt, about 100 metres from the bridge, he observed a dark-green Kamaz truck with a canvass cover. He descended from 1500 metres to 200 metres for a closer look. The pilot could see the truck very clearly, was certain of its mark and was sure that it did not bear any signs of the Red Cross. When asked, he responded that had he seen the Red Cross signs, he would not have fired at the vehicle. He was also certain that there were no other vehicles on the road at that time. The wingman reported fire from the truck, and the pilot requested the ground controller’s permission to open fire. Permission was granted and the pilot made a loop, aimed at the truck and fired rockets from the height of 800 metres. By that time the truck had already crossed the bridge. The timing of the attack was about 2.05 – 2.10 p.m. He then climbed to 2000 metres. When flying over the site he noted that the truck had stopped. Then, at the crossroads near the village of Kulary he noted a second solitary Kamaz truck, also dark-green, and a group of armed persons dressed in camouflage near it, firing at the planes with sub-machine guns. The crew’s attention was drawn to this new target and they no longer observed the first target. The visibility conditions were good and the sky was clear. No other cars were on the road at the time. The pilot submitted a drawing of the site with indications of the two solitary trucks on the road.
82. On 10 October, 2000 a pilot identified as “Petrov” was questioned as a witness. His testimony begins with words “I confirm my previous submissions”, however no other testimonies from him were submitted to the Court. He repeated, almost word for word, the first pilot’s submissions about the circumstances of the attack on 29 October, 1999. He added that he did not see “any refugee convoys” or cars marked with a Red Cross symbol.
83. On 8 December, 2000 additional information was taken from the pilot identified as “Ivanov”. The statement refers to two previous interviews, of which only one – dated 10 October, 2000 – was submitted to the Court. The pilot was questioned about the number and type of missiles fired. He said that he fired two S-24 missiles at the first Kamaz truck.
84. As well as answering questions, the pilots were asked to indicate the coordinates of their targets on a detailed map of the district, which they did. One target was marked on the road before the bridge leading to the village of Shaami-Yurt, the other – about 12 kilometres away along the same road, on an intersection near the village of Kulary.
85. The case-file also contains two photographs of planes, undated and without descriptions.

1) Decision to close the criminal proceedings and its challenge

86. On 7 September, 2001 the criminal case was closed due to the absence of *corpus delicti* in the pilots’ actions. It does not appear, however, that this decision was communicated in a timely manner to the victims or to the applicants. Nor was a copy of this decision submitted to the Court.

87. On 6 June, 2002 Ms Burdynyuk wrote to the Rostov-on-Don Garrison Military Court asking for review of the decision not to open criminal proceedings. On 31 December, 2002 the Military Prosecutor of the Northern Caucasus forwarded her complaint to the Military Circuit Court, along with the criminal case which comprised five volumes. On 4 February, 2003 the North Caucasus Circuit Military Court established that the case should have been reviewed by the Grozny Garrison Court, but because the latter was not functioning, the case was transferred to the Bataysk Garrison Military Court.
88. On 14 March, 2003 the Bataysk Garrison Military Court quashed the decision of 7 September, 2001 and remitted the case for a new investigation. The court cited the decision of 7 September, 2001, according to which the investigation had established that on 29 October, 1999 the pilots "Ivanov" and "Petrov" struck at two solitary Kamaz trucks containing rebel fighters on the road between the border between Ingushetia and Grozny. Both vehicles were destroyed. However, besides the two vehicles, the rockets damaged the convoy of Red Cross vehicles and refugees. As a result of the attack, 14 vehicles were destroyed and 16 persons killed, including Ms Burdynyuk's husband; 11 persons were wounded. The investigation concluded that "the convoy was indeed damaged by the actions of the pilots 'Ivanov' and 'Petrov' from the Ministry of Defence, who were acting in accordance with their mission and aimed the missiles at the cluster of enemy personal [author's note: personnel] and hardware. They did not intend to destroy the civilian population and the Red Cross convoy, because they did not and could not have foreseen such a possibility. Death and injuries were caused to the victims because they, on their own initiative, happened to be in the impact zone of the missiles, the extent of which exceeds 800 metres".

The Garrison Court stated:

"On 7 September, 2001 the criminal case was closed by an investigator of the Circuit Military Prosecutor's Office for the Northern Caucasus under Article 5 § 2 of the Criminal Procedural Code, i.e. due to the absence of corpus delicti in the pilots' actions, because the vehicles of the Red Cross and of the refugees on their own entered into the impact zone of the missiles. The pilots did not and could have not foreseen such consequences [author's note: emphasis added].

The court believes that the pilots were executing an assigned task, namely to 'locate and destroy fortified points and the enemy mobile forces and resources' in 'free chase' mode, i.e. the decision to employ combat means was based on their own appreciation of the observed situation. There is no doubt that such assessment should include not only an assessment of the targets, but also of the possible harm to other vehicles and persons who were in the vicinity. Observing the said targets (cars with 'fighters'), they could not have failed to notice other vehicles with people nearby, and they should have proportionated the weapons according to their characteristics, precision, damage radius etc. The court finds that the pilots did not take all this properly into account, which explains that 14 civilian vehicles were damaged, 16 persons killed and 11 persons were wounded as a result of the missile attack.

... taking into account that not all investigative measures were taken to the extent necessary to ascertain the pilots' guilt, an additional investigation is needed in this case."

89. On March 26, 2003 the North Caucasus Military Prosecutor's Office accepted the case for further investigation.

m) Decision of May 5, 2004

90. On 5 May, 2004 a prosecutor of the North Caucasus Military Prosecutor's Office again closed the criminal case due to the absence of *corpus delicti* in the pilots' actions. A copy of this document was submitted by the Government after the hearings in Strasbourg on 14 October, 2004. The Government did not submit new documents from the investigation file to which the decision refers. From this document it follows that at some point (presumably, after March 2003) the first and the second applicants were questioned as witnesses about the circumstances of the attack and granted victim status in the proceedings. Additional attempts were made to find and question the third applicant, but they were not successful.
91. The document also referred to some additional evidence obtained from the military. It mentioned a log book which noted the time of the missile strike on 29 October, 1999 in the vicinity of Shaami-Yurt as 14.05 – 14.20 p.m.
92. The decision referred to undated statements of the two pilots identified as P. and B. (presumably the same ones as "Ivanov" and "Petrov" [...]). Pilot P. in his statement allegedly submitted that while on mission on 29 October, 1999 they noted a Kamaz truck on the eastern edge of the Samashki forest, near the village of Shaami-Yurt. Some persons jumped out and ran towards the forest. At the same time the plane was shot at from the truck, probably with a large-calibre machine-gun. The pilot realised that the plane had been hit. He reported this to the leading pilot, who requested permission to use fire-power from the control centre. When the permission had been granted, they both fired at the truck two rockets each, twice, from the height of 1600–2000 metres. At that time they did not notice any other vehicles on the road in the vicinity of the truck. There were some vehicles further on the road, towards Grozny, but at a considerable distance. One or two seconds after the missiles were fired the pilot noted another truck coming out of the Samashki forest and heading towards Grozny. The truck entered the impact zone. The pilot did not have time to verify what had happened to it or if there had been other vehicles on the road because of the danger of being shot at.
93. Pilot P. is further quoted as saying that they were informed that the road had been closed at the administrative border with Ingushetia. They therefore presumed that the trucks were coming out of the Samashki forest, where a considerable group of fighters ("*boyeviki*") had gathered. They did not see any transport moving out of Grozny at that time. Pilot B. is quoted as having added to these statements that the missiles could have changed the direction on their own, or because they had been shot at from the ground.
94. The document further cites undated statements of two unidentified airport technicians, who had on 29 October, 1999 examined two SU-25 planes after their return from a mission. The pilots informed them that they had been shot at, probably with a large-calibre machine-gun. The examination of both planes,

hull numbers 40 and 73 respectively, revealed two holes, 20 and 70–90 mm large, in the first plane and one hole, 20 mm large, in the second plane. One technician suggested that the holes resulted from large-calibre machine-gun bullets. The decision further referred to two undated protocols of inspection of planes nos. 40 and 73, which noted similar damage.

95. The decision further mentioned statements on unspecified dates by the commander of the military aviation unit and 12 of the pilots' colleagues, who apparently denied having heard anything about the attack on the civilian convoy on October 29, 1999.
96. In addition, the decision of May 5, 2004 referred to the results of an investigative experiment, which showed that the sign of the red cross on the flag of the Chechen Committee of the Red Cross was clearly distinguishable from the distance of 200 metres. The document also referred to information from the headquarters of the 4-th Army of the Air Force and Anti-Air Defence which defined the impact radius of the S-24 missiles at 300 metres.
97. The document concluded that harm to the civilians was caused by the actions of the pilots B. and P., who had acted in permissible self-defence and had tried to prevent damage to the legitimate interests of the society and state from members of illegal armed groups. Furthermore, the pilots did not intend to cause harm to the civilians because they did not see them until the missiles had been launched. The criminal investigation was closed for absence of *corpus delicti* in the pilots' actions. By the same decision the decisions to grant victim status in the civil proceedings were quashed, and the victims should have been informed of a possibility to seek redress from the Ministry of Defence through civil proceedings. It does not appear that the decision was sent to the victims, including the applicants.

2. Documents submitted by the applicants

98. The applicants submitted a number of additional documents relating to the circumstances of the attack and the investigation.

a) Additional statements by the applicants

99. The applicants submitted additional statements about the circumstances of the attack and its effects. The second applicant submitted that the shock of that day has stayed with her and her relatives. The third applicant submitted that "since that attack on the road I am plagued by nightmares . . . I am still sick every time I see a dummy in a shop window. It reminds me of the dead I saw on the Rostov-Baku highway. This effect is so strong that on several occasions I have fainted in shops. A month ago I walked into a phone company store in Nazran. They had a model of a hand in the shop window. That brought back the memory of a hand cut off and a woman's leg that I saw right in front of me on the road on October 29, 1999. I felt sick and fainted. I was sick for some days afterwards. Now I simply can't walk into a shop with dummies or with models of human bodies".

100. The third applicant also submitted a list of items which were inside the GAZ vehicle destroyed during the attack and documents for the three vehicles destroyed during the attack – a “Zhiguli” VAZ 21063, produced in 1992, a “Niva” VAZ 21213, produced in 1996 and a GAZ 53, produced in 1982. The list of items included cash in US \$ to the amount of 48,000, hi-fi and computer equipment to a value of 1,350 US \$, household items and clothing to the value of 28,640 US \$, jewellery to the value of 8,770 US dollars, and three cars to a value of 20,500 US \$. The total value was indicated at 108,760 US \$.

b) Statements of other witnesses and victims

101. The applicants submitted five additional testimonies from witnesses and victims, related to the circumstances of the attack. Witness A. testified that she was in the same car as Ramzan Mezhidov and Shamil Gigayev, TV reporters, both of whom were killed. After the first blast Mezhidov got out of the car and filmed the destruction around him; he was killed by a second blast. Afterwards, they attempted to retrieve his camera and the tape, but they were beyond repair. Gigayev’s widow testified about her husband’s death. Witness B. testified that their car was near Shaami-Yurt and returning to Grozny when the attack occurred. The witness and his brother were wounded and taken to the Urus-Martan hospital for treatment. On 22 November, 1999 he was transferred to Ingushetia. Two other witnesses, employees of the Red Cross, also described the circumstances of the attack. All witnesses denied that there had been any shooting at the planes before or during the attack, or that there were armed men in the convoy.

c) Human Rights Watch Report

102. The applicants submitted a report prepared by the NGO Human Rights Watch in April 2003, entitled “A Summary of Human Rights Watch Research on Attacks on Fleeing Civilians and Civilian Convoys during the War in Chechnya, Russia, between October 1999 and February 2000”. The submission, prepared for the European Court of Human Rights, is based on eyewitness testimonies collected by the HRW researchers in Ingushetia between November 1999 and May 2000. The report described at least five independent incidents where civilians fleeing from fighting were attacked *en route*. The report stated that “the Russian forces appear to have deliberately bombed, shelled, or fired upon civilian convoys, causing significant civilian casualties. . . . The most egregious attack occurred on 29 October, 1999 when dozens of civilian vehicles taking a so-called safe route out of Grozny on the Baku-Rostov highway were attacked by Russian aircraft.” The report invoked provisions of international humanitarian law, namely Common Article 3 to the Geneva Conventions of 1949, as well as Article 13 (2) of Protocol II Additional to the Geneva Conventions of August 1949. The report submitted that “where aircraft make multiple attack passes over a civilian convoy, or convoys are subject to prolonged attack by ground troops, the most plausible

inference is that such attacks are intentional and with the likely knowledge of the predominantly civil character of the convoy. Customary international law requires that any attacks discriminate between the civilians and military objects and that foreseeable injury to civilians be proportionate to the direct and concrete military advantage to be gained by the attack. . . . Each of the incidents described below raises concerns that civilians may have been targeted intentionally or that the force used was not proportionate to the military advantage pursued. . . .”

103. The report proceeded to describe in detail the announcement of the safe route on 29 October, 1999, the closing of the administrative border with Ingushetia and the attack itself. Based on interviews with witnesses, press articles and public statements, it presented information about the damaged vehicles. It referred to the van with 13 passengers in which the first and the second applicants with their families were travelling. The second applicant and another passenger who had been in the minivan were interviewed and gave details of the attack.
104. The report concluded that the exact number of victims of the attack is unknown and it is unlikely that it would ever be known, since many victims were never identified. The eyewitnesses gave accounts of the number of persons killed, varying between 40 and 70 people. They were buried in nearby villages.

3. Documents related to the establishment of facts in the domestic courts

105. *Various documents related to the establishment of facts of the first applicant's children's deaths were submitted to the Court* [author's note: emphasis added].

a) The first applicant's statement

106. In her statement of 15 December, 1999 the first applicant asked the Nazran Town Court to certify the fact of her two children's deaths. She submitted that on 29 October, 1999 a refugee convoy was attacked by fighter planes on the “Kavkaz” highway, between Achkhoy-Martan and Shaami-Yurt. Many people were killed, among them her children Ilona Isayeva and Said-Magomed Isayev. Their bodies were taken back to Grozny and buried in Chernorechye, near Grozny. The applicant could not attend her children's funeral, because at that time she was being treated for her wounds by relatives in Grozny. She could not produce any documents about her children's deaths nor about her own wounds, because no hospital or state body was functioning in Chechnya due to the hostilities. The applicant could not even obtain a burial certificate from the local authority. She requested that the second applicant and Ruslan Vakhobov be called to testify about her children's deaths, to which they had been eyewitnesses. At that time they were all living in the Logovaz-1 refugee camp in Nazran. The court decision was required to obtain death certificates,

which the civil registration body had refused to issue in the absence of medical certification of the deaths.

b) Transcript of the court proceedings

107. On 20 December, 1999 the Nazran Town Court granted the first applicant's request. From the transcript of the proceedings it follows that the court heard the first applicant, who repeated her statement, and two witnesses as she had requested. Ruslan Vakhobov and the second applicant confirmed the deaths of Ilona Isayeva and Said-Magomed Isayev [...].

[...]

2. The applicants

132. The applicants submitted that they had complied with the obligation to exhaust domestic remedies, in that the remedies referred to by the Government would be illusory, inadequate and ineffective. The applicants based this assertion on the following arguments.

a) The violations were carried out by State agents

133. The applicants submitted that the anti-terrorist operation in Chechnya, run by agents of the State, was based on the provisions of the Law on the Suppression of Terrorism, and was officially sanctioned at the highest level of State power.
134. The applicants referred to the text of the Law on the Suppression of Terrorism, which allowed anti-terrorist units to interfere with a number of rights, including the right to freedom of movement, liberty, privacy of home and correspondence, etc. The Law set no clear limit on the extent to which such rights could be restricted and provided for no remedies for the victims of violations. Nor did it contain provisions regarding officials' responsibility for possible abuses of power. The applicants referred to correspondence between the Secretary General of the Council of Europe and the Russian Government in 2000 under Article 52 of the European Convention on Human Rights. They pointed out that the Consolidated Report, commissioned by the Secretary General to analyse the correspondence, had highlighted those deficiencies in the very Law to which the Russian Government referred as a legal basis for their actions in Chechnya.
135. They also submitted that although the officials who had mounted the anti-terrorist operations in Chechnya should have been aware of the possibility of wide-scale human rights abuses, no meaningful steps had been taken to stop or prevent them. They submitted press-cuttings containing praise of the military and police operations in Chechnya by the President of the Russian Federation, and suggested that prosecutors would be unwilling to contradict the "official line" by prosecuting agents of the law-enforcement bodies or the military.

136. The applicants alleged that there was a practice of non-respect of the requirement to investigate abuses committed by servicemen and members of the police effectively, both in peacetime and during conflict. The applicants based this assertion on four principal grounds: impunity for the crimes committed during the current period of hostilities (since 1999), impunity for the crimes committed in 1994–1996, impunity for police torture and ill-treatment all over Russia, and impunity for the torture and ill-treatment that occur in army units in general.
137. As to the current situation in Chechnya, the applicants cited human rights groups, NGO and media reports on violations of civilians' rights by federal forces. They also referred to a number of the Council of Europe documents deploring lack of progress in investigations into credible allegations of human rights abuses committed by the federal forces.

b) Ineffectiveness of the legal system in the applicants' case

138. The applicants further argued that the domestic remedies to which the Government referred were ineffective due to the failure of the legal system to provide redress. They invoked the Court judgment in the case of *Akdivar and Others v. Turkey* and argued that the Russian Federation had failed to satisfy the requirement that the remedy was “an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaint and offered reasonable prospects of success” (see the *Akdivar and Others v. Turkey* judgment of 30 August 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 68).
139. In the applicants' view, the Government had not satisfied the criteria set out in the *Akdivar* judgment, since they had provided no evidence that the remedies that existed in theory are or were capable of providing redress, or that they offered any reasonable prospects of success. The applicants challenged each of the two remedies mentioned by the Government.
140. So far as civil proceedings were concerned, the applicants submitted that they did not have effective access to the remedies suggested by the Government. An application to the Supreme Court would be plainly useless, because it had only limited jurisdiction as a court of first instance, e.g. to review the lawfulness of administrative acts. The Supreme Court's published case-law did not contain a single example of a civil case brought by a victim of the armed conflict in Chechnya against the state authorities. As to the possible transfer of cases by the Supreme Court, the applicants referred to a decision by the Constitutional Court of 16 March 1998, which found that certain provisions of the Code of Civil Procedure then in force, permitting higher courts to transfer cases from one court to another were unconstitutional. As to the possibility of applying to a district court in a neighbouring region or in Chechnya, the applicants submitted that this would have been impractical and inefficient.

141. In respect of a civil claim, the applicants argued that, in any event, it could not have provided an effective remedy within the meaning of the Convention. A civil claim would ultimately be unsuccessful in the absence of a meaningful investigation, and a civil court would be forced to suspend consideration of such a claim pending the investigation under Article 214 (4) of the Code of Civil Procedure. They further argued that civil proceedings could only lead to compensation for pecuniary and non-pecuniary damages, while their principal objective was to see the perpetrators brought to justice. Finally, they pointed out that although civil claims to obtain compensation for the military's illicit actions had been submitted to the courts, almost none had been successful.
142. The applicants submitted that criminal proceedings alone were capable of providing adequate effective remedies, and that compensation could be awarded to them in the course of criminal proceedings as victims of the crimes. The applicants questioned the effectiveness of the investigation into their case.

B. The Court's assessment

143. In the present case the Court made no decision about exhaustion of domestic remedies at the admissibility stage, having found that this question was too closely linked to the merits. The same preliminary objection being raised by the Government at the stage of considerations on the merits, the Court should proceed to evaluate the arguments of the parties in view of the Convention provisions and its relevant practice.
144. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 35 s. 1 of the Convention obliges applicants first to use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 s.1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but that no recourse should be had to remedies which are inadequate or ineffective [...].
145. The Court emphasises that the application of the rule of exhaustion of domestic remedies must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting States have agreed to set up. Accordingly, it has recognised that Article 35 s. 1 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the

circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting State concerned but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies [...].

146. The Court observes that Russian law provides, in principle, two avenues of recourse for the victims of illegal and criminal acts attributable to the State or its agents, namely civil procedure and criminal remedies.
147. As regards a civil action to obtain redress for damage sustained through alleged illegal acts or unlawful conduct on the part of State agents, the Court recalls that the Government have relied on two possibilities, namely to lodge a complaint with the Supreme Court or to lodge a complaint with other courts [...]. The Court notes that at the date on which the present application was declared admissible, no decision had been produced to it in which the Supreme Court or other courts were able, in the absence of any results from the criminal investigation, to consider the merits of a claim relating to alleged serious criminal actions. In the instant case, however, the applicants are not aware of the identity of the potential defendant, and so, being dependent for such information on the outcome of the criminal investigation, did not bring such an action.
148. As regards the case of Mr Khashiyev, who had brought a complaint to the Court [...] to which the Government refer, it is true that, after receiving the Government's claim that a civil remedy existed, he brought an action before the Nazran District Court in Ingushetia. That court was not able to, and did not, pursue any independent investigation as to the person or persons responsible for the fatal assaults, but it did make an award of damages to Mr Khashiyev on the basis of the common knowledge of the military superiority of the Russian federal forces in the district in question at the relevant time and the State's general liability for the actions by the military.
149. The Court does not consider that that decision affects the effectiveness of a civil action as regards exhaustion of domestic remedies. Despite a positive outcome for Mr Khashiyev in the form of a financial award, it confirms that a civil action is not capable, without the benefit of the conclusions of a criminal investigation, of making any findings as to the identity of the perpetrators of fatal assaults, and still less to establish their responsibility. Furthermore, a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if, in respect of complaints under those Articles, an applicant would be required to exhaust an action leading only to an award of damages (see *Yaşa v. Turkey*, judgment of 2 September, 1998, *Reports* 1998-VI, p. 2431, § 74).

150. The Court also notes the practical difficulties cited by the applicants and the fact that the law-enforcement bodies were not functioning properly in Chechnya at the time. In this respect the Court is of the opinion that there existed special circumstances which affected their obligation to exhaust remedies that would otherwise be available under Article 35 § 1 of the Convention.
151. In the light of the above the Court finds that the applicants were not obliged to pursue the civil remedies suggested by the Government in order to exhaust domestic remedies, and the preliminary objection is in this respect unfounded.
152. As regards criminal law remedies, the Court observes that a criminal investigation was instituted into the attack on the refugee convoy, albeit only after a considerable delay – in May 2000, despite the fact that the authorities were aware of it immediately after the incident. The complaints to the authorities made by other victims of the attack, the Committee of the Red Cross and Ms Burdynyuk, in November and December 2000, did not lead to an investigation. The Court further notes that, at least for several years after the incident, the applicants were not questioned about the event, were not granted victim status, had no access to the investigation file and were never informed of its progress [...]. No charges were brought against any individuals.
153. The Court considers that this limb of the Government's preliminary objection raises issues concerning the effectiveness of the criminal investigation in uncovering the facts and responsibility for the attack of which the applicants complain. These issues are closely linked to those raised in the applicant's complaints under Articles 2, 3 and 13 of the Convention. Thus, it considers that these matters fall to be examined under the substantive provisions of the Convention invoked by the applicants. In view of the above, it is not necessary for the Court to decide whether there was indeed a practice of non-investigation of crimes committed by police or military officials, as claimed by the applicants.

II. Alleged Violation of Article 2 of the Convention

154. *The first applicant alleged that her two children were killed by agents of the State in violation of Article 2. The three applicants complained that their right to life was violated by the attacks against the convoy by military planes. They also submitted that the authorities had failed to carry out an effective and adequate investigation into these attacks. They relied on Article 2 of the Convention [author's note: emphasis added], which provides:*
 1. "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

A. The alleged failure to protect life

1. Arguments of the parties

a) The applicants

155. The applicants alleged that the way in which the operation had been planned, controlled and executed constituted a violation of their own right to life and the right to life of their relatives. In their opinion, this violation was intentional, because the authorities should have known of the massive civilian presence on that road on 29 October, 1999 and because the aircraft flew for a relatively long time at low altitude above the convoy before firing at it.
156. The choice of means in the present case, namely that of the military aviation and S-24 missiles with a large radius of destruction, was not in conformity with the “strict proportionality” test, established in the Court’s practice. They submitted that the degree of force used was manifestly disproportionate to whatever aim the military were trying to achieve, even had it been used in self-defence.
157. The applicants regarded the aerial bombardment as an indiscriminate attack on civilians, which could not be justified under international humanitarian law. They referred, in this respect, to the common Article 3 of the Geneva Conventions of 12 August, 1949.
158. The applicants pointed to the Government’s failure to produce all the documents contained in the case-file related to the investigation of the attack. In their opinion, this should lead the Court to draw inferences as to the well-foundedness of their allegations.

b) The Government

159. The Government did not dispute the fact of the attack, the fact that the first applicant’s two children had been killed or the fact that the first and the second applicants had been wounded.
160. They submitted that the pilots had not intended to cause harm to the civilians, because they did not and could not have seen the convoy. In the Government’s view, the attack and its consequences were legitimate under Article 2 § 2 (a), i.e. they had resulted from the use of force absolutely necessary in the circumstances of protection of a person from unlawful violence. Basing themselves on the

results of the investigation, they submitted that the use of air power was justified by the heavy fire opened by members of illegal armed formations, which constituted a threat not only to the pilots, but also to the civilians who were in the vicinity. The pilots had to act in order to stop these illegal actions.

c) The third party submissions

161. Rights International, the Centre for International Human Rights Law, Inc., a USA based NGO, submitted written comments. They submitted, referring to the Court's decision in *Banković and Others v. Belgium and 16 Other Contracting States*, that the Court should take into account any relevant rules of international law in interpreting the Convention (see *Banković and Others v. Belgium and 16 Other Contracting States* (dec.) [GC], no. 52207/99, ECHR 2001-XII).
162. The submission addressed the relevant rules of international law governing armed attacks on mixed combatant/civilian targets during a non-international armed conflict.
163. Common Article 3 of the 1949 Geneva Conventions governs non-international conflicts. The relevant provisions state: "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 ... shall in all circumstances be treated humanely ... To this end the following acts are and shall be prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
 - (a) violence to life and person ..."
164. Individuals are criminally responsible for violations of Common Article 3 under both the Geneva Conventions and the International Criminal Court (ICC) Statute.
165. The submission recognised the difficulty of differentiating between combatants and non-combatants in non-international military conflicts, where the irregular military forces are not clearly identified as such. In these circumstances it was essential that attacks on mixed combatant/civilian targets be undertaken in a manner calculated to reduce the probability of harm to civilians.
166. The norms of non-international armed conflict should be construed in conformity with international human rights law governing the right to life and to humane treatment. The right to life and to humane treatment required that when force is used, it could only cause the least amount of foreseeable physical and mental suffering. In this respect, they referred, among other authorities, to the Court's finding in *Güleç v. Turkey* that States should make non-lethal weapons available to their forces for use against mixed targets (see *Güleç v. Turkey* judgment of 27 July, 1998, *Reports* 1998-IV).

167. The submission argued that the law of non-international armed conflicts as construed by international human rights law established a three-part test. First, armed attacks on mixed combatant/civilian targets were lawful only if there was no alternative to using force for obtaining a lawful objective. Second, if such use of force was absolutely necessary, the means or method of force employed could only cause the least amount of foreseeable physical and mental suffering. Armed forces should be used for the neutralisation or deterrence of hostile force, which could take place by surrender, arrest, withdrawal or isolation of enemy combatants – not only by killing and wounding. This rule required that States made available non-lethal weapons technologies to their military personnel. Furthermore, the authorities should refrain from attacking until other non-lethal alternatives could be implemented. Third, if such a means or method of using force did not achieve any of its lawful objectives, then force could be incrementally escalated to achieve them.

2. The Court's assessment

a) General principles

168. Article 2, which safeguards the right to life and sets out the circumstances where deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective.

169. Article 2 covers not only intentional killing but also the situations where it is permitted to “use force” which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is, however, only one factor to be taken into account in assessing its necessity. Any use of force must be no more than “absolutely necessary” for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is “necessary in a democratic society” under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.

170. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances.

171. In particular, it is necessary to examine whether the operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The authorities must take appropriate care to ensure that any risk to life is minimised. The Court must also examine whether the authorities were not negligent in their choice of action [...]. The same applies to an attack where the victim survives but which, because of the lethal force used, amounted to attempted murder [...].
172. As to the facts that are in dispute, the Court recalls its jurisprudence confirming the standard of proof “beyond reasonable doubt” in its assessment of evidence ... Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account [...].
173. The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny (see, *mutatis mutandis*, the *Ribitsch v. Austria* judgment of 4 December, 1995, Series A no. 336, § 32, and *Avsar* judgment, cited above, § 283) even if certain domestic proceedings and investigations have already taken place.

b) Application in the present case

174. It is undisputed that the applicants were subjected to an aerial missile attack, during which the first applicant’s two children were killed and the first and the second applicant were wounded. This brings the complaint, in respect of all three applicants, within the ambit of Article 2). The Government suggested that the use of force was justified in the present case under paragraph 2 (a) of Article 2 and that the harm done was not intentional.
175. At the outset it has to be stated that the Court’s ability to make an assessment of the legitimacy of the attack, as well as of how the operation had been planned and executed, is severely hampered by the lack of information before it. No plan was submitted and no information was provided as to how the operation had been planned, what assessment of the perceived threats and constraints had been made, or what other weapons or tactics had been at the pilots’ disposal when faced with the ground attack the Government refer to. Most notably, there was no reference to assessing and preventing possible harm to the civilians who might have been present on the road or elsewhere in the vicinity of what the military could have perceived as legitimate targets.
176. The Court further notes that the document submitted by the Government in October 2004 refers to a number of new evidence, which have not been submitted to the Court ... Several undated documents on which the conclusions of that document are based appear inconsistent with other evidence present in the case-file. No explanation was submitted as to why such

important evidence as the testimonies of the technicians and the examination of the planes have not been collected earlier, nor as to why the pilots' statements cited in it appear to be in contradiction with their other, presumably earlier, statements. It is not clear why this document, issued in May 2004, was only submitted to the Court and to the other party in October 2004. The Court will therefore rely on its contents with caution.

177. Bearing this in mind, the documents submitted by the parties and the investigation file nevertheless allow the Court to draw certain conclusions as to whether the operation was planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, damage to civilians.
178. The Court accepts that the situation that existed in Chechnya at the relevant time called for exceptional measures on behalf of the State in order to regain control over the Republic and to suppress the illegal armed insurgency. These measures could presumably include employment of military aviation equipped with heavy combat weapons. The Court is also prepared to accept that if the planes were attacked by illegal armed groups that could have justified use of lethal force thus falling within paragraph 2 of Article 2.
179. However, in the present case, the Government failed to produce convincing evidence which would have supported such findings. The testimonies submitted by the two pilots and the air traffic controller are the only mention of such an attack [...]. These testimonies were collected in October and December 2000, i.e. over a year after the attack. They are incomplete and refer to other statements made by these witnesses during the course of the investigation, which the Government failed to disclose. They are made in almost identical terms and contain a very brief and incomplete account of the events. Their statements quoted in the document of 5 May, 2004 submit a somewhat different account of the circumstances of the attack at the planes from the trucks, the height from which the pilots fired at the first truck and the presence of other vehicles on the road [...]. In the absence of all the pilots' statements and lack of explanation of the obvious inconsistencies contained in them the Court puts into question the credibility of their statements.
180. The Government failed to submit any other evidence that could be relevant to legitimise the attack, including the exact nature of the pilots' mission and evaluation of the perceived threats and constraints, an account of the pilots' debriefing upon return, mission reports or relevant explanations which they presumably had to submit concerning the discharged missiles and the results of their attack, a description or names of the fighters presumably killed in the attack etc. The decision of 5 May, 2004 refers to a description of the damage caused to the planes by the hostile fire and statements of the technicians. These documents were not submitted to the Court, and the Court retains doubts as to the credibility of evidence disclosed four and a half years after the events in question [...]. Further, none of the other witnesses whose statements were produced mentioned seeing the Kamaz trucks from which the planes would be attacked or the presence of armed

persons in the convoy at all. An investigation of the site of the attack, conducted in August 2000, found remains of the Red Cross Mercedes truck. No remains of a Kamaz truck were reported [...]. The only non-military witness who reported seeing armed men on the road to Grozny on 29 October, 1999 referred to a UAZ all-terrain vehicle in the Samashki forest, but not to a Kamaz truck [...].

181. On the basis of the Government's submissions and admissions, the military were responsible for a military operation which resulted in the losses suffered by the applicants. The Government claim that the aim of the operation was to protect persons from unlawful violence within the meaning of Article 2 s. 2 (a) of the Convention. In the absence of corroborated evidence that any unlawful violence was threatened or likely, the Court retains certain doubts as to whether the aim can at all be said to be applicable. However, given the context of the conflict in Chechnya at the relevant time, the Court will assume in the following paragraphs that the military reasonably considered that there was an attack or a risk of attack from illegal insurgents, and that the air strike was a legitimate response to that attack.
182. Thus, assuming that the use of force could be said to have pursued the purpose set out in paragraph 2 (a) of Article 2, the Court will consider whether such actions were no more than absolutely necessary for achieving that purpose. The Court will therefore proceed to examine, on the basis of the information submitted by the parties and in view of the above enumerated principles [...], whether the planning and conduct of the operation were consistent with Article 2 of the Convention.
183. The applicants, Red Cross workers and other witnesses to the attack unanimously testified about being aware in advance of the "safe passage" or "humanitarian corridor" to Ingushetia for the Grozny residents on 29 October, 1999. This exit was prepared and foreseen by the residents fleeing from heavy fighting. They collected their belongings and arranged for transportation in advance, and started early in the morning of 29 October, 1999 in order to reach safety. The first and second applicants and their families arranged for a minivan with a driver. They submitted that on October 29, 1999 they attempted to cross the administrative border, but the military at the roadblock ordered them to return the next day. The third applicant and her family had been waiting since October 26, 1999 for the announced "safe exit" in the village of Gekhi, because the shelling of Grozny had become too severe [...]. Ms Burdynyuk and her husband were aware of the "corridor" and ordered in advance a truck from a transport agency to take them and their household items out [...]. The Red Cross workers testified that they planned the evacuation of the offices for 29 October, 1999 to benefit from the announced "safe passage", of which they had informed their headquarters in Nalchik and obtained a permit to travel from the local rebel commander [...].
184. The presence of a substantial number of civilian cars and thousands of people on the road on that day is further confirmed by the statements of the applicants

and the statements by the Red Cross workers and other witnesses, who testified that there had been a line of cars several kilometres long. The Government in their submission of March 28, 2003 explained that on October 29, 1999 the roadblock “Kavkaz-1” on the administrative border between Chechnya and Ingushetia had been closed, because it could not cope with the substantial amount of refugees wishing to cross [...].

185. The applicants and the Red Cross workers refer to an order from a senior military officer at the roadblock to clear the road and to return to Grozny, which came at round 11 a.m. It appears that the civilians in the convoy were fearful for their safety on the return journey, and they referred to assurances of security given by that senior officer [...]. As the applicants and other witnesses submit, the order to return caused a traffic jam on the road, filled with cars, buses and trucks. Some had to wait as long as about an hour to be able to start moving and the progress was very slow, at least initially [...].
186. All this should have been known to the authorities who were planning military operations on 29 October, 1999 anywhere near the Rostov-Baku highway and should have alerted them to the need for extreme caution as regards the use of lethal force.
187. It transpires from the testimony given by the air controller identified as “Sidorov” that he was given the mission order for 29 October, 1999 on the previous evening. The mission was to prevent movement of heavy vehicles towards Grozny in order to cut supplies to the insurgents defending the city. Neither he, nor, apparently, the pilots had been informed of the announcements of a “safe passage” for that day, of which the civilians were keenly aware. Nor had they been alerted at any moment by the military manning the “Kavkaz-1” roadblock to the massive presence of refugees on the road, moving towards Grozny on their orders [...].
188. It appears from the air controller’s evidence that forward air controllers are normally taken on board when a mission is perceived as taking place close to federal positions. The absence of a forward air controller on the mission of 29 October, 1999 meant that, in order to receive permission to use weapons, the pilots had to communicate with a controller at the control centre, who could not see the road and could not be involved in any independent evaluation of the targets.
189. All this had placed the civilians on the road, including the applicants, at a very high risk of being perceived as suitable targets by the military pilots.
190. The pilots in their testimonies presented to the Court submitted that they had attacked two solitary Kamaz trucks on the stretch of road between Shaami-Yurt and Kulary villages, which are about 12 kilometres apart. They stated that at that time the road was empty save for these two trucks. No questions were put to them to explain the civilian casualties [...]. From the document dated 5 May, 2004 it appears that at some point after March 2003 the pilots were questioned again, and submitted that after they had fired at the first truck another truck appeared out of the forest and drove into the impact radius of the missile [...].

191. The air controller in his testimony stated that he had not been aware of any civilian casualties until the day of the interview, i.e. until a year after the incident [...]. The Court finds this difficult to accept, because the Red Cross immediately communicated information about the casualties to the relevant authorities, which had already in November 1999 started some form of investigation of the incident. The press release from the Russian military air force announced the destruction of a column of trucks with fighters and ammunition on the road towards Grozny on 29 October, 1999 and denied the allegations that civilians could have been injured by the air strikes [...].
192. The Court finds insurmountable the discrepancy between the two pilots' and the air controller's testimonies that the aircraft directed their missiles at isolated trucks and the victims' numerous submissions about the circumstances of the attack. The Government explained the casualties by submitting that in the very short time between firing of the missiles at the trucks and the moment they hit them, the convoy, previously unseen by the pilots, appeared on the road and was affected due to the wide impact radius of the missiles used. The Court does not accept this reasoning, which does not begin to explain the sudden appearance of such a large number of vehicles and persons on the road at the time. Moreover, the Government's contentions are contradicted by a substantial mass of other evidence presented to the Court.
193. First, it follows from the witnesses' accounts that several vehicles in the convoy were directly hit by the explosions – the Mercedes truck used by the Red Cross, the cabin of which had been destroyed, the PAZ bus and a Kamaz truck filled with refugees. The third applicant submits that her GAZ car with possessions was destroyed by a direct hit. This excludes accidental damage by shrapnel due to a large impact radius.
194. *Second, the applicants, the Red Cross workers and other witnesses submitted that the attacks were not momentaneous, but lasted for several hours, possibly as many as four [author's note: emphasis added].* The pilots and the air controller gave the timing of the first attack as about 2.05 – 2.15 p.m., but they failed to indicate, even approximately, the timing of the second attack. In their submissions on the admissibility of the applications, the Government indicated the timing of the attack as 2.05 – 2.20 p.m. and 3.30 – 3.35 p.m. Assuming that the initial missile was fired about 2 p.m. at what the pilots had perceived as a "solitary" vehicle on an otherwise empty road, further launches, which took place at least an hour and a half later, could not have failed to take into account other vehicles. It is established that, during that quite significant stretch of time, *the pilots made several passes over the road, descending and ascending from 200 to 2000 metres. They had the benefit of good visibility conditions and thus could not have failed to see the numerous cars on the road. The air force press release, issued soon after the events, spoke of a "column of trucks with fighters and ammunition" and not of two solitary vehicles [author's note: emphasis added].*
195. *The military used an extremely powerful weapon for whatever aims they were trying to achieve. According to the conclusions of the domestic*

investigation, 12 S-24 non-guided air-to-ground missiles were fired, six by each plane, which is a full load. On explosion, each missile creates several thousand pieces of shrapnel and its impact radius exceeds 300 metres (or 600–800 metres, as suggested by some documents) [author's note: emphasis added]. There were thus several explosions on a relatively short stretch of the road filled with vehicles. Anyone who had been on the road at that time would have been in mortal danger.

196. The question of the exact number of casualties remains open, but there is enough evidence before the Court to suggest that in these circumstances it could be significantly higher than the figures reached by the domestic investigation. The Court also bears in mind the report produced by Human Rights Watch concerning this and other incidents where civilians were attacked when fleeing from fighting. The Court does not find any difference between the situations of the three applicants in view of the level of danger to which they were exposed.
197. The question of the apparent disproportionality in the weapons used was also raised by the Bataysk Garrison Court in its decision of 14 March, 2003, by which the decision to close the investigation was quashed and a new investigation ordered.
198. In addition, the fact that the Government failed to invoke the provisions of domestic legislation at any level which would govern the use of force by the army or security forces in situations such as the present one, while not in itself sufficient to decide on a violation of the positive obligation of the State to protect the right to life, in the circumstances of the present case is also directly relevant to the proportionality of the response to the alleged attack [...].
199. *To sum up, even assuming that that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October, 1999, the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population* [author's note: emphasis added].
200. *The Court finds that there has been a violation of Article 2 of the Convention in respect of the responding State's obligation to protect the right to life of the three applicants and of the two children of the first applicant, Ilona Isayeva and Said-Magomed Isayev* [author's note: emphasis added].

B. Concerning the inadequacy of the investigation

1. Arguments of the parties

a) The applicants

201. The applicants submitted that the authorities had failed to conduct an independent, effective and thorough investigation into the attack.

202. In this respect the applicants submitted that the situation which had existed in Chechnya since 1999 was characterised by significant civil strife due to the confrontation between the federal forces and the Chechen armed groups. They referred to press and NGO reports which, in their view, demonstrated that there were serious obstacles to the proper functioning of the system for the administration of justice and put the effectiveness of the prosecutors' work in serious doubt. They submitted that the difficult circumstances in the Republic did not dispense the Russian Government from their obligations under the Convention and that the Government had failed to provide any evidence that an investigation into abuses against civilians was effective and adequate.
203. The applicants further submitted that they had good reason not to apply to the prosecutors immediately after the attack, because they felt vulnerable, powerless and apprehensive of the State representatives. They also stated that the prosecutor's office had inexplicably failed to act with sufficient expediency on receiving news of the attack. The prosecutor's office knew or should have known about the attack and about the deaths of numerous civilians as early as 30 October, 1999, when the ICRC communicated the news of the attack to the Ministry of Interior. In the applicants' opinion, the information from the Red Cross and in the media concerning the destruction of medical vehicles, which enjoy special protection under international humanitarian law and domestic law, and the high number of casualties reported should have prompted the prosecutors to act with special expediency and diligence.
204. They further noted that the Nazran District Court, which certified the deaths of the first applicant's children on 20 December, 1999, should have made the information available to the prosecutors, in accordance with Article 225 of the Civil Procedural Code. They also pointed out that the first and second applicants had received medical assistance in Ingushetia, and that the medical workers were under an obligation to inform the law-enforcement bodies of injuries that might have been related to a crime.
205. The applicants found that despite all of the above the prosecutors had failed to act quickly to investigate the attack. No criminal case had been instituted until May 2000. Moreover, a number of press statements issued by high-ranking Russian officials, including from the air force's press centre, denied that the attack that took place on 29 October, 1999 had led to any civilian casualties. The investigation was closed in September 2001 for lack of *corpus delicti*. This decision had been appealed by another victim of the attack, Ms Burdynyuk.
206. Finally, the applicants submitted that the investigation of the crimes had been inadequate and incomplete and could not be regarded as effective. They referred to shortcomings in the investigation. The applicants referred to the failure of the authorities to contact them timely for questioning, to lack of information about the progress of the case and of their procedural status.

b) The Government

207. The Government denied any shortcomings in the investigation. They referred to the decision of the Bataysk Garrison Court of 14 March, 2003, which had quashed the decision to terminate the investigation and sent the case for further investigation, and to the military prosecutor's decision of 5 May, 2004 to close the criminal investigation for absence of *corpus delicti*, which had not been appealed by the applicants.

2. The Court's assessment

a) General considerations

208. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force [...].
209. The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures [...].
210. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events [...]. This means not only a lack of hierarchical or institutional connection but also a practical independence [...].
211. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances [...] and to the identification and punishment of those responsible [...]. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death [...]. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard [...].

212. A requirement of promptness and reasonable expedition is implicit in this context [...]. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts [...].
213. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests [...].

b) Application in the present case

214. An investigation was carried out into the attack of 29 October, 1999. The Court must assess whether that investigation met the requirements of Article 2 of the Convention.
215. The applications to the military prosecutors made independently by the Red Cross and by Ms Burdynyuk in November and December 1999 constituted detailed and well-founded allegations of heavy casualties caused to civilians and an attack on cars marked with the Red Cross sign. However, despite these very serious allegations, supported by substantial evidence, both their complaints were initially rejected as unsubstantiated by the military prosecutors of military unit no. 20102 [...].
216. *The first applicant applied to the Nazran Town Court, which on 20 December, 1999 certified the deaths of her two children as a result of an air strike by the Russian military. The court was obliged under domestic law to report this information to the prosecuting bodies* [author's note: emphasis added].
217. Despite that, a proper investigation into the complaint submitted by the Red Cross was opened by a military prosecutor only in May 2000. The investigation into Ms Burdynyuk's complaint was opened and joined to the Red Cross complaint in October 2000. The criminal investigation into the deaths of the first applicant's children and the wounding of the first and second applicant was opened in September 2000 by the District Prosecutor's Office of Achkhoy-Martan, upon communication of the complaints by the Court to the Respondent Government. It was transferred in November 2000 to the military prosecutor's office of military unit no. 20102 and joined to the pending investigation.
218. *There was thus a considerable delay – at least until May 2000 – before a criminal investigation was opened into credible allegations of a very serious crime. No explanation was put forward to explain this delay* [author's note: emphasis added].

219. The Court notes a number of elements in the documents submitted in the investigation file which, together, produce the strong impression of a series of serious and unexplained failures to act once the investigation had commenced.
220. No plan of the operation of 29 October, 1999 was produced, though it appears that it had been requested by the Achkhoy-Martan District Prosecutor's Office in November 2000 . . . *It also transpires from the documents contained in the case-file that the military initially denied that any military aviation flights had taken place in the vicinity of Shaami-Yurt on 29 October, 1999. This served as a basis to refuse to open a criminal investigation on 27 April, 2000* [author's note: emphasis added]. Additional documents to clarify these contradictions were not requested by the investigation. It does not appear that an operations record book, mission reports and other relevant documents produced immediately before or after the incident were requested or reviewed.
221. There appear to have been no efforts to establish the identity and rank of the senior officer at the "Kavkaz-1" military roadblock who ordered the refugees to return to Grozny and allegedly promised them safety on the route, and to question him or other servicemen from that roadblock.
222. Finally, and probably most importantly, no efforts were made to collect information about the declaration of the "safe passage" for civilians for 29 October, 1999, or to identify someone among the military or civil authorities who would be responsible for the safety of the exit. *Nothing has been done to clarify the total absence of coordination between the public announcements of a "safe exit" for civilians and the apparent lack of any considerations to this effect by the military in planning and executing their mission* [author's note: emphasis added].
223. In the light of these omissions alone it is difficult to imagine how the investigation could be described as efficient.
224. There are other elements of the investigation that call for comment. The investigation did not take sufficient steps to identify other victims and possible witnesses of the attack. While some attempts were made to locate the first and second applicants, it does not appear that such attempts were made in respect of the third applicant, at least until March 2003. Also, at least until March 2003, the applicants were not contacted directly by the investigation, no testimonies were collected from them and no victim status was awarded to them in accordance with the domestic legislation. As to the Government's assertion that the investigation was undermined by the applicants' failure to present themselves to the authorities or to leave an address, the Court notes that it is true that some attempts were made to locate the first and second applicants with a view to obtaining their statements with regard to their allegations. However, it should be borne in mind that the applicants fled Grozny in an attempt to escape wide-scale attacks on the city. They had no permanent address to submit to the authorities since they were moving from

one place to another in order to find a shelter for themselves and their families. Their feelings of vulnerability and insecurity are also of some relevance in this connection [...]. Accordingly, the Court considers that the personal circumstances of the applicants and the omissions and the defects in the domestic investigation outweigh their failure to make their addresses known to the authorities.

225. *In the light of the foregoing, the Court finds that the authorities failed to carry out an effective investigation into the circumstances of the attack on the refugee convoy on 29 October, 1999. This rendered recourse to the civil remedies equally ineffective in the circumstances* [author's note: emphasis added]. The Court accordingly dismisses the Government's preliminary objection and holds that there has been a violation of Article 2 in this respect as well.

III. Alleged Violation of Article 3 of the Convention

226. The first and the second applicants submitted that, as a result of the attack, their right to freedom from inhuman and degrading treatment within the meaning of Article 3 of the Convention had been violated. This Article provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

227. The first and the second applicants submitted that they were wounded by shells and witnessed the deaths of many people around them, including their loved ones. This amounted to inhuman treatment in the meaning of the Court's definition given in the case of *Ireland vs. the United Kingdom* [...].
228. The Government did not submit any arguments on the merits of this complaint.
229. The Court considers that the consequences described by the applicants were a result of the use of lethal force by the State agents in breach of Article 2 of the Convention. Having regard to its above findings about the danger to the lives of the three applicants as a result of the missile attacks, the Court does not find that separate issues arise under Article 3 of the Convention.

IV. Alleged Violation of Article 1 of Protocol No. 1

[...]

233. The Court has found it established that the third applicant was subjected to an aerial attack by the federal military forces when trying to use the announced "safe exit" for civilians fleeing heavy fighting. This attack resulted in destruction of the vehicles and household items belonging to the applicant and her family. There is no doubt that these acts, in addition to giving rise to a violation of Article 2 [author's note: right to life], constituted grave and

unjustified interferences with the third applicant's peaceful enjoyment of her possessions [...].

234. It follows that there has been a violation of Article 1 of Protocol No. 1 in respect of the third applicant.

V. Alleged Violation of Article 13

235. The applicants submitted that they had no effective remedies in respect of the above violations, contrary to Article 13 of the Convention. This Article reads:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

1. General principles

236. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State ([...] *Aydin vs. Turkey* judgment of 25 September, 1997, *Reports* 1997-VI [...]).
237. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Given the fundamental importance of the rights guaranteed by Articles 2 and 3 of the Convention, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life and infliction of treatment contrary to Article 3, including effective access for the complainant to the investigation procedure [...]. The Court further recalls that the requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation [...].

2. The Court's assessment

238. In view of the Court's findings above on Article 2 and Article 1 of Protocol No. 1, these complaints are clearly "arguable" for the purposes of Article 13 [...]. In view of this, the applicants should accordingly have been able to avail themselves of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation, for the purposes of Article 13, at least as regards the claims under Article 2.
239. However, in circumstances where – as here – the criminal investigation into the circumstances of the attack was ineffective in that it lacked sufficient objectivity and thoroughness; and since the effectiveness of any other remedy that may have existed, including the civil remedies suggested by the Government, was consequently undermined, the Court finds that the State has failed in its obligation under Article 13 of the Convention, which are broader than those under Article 2.
240. Consequently, there has been a violation of Article 13 of the Convention.

VI. Application of Article 41 of the Convention

241. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary Damage

[...]

246. In the absence of any independent and conclusive evidence as to the applicant's claims for the lost property and on the basis of the principles of equity, the Court awards an amount of 12,000 euros (EUR) to the third applicant as compensation for the sustained pecuniary losses.

B. Non-pecuniary damage

247. *The first applicant's son Said-Magomad and daughter Ilona were killed as result of the attack. Her other relatives were killed or wounded. She was wounded and received treatment. She claimed EUR 25,000 as non-pecuniary damages* [author's note: emphasis added].
248. The second applicant was wounded and lost consciousness as a result of the attack. She was deeply traumatised by the experience. She asked the Court to award her EUR 15,000 as non-pecuniary damages.

- 249. The third applicant lost her property and suffered anguish and fear as a victim of the attack. She claimed EUR 5,000 as non-pecuniary damages.
- 250. The Government found the amounts claimed to be exaggerated.
- 251. The Court considers that awards should be made in respect of non-pecuniary damage bearing in mind the seriousness of the violations it has found in respect of Articles 2, 13 and Article 1 of Protocol No. 1.
- 252. *The Court notes the modest nature of the requests for non-pecuniary damage made by the applicants and awards EUR 25,000 to the first applicant, EUR 15,000 to the second applicant and EUR 5,000 to the third applicant as non-pecuniary damage* [author's note: emphasis added]. The awards to the first and the second applicants are to be converted into Russian roubles at the rate applicable at the date of payment.

C. Costs and expenses

- 253. The applicants claimed EUR 8,960 and 1,605 pounds sterling (GBP) for fees and costs involved in bringing the applications. This included GBP 1,605 for the work of the London-based lawyers from the European Human Rights Advocacy Centre; EUR 3,750 for the work of the Moscow-based lawyers from the Human Rights Centre Memorial and EUR 5,210 for the work by the Memorial human rights field staff in Moscow and in the Northern Caucasus connected with the case and for other expenses incurred.
- 254. In addition, the applicants claimed GBP 2,608 for costs and fees involved in respect of the preparation for, and conduct of the hearing on the merits. This included GBP 2,300 for the work of the London-based lawyers from the European Human Rights Advocacy Centre and GBP 308 for the work of the Moscow-based lawyer.
- 255. The Government did not submit any comments on the amount or substantiation of the claims under this heading.
- 256. The Court observes that only legal costs and expenses necessarily and actually incurred and which are reasonable as to quantum can be reimbursed pursuant to Article 41 of the Convention. It notes that this case involved complex issues of fact and law and gave rise to two sets of written observations and an adversarial hearing. However, it considers excessive the total amount which the applicants claim in respect of their legal costs and expenses and considers that it has not been demonstrated that all of them were necessarily and reasonably incurred. In particular, the Court finds excessive the amount of legal work claimed by the applicants in the course of the preparation for the hearing in view of the extensive written submissions already submitted by parties.
- 257. In these circumstances, the Court is unable to award the totality of the amount claimed; deciding on an equitable basis and having regard to the details of the claims submitted by the applicants, it awards them the sum of EUR 12,000, less the EUR 1,074 received by way of legal aid from the Council of Europe, together with any value-added tax that may be chargeable.

C. Default interest

258. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;
2. *Holds that there has been a violation of Article 2 of the Convention in respect of the respondent State's obligation to protect the right to life of the three applicants and of the two children of the first applicant* [author's note: emphasis added];
3. *Holds that there has been a violation of Article 2 of the Convention in that the authorities failed to carry out an adequate and effective investigation into the circumstances of the attack of 29 October 1999;*
4. *Holds that no separate issue arises in respect of Article 3 of the Convention;*
5. *Holds that there has been a violation of Article 1 of Protocol No. 1 of the Convention in respect of the third applicant;*
6. *Holds that there has been a violation of Article 13 of the Convention;*
7. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 12,000 (twelve thousand euros) to the third applicant in respect of pecuniary damage;
 - (ii) EUR 5,000 (five thousand euros) to the third applicant in respect of non-pecuniary damage;
 - (iii) EUR 25,000 (twenty-five thousand euros) to the first applicant and EUR 15,000 (fifteen thousand euros) to the second applicant in respect of non-pecuniary damage, both sums to be converted into Russian roubles at the rate applicable at the date of the settlement;
 - (iv) EUR 10,926 (ten thousand nine hundred twenty-six euros) in respect of costs and expenses, to be converted into Russian roubles at the rate applicable at the date of the settlement in respect of costs and expenses;
 - (v) any tax that may be chargeable on the above amounts;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

[...]

7.2 Notes and Questions

7.2.1 *Who Were the Child Victims in the Case of Isayeva, Yusupova and Bazayeva vs. Russia?*

The particular child victims who were part of the focus in the instant case were Chechnyans; Ilona (also spelled Elona) Isayeva (born in 1983) and Said-Magomed Isayeva (born in 1990) the minor children of the first applicant:

The first and third applicant lived in the city of Grozny, and the second applicant in Staraya Sunzha, which is a suburb of Grozny. In the autumn of 1999 hostilities began in Chechnya between the federal [author's note: Russian] military forces and Chechen fighters. The city and its suburbs were the targets of wide-scale attacks by the military. (ECHR Trial Chamber judgment, para. 13)

The first applicant lost her two young children who were amongst the many persons who were killed or injured during the incident in question ("As a result of the attack, 14 vehicles were destroyed and 16 persons killed, including Ms Burdynyuk's husband; 11 persons were wounded", ECHR Trial Court judgment, para. 88). While there was internal conflict between the federal [Russian] military forces and Chechen fighters at the time, the facts of the case were in dispute with respect to whether or not the missile attack that caused the deaths and injuries in the particular incident was an avoidable and unprovoked attack on civilians.

7.2.2 *Did International Justice in This Case Affirm Respect for the Separable Independent Human Rights of the Child?*

7.2.2.1 *Were the Child Victims Regarded as Having Juridical Personality in Their Own Right, or Were the Children's Rights Subsumed Under Those of the Parents or Other Adult Family Members?*

In the instant case, the first applicant brought the case before the ECHR both on behalf of her children and on behalf of herself. In regard to the human rights violations against her children, she alleged a violation of their fundamental right to life:

The first applicant alleged that her two children were killed by agents of the State in violation of Article 2. The three applicants complained that their right to life was violated by the attacks against the [author's note: civilian] convoy by military planes [...]. (ECHR Trial Court judgment, para. 154, emphasis added)

To the extent that the applicant Isayeva brought the case on behalf of her children and the Court considered the children's independent right to life under Article 2 of the European Convention on Human Rights, the children can be considered to have been regarded as having their own juridical personality. Note that there was at least one child witness, if not more, who in the instant case provided a statement to military criminal investigators:

On 11 August, 2000 two of the first applicant's relatives – her brother Aslanbek Vakhobov and nephew Alikhan Vakhobov – were questioned as witnesses. Aslanbek testified that his wife and son, the first and the second applicants and other relatives (he named 12 persons) had left Grozny on the morning of 29 October, 1999 for Ingushetia. The witness had remained at home, and at about 5 p.m. his relatives had returned with the same minibus. Four of the people inside had been killed and the rest were wounded, as a result of an air strike at the convoy. The first applicant's two children, Ilona Isayeva and Said-Magomed Isayev, were buried in the Chernorechye cemetery near Grozny. *Alikhan Vakhobov, a teenager who was in the minibus, testified about the circumstances of the attack and about his splinter wound in the left shoulder.* He was treated in the Atagi hospital immediately after the incident, and then stayed for some time in the Nazran hospital in Ingushetia. (ECHR Trial Court judgment, para. 60, emphasis added)

Thus, Alikhan Vakhobov, a minor, was permitted to give a statement to the military investigators as a witness to the aerial missile attack that left two of the first applicants' children dead. The fact that this statement was considered along with other evidence by the ECHR is consistent with Article 12 of the Convention on the Rights of the Child. Article 12, it will be recalled, guarantees the right of children to participate directly or indirectly (i.e., through their parents acting on their behalf or guardians at law) in any judicial or administrative proceeding the outcome of which will affect their fundamental rights.

7.2.2.2 What Is the Legal Capacity of Minors Before the International Human Rights Courts?

Recall that the Inter-American Court of Human Rights does not recognize children's legal capacity to bring forward a case in their own name without an intermediary (see *Juridical Status and Human Rights of the Child*, Advisory Opinion [OC-17/02, 28 August, 2002, Inter-Am. Ct. H.R. (Ser. A) No. 17 (2002)], para. 15, available online at http://www1.umn.edu/humanrts/iachr/series_A_OC-17.html). The European Court of Human Rights (ECHR), however, in contrast, accords even minors the legal capacity to bring forward a legal complaint in their own right against the State with respect to an alleged human rights violation they have suffered due to the actions or inaction of agents of the State (Isabelle Berro-Lefèvre, Judge of the ECHR Children's Access to the European Court of Human Rights available online at http://www.coe.int/t/transversalprojects/children/JusticeSpeeches/berro_en.asp).

Judge Isabelle Berro-Lefèvre of the European Court of Human Rights explains that the European Convention on Human Rights, under Article 34, imposes no age requirement concerning eligibility for legal capacity upon those who wish to advance a complaint before the European Court.

Article 34 of the European Convention on Human Rights

The Court may receive applications from *any person*, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Judge Isabelle Berro-Lefèvre comments thus that the reference in this article (Article 34 of the European Convention on Human Rights) to “any person” claiming to be the victim of a violation makes it clear that the right to approach the Court is “not subject to any conditions of legal capacity”. Judge Berro-Lefèvre further stresses that children may thus apply to the European Court of Human Rights for redress of human rights abuses even when they are not entitled to bring legal proceedings before a national court due to their legal incapacity under domestic law (28th Conference of the Ministers of Justice Lanzarote (25–26 October, 2007) “Emerging issues of access to justice for vulnerable groups, in particular: migrants and asylum seekers, children, including children perpetrators of crime”. Report Prepared by the registry of the European Court of Human Rights. Available online at <http://www.coe.int/minjust>).

Yet, this opportunity for minors to file a complaint with the European Court of Human Rights often advances their cause little in that the Court procedures, at the same time, require that applicants exhaust all domestic remedies before filing a complaint with the European Court of Human Rights. There have been very few cases filed by children before the European Court of Human Rights. It remains to be seen whether the European Court of Human Rights will consistently abide by the principle of providing access to a judicial remedy to minors who have been blocked from any possibility of a domestic remedy in part due to their statutorily defined lack of legal capacity at the domestic level. In this regard Isabelle Berro-Lefèvre, Judge of the ECHR comments:

As already mentioned, the European Convention on Human Rights draws no distinction between the holders of rights to be safeguarded. Nonetheless it is important that the rights of vulnerable individuals, such as minors, should not be purely fictitious. The fact that children have rights on paper does not mean much, if we do not make their rights an effective reality. At the same time, reality often shows just how fragile the legislative framework is. Everyone is aware of the gulf that exists between the legal and political commitments and the fate of many children in Europe. (Isabelle Berro-Lefèvre, Judge of the ECHR, Children’s Access to the European Court of Human Rights available online at http://www.coe.int/t/transversalprojects/children/JusticeSpeeches/berro_en.asp)

The ECHR affording children the opportunity to file a complaint with the Court in their own right reflects recognition that the legal representatives of the child may not always have the child’s best interest at heart (i.e., see *A vs. the United Kingdom* ECHR judgment of 23 September, 1998 concerning a case brought by a minor regarding the State’s failure to protect him from physical assault by his stepfather). It may also be the case that the minor child has no access to intermediaries who could act on his or her behalf in filing an application to the European Court of Human Rights. Hence, the fact that minors may themselves directly file such an application to the European Court of Human Rights is of utmost importance in such an instance. The ECHR has also ruled on the issue of whether various procedural guarantees to which children are entitled (i.e., the right to legal standing either directly or through a representative, the minor’s right to be heard regarding opinions on issues being litigated such as visitation rights of a parent in a divorce situation even if the child is but a party in interest, etc.) are being properly enforced

in national courts (i.e., *X and Y vs. the Netherlands* decided by the ECHR March 1985. Judge Isabelle Berro-Lefèvre outlines various procedural safeguards that the ECHR has employed to make child participation in the court process feasible and consistent with protection of the minor's substantive and procedural rights (procedures that are in many ways similar to those employed by the ICC). These include, among others, protecting the anonymity of the child, and holding hearings in camera where necessary for the protection of the child's interests with due respect to the rights of the other parties. Judge Isabelle Berro-Lefèvre raises the issue of timely redress which is relevant to any international court considering human rights abuses committed by agents of the State against any persons including minors. The individual's interests and circumstances may have changed dramatically if the judgment is executed years after the event perhaps when the individual is no longer a minor. Many child victims find themselves in this situation and, hence, the remedies offered may not serve to undo the damage that has been incurred in the interim due to the delay in the issuing of the judgment. It is essential to consider then that justice delayed in such a case is most often justice denied.

7.2.3 Was There a Public Acknowledgement Through the ECHR Judgment Itself of the Offences Under International Human Rights Law Committed by the State Through Its Agents?

In the instant case, the European Court of Human Rights found that there had been violations by the State of the following articles of the European Convention on Human Rights: Articles 2 (right to life), 3 (right to be protected from inhumane treatment) and 13 (right to a domestic remedy for injustices suffered due to State action or inaction). These violations of the European Convention were due to the Russian pilots' aerial missile attack on the refugee convoy in question. Yet, only nominal reparations were awarded by the Court despite the violations of the Convention being amongst the most grave:

Article 2, which safeguards the right to life and sets out the circumstances where deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, from which in peacetime no derogation is permitted under Article 15. Together with Article 3 [author's note: the right to be protected against torture, inhumane or degrading treatment], it also enshrines one of the basic values of the democratic societies making up the Council of Europe. (ECHR Trial Court judgment, para. 168)

7.2.4 What Was the Nature of the Reparations Ordered by the Court, to Whom Were They to Be Paid, and Is There Any Special Significance of the Reparations in Terms of Promoting the Rights of the Child?

In the instant case, the reparations for non-pecuniary damages paid to the applicants were nominal sums when one considers that: two of the first applicants' children

were killed in the aerial missile attack while her other relatives were killed or wounded (there were 16 killed in all and 11 injured victims of the attack); all three applicants had been exposed to mortal danger due to the missile attack on their civilian convoy which had been promised safe passage by agents of the government and suffered severe fear and trauma, and the first and second applicants themselves also sustained injury. Can it be argued that in respect of the reparations for loss of life of the first applicants' two children, and for physical and psychological injury that the ECHR should have *sua sponte* substantially increased the award given the gravity of the human rights violations by the State? Note that the ECHR itself commented on the low sums requested in respect of the *non-pecuniary* damages (reduced even further when converted into Russian roubles):

The Court notes the modest nature of the requests for non-pecuniary damage made by the applicants and awards EUR 25,000 to the first applicant, EUR 15,000 to the second applicant and EUR 5,000 to the third applicant as non-pecuniary damage. The awards to the first and the second applicants are to be converted into Russian roubles at the rate applicable at the date of payment. (ECHR Trial Court judgment, para. 252; in addition to the above, EUR 12,000 was awarded to the third applicant as pecuniary damage regarding lost property.)

Does the failure of the ECHR to substantially increase the reparations for the non-pecuniary damages serve to create a perception that diminishes the value of the lives of the children lost due to the missile attack on a civilian convoy?

7.2.5 Was the International Obligation to Afford Children “Special Protection” Acknowledged and the Nature of the Offence Considered “Aggravated” by the Fact that the Victims Were Children?

There was no discussion in the ECHR judgment of the special protection that children are to be accorded under international law including during internal (non-international), or international armed conflicts (i.e., such special protections being incorporated into the Convention on the Rights of the Child; the Geneva Conventions, etc.). In addition, there was no discussion by the ECHR in the instant case of there being an aggravating factor in what might potentially be considered the commission of an *international war crime* given that there were child victims who had lost their lives due to a massive aerial missile attack on civilians who had been promised safe passage. Nor was there consideration by the ECHR of the fact that there were *child victims* when the Chamber assessed the nature and gravity of the violations of guarantees under the European Convention on Human Rights (respecting the State's obligation to protect non-combatant civilians during a time of internal conflict and to protect human life). There was as a consequence no significant sum in reparations for non-pecuniary damages awarded to the first applicant to signify the grave violation which had occurred due to the State's failure to adequately protect her minor children during internal armed conflict. Contrast

the foregoing with, for example, the *Gómez-Paquiyaury Brothers vs. Peru* case heard by the Inter-American Court in which that Court: ordered the State to pay substantial sums for the loss of life and torture of the minor children, and held that the State was responsible to find the mastermind(s) who perpetrated the crimes against the Gómez-Paquiyaury Brothers and bring them to justice if it were to uphold its obligations under the American Convention on Human Rights. Note that in the instant case, the ECHR held that:

However, in circumstances where – as here – the criminal investigation into the circumstances of the attack was ineffective in that it lacked sufficient objectivity and thoroughness [...]. (ECHR Trial Court judgment, para. 239)

Yet, the ECHR did not declare that the State is still obligated to properly do a criminal investigation of the complaints, and prosecute those, if any, who may be liable for any criminal wrongdoing (if such existed) leading to the incident which may or may not have constituted a violation of international humanitarian law (a war crime).

7.2.6 Was There Any Public Acknowledgement by the State of the Violation of International Human Rights and/or Humanitarian Law Committed Against the Child Victims in the Instant Case?

7.2.6.1 What Was the Position of the State in *Isayeva, Yusupova and Bazayeva vs. Russia* on Whether a War Crime May Have Been Committed?

Recall that the incident leading to the deaths of the first applicant's children, Ilona (also spelled Elona) Isayeva (born in 1983) and Said-Magomed Isayev (born in 1990) (among others) was investigated by the Russian military criminal prosecutorial branch. That body held that the incident did *not* satisfy the elements of a war crime. The incident in question involved the deaths and injuries to civilians resulting from the approximately four hour aerial missile attack on a convoy of refugee trucks by two Russian pilots. The ECHR found that: (a) the refugees and Red Cross had been told *in advance* that the highway they would travelling on at the time and which was subjected to the missile attack would supposedly be regarded by the Russian military as a humanitarian “safe corridor” for refugees for the period in question; (b) there had been no organized State plan in place to safeguard the safety of the civilians trying to escape the widespread bombing in Chechnya, and (c) there was no coordination between the pilots who appeared not to know of the safe corridor and superiors who might have been aware of the safe corridor. The ECHR Trial Chamber did *not* make a finding as to the *potential* criminal liability under international law of the *individual* perpetrators (the pilots and/or superiors) in the instant case, but merely restated for information the contention of the Russian State that no crime had been committed by the pilots who (for whatever reason) carried out the aerial missile attack on civilian targets:

On 7 September, 2001 the criminal case was closed by an investigator of the Circuit Military Prosecutor's Office for the Northern Caucasus under Article 5 § 2 of the Criminal Procedural Code, i.e. due to the *absence of corpus delicti* in the pilots' actions, because the vehicles of the Red Cross and of the refugees on their own entered into the impact zone of the missiles. The pilots did not and could have not foreseen such consequences. [...] (ECHR Trial Court judgment, para. 88, emphasis added)

On 5 May, 2004 a prosecutor of the North Caucasus Military Prosecutor's Office again closed the criminal case due to the *absence of corpus delicti* in the pilots' actions. [...] (ECHR Trial Court judgment, para. 90, emphasis added)

7.2.6.2 Was a Full Measure of Justice Accorded to the Victims of the International Human Rights Violations Which Occurred in the *Isayeva, Yusupova and Bazayeva vs. Russia* Case?

The case had been brought by the applicants in 2000 *prior* to the establishment of the International Criminal Court (ICC). There had already been a long delay in the applicants securing any remedy as the ECHR judgment was issued in 2005 which was five years after the applicants had first filed their complaints with the Court and six years after the incident had occurred. The ECHR holds only *States* accountable for violations of the human rights guarantees articulated in the European Convention on Human Rights. Despite the fact that the State was apparently not prepared to act in regards to any potential criminal proceedings in the matter, there was no recourse to the ICC as the crimes had been committed prior to the coming into force of the Rome Statute 1 July, 2002 and the ICC can only address international crimes committed after that date (assuming the other admissibility requirements are also met).

7.2.6.3 What Findings of Fact of the ECHR in *Isayeva, Yusupova and Bazayeva vs. Russia* Are Relevant to Whether or Not a War Crime May Have Been Committed?

Consider with respect to the issue of the potential criminal liability of the State authorities and/or the pilots involved that it was unclear from the evidence submitted by the State (according to the findings of the ECHR) whether the attack was intentional and calculated or not. The ECHR found no *established threat* from Chechnyan rebels firing on the planes at the time of the incident though the pilots made claims to the contrary. It was also unclear whether the attack was instigated due to negligence and a complete disregard for civilian lives. Certainly, the use of disproportionate force, even if there had been insurgent fire on the Russian planes, was undisputed. Nevertheless, the ECHR made no comments regarding whether the pilots involved in the aerial missile attack in the incident in question and/or their relevant superiors ought to be tried by a domestic court based on the alleged sufficiency of information that was available from eyewitnesses and other evidence (i.e., damage to Red Cross vehicles but no evidence of the remains of Kamaz trucks

that could have fired on the Russian planes as alleged by the State, etc.). Nor did the ECHR find that the State needed to reopen a more objective and thorough criminal investigation, at least, to determine whether or not there existed individual partial or full criminal responsibility for the deaths and injuries (as well as property damage) caused to the civilian complainants and their families (among others).

7.2.6.4 In *Isayeva, Yusupova and Bazayeva vs. Russia*, Did the ECHR Adequately Address the Issue of the State's Responsibility to Determine the Potential Criminal Liability of Individual State Authorities and/or the Pilots for the Injuries Suffered by the Civilians Due to the Aerial Missile Attack?

Recall in relation to the issue of the laying of criminal charges, that the ECHR in the instant case noted the unsatisfactory nature of the domestic military investigations that had been conducted and the effective lack of access to any available domestic civil or criminal law remedy for the loss of life and injury sustained by these civilian applicants:

The Court further notes that, at least for several years after the incident, the applicants were not questioned about the event, were not granted victim status, had no access to the investigation file and were never informed of its progress [...]. No charges were brought against any individuals. (ECHR Trial Court judgment, para.152)

The ECHR commented on the lack of evidence provided by the State regarding the background and full details regarding the circumstances of the attack on the civilians:

At the outset it has to be stated that the Court's ability to make an assessment of the legitimacy of the attack, as well as of how the operation had been planned and executed, is severely hampered by the lack of information before it. No plan was submitted and no information was provided as to how the operation had been planned, what assessment of the perceived threats and constraints had been made, or what other weapons or tactics had been at the pilots' disposal when faced with the ground attack the Government refer to. *Most notably, there was no reference to assessing and preventing possible harm to the civilians who might have been present on the road or elsewhere in the vicinity of what the military could have perceived as legitimate targets.* (ECHR Trial Court judgment, para. 175, emphasis added).

Should the ECHR have urged the State to reopen the criminal investigation regarding the individuals (the pilots and their superiors) who may have been involved in some way in the attack on the civilians (via instigation, aiding and abetting, or committing the act, etc.)? Consider in this regard *the reluctance of the State* in the instant case in properly establishing any potential criminal liability of individual perpetrators: there were delays in the Circuit Military Prosecutor's Office for the Northern Caucasus military launching an investigation at the outset; and two such military investigations concluded that there was an alleged "absence of corpus delicti in the pilots' actions" despite the *absence of credible evidence* clearly pointing to the operation being occasioned by an actual or reasonably perceived threat of violence. The ECHR stated in fact: "[...] In the absence of

corroborated evidence that any unlawful violence was threatened or likely, the Court retains certain doubts as to whether the aim [author's note: to protect persons from unlawful violence within the meaning of Article 2 s. 2 (a) of the Convention] can at all be said to be applicable" (ECHR Trial Court judgment, para. 181).

7.2.6.5 What Evidence Did the ECHR Cite in Its Finding that, at the Very Least, the Military in the Instant Case Did Not Take the Minimum Requisite Care to Protect the Lives of Innocent Civilians?

Further, in regards to whether the ECHR should have urged the State to provide at least the possibility of a criminal law remedy to the victims (starting with a proper thorough criminal investigation by the State), consider the following additional Court findings reflecting the Court's substantial doubts about the State's version of events:

It is undisputed that the applicants were subjected to an aerial missile attack, during which the first applicant's two children were killed and the first and the second applicant were wounded. This brings the complaint, in respect of all three applicants, within the ambit of Article 2 [...]. (ECHR Trial Court judgment, para. 174)

The Government failed to submit any other evidence that could be relevant to legitimise the attack, including the exact nature of the pilots' mission and evaluation of the perceived threats and constraints, an account of the pilots' debriefing upon return, mission reports or relevant explanations which they presumably had to submit concerning the discharged missiles and the results of their attack, a description or names of the fighters presumably killed in the attack etc. The decision of 5 May, 2004 refers to a description of the damage caused to the planes by the hostile fire and statements of the technicians. These documents were not submitted to the Court, and the Court retains doubts as to the credibility of evidence disclosed four and a half years after the events in question [...]. Further, none of the other witnesses whose statements were produced mentioned seeing the Kamaz trucks from which the planes would be attacked or the presence of armed persons in the convoy at all. An investigation of the site of the attack, conducted in August 2000, found remains of the Red Cross Mercedes truck. No remains of a Kamaz truck were reported [...]. The only non-military witness who reported seeing armed men on the road to Grozny on 29 October, 1999 referred to a UAZ all-terrain vehicle in the Samashki forest, but not to a Kamaz truck [...]. (ECHR Trial Court judgment, para. 180)

The applicants, Red Cross workers and other witnesses to the attack unanimously testified about being aware in advance of the "safe passage" or "humanitarian corridor" to Ingushetia for the Grozny residents on 29 October, 1999. This exit was prepared and foreseen by the residents fleeing from heavy fighting. (ECHR Trial Court judgment, para. 183)

The Court finds insurmountable the discrepancy between the two pilots' and the air controller's testimonies that the aircraft directed their missiles at isolated trucks and the victims' numerous submissions about the circumstances of the attack. *The Government explained the casualties by submitting that in the very short time between firing of the missiles at the trucks and the moment they hit them, the convoy, previously unseen by the pilots, appeared on the road and was affected due to the wide impact radius of the missiles used. The Court does not accept this reasoning, which does not begin to explain the sudden appearance of such a large number of vehicles and persons on the road at the time. Moreover, the Government's contentions are contradicted by a substantial mass of other evidence presented to the Court.* (ECHR Trial Court judgment, para. 192, emphasis added)

The military used an extremely powerful weapon for whatever aims they were trying to achieve. According to the conclusions of the domestic investigation, 12 S-24 non-guided

air-to-ground missiles were fired, six by each plane, which is a full load. On explosion, each missile creates several thousand pieces of shrapnel and its impact radius exceeds 300 metres (or 600–800 metres, as suggested by some documents). There were thus several explosions on a relatively short stretch of the road filled with vehicles. Anyone who had been on the road at that time would have been in mortal danger. (ECHR Trial Court judgment, para. 195, emphasis added)

The question of the apparent disproportionality in the weapons used was also raised by the Bataysk Garrison Court in its decision of 14 March, 2003, by which the decision to close the investigation was quashed and a new investigation ordered. (ECHR Trial Court judgment, para. 197, emphasis added)

To sum up, even assuming that that the military were pursuing a legitimate aim in launching 12 S-24 non-guided air-to-ground missiles on 29 October, 1999, the Court does not accept that the operation near the village of Shaami-Yurt was planned and executed with the requisite care for the lives of the civilian population. (ECHR Trial Court judgment, para. 199, emphasis added)

7.2.6.6 Did the ECHR Analysis of *Isayeva, Yusupova and Bazayeva vs. Russia*, and Its Judgment as to Remedy, Fully Accord the Child Victims the Respect for Their Human Dignity and the Consideration to Which They Were Entitled Under International Human Rights and Humanitarian Law?

Consider in this regard also that “*Individuals are criminally responsible* for violations of Common Article 3 under both the Geneva Conventions and the International Criminal Court (ICC) Statute” (ECHR Trial Court judgment, para. 164, emphasis added). However, instead of making recommendations that the case be referred for further criminal investigation by the State and/or a domestic criminal court proceeding based on the information already available, the ECHR simply found the State guilty of violating (among other articles) the European Convention on Human Rights Article 2 (right to life) and Article 3 (regarding the obligation to treat non-combatant civilians humanely and protect their lives to the extent feasible in the context of a non-international conflict) with respect to the deaths of the minor children Ilona Isayeva and Said-Magomed Isayev (among others). Does this too send a message then which diminishes the dignity and value of the children’s lives in that the only justice accorded the children was financial reparation for non-pecuniary damage and a sum in that regard that was quite paltry given the loss of such young lives and all the promise those lives held? Might it be argued then that in fact in the instant case there was no proper acknowledgement of the substantial grounds to consider that an international war crime against the civilians in question (including children) had possibly been committed (though any charge in this regard would yet have to be proven, i.e., before a national criminal court). This even though the ECHR findings themselves establish likely *probable cause* to believe that a grievous violation of humanitarian law had been committed; that probable cause arising due to:

- The disproportionate force used by the pilots even if they were under fire from rebels on the ground (such a rebel attack being an unproven fact);
- The evidence that the refugees and the International Red Cross were led to believe that they would have safe passage on the very highway and at the specific time when the highway was attacked with missiles;
- The absence of credible corroboration that the pilots were defending against insurgents who were firing at them; and
- Evidence that the pilots were uninformed of any superior order designating the highway as a safe corridor at the very time when they attacked it with extremely powerful missiles.

7.2.6.7 Was the State Ordered by the ECHR to Make a Public Apology to the Victims in the Instant Case, or Offer Any Other Form of Public Acknowledgement of the State Violation of the Victims' Most Fundamental Human Rights?

There was no mention in the ECHR judgment of any acknowledgement by the State that an international crime may have been committed; and no offer by the State to reopen a domestic criminal investigation/proceeding on recommendation by the ECHR that the State do so. In addition, the ECHR did not order the State to make a public apology to the victims and none was forthcoming (contrast this also to the situation in the *Gómez-Paquiyaury Brothers vs. Peru* case heard in the Inter-American Court where a public State apology was considered a significant component in the remedy).

7.2.7 *Were the Principles of the Convention on the Rights of the Child (CRC) Reflected in the Treatment of the Case and the Remedy Afforded the Victims?*

The Russian Federation ratified the CRC 15 September, 1990 and the events that are the subject matter of the instant case took place in 1999 fully nine years later. Yet, there was no mention by the ECHR in the instant case of the high obligation of States to protect minors in times of armed conflict, i.e., there was no mention of CRC articles concerning the child's right to life and right to special protection under international humanitarian law which follow:

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 22

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

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. . .
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Nor did the ECHR in the instant case refer to Additional Protocol II to the Geneva Convention, Part II: Humane Treatment, Article 4: Fundamental Guarantees with respect to special protection rights for children in times of internal conflict:

Article 4: Fundamental Freedoms

[...]

3. Children shall be provided with the care and aid they require, and in particular:

[...]

- (e) *Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.*

(Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Adopted on 8 June, 1977 by the Diplomatic Conference on the Reaffirmation and Development of International

Humanitarian Law applicable in Armed Conflicts, entry into force 7 December, 1978; Protocol II was ratified by the Russian Federation 28 September, 1989; emphasis added.)

It is clear that the ECHR failed to consider both in its analysis of the facts of the instant case and in its decision regarding reparations, the high standard of protection owed to children during armed conflicts under the Convention on the Rights of the Child and the “special protection” the State is obligated to afford children in times of armed conflict under international humanitarian law, i.e., the Additional Protocol II to the Geneva Conventions.

7.2.8 Did the Primacy Accorded Domestic Courts Hinder or Facilitate the State's International Accountability in the Instant Case for the International Human Rights Violations Committed Within Its Jurisdiction?

Due to the findings of the military body that the pilots purportedly had not committed a crime as allegedly they were simply defending against insurgent firing, the victims could not access the courts for a civil remedy. As the pilots involved in the missile attack on the civilians were not charged, there was also no remedy through the domestic criminal court system or military tribunal system though there had been loss of life (including the lives of children) as the result of the action of the Russian pilots. The ECHR made the following comments in regards to the issue of the primacy of the national courts:

The Court is sensitive to the subsidiary nature of its role and recognises that it must be cautious in taking on the role of a first instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case [...]. Nonetheless, where allegations are made under Articles 2 and 3 of the Convention the Court must apply a particularly thorough scrutiny [...] even if certain domestic proceedings and investigations have already taken place. (ECHR Trial Court judgment, para. 173)

In the instant case, the ECHR did *not* accept the State's contention that the applicants had not exhausted the potential domestic remedies. Thus, the ECHR did in fact make findings regarding State violations of the European Convention on Human Rights. Nonetheless, the ECHR, as mentioned, did not attempt to facilitate a possible remedy also through criminal proceedings (i.e., by holding that the State was obligated to provide such a remedy given the facts established to date). Recall that the ECHR offered only monetary reparations for the failure of the State to do a proper criminal investigation regarding the missile attack on the civilian convoy (considered here by the ECHR to be a violation of Article 2). Does such an approach *indirectly* serve to reinforce the primacy of the national system even when that system is ineffective, unjust or even inoperable

7.2.9 Would Justice Have Been Better Served by Advancing the Case Before an Alternative International System (in This Case the ICC) Had That Been Possible?

The ECHR judgment was issued in 2005 subsequent to the establishment of the International Criminal Court. However, as mentioned, the incident occurred in 1999 prior to the Rome Statute entering into force and thus prosecution of the individual perpetrators was beyond the jurisdiction of the ICC even if Russia had been a State's Party to the Rome Statute. The ECHR judgment in *Isayeva, Yusu-pova and Bazayeva vs. Russia* made no findings in respect of establishing any

individual criminal responsibility in regards to the missile attack on the civilians. This was the case in that it is not the role of the ECHR to prosecute individuals for international crimes, but rather to make findings regarding State violations of the European Convention on Human Rights and Fundamental Freedoms. Given the foregoing, were the victims in fact accorded the full measure of justice? Consider in this regard that the ECHR found that the State's evidence clearing the pilots of criminal responsibility in the missile attack on the civilians was contestable and no proper criminal investigation had been conducted by the State and no charges laid (i.e., see ECHR Trial Court judgment, para. 199, and the ECHR disposition of the case)

The ECHR found that the State had *not* properly investigated the missile attack on the refugee convoy and in this respect also had violated Article 2 of the European Convention. The ECHR found *State* violations of Article 2 (the right to life), Article 3 (the right to be protected from inhumane treatment) and Article 13 (the right to a domestic remedy even where the perpetrators of the human rights violations are acting in an official State capacity). Despite Articles 2 and 3 being consistent with the prohibition against certain war crimes as defined under the Rome Statute and the failure of the State to do a proper criminal investigation, there could be no referral of the case to the ICC with respect to potentially assigning criminal responsibility to the pilots and/or any of their relevant superiors. Rather, the ECHR simply found that Article 13 of the European Convention on Human Rights had been violated by the *State* in respect of not providing any domestic remedy (civil or criminal law remedy) for the loss of life and inhumane treatment and monetary reparations were provided in regards to these violations. Might it be the case that the notion that justice is served by the ECHR's finding that there was a violation of Article 13 is but something of a non-sequitor. This in that finding an Article 13 violation frustratingly, and ever so painfully simply reinforces the fact that the victims had no possibility of potentially holding *individuals* to account civilly or criminally given the State's apparent continued refusal to pursue a proper criminal investigation and the ECHR lack of jurisdiction in that regard.

7.2.10 What Remedy Were the Victims in the Instant Case Most Interested in Securing and Was the ECHR Judgment Helpful or Unhelpful in Their Moving Closer to Attaining That Remedy?

The applicants in the instant case were to be awarded nominal reparations for non-pecuniary damages according to the judgment of the ECHR in the case. This monetary reparation was not available to the applicants through the State civil mechanisms for the reasons explained below:

As regards a civil action to obtain redress for damage sustained through alleged illegal acts or unlawful conduct on the part of State agents the Court recalls that the Government have

relied on two possibilities, namely to lodge a complaint with the Supreme Court or to lodge a complaint with other courts [...]. The Court notes that at the date on which the present application was declared admissible, no decision had been produced to it in which the Supreme Court or other courts were able, in the absence of any results from the criminal investigation, to consider the merits of a claim [author's note: for damages] relating to alleged serious criminal actions. In the instant case, however, the applicants are not aware of the identity of the potential defendant, and so, being dependent for such information on the outcome of the criminal investigation, did not bring such an action. (ECHR Trial Court judgment, para. 147)

The complainants in the instant case were, however, desperate in their search for justice. Most importantly, they considered that justice would entail acknowledgement of the international war crime they alleged as victims and a *criminal law* remedy (prosecution of the individual perpetrators):

They [author's note: the applicants] further argued that civil proceedings could only lead to compensation for pecuniary and non-pecuniary damages, *while their principal objective was to see the perpetrators brought to justice*. (ECHR Trial Court judgment, para. 141, emphasis added)

The applicants submitted that criminal proceedings alone were capable of providing adequate effective remedies, and that compensation could be awarded to them in the course of criminal proceedings as victims of the crimes. The applicants questioned the effectiveness of the investigation into their case. (ECHR Trial Court judgment, para. 142)

The ECHR in the instant case acknowledged that a monetary damages award is *not* a vehicle for securing the full measure of justice owing both the victims who have directly suffered grave human rights violations and their surviving relatives:

[...] a civil action is not capable, without the benefit of the conclusions of a criminal investigation, of making any findings as to the identity of the perpetrators of fatal assaults, and still less to establish their responsibility. Furthermore, a Contracting State's obligation under Articles 2 and 13 of the Convention to conduct an investigation capable of leading to the identification and punishment of those responsible in cases of fatal assault might be rendered illusory if, in respect of complaints under those Articles, an applicant would be required to exhaust an action leading only to an award of damages (see *Yaşa vs. Turkey*, judgment of 2 September, 1998, *Reports* 1998-VI, p. 2431, § 74). (ECHR Trial Court judgment, para. 149)

Yet, sadly the reality is that the ECHR judgment brought the victims no closer to any possible criminal law remedy either under the domestic system or international human rights court system.

Case 4: Case of Aydin v. Turkey (57/1996/676/866)

A summary of the judgment is available at <http://www.unhcr.org/refworld/docid/3ae6b7228.html> (accessed February 23, 2009).

7.3 Excerpt from the Judgment of September 25, 1997

[Author's note: internal footnotes have been omitted.]

Judgment delivered by a Grand Chamber

In the case of Aydn v. Turkey

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A, as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, President,
Mr R. BERNHARDT,
Mr THÓR VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr C. RUSSO,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mrs E. PALM,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr J. MAKARCZYK,
Mr D. GOTCHEV,
Mr K. JUNGWIERT,
Mr P. KÜRIS,

and also of Mr H. PETZOLD, Registrar, and Mr P.J. MAHONEY, Deputy Registrar, Having deliberated in private on 24 April and 26 August 1997, Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 15 April, 1996 [. . .]. It originated in an application (no. 23178/94) against the Republic of Turkey lodged with the Commission under Article 25 by Mrs Şükran Aydn, a Turkish national, on 21 December, 1993. The Commission’s request referred to Articles 44 and 48(a) of the Convention and to the declaration of 22 January, 1990 whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain the Court’s decision on the question whether or not the applicant was the victim of a violation of the rights guaranteed by Articles 3 [author’s note: protection against torture, inhuman or degrading treatment or punishment], 6 [author’s note: provided legal rights if criminally charged such as the presumption of innocence] and 13 of the Convention [author’s note: right to a domestic remedy for violations of rights guaranteed under the European Convention on Human Rights] and whether or not Turkey failed to comply with its obligations under Article 25 s. 1 of the Convention [author’s note: the obligation of the State not to interfere with the alleged victim’s right to file a complaint with the European Commission of Human Rights generally referred to as “the Commission”].
2. In response to the enquiry made in accordance with Rule 33 s. 3(d) of Rules of Court A, the applicant stated that she wished to take part in the proceedings and designated the lawyers who would represent her [. . .]. On 23 September, 1996 the President of the Chamber granted leave [. . .] to Ms Françoise Hampson, a Reader in Law at the University of Essex, to act as one of the applicant’s representatives.
3. The Chamber to be constituted included ex officio Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court [. . .]. On 27 April, 1996, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr J. De Meyer, Mrs E. Palm, Mr A.N. Loizou, Mr D. Gotchev and Mr K. Jungwiert [. . .].
4. As President of the Chamber [. . .] Mr Ryssdal, acting through the Registrar, consulted the Agent of the Turkish Government (“the Government”), the applicant’s lawyers and the Delegate of the Commission on the organisation of the proceedings [. . .]. Pursuant to the order made in consequence, the Registrar received the applicant’s memorial on 12 November, 1996 and the Government’s memorial on 19 November, 1996.
5. On 20 June, 1996 the President of the Chamber refused the applicant’s request [. . .] for interpretation in an unofficial language at the hearing, having regard to the fact that two of the applicant’s representatives used one of the official languages of the Court.
6. On 2 September, 1996, the President of the Chamber granted leave [. . .] to Amnesty International to submit written comments on specified aspects of the case. These were received on 4 November, 1996 and communicated for

- observation to the applicant's lawyers, the Agent of the Government and the Delegate of the Commission. No observations were received.
7. By letters dated 1, 7 and 18 November, 1996 the applicant's lawyers informed the Registrar that they were concerned about the pressure being brought to bear by the authorities on the applicant and her family to secure her attendance at a medical examination in Istanbul. They requested the Court to indicate to the Government [...] that the authorities instruct officials in and around Derik not to contact the applicant regarding anything connected with her application or the events which gave rise to it.
 8. By letter dated 23 November, 1996 the Agent of the Government informed the Registrar that his authorities denied that the applicant had been intimidated or subjected to pressure, and that she was not obliged to undergo a further medical examination. The Government's observations were communicated to the applicant's lawyers in a letter dated 23 November, 1996.
 9. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 January, 1997. The Court had held a preparatory meeting beforehand. [...]
 10. *Following deliberations on 19 February, 1997 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber [...]* [author's note: emphasis added].
 11. The Grand Chamber to be constituted included ex officio Mr Ryssdal, the President of the Court, and Mr R. Bernhardt, the Vice-President, together with the other members and the three substitute judges of the original Chamber, the latter being Mr J. Makarczyk, Mr M.A. Lopes Rocha and Mr L. Wildhaber [...]. On 25 February, 1997, the President, in the presence of the Registrar, drew by lot the names of the eight additional judges needed to complete the Grand Chamber, namely Mr F. Matscher, Mr B. Walsh, Mr C. Russo, Mr N. Valticos, Mr R. Pekkanen, Sir John Freeland, Mr A.B. Baka and Mr P. Kūris [...].
 12. Having taken note of the opinions of the Agent of the Government, the applicant's representatives and the delegate of the Commission, the Grand Chamber decided on 24 April, 1997 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the Chamber [...].

AS TO THE FACTS

1. The applicant

13. *The applicant, Mrs Şükran Aydın, is a Turkish citizen of Kurdish origin. She was born in 1976. At the time of the events in issue she was 17 years old and living with her parents in the village of Tasit, which is about ten kilometres from the town of Derik where the district gendarmerie headquarters are located*

[author's note: emphasis added]. The applicant had never travelled outside her village before the events which led to her application to the Commission.

2. The situation in the south-east of Turkey

14. *Since approximately 1985, serious disturbances have raged in the south-east of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has so far, according to the Government, claimed the lives of 4,036 civilians and 3,884 members of the security forces* [author's note: emphasis added].

At the time of the Court's consideration of the case, ten of the eleven provinces of south-eastern Turkey had since 1987 been subjected to emergency rule.

I. Particular circumstances of the case

15. The facts in the case are disputed.

A. The detention of the applicant

16. According to the applicant, a group of people comprising village guards and a gendarme arrived in her village on 29 June, 1993. Although the applicant put the time of their arrival at 5 p.m., the Commission, relying on the recollection of the applicant's father and sister-in-law, found that it was more likely that this occurred early in the morning of 29 June at around 6 a.m.
17. Four members of the group came to her parents' home and questioned her family about recent visits to the house by PKK members [author's note: Workers' Party of Kurdistan] Her family were threatened and subjected to insults. They were then taken to a village square where they were joined by other villagers who had also been forcibly taken from their homes.
18. The applicant, her father, Seydo Aydn, and her sister-in-law, Ferahdiba Aydn, were singled out from the rest of the villagers, blindfolded and driven away to Derik gendarmerie headquarters.
19. The Government have disputed the applicant's claim that she and two members of her family were detained in the circumstances described above. In his oral evidence to the Commission delegates who heard evidence from witnesses in Ankara from 12 to 14 July 1995 [. . .]. Mr Musa Çitil, the commander of Derik gendarmerie headquarters in 1993, stated that no operations had been conducted in or immediately around the village on the day in question and no incidents had been recorded. Furthermore, in support of their challenge to the applicant's account of the events the Government drew attention to the inconsistencies in the evidence concerning the time of the incident and the number

of village guards involved as well as to the fact that the applicant and her family failed to recognise any of the village guards although they all would have come from neighbouring villages.

B. Treatment of the applicant during detention

20. *The applicant alleges that, on arrival at the gendarmerie headquarters, she was separated from her father and her sister-in-law. At some stage she was taken upstairs to a room which she later referred to as the “torture room”. There she was stripped of her clothes, put into a car tyre [author’s note: tire] and spun round and round. She was beaten and sprayed with cold water from high-pressure jets. At a later stage she was taken clothed but blindfolded to an interrogation room. With the door of the room locked, an individual in military clothing forcibly removed her clothes, laid her on her back and raped her. By the time he had finished she was in severe pain and covered in blood. She was ordered to get dressed and subsequently taken to another room. According to the applicant, she was later brought back to the room where she had been raped. She was beaten for about an hour by several persons who warned her not to report on what they had done to her [author’s note: emphasis added].*
21. *The Government have challenged the credibility of the applicant’s account of the events [author’s note: emphasis added]. They pointed out that there was no indication in the custody register kept at Derik gendarmerie headquarters that anyone had been detained on 29 June, 1993. Had the applicant and the members of her family been taken into custody on that date the responsible duty officer would have followed the proper procedure and entered the details in the custody register. The station commander and the custody officer on duty at the time had been heard by the Commission delegates as witnesses and both had confirmed that no one had been taken into custody at that time. Furthermore, interrogation of terrorist suspects never took place at the Derik headquarters but at the provincial headquarters in Mardin. The Government also found it significant that the applicant failed to recognise photographs of the premises when shown to her. Furthermore, the Government highlighted several inconsistencies in the way in which the applicant reported on the details of the alleged rape and assault to the public prosecutor and to the Diyarbakr Human Rights Association (see paragraph 23 below).*

C. Release from detention

22. According to the applicant, she, her father and her sister-in-law were taken away from the gendarmerie headquarters on or about 2 July, 1993. They were driven by members of the security forces to the mountains where they were questioned about the location of PKK shelters. They were subsequently

released separately. The applicant made her own way back to her village. The Government argued that the applicant's account of her release also undermined the credibility of her allegations. They contended that it would have been extremely naïve on the part of the security forces to take the applicant and the members of her family to a location within ten minutes of Tasit after three days of detention to ask about the whereabouts of terrorists.

D. The investigation of the applicant's complaint

23. On 8 July, 1993 the applicant together with her father and her sister-in-law went to the office of the public prosecutor, Mr Bekir Özenir, in Derik to lodge complaints about the treatment which they all alleged they had suffered while in detention. The public prosecutor took statements from each of them. *The applicant reported that she had been tortured by being beaten and raped. Her father and sister-in-law both alleged that they had been tortured* [author's note: emphasis added]. According to the applicant, she confirmed her account of what happened to her in a statement given to the Diyarbakır Human Rights Association on 15 July, 1993, which was submitted, undated, to the Commission along with her application.

1. Medical examination of the applicant

24. All three were sent the same day to Dr Deniz Akkuş at Derik State Hospital. The public prosecutor had requested Dr Akkuş to establish the blows and marks of physical violence, if any, in respect of Seydo and Ferahdiba. In respect of the applicant, he requested that she be examined to establish whether she was a virgin and the presence of any marks of physical violence or injury. In his report on the applicant dated 8 July, 1996, Dr Akkuş, who had not previously dealt with any rape cases, stated that the applicant's hymen was torn and that there was widespread bruising around the insides of her thighs. He could not date when the hymen had been torn since he was not qualified in this field; nor could he express any view on the reason for the bruising. *In separate reports he noted that there were wounds on the bodies of the applicant's father and sister-in-law* [author's note: emphasis added].
25. *On 9 July, 1993 the public prosecutor sent the applicant to be examined at Mardin State Hospital with a request to establish whether she had lost her virginity and, if so, since when. She was examined by Dr Ziya Çetin, a gynaecologist. According to the doctor's report, dated the same day, defloration had occurred more than a week prior to her examination. No swab was taken and neither the applicant's account of what had happened to her nor whether the results of the examination were consistent with that account were recorded in his report* [author's note: emphasis added]. Dr Çetin did not

comment on the bruising on her inner thighs on account of the fact that he was a specialist in obstetrics and gynaecology. He did not frequently deal with rape victims.

26. On 12 August, 1993 the public prosecutor took a further statement from the applicant who by that stage was married. On the same day he referred the applicant to Diyarbakır Maternity Hospital requesting that a medical examination be carried out to establish whether the applicant had lost her virginity and, if so, since when. *The medical report dated 13 August, 1993 confirmed Dr Çetin's earlier findings [...] that the hymen had been torn but that after seven to ten days defloration could not be accurately dated* [author's note: emphasis added].

2. Other investigatory measures

27. On 13 July, 1993 the public prosecutor wrote to Derik gendarmerie headquarters enquiring as to whether the applicant, her father and her sister-in-law had been held in custody there and, if so, as to the dates and duration of the detention and the names of those who carried out the interrogations. By letter dated 14 July, 1993, the commander of the gendarmerie headquarters, Mr Musa Çitil, replied that they had not been taken into custody. On 12 July, 1993, he supplied the public prosecutor with a copy of the entries for 1993. There were only six entries for that year.
28. On 22 July, 1993 the public prosecutor wrote to Derik gendarmerie headquarters requesting that the custody register for the months June-July 1993 be sent to him for inspection. The register contained no entries for the months in question.
29. The public prosecutor sent the applicant's file to the Forensic Medicine Institute in Ankara. By letter dated 22 December, 1993, the chief coroner requested that the applicant attend for an examination.
30. The public prosecutor wrote to the chief of security in Derik on 18 January and 17 February 1994 requesting that the applicant be brought to the office of the Attorney-General. In a follow-up letter of 18 April 1994 the public prosecutor referred to the fact that he had received no reply to his earlier letters. In a further letter dated 13 May, 1994, the public prosecutor informed the chief of security at Derik that the applicant, her father and her sister-in-law should attend at his office.
31. By report dated 13 May, 1994 in reply to a request for information of 9 May, 1994, the public prosecutor informed the office of the Attorney-General in Mardin that there was no evidence to support the applicant's claims but that the investigation continued.
32. On 18 May, 1994 the public prosecutor in Derik took two further statements from the applicant's father who confirmed his earlier account of the events of 29 June, 1993. Her father also declared that the applicant and her husband had left the district in March 1994 to find work elsewhere and that he did not know of their whereabouts.

33. On 19 May, 1994 the public prosecutor, Mr Bekir Özenir, interviewed Mr Harun Aca, a former PKK activist. Mr Aca alleged that the PKK members used the applicant's home as a shelter and that around April and May 1993 she was having a sexual relationship with two PKK members.
34. On 25 May, 1995, after the applicant's complaint had been declared admissible by the Commission, a public prosecutor, Mr Cahit Canepe, took a statement from Mr Ali Kocaman who commanded Derik gendarmerie headquarters from 1992 to 1994. Mr Kocaman, who admitted to memory loss as a result of a road accident, stated that he had no recollection of any incident of rape or torture at the time in question and denied any involvement.

E. Alleged interference with the applicant's right of individual petition

35. *The applicant also alleged that she and her family have been subjected to intimidation and harassment following the communication by the Commission of her application to the Government and particularly following the Commission's decision to invite her to give oral evidence. Her father was repeatedly asked her address by the public prosecutor and, on occasion, by the police. The applicant and her husband were also repeatedly called to the police station for no apparent reason, their house had been searched (once before 19 October, 1995 and again on 1 and 8 November, 1995) and they were questioned about her application to the Commission. The applicant was also made to sign a statement of the contents of which she is ignorant. Further, on or about 14 and 18 December 1995, the applicant's husband was taken into custody [author's note: emphasis added]. On the first occasion, he was slapped, kicked and severely beaten with truncheons by three police officers, one of his teeth being broken in the process. On the second occasion, he was again severely beaten by the same three officers.*
36. Furthermore, the applicant alleged that on 16 January, 1996, the applicant, her husband, father and father-in-law were called to Derik police station from where they were sent to the public prosecutor. He showed them the applicant's husband's statement of 19 October, 1995 and asked questions about it. The applicant's husband was asked whether the police were intimidating them, to which he replied "Yes". While they were not ill-treated on this occasion, the applicant's husband strongly considered that they all felt intimidated by the very fact of being called by the police and that the constant calls by the police to their homes were making their situation very difficult. The applicant also referred to incidents of harassment, including the stoning of her father-in-law's house which neighbours attributed to the security forces.
37. The Government [was] were requested by the Commission to respond to the above allegations. By letter and comments dated 12 January, 1996, the Government referred to the provisions of Turkish criminal procedure whereby it is the duty and unavoidable obligation of public prosecutors to investigate the

facts of crimes, which involves finding and questioning witnesses. In this context, police officers function as assistants to the public prosecutors. The public prosecutor who conducted the investigation instigated by the applicant and her father, and the police officers who acted under his authority, contacted the applicant and her father with the sole purpose of investigating the facts of the allegations and assembling the evidence. They submitted that the statements taken by the public prosecutor revealed no element of pressure being exerted and it was in the interests of the applicant for further evidence to be gathered. There was, they contended, no substantiation of the allegations of intimidation and harassment, the statements submitted by the applicant's representatives having been taken by extra-judicial means and their authenticity disputed. They submitted a letter from the Ministry of the Interior (Gendarmerie Department) stating that no search took place at the applicant's house and that the purpose of the police officers' visit to Seydo Aydın was to communicate to the applicant the summons to attend the Commission's hearing. Since she was not there, he was asked for her address and there was no persecution involved. In an earlier communication of 16 June, 1995 in response to the first allegations of harassment of the applicant's father, the Government had responded that they rejected these allegations categorically and that they formed part of a campaign to influence the course of the proceedings and the holding of hearings to take evidence.

38. At the taking of evidence before delegates of the Commission in Strasbourg on 18 October, 1995, the Agent of the Government responded to allegations made orally by the applicant's representative concerning the repeated questioning of the applicant's father. He stated that it was the duty of the Turkish Government to facilitate the proceedings of the Commission and that they had to notify the applicant. To avoid any problems of non-attendance or the waste of expenditure of coming to Strasbourg if she did not intend to comply with the summons, it was necessary to obtain her address from her father and that was why he was continually asked for the address. Requesting that information from her father could not, in his view, be regarded as harassment.

F. The Commission's evaluation of the evidence and findings of fact

39. *In the absence of any findings of fact reached by the domestic authorities on the applicant's complaint, the Commission assessed the evidence* [author's note: emphasis added] and established the facts on the basis of:

1. written and oral submissions on the admissibility and merits of the complaint;
2. oral evidence of eight witnesses taken by three delegates of the Commission in Ankara from 12 to 14 July, 1995;
3. oral evidence of the applicant taken by those delegates in Strasbourg on 19 October, 1996;

4. medical reports provided by the three doctors who examined separately the applicant at the public prosecutor's request on 8 July, 9 July and 13 August, 1993; a medical report on the findings in those reports which the applicant's representatives had had prepared by an English doctor (dated 7 July, 1995); a report dated 13 October, 1995 prepared by professors at the Faculty of Medicine of the University of Hacettepe, Turkey, disputing the findings reached by the English doctor;
5. Documents and statements from the applicant and witnesses, plans as well as a video film of Derik gendarmerie headquarters and the original custody register for 1993.

40. The Commission's findings can be summarised as follows:

1. While it was true that there were inconsistencies in the applicant's account of the time of the arrival of the village guards in Tasit and that she had failed to recognise photographs of Derik gendarmerie headquarters, these elements did not impinge on her credibility. Her evidence as to the time of arrival of the guards was basically consistent with her father's testimony and it was likely that she had relied on her father's identification of the station.
2. There were serious doubts as to the accuracy of the custody register in respect of the period in question. *The Commission delegates had been able to examine the custody register for 1993 and noted that the total of seven entries for that entire year represented a drop of almost 90% on previous years' entries.* The explanations given by the commander of Derik gendarmerie headquarters as well as by the duty custody officer to account for this drop were less than satisfactory [author's note: emphasis added]. The Commission concluded:

“[...] the evidence of these officers as regards the facilities for taking persons into custody and the practice regarding taking persons into custody during 1993 has been less than frank. It finds itself left with serious doubts as to whether the gendarmerie custody register is an accurate record of persons taken into custody during 1993. In these circumstances, the Commission considers that the lack of any official confirmation of the applicant's detention is insufficient evidence to discredit the account of the applicant and her father, which it finds to be credible and on the whole consistent.” (paragraph 172 of the Commission's report)
[author's note: emphasis added]

3. While the commander of Derik gendarmerie headquarters and the duty custody officer had failed to mention the existence of a basement or cellar when describing the layout of the building, it clearly emerged from a video of the building and a plan of the premises that there was in fact a basement used as a security area comprising two custody rooms and an office.
4. Having regard to her evidence and her demeanour before the delegates, and having given due consideration in particular to the medical reports drawn up by Dr Akkuş, Dr Çetin and the doctor from Diyarbakır

Maternity Hospital, the Commission found it established that during her custody at Derik gendarmerie headquarters

“[...] the applicant was blindfolded, beaten, stripped, placed inside a tyre [author’s note: tire] and sprayed with high-pressure water, and raped. It would appear probable that the applicant was subjected to such treatment on the basis of suspicion of collaboration by herself or members of her family with members of the PKK, the purpose being to gain information and/or to deter her family and other villagers from becoming implicated in terrorist activities.” (paragraph 180 of the Commission’s report) [author’s note: emphasis added]

5. The Commission examined the applicant’s complaints of interference with her right of individual petition, which allegedly occurred before November 1996 [...]. As regards those complaints, the Commission was satisfied that the applicant and her family were genuinely complaining of harassment and intimidation [...]. Having regard to the unsatisfactory response of the Government to the applicant’s complaints, *the Commission found that she and her family “... have been subjected to significant pressure from the authorities in circumstances which threaten to impinge on their continued participation in the proceedings before the Commission and that this has rendered the exercise of the applicant’s right of individual petition more difficult.”* (paragraph 217 of the Commission’s report) [author’s note: emphasis added]

II. Relevant domestic law and practice

A. The Turkish Criminal Code

41. The Turkish Criminal Code makes it a criminal offence

- to deprive anyone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),
- to issue threats (Article 191),
- to subject anyone to torture or ill-treatment (Articles 243 and 245 respectively),
- to commit rape (Article 416 concerning persons over 15).

B. The Turkish Code of Criminal Procedure

42. Under Article 153 of the Turkish Code of Criminal Procedure, the public prosecutor must investigate the facts on being informed of the commission of a crime. He must conduct the necessary inquiries to identify the perpetrators, hear witnesses, take statements from suspects, issue search warrants, etc. Article 154 of the Code authorises the public prosecutor to conduct a preliminary investigation into an offence either directly or with the support of the police. According to Article 163 the public prosecutor may institute criminal

proceedings if he decides that the evidence justifies the indictment of a suspect. If it appears that the evidence against a suspect is insufficient to justify the institution of criminal proceedings, he may close the investigation. However, the public prosecutor may decide not to prosecute if and only if the evidence is clearly insufficient. Under Article 165 a complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

43. Decree no. 285 modifies the application of Law no. 3713, the Anti-Terror Law (1981), in those areas which are subject to the state of emergency, with the effect that the decision to prosecute members of the administration or of the security forces is removed from the public prosecutor and conferred on local administrative councils. These councils are composed of civil servants. Decisions of the local council may be appealed to the Supreme Administrative Court; a refusal to prosecute is subject to an automatic appeal. If the offender is a member of the armed forces, he would fall under the jurisdiction of the military courts and would be tried in accordance with the provisions of Article 152 of the Military Criminal Code.

1. Administrative liability

44. Article 125 of the Turkish Constitution provides as follows:

“All acts or decisions of the administration are subject to judicial review. [...] The administration shall be liable to indemnify any damage caused by its own acts and measures.”

45. This provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the administration, whose liability is of an absolute, objective nature, based on the theory of “social risk”. Thus the administration is liable to indemnify persons who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.
46. The principle of administrative liability is reflected in the additional section 1 of Law no. 2935 of 25 October, 1983 on the state of emergency, which provides:

“... actions for compensation in relation to the exercise of the powers conferred by this Law are to be brought against the administration before the administrative courts.”

2. Civil liability

47. Any illegal act by civil servants, be it a crime or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts. Pursuant to Article 41 of the Civil Code, an injured person may file a claim for compensation against an alleged perpetrator who

has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 and non-pecuniary or moral damages may be awarded under Article 47.

III. International material

A. The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

48. Article 13 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December, 1984 requires that a State party “shall ensure that any individual who alleges that he has been subjected to torture in any territory under its jurisdiction has the right to complain to and have his case promptly and impartially examined by its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against ill-treatment or intimidation as a consequence of evidence given”. *Article 12 of the Convention [author’s note: European Convention on Human Rights] requires each State party to ensure “that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction [author’s note: emphasis added].”*

B. Public statements adopted by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

49. In its public statement on Turkey adopted on 15 December, 1992 (CPT/inf (93) 1), the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”), following three visits to Turkey, found:

“In light of all the information at its disposal, the CPT can only conclude that the practice of torture and other forms of severe ill-treatment of persons in police custody remains widespread in Turkey . . .” (paragraph 21) [author’s note: emphasis added]

It emphasised the words “persons in police custody”, having heard fewer allegations and finding less medical evidence of torture and other forms of premeditated severe ill-treatment by members of the gendarmerie [. . .]. It considered that “the phenomenon of torture and other forms of ill-treatment of persons deprived of their liberty in Turkey concerns at the present time essentially the police (and to a lesser extent the gendarmerie). *All the indications are that it is a deep-rooted problem*” (paragraph 25) [author’s note: emphasis added].

50. In its second public statement issued on 6 December, 1996 the CPT [European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment] noted that some progress had been made in implementing the remedial measures which it had recommended but that “the translation of words into deeds is proving to be a highly protracted process” [...]. The committee noted in its statement that in the course of visits to Turkey in 1996 its delegations had found clear evidence of the practice of torture and other forms of severe ill-treatment by the Turkish police [...]. It concluded that the information at its disposal

“... demonstrates that resort to torture and other forms of severe ill-treatment remains a common occurrence in police establishments in Turkey. To attempt to characterise this problem as one of isolated acts of the kind which can occur in any country - as some are wont to do - is to fly in the face of the facts”. (paragraph 10) [author’s note: emphasis added]

C. Submissions of Amnesty International

51. *In their written submissions to the Court [...] Amnesty International noted that the rape of a female detainee by an agent of the State for purposes such as the extraction of information or confessions or the humiliation, punishment or intimidation of the victim was considered to be an act of torture under current interpretations of international human rights standards.* They referred in this respect to the *Fernando and Raquel Mejia v. Peru* decision of 1 March, 1996 (Report no. 5/96, Case 10,970) of the Inter-American Commission on Human Rights taken under Article 5 of the American Convention on Human Rights, to the reports published by the United Nations Special Rapporteur on Torture and to the fact that the *International Criminal Tribunal for Former Yugoslavia had approved bills of indictment against individuals for torture based on allegations that they had raped female detainees* [author’s note: emphasis added].

Amnesty International also drew attention to current international legal standards on the investigation of allegations of rape made by detainees, in particular Articles 11 and 12 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted in 1984 [...].

PROCEEDINGS BEFORE THE COMMISSION

52. In her application to the Commission (no. 23178/94) introduced on 21 December, 1993, the applicant complained that she was subjected to physical ill-treatment and rape amounting to torture under Article 3 of the Convention, and that she was denied an effective right of access to a court as guaranteed by Article 6. She also complained that there was no effective domestic remedy in regard to the violations of her rights, contrary to Article 13.

53. The Commission declared the application admissible on 28 November, 1994. In its report of 7 March, 1996 (Article 31), it expressed the opinion that there had been a violation of Article 3 of the Convention (twenty-six votes to one); that there had been a violation of Article 6 s. 1 of the Convention (nineteen votes to eight); that no separate issue arose under Article 13 of the Convention (nineteen votes to eight); and that Turkey had failed to comply with its obligations under Article 25 s. 1 of the Convention (twenty-five votes to two). The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment.

Final Submissions to the Court

54. *In both their memorial and oral submissions before the Court, the Government contended that the applicant's case should be dismissed for failure to exhaust domestic remedies and for abuse of the right of individual petition. In the alternative, they requested the Court to find that the applicant's allegations were unsubstantiated [author's note: emphasis added].*

The applicant, for her part, requested the Court to rule that she had been the victim of violations of Articles 3, 6, 13 and 25 of the Convention and that the Government had failed to respect their obligations under Articles 28 s. 1(a) and 53 of the Convention. She also requested the Court to award her just satisfaction under Article 50 of the Convention.

AS TO THE LAW

I. The Government's Preliminary Objections

A. Non-exhaustion of domestic remedies

55. In their memorial the Government requested the Court to reject the applicant's complaints on account of her failure to have normal recourse to effective domestic remedies which were available to her under Turkish law. They criticised the Commission's decision to declare her application admissible although she had not even attempted to pursue a claim for compensation before the civil or administrative courts in respect of the harm which she allegedly suffered while in detention. [. . .].
56. In support of their assertion that the complaints should be declared inadmissible, the Government relied heavily on the fact that at the time the applicant lodged her application with the Commission a criminal investigation had been opened by the public prosecutor into her allegations. This investigation was in fact still being actively pursued. The decision of the Commission to declare the

application admissible and its subsequent pronouncement on the merits completely disregarded the steps which were being taken under Turkish criminal procedural law [...] to establish the veracity of the applicant's account of the events at the relevant time and were in contradiction to the principle of subsidiarity which underpinned the functioning of the Convention system.

57. *The Delegate of the Commission reminded the Court that in accordance with its usual procedure the Commission had invited the Government to submit observations on the admissibility of the application. They failed to respond and they should now be estopped from challenging the admissibility of the complaints before the Court.*
58. The Court agrees with the view of the Delegate. It notes from the Commission's decision on the admissibility of the application that *the Government [was] were in fact granted an extended time-limit by which to comment on the issue of admissibility. Notwithstanding this facility, they failed to submit any observations on this question. They are therefore estopped from raising objections to the admissibility of the application before the Court [...]* [author's note: emphasis added].

B. Abuse of process

59. Related to their first objection, the Government further asserted that the alleged complaints had been fabricated and the application to the Strasbourg institutions deliberately manipulated at the instigation of certain associations hostile to government policy in south-east Turkey in order to circumvent local remedies and the corresponding Convention requirement. *The application was in reality brought for propaganda purposes to denigrate the image of Turkey by promoting the view that local remedies were ineffective* [author's note: emphasis added].
60. *The Court finds that, as for the first preliminary objection, the Government must be considered to be estopped from raising their second objection at this juncture since they failed to assert the above argument at the admissibility stage of the proceedings before the Commission* [author's note: emphasis added].
61. The Government's preliminary objections must therefore be dismissed. The Court will now proceed to examine the merits of the applicant's complaints.

II. Alleged Violation of Article 3 of the Convention

A. Establishment of the facts

62. The Commission found that the applicant's account of the alleged events between 29 June and 1 July, 1993 had been borne out by the evidence which it had carefully evaluated [...]. The applicant requested the Court to accept the facts as found by the Commission. The Government challenged the way in

which the Commission assessed the evidence before it and strenuously disputed the conclusions which it reached.

B. Arguments of those appearing before the Court

1. The Commission

63. The Delegate of the Commission stressed before the Court that the Commission had reached its conclusions on the basis of a meticulous assessment of the evidence and in application of the evidentiary test enunciated by the Court in the case of *Ireland v. the United Kingdom* (judgment of 18 January, 1978, Series A no. 25, pp. 64–65, §§ 160–61) for finding a violation of Article 3 of the Convention, namely whether the evidence proved beyond reasonable doubt that the applicant had been taken to Derik gendarmerie headquarters on the date in question and raped and ill-treated during the period of her detention.

The Delegate reminded the Court that the Commission had appointed three delegates to conduct hearings in Ankara in July 1995 and in Strasbourg in October of the same year [...]. They heard the evidence of the key witnesses, including the testimony of the applicant and her father. They were able to cross-examine the public prosecutor about the conduct of his investigation, question the doctors who had examined the applicant, probe the veracity of the account given by the two gendarmes on duty at Derik gendarmerie headquarters at the time of the events and inspect the entries in the custody register kept at the headquarters. The Commission carefully cross-checked the statements given by the applicant to the public prosecutor, to the Diyarbakr Human Rights Association and to the delegates against the various statements made by her father as well as her sister-in-law. There were inconsistencies, but they were not such as to impinge on the credibility of the applicant and of her father. There was strong, clear and concordant evidence which entitled the Commission to conclude that the applicant had in fact been detained over the relevant period and while in detention raped and ill-treated in the way described in the Commission's report [...].

2. The applicant

64. The applicant requested the Court to accept the facts as found by the Commission. She had been taken from her village along with her father and sister-in-law by the security forces on 29 June, 1993 and held at Derik gendarmerie headquarters until 1 July, 1993. While in custody she was tortured by being raped and severely ill-treated.

3. The Government

65. In their memorial the Government criticised the way in which the Commission had evaluated the evidence. They contended that the Commission's finding that the applicant had been tortured by being raped and ill-treated while in

custody could not be sustained by the evidence which the delegates had collected.

66. Before the Court the Government sought to undermine the facts as established by the Commission by highlighting the inconsistencies and contradictions in the evidence given by the applicant and by her father to the delegates. The evidence was seriously deficient as regards, firstly, the date and time of the alleged taking into custody of the Aydın family and, secondly, the alleged rape and ill-treatment of the applicant while in detention. As regards the alleged detention, none of the villagers was able to confirm her account and surprisingly no one was able to recognise any of the local village guards who were supposed to have been present at the relevant time. The applicant's father had told the delegates at the hearing in Ankara that one of the villagers had also been detained along with his family. However he failed to name this person. The Commission had chosen to disregard the applicant's failure to recognise photographs of Derik gendarmerie headquarters although she testified that her blindfold was removed when she was taken outside. Furthermore, the Commission had impugned without justification the credibility of the gendarmes who were on duty at the time of the alleged detention and wrongly criticised the accuracy of the custody register.
67. As to the alleged rape and ill-treatment while in detention, the Government stressed that neither Dr Akkuş nor Dr Çetin had found any bruising or injury to the applicant's body which was consistent with rape or violent assault. The applicant maintained that she struggled during the alleged rape. However, there were no signs of bruising to her wrists or back or genitalia which would have suggested the use of violence to overcome her resistance. The bruising found on her inner thighs could be explained by factors other than the forcing apart of her legs to effect a sexual assault. In fact, the report drawn up by the Faculty of Medicine of the University of Hacettepe [...] which the Government had submitted to the Commission, indicated that the bruising could have been attributed to the fact that the applicant rode a donkey. While it was true that the medical examinations confirmed that her hymen had been torn, this could not justify a conclusion that defloration had resulted from the alleged rape. It was in fact medically impossible to estimate the date of defloration after a lapse of seven days from the date of the initial tear of the hymen. Had the applicant not waited as long as she did before going to the public prosecutor the medical evidence may have yielded further results. However, her delay in so doing led to the loss of vital evidence and was fatal to any medical corroboration of her account.
68. In addition, the applicant's claim that she was raped did not prevent her from marrying and conceiving a child shortly after the alleged event. In the view of the Government her decision to marry and her ability to be sexually active so soon after her claimed traumatic experience were scarcely consistent with the behaviour of a rape victim. It was equally surprising that, given the cultural context, her alleged loss of virginity did not create any obstacle to her marriage.

69. The Government accordingly requested the Court to reject the Commission's findings together with the applicant's allegations on account of the absence of convincing proof.

C. The Court's assessment of the evidence and the facts established by the Commission

70. The Court observes that under its constant case-law the establishment and verification of the facts are primarily a matter for the Commission (Articles 28s. 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area [...]. Such exceptional circumstances may arise in particular if the Court, following a careful examination of the evidence on which the Commission has based its facts, finds that those facts have not been proved beyond reasonable doubt.
71. *In the instant case, it must be recalled that the Commission reached its findings of fact after three delegates had heard the evidence of the key witnesses in the course of hearings held in Ankara and Strasbourg [author's note: emphasis added].* At those hearings the delegates had the advantage of putting questions to the witnesses, observing their reaction and demeanour and assessing the veracity and the probative value of their statements and overall credibility. They were also in a position to assess whether the credibility of the applicant and her father as witnesses withstood the questions put to them by the Government representatives at the hearings.
72. *The Commission reached its conclusions on the basis of the appropriate evidentiary requirement, namely proof beyond reasonable doubt [author's note: emphasis added].* Admittedly there were inconsistencies in the testimony of the applicant and her father, as the Government have noted. However, it is to be observed that the Commission was also aware of such inconsistencies but did not consider them to be of such a fundamental nature as to undermine the credibility of the applicant's account [...]. From its own careful examination of the evidence gathered by the Commission, it would appear to the Court that there is in fact a high degree of consistency between the accounts given by the applicant, her father and sister-in-law to the public prosecutor and by the applicant and her father to the delegates, which makes it highly unlikely that the applicant's allegations were fabricated.
73. The Court considers that it should accept the facts as established by the Commission, having been satisfied on the basis of the evidence which it has examined that the Commission could properly reach the conclusion that the applicant's allegations were proved beyond reasonable doubt, it being recalled that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences [...]. It would also note in this regard that the Government have been unable to adduce any evidence collected in the course

of the criminal investigation into the applicant's allegations ...which would have served to contradict this conclusion and that the medical evidence which they rely on cannot be taken to rebut the applicant's assertion that she was raped while in custody. [...].

1. Arguments of those appearing before the Court

(a) The applicant

74. *The applicant contended that the rape and ill-treatment to which she had been subjected gave rise to separate violations of Article 3 of the Convention, both of which should be characterised as torture* [author's note: emphasis added]. Article 3 provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

75. *She was 17 years old at the time of her detention* [author's note: emphasis added]. She was kept blindfolded and isolated from her father and sister-in-law throughout the period of detention. During that time she was debased by being raped and has suffered long-term psychological damage as a result of that particular act of torture. Furthermore, she was stripped naked, questioned by strangers, beaten, slapped, threatened and abused. She was forced into a tyre [author's note: tire], spun around and hosed with ice-cold water from high-pressure jets. *Having regard to her sex, age and vulnerability she requested the Court to find that the deliberately inflicted and calculated physical suffering and sexual humiliation of which she was the victim was of such severity as to amount to an additional act of torture* [author's note: emphasis added].

76. Finally, she contended that the failure of the authorities to carry out an effective investigation into her complaint of torture was in itself a violation of Article 3 of the Convention.

(b) The Government

77. The Government maintained that the allegations had not been proved. [...].

(c) The Commission

78. The Commission concluded that the deliberate ill-treatment inflicted on her by being beaten, being placed in a tyre [author's note: tire] and hosed with pressurised water, combined with the humiliation of being stripped naked, fell clearly within the scope of the prohibition of Article 3. The Commission also found that rape committed by an official or person in authority on a detainee must be regarded as treatment or punishment of an especially severe kind. Such an offence struck at the heart of the victim's physical and moral integrity and had to be characterised as a particularly cruel form of ill-treatment involving acute physical and psychological suffering.

79. *The Commission found that the applicant had been the victim of torture at the hands of officials in violation of Article 3* [author's note: emphasis added].

2. The Court's assessment

80. The Court recalls that it has accepted the facts as established by the Commission, namely that the applicant was detained by the security forces and while in custody was raped and subjected to various forms of ill-treatment. [...].
81. As it has observed on many occasions, *Article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment* [author's note: emphasis added]. Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible under Article 15 even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities.
82. In order to determine whether any particular form of ill-treatment should be qualified as torture, regard must be had to the distinction drawn in Article 3 between this notion and that of inhuman treatment or degrading treatment. *This distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering* [...] [author's note: emphasis added].
83. While being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.
84. *The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held* [author's note: emphasis added]. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre [author's note: tyre].
85. The applicant and her family must have been taken from their village and brought to Derik gendarmerie headquarters for a purpose, which can only be explained on account of the security situation in the region... and the need of the security forces to elicit information. The suffering inflicted on the applicant during the period of her detention must also be seen as calculated to serve the same or related purposes.

86. *Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention* [author's note: emphasis added]. Indeed the Court would have reached this conclusion on either of these grounds taken separately.
87. In conclusion, there has been a violation of Article 3 of the Convention.
88. As to the applicant's contention that the failure of the authorities to carry out an effective investigation into her treatment while in custody constituted a separate violation of Article 3 [...] the Court considers that it would be appropriate to examine this complaint in the context of her complaints under Articles 6 and 13 of the Convention.

III. Alleged Violations of Articles 6 S. 1 and 13 of the Convention

89. The applicant pleaded that she was denied an effective access to a court to seek compensation for the suffering which she experienced while detained at Derik gendarmerie headquarters on account of the inadequacy of the investigation into her complaints. She asked the Court to find that Turkey was in breach of Article 6 s. 1 of the Convention.
90. She also requested the Court to find a violation of Article 13 of the Convention on account of the ineffectiveness of the system of remedies in the respondent State to secure her right not to be subjected to torture.
91. Article 6 s. 1 provides to the extent relevant:

In the determination of his civil rights and obligations [...], everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...].

92. Article 13 states:

Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

93. The applicant, while asserting that an award of compensation was only one element in the discharge of the respondent State's obligation under Article 3, submitted that any prospect of obtaining reparation before the civil or administrative courts was dependent on the conduct of a proper criminal investigation into the complaint. Irrespective of the fact that Turkish administrative law absolved her from the civil-law requirement to establish fault on the part of an agent of the State [...] she would still have to prove before the administrative courts that she had been tortured while in custody. However, the criminal investigation as conducted was wholly inadequate to enable her to adduce such proof. The public prosecutor failed to question the gendarmes at Derik gendarmerie headquarters where she had been held, neglected to seek out

possible eyewitnesses in Tasit to the events which occurred in the village on 29 June, 1993 and made no attempt whatsoever to ascertain whether there was a case to answer. The various medical examinations ordered by the public prosecutor and the corresponding doctors' reports also failed to meet the needs of an effective investigation into a complaint of rape, focused as they were on the question as to whether or not she was a virgin as opposed to a rape victim.

94. The applicant further argued that the domestic law of the respondent State did not guarantee her an effective remedy in respect of other wrongs committed against her which constituted violations of her Convention rights but which could not be characterised as civil rights within the meaning of Article 6 s. 1. By way of example, she referred to the fact that she had been kept blindfolded throughout her period of custody. The applicant also requested the Court to find that the inadequacy of the criminal investigation violated not just Article 6 but also Article 13 of the Convention since that inadequacy disclosed problems with the system of remedies as a whole. In particular, it revealed the absence of an independent and rigorous investigative and prosecution policy, the prevalence of intimidation of complainants, their advisers and witnesses, and the lack of professional standards for taking medical evidence.
95. The Government insisted that the domestic criminal, civil and administrative law provided the applicant with adequate means of redress in respect of her complaints. Referring to the relevant provisions of the Code of Criminal Procedure [...] they stressed that the public prosecutor was under a legal duty to investigate alleged offences, to gather evidence, to question witnesses and, as appropriate, to prosecute where the evidence pointed to the guilt of a suspect. As to the alleged inadequacy of the criminal investigation into the applicant's case, they emphasised that the public prosecutor took immediate action on receipt of her complaint by sending her for a medical examination first to Dr Akkuş and then to a gynaecologist, Dr Çetin [...]. Both doctors had concluded that it was impossible by that stage to date when her hymen had been torn. A third medical examination followed and the results supported this view [...]. The Government insisted that the applicant's delay in lodging a complaint with the public prosecutor had resulted in a missed opportunity to obtain medical evidence confirming or refuting the veracity of her account. In parallel to his attempts to secure medical evidence, the public prosecutor sought information from Derik gendarmerie headquarters as to whether the applicant and members of her family had been detained at the relevant time and instructed that the custody register be forwarded to him for inspection. [...].
96. The Government stressed that the disappearance of the applicant from the Derik region impeded the investigation, including the carrying out of a psychological examination of the applicant. Notwithstanding, the investigation was still being pursued and it would be open to the applicant to take a legal challenge against any decision not to lay charges against a suspect.
97. Moreover, in accordance with the principle of the objective liability of the administration, Turkish administrative law enabled an aggrieved individual

- such as the applicant to be compensated for rape and ill-treatment at the hands of an official of the State without having to identify the culprit. [...].
98. The Commission agreed with the applicant's assertion that the conduct of a proper criminal investigation into her complaints was a vital precondition to obtaining reparation before the civil or administrative courts. The public prosecutor manifested an unacceptable degree of restraint with regard to the security forces by not questioning the gendarmes who were present at the Derik headquarters at the time of the alleged incident. Furthermore, he failed to explore other lines of enquiry which may possibly have corroborated the applicant's account of her detention. The manner in which the medical evidence was taken and the content of the medical reports were also deficient having regard to the nature of the offence under investigation. The overall and serious inadequacy of the criminal investigation resulted in the applicant being denied effective access to a court or tribunal to have a determination of her civil right to compensation, in breach of Article 6 of the Convention. In the light of this finding the Commission did not consider it necessary to examine the applicant's complaint under Article 13.

A. Article 6 s. 1 of the Convention

99. The Court recalls that Article 6 s. 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect [...]. Furthermore, Article 6 s. 1 applies to a civil claim for compensation in respect of ill-treatment allegedly committed by State officials.
100. *The applicant has never instituted proceedings before either the civil or administrative courts to seek compensation in respect of the suffering to which she was subjected in custody. On the other hand she has been prepared to invoke the criminal process in order to bring the offenders to justice and, at least in the initial stages of the criminal investigation, to cooperate with the investigating authority* [author's note: emphasis added]. She has sought to explain her failure even to attempt to pursue a claim for compensation on the grounds that she would have no prospect of success in the absence of proof that she had been raped and ill-treated at the hands of agents of the State, and such proof was impossible to adduce on account of the manner in which the public prosecutor conducted the investigation.
101. It appears to the Court that the essence of her complaint under Article 6 s. 1 of the Convention is the failure of the public prosecutor to conduct an effective investigation, which, if not giving rise to a prosecution, at the very least would prove that she had suffered harm while in custody, thus enhancing the prospects of success of her claim for compensation.
102. The Court considers therefore that it is appropriate to examine this complaint in relation to the general obligation on States under Article 13 to provide an

effective remedy in respect of violations of the Convention. *It notes in this respect that the applicant has indicated that an award of compensation would not in itself redress the gravity of the violation which she suffered, nor absolve the respondent State from respecting other aspects of its obligations under Article 3 of the Convention* [author's note: emphasis added].

B. Article 13 of the Convention

103. The Court recalls at the outset that Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State [. . .]. Furthermore, the nature of the right safeguarded under Article 3 of the Convention has implications for Article 13. *Given the fundamental importance of the prohibition of torture and the especially vulnerable position of torture victims . . . Article 13 imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture* [author's note: emphasis added]. Accordingly, where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. *It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a "prompt and impartial" investigation whenever there is a reasonable ground to believe that an act of torture has been committed (see paragraph 48 above). However, such a requirement is implicit in the notion of an "effective remedy" under Article 13* [. . .] [author's note: emphasis added].
104. Having regard to these principles, the Court notes that the applicant was entirely reliant on the public prosecutor and the police acting on his instructions to assemble the evidence necessary for corroborating her complaint. The public prosecutor had the legal powers to interview members

of the security forces at Derik gendarmerie headquarters, summon witnesses, visit the scene of the incident, collect forensic evidence and take all other crucial steps for establishing the truth of her account. His role was critical not only to the pursuit of criminal proceedings against the perpetrators of the offences but also to the pursuit by the applicant of other remedies to redress the harm she suffered. The ultimate effectiveness of those remedies depended on the proper discharge by the public prosecutor of his functions.

105. The applicant, her father and her sister-in-law complained to the public prosecutor about the treatment they suffered while in custody. In her statement she specifically referred to the fact that she was raped and tortured at Derik gendarmerie headquarters [...]. Although she may not have displayed any visible signs of torture, the public prosecutor could reasonably have been expected to appreciate the seriousness of her allegations bearing in mind also the accounts which the other members of her family gave about the treatment which they alleged they suffered. In such circumstances he should have been alert to the need to conduct promptly a thorough and effective investigation capable of establishing the truth of her complaint and leading to the identification and punishment of those responsible.
106. The provisions of the Turkish Code of Criminal Procedure taken together with the Criminal Code impose clear obligations on the public prosecutor to investigate allegations of torture, rape and ill-treatment [author's note: see paras. 41–43 above]. Notwithstanding, he only carried out an incomplete inquiry to determine the veracity of the applicant's statement and to secure the prosecution and conviction of the culprits. While he may not have been provided with the names of villagers who may have seen the Aydin family being taken into custody on 29 June, 1993, he could have been expected to take steps of his own initiative to ascertain possible eyewitnesses. It would appear that he did not even visit Tasit to familiarise himself with the scene of the incident which occurred on that date and whether the locations were consistent with those mentioned by the applicant or the other members of the family in their statements. Furthermore, he took no meaningful measures to determine whether the Aydin family were held at Derik gendarmerie headquarters as alleged. No officers were questioned in the critical initial stages of the investigation. The public prosecutor was content to conduct this part of the inquiry by correspondence with officials at the headquarters [author's note: see paras. 27–28 above]. He accepted too readily their denial that the Aydin family had been detained and was prepared to accept at face value the reliability of the entries in the custody register. Had he been more diligent, he would have been led to explore further the reasons for the low level of entries for the year 1993 given the security situation in the region [...]. *His failure to look for corroborating evidence at the headquarters and his deferential attitude to the members of the security forces must be considered to be a particularly serious shortcoming in the investigation* [author's note: emphasis added].
107. It would appear that his primary concern in ordering three medical examinations in rapid succession was to establish whether the applicant had lost her

virginity. The focus of the examinations should really have been on whether the applicant was a rape victim, which was the very essence of her complaint. In this respect it is to be noted that neither Dr Akkuş nor Dr Çetin had any particular experience of dealing with rape victims (see para. 24–25 above). No reference is made in either of the rather summary reports drawn up by these doctors as to whether the applicant was asked to explain what had happened to her or to account for the bruising on her thighs. Neither doctor volunteered an opinion on whether the bruising was consistent with an allegation of involuntary sexual intercourse (see para. 24–25 above). Further, no attempt was made to evaluate, psychologically, whether her attitude and behaviour conformed to those of a rape victim. The Court notes that the requirement of a thorough and effective investigation into an allegation of rape in custody at the hands of a State official also implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination [author's note: emphasis added]. It cannot be concluded that the medical examinations ordered by the public prosecutor fulfilled this requirement.

108. It has been contended that the investigation is still being conducted and that the applicant's absence from the vicinity of Derik impeded the investigation for a certain period [. . .]. She has also refused to undergo a further examination involving psychological testing [. . .]. In the view of the Court, this cannot justify the serious defects and inertia which characterised the crucial phase immediately following receipt of the complaint. The public prosecutor had at that stage the legal means to act promptly and gather all necessary evidence including, as appropriate, psychological and behavioural evidence; nor can the decision to suspend the investigation on account of the applicant's absence be justified given the gravity of the offence under investigation.
109. In the light of the above considerations, it must be concluded that no thorough and effective investigation was conducted into the applicant's allegations and that this failure undermined the effectiveness of any other remedies which may have existed given the centrality of the public prosecutor's role to the system of remedies as a whole, including the pursuit of compensation.

In conclusion, there has been a violation of Article 13 of the Convention.

IV. Alleged Violation of Article 25 S. 1 of the Convention

110. The applicant complained that the authorities had harassed and intimidated both her and members of her family in various ways on account of her decision to bring proceedings before the Convention institutions. There had accordingly been an interference with her right of individual petition in breach of Article 25 s. 1 of the Convention, which provides:

“The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.”

111. In support of her claim, she described how she and members of her family had been repeatedly summoned to the police station, the Security Directorate and the office of the public prosecutor and questioned about the nature of her application to the Commission. After leaving her village, her father was constantly questioned about her whereabouts. Her own home had been searched on two occasions and her husband had been twice taken into custody and beaten by police officers. She further alleged that neighbours had reported that the security forces had stoned her father-in-law's house. In November 1996, following the publication of the Commission's report and while the hearing in her case was pending before the Court, the authorities tried to pressurise her into undergoing a fourth medical examination in Istanbul, threatening to take her there by force if she refused. She requested the Court to find that this most recent act of intimidation should be considered a new violation of Article 25 [author's note: the right to petition the Commission regarding violation of her fundamental human rights].
112. The Government firmly rejected the applicant's interpretation of the contacts which the authorities had with her and members of her family over the relevant period. No independent evidence had ever been adduced in support of her allegation that she and members of her family had been subjected to intimidation and harassment or that her home had been searched. The Government in fact had rejected these allegations in a letter sent to the Commission on 12 December, 1995 in response to the Commission's request for an official reaction to them and they stood by that official denial. They recalled that under the Turkish Code of Criminal Procedure the public prosecutor together with the police were and continue to be under an obligation to conduct an investigation into the complaint which the applicant herself had made. The fact that the applicant had invoked the Convention system to seek redress in respect of her allegations did not bring an end to the investigation at the domestic level. It was of crucial importance to the success of that investigation to interview the applicant and her father about the events which they alleged took place and to check the veracity of their account. No pressure was ever exerted on the applicant and her family. In fact the authorities had endeavoured to facilitate her appearance before the delegates in Strasbourg in October 1995 both by trying to contact her through her father about the impending hearing and by expediting the issue of a passport.
113. As to the applicant's allegation that the authorities had tried to pressurise her in November 1996 into undergoing a fourth medical examination in Istanbul,

the Government once again highlighted the need to further the criminal investigation into her rape allegation by submitting her to a psychological examination. She was under no obligation to submit to any such examination and indeed the authorities have respected her wish not to be examined.

114. The Commission found that the applicant and her family were genuinely complaining of harassment and intimidation and had been subjected to significant pressure in circumstances which threatened to impinge on her continued participation in the proceedings before it and that this had rendered the exercise of her right of individual petition more difficult. While it was true that there was no independent evidence to support the allegations, the Commission considered nevertheless that the Government had on no occasion provided any plausible reasons which could justify the contacts which the authorities had with the applicant and her family. Furthermore, although invited by the Commission to address the factual allegations of intimidation and harassment, the Government had failed to do so.
115. The Court stresses that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 25 of the Convention that applicants or potential applicants are able to communicate freely with the Commission without being subjected to any form of pressure from the authorities to withdraw or modify their complaints [. . .].
116. It is to be noted that neither the applicant nor her family have adduced any concrete and independent proof of acts of intimidation or harassment calculated to hinder the conduct by her of the proceedings which she brought before the Convention institutions. The Commission has relied heavily on the failure of the authorities to provide more than a simple denial of the substance of her allegations that her house was raided, her husband beaten by police officers and that she and members of her family were repeatedly and without due justification contacted and questioned by the authorities about her application to the Commission. However, before the Court the Government reaffirmed that the allegations of intimidation and harassment had not been substantiated. They acknowledged that contacts and questioning did take place but have sought to justify these by referring to the needs of the criminal investigation being conducted into her complaints and to facilitate her attendance at the delegates' hearings.
117. Against this background, the Court's evaluation of the evidence before it leads it to find that there is an insufficient factual basis to enable it to conclude that the authorities of the respondent State have intimidated or harassed either the applicant or members of her family in circumstances which were calculated to induce her to withdraw or modify her complaint or otherwise interfere with the exercise of her right of individual petition.

Accordingly, there has been no breach of Article 25 s. 1 of the Convention.

V. Alleged Violations of Articles 28 s. 1(a) and 53 of the Convention

118. The applicant in her memorial requested the Court to find that the Government had failed to comply with their obligations under Articles 28 s. 1(a) and 53 of the Convention. Article 28 s.1(a) provides:

“In the event of the Commission accepting a petition referred to it:
(a) it shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities, after an exchange of views with the Commission;”

Article 53 provides:

“The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties.”

119. In support of her request the applicant contended that she was the victim of further acts of intimidation and harassment following the adoption of the Commission’s report on 7 March, 1996 wherein the Commission had found the Government to be in violation of Article 25 of the Convention. Moreover, intimidation and harassment in connection with the proceedings before the Court continued despite the ruling of the Court on 16 September, 1996 in the Akdivar case [author’s note: Akdivar and Others v. Turkey judgment of 16 September, 1996, Reports 1996-IV, p. 1219, § 105] that the respondent Government were found to be in breach of Article 25 of the Convention. In these circumstances the good faith of the Government and their willingness to abide by their commitments under the Convention were seriously in question.
120. Having regard to its conclusion on the applicant’s complaint under Article 25 [...] the Court considers that it is unnecessary to examine the applicant’s complaints under Articles 28 s. 1(a) and 53.

VI. Alleged Administrative Practice of Violating the Convention

121. In addition to finding individual violations of Articles 3, 6 § 1, 13 and 25 of the Convention, the applicant requested the Court to find that she was the victim of aggravated violations of these Articles on account of the existence of an officially tolerated practice of violation.
122. The applicant pointed to, inter alia, the public statement released by the CPT in December 1992 wherein it concluded that the practice of torture and other forms of ill-treatment of persons in custody was widespread in Turkey [...].

Before the Court she drew attention to the CPT's most recent public statement of 6 December, 1996 which confirmed that torture and ill-treatment remained a common occurrence in police establishments in Turkey [...]. The authorities have not taken action to improve the situation. The pattern established was for the authorities to deny such allegations with the result that adequate and independent investigations were not conducted to bring culprits before the criminal courts. This in turn resulted in the denial of effective remedies, including access to a court to claim compensation. Complainants and those assisting them were also routinely subjected to intimidation, thus discouraging use of the domestic legal system to obtain redress and rendering domestic remedies illusory in practice.

123. Furthermore, the applicant maintained that there was a high incidence of cases involving the respondent State before the Convention institutions in which applicants have alleged that they have been subjected to threats, intimidation and harassment as a result of the exercise of their right under Article 25 of the Convention. Doctors and lawyers assisting applicants with their claims were also subjected to such pressures.
124. The Court is of the view that the evidence established by the Commission is insufficient to allow it to reach a conclusion concerning the existence of any administrative practice of the violation of these Articles of the Convention relied on by the applicant.

VII. Application of Article 50 of the Convention

125. The applicant claimed just satisfaction under the provisions of Article 50 of the Convention, which provides:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary and non-pecuniary damage

126. The applicant stated that she incurred costs amounting to 50 pounds sterling (GBP) through having to leave Derik and travel to another town to avoid the intimidation and harassment to which she had been subjected (see para. 111 above). She claimed this amount by way of compensation for pecuniary damage.
127. As to non-pecuniary damage she claimed GBP 30,000 by way of compensation for the mental anguish and physical pain which she suffered as a result

of the ill-treatment to which she was subjected while in custody, and an additional GBP 30,000 in respect of the physical and enduring psychological suffering resulting from the rape. In addition she requested the Court to award a further GBP 30,000, to be paid to a charitable institution in Turkey, by way of aggravated damages for the practice of ill-treatment amounting to torture and of intimidation in relation to proceedings under the Convention. Finally, she invited the Court to express its condemnation of the serious violations of Articles 3 and 25 of the Convention of which she had been the victim by awarding the sum of GBP 30,000 by way of exemplary or punitive damages.

128. Before the Court the applicant requested that the total amount claimed – GBP 120,050 – by way of compensation for pecuniary and non-pecuniary damage should be expressed in sterling to be converted into Turkish liras at the exchange rate applicable at the date of payment. Alternatively, if the award of compensation were to be expressed in Turkish liras the Court should set the level of default interest at 95%, having regard to the extremely high rate of inflation in Turkey.
129. The Government requested the Court to reject the applicant's claim since she had failed to prove her allegations. *Without prejudice to this position, they suggested that in the event of a finding by the Court that Turkey had breached the Convention such a conclusion would in itself constitute just satisfaction* [author's note: emphasis added]. In any event the Court should avoid making any award which would unjustly enrich the applicant, having regard to salary levels in Turkey as well as the general state of the country's economy.
130. The Delegate of the Commission stated that the award of compensation made by the Court should be significant, having regard to the gravity of the violation under Article 3 and the fundamental importance of the right guaranteed therein.
131. *In view of the Court's finding that Article 25 has not been breached [...] the applicant's claim for compensation in respect of pecuniary damage must be rejected. In addition, the applicant's claim for compensation for non-pecuniary damage must be limited to the finding that the applicant was the victim of a violation of Article 3 of the Convention. In that respect, and having regard to the seriousness of the violation of the Convention suffered by the applicant while in custody and the enduring psychological harm which she may be considered to have suffered on account of being raped, the Court has decided to award a sum of GBP 25,000 by way of compensation for non-pecuniary damage, to be converted into Turkish liras at the exchange rate applicable at the date of settlement* [author's note: emphasis added].

B. Costs and expenses

132. The applicant claimed a total amount of GBP 43,360 by way of reimbursement of costs and expenses which she maintained were necessarily and reasonably incurred in bringing her complaints before the Convention institu-

tions. This sum represented the reasonable legal fees charged by her United Kingdom representatives (GBP 30,000), and by her Turkish representatives (GBP 3,000), as well as fees for research and assistance provided by the Kurdish Human Rights Project (GBP 6,000) and other necessarily and reasonably incurred costs and disbursements (translation, photocopying, telecommunications, medical report, etc., including direct costs incurred by the applicant – GBP 4,360). At the hearing the applicant requested that the amount to be awarded by way of legal costs to her United Kingdom-based representatives be paid directly to them in sterling, and that the other itemised costs and expenses expressed in sterling be converted into Turkish liras on the date of payment, in both cases on the basis of an 8% rate of default interest.

133. The Government considered that the amount claimed by the applicant had been unnecessarily inflated as a result of her decision to appoint representatives based in the United Kingdom. Turkish lawyers could have dealt with her application at more modest rates than those charged by her United Kingdom lawyers and their appointment would have avoided expenditure on interpretation, translation and telecommunications. They also disputed the entitlement of the Kurdish Human Rights Project to costs and expenses since this organisation had no authority to represent the applicant.
134. The Delegate did not comment on the amounts claimed.
135. The Court considers the amounts claimed by the applicant's duly appointed United Kingdom-based representatives for costs and expenses to have been necessarily and reasonably incurred (GBP 34,360). The Court therefore awards the amounts claimed in full together with any value-added tax (VAT) which may be chargeable, less the amount received by way of legal aid from the Council of Europe which has not already been taken into account in their claim. Moreover, it awards the full amount claimed by her Turkish representatives in respect of costs (GBP 3,000). As to the costs claimed by the Kurdish Human Rights Project, the Court is not persuaded that the extent of that association's involvement in the proceedings justifies the making of any award. It therefore dismisses their claim.

C. Default interest

136. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum. The Court considers that this rate of default interest should apply to the amount awarded by way of costs and expenses to the applicant's United Kingdom-based representatives and to the amount awarded in sterling to her Turkish representatives to be converted into Turkish liras at the exchange rate applicable at the date of payment.

FOR THESE REASONS, THE COURT

1. Dismisses by eighteen votes to three the preliminary objection concerning the exhaustion of domestic remedies;

2. Dismisses unanimously the preliminary objection concerning abuse of process;
3. Holds by fourteen votes to seven that there has been a violation of Article 3 of the Convention;
4. Holds by sixteen votes to five that there has been a violation of Article 13 of the Convention;
5. Holds by twenty votes to one that it is not necessary to consider the applicant's complaint under Article 6 § 1 of the Convention;
6. Holds unanimously that there has been no violation of Article 25 § 1 of the Convention;
7. Holds unanimously that it is not necessary to consider the applicant's complaints under Articles 28 § 1(a) and 53 of the Convention;
8. Holds by eighteen votes to three
 - (a) that the respondent State is to pay the applicant, within three months, in respect of compensation for non-pecuniary damage, 25,000 (twenty-five thousand) pounds sterling to be converted into Turkish liras at the rate applicable on the date of settlement;
 - (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;
9. Holds by sixteen votes to five
 - (a) that the respondent State is to pay directly to the applicant's United Kingdom-based representatives, within three months, in respect of costs and expenses 34,360 (thirty-four thousand three hundred and sixty) pounds sterling together with any VAT that may be chargeable, less 19,145 (nineteen thousand one hundred and forty-five) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment; and her Turkish representatives 3,000 (three thousand) pounds sterling to be converted into Turkish liras at the rate applicable on the date of settlement;
 - (b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;
10. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 September, 1997.

7.4 Notes and Questions

7.4.1 *Who Was the Child Victim in Aydın v. Turkey?*

The child victim in the instant case was Şükran Aydın who was a 17-year-old unmarried girl, a Turkish citizen of Kurdish origin, and at the time of her victimization by agents of the State, living with her parents (see European Court

of Human Rights [ECHR] judgment in *Aydin*, para. 13). It was stated in the ECHR judgment in the case that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment had noted the use of torture by State authorities in the early 1990s which continued at least up to the time of their report in 1996:

The committee noted in its statement that in the course of visits to Turkey in 1996 its delegations had found clear evidence of the practice of torture and other forms of severe ill-treatment by the Turkish police [...]. It concluded that the information at its disposal “... demonstrates that resort to torture and other forms of severe ill-treatment remains a common occurrence in police establishments in Turkey. To attempt to characterise this problem as one of isolated acts of the kind which can occur in any country - as some are wont to do - is to fly in the face of the facts”. (Committee report, para. 10, emphasis added cited at para. 50 of the ECHR *Aydin v. Turkey* Trial judgment)

Given the findings of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, it is likely that other children had suffered the same fate at the hands of the police and other Turkish authorities responsible for maintaining security during the period in question.

7.4.2 Did International Justice in This Case Affirm Respect for the Human Rights of the Child?

7.4.2.1 Was the Child Victim in This Case Regarded as Having Juridical Personality in Her Own Right, or Were Her Rights as a Human Being and as a Child Subsumed Under Those of the Parents or Other Adult Family Members?

In this case, Mrs Şükran Aydın, a Turkish national, brought the case to the Commission as an adult. However, the case concerned her rape and other torture as well as additional victimization by the State of Turkey when she was aged seventeen. The human rights infringements visited by the State upon Şükran as a 17-year-old were considered by the European Court of Human Rights as separate and apart from the claims regarding the torture and harassment of her father and sister-in-law (though the physical evidence of the torture of her family members was treated as partial corroboration of her complaint).

7.4.2.2 Was the International Obligation to Afford Children “Special Protection” Acknowledged and the Nature of the Offences by Agents of the State Considered Aggravated by the Fact that Şükran Was a Child at the Time She Was Tortured?

The victim in the instant case made specific mention of her age and vulnerability at the time of her victimization and these factors were considered by the European

Court of Human Rights (ECHR) in assessing the nature and severity of the human rights violations committed against her:

She was 17 years old at the time of her detention. She was kept blindfolded and isolated from her father and sister-in-law throughout the period of detention. During that time she was debased by being raped and has suffered long-term psychological damage as a result of that particular act of torture. Furthermore, she was stripped naked, questioned by strangers, beaten, slapped, threatened and abused. She was forced into a tyre [author's note: tire], spun around and hosed with ice-cold water from high-pressure jets. *Having regard to her sex, age and vulnerability she requested the Court to find that the deliberately inflicted and calculated physical suffering and sexual humiliation of which she was the victim was of such severity as to amount to an additional act of torture.* (ECHR judgment in Aydin, para. 75, emphasis added)

There was no explicit specific mention by the European Court of Human Rights, however, of the special protection due children under international law. However, the European Court accepted the Commission's finding of fact that Şükran had been raped, humiliated and degraded and that the acts perpetrated were even more terrifying given her age and vulnerability *and that they constituted torture*:

The applicant was also subjected to a series of particularly terrifying and humiliating experiences while in custody at the hands of the security forces at Derik gendarmerie headquarters having regard to her sex and youth and the circumstances under which she was held. She was detained over a period of three days during which she must have been bewildered and disoriented by being kept blindfolded, and in a constant state of physical pain and mental anguish brought on by the beatings administered to her during questioning and by the apprehension of what would happen to her next. She was also paraded naked in humiliating circumstances thus adding to her overall sense of vulnerability and on one occasion she was pummelled with high-pressure water while being spun around in a tyre [author's note: tire]. (ECHR judgment in Aydin, para. 84, emphasis added)

Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately. (ECHR judgment in Aydin, para. 86, emphasis added).

Thus, the European Court of Human Rights:

- Affirmed the veracity of the applicant's allegations regarding the various forms of torture she had endured at the hands of agents of the State of Turkey;
- Endorsed the applicant's position that rape in and of itself is a form of torture; and
- Found that the victim's suffering was intensified due to her young age and vulnerability (while not denying that the rape of a female at any age, married or unmarried, previously virginal or not, also constitutes torture).

Notwithstanding the foregoing, however, no mention of the fact that Şükran was a child at the time of the torture inflicted on her was made in regards to the Court's stated rationale for the amount of monetary damages awarded (i.e., no mention of the victim being a child as a further "aggravating factor"). Rather, the sum regarding non-pecuniary damage was based on the seriousness of the Article 3 violation (torture) in and of itself. This despite the fact that children are to be accorded special

protection under international human rights law and that according to the Court's own conclusions, Şükran's suffering was compounded on account of her young age and vulnerability.

7.4.2.3 What Did the Victim Ask the ECHR to Consider in Regards to the Article 3 Violation(s)?

Recall that the applicant requested that the court consider her tender age and find that the additional severe acts of sexual degradation and physical suffering aside from the rape itself constituted an additional violation of Article 3:

Having regard to her sex, age and vulnerability she requested the Court to find that the deliberately inflicted and calculated physical suffering and sexual humiliation of which she was the victim was of such severity as to amount to an additional act of torture.
(Re Applicant's submission, ECHR judgment in Aydin, para. 75, emphasis added)

The aforementioned request, in part, begs the court to consider as an aggravating factor the fact that she was a child at the time of the torture by the Turkish security agents. The European Court of Human Rights, however, ignored this opportunity to specifically find that the age of the child was a significant "aggravating factor" adding to the gravity of the crime in the eyes of the Court and would therefore have implications for the amount of reparation and any other remedy ordered.

7.4.3 Were the Medical Examinations Conducted of the Child Victim Directed Toward Establishing Whether or Not She Had Been Raped?

It should be noted that none of the medical examinations of the victim ordered by the Public Prosecutor were appropriately directed to investigating whether or not she was a rape victim, but rather were intended to determine if and when she had lost her virginity:

It would appear that his primary concern in ordering three medical examinations in rapid succession was to establish whether the applicant had lost her virginity. The focus of the examinations should really have been on whether the applicant was a rape victim, which was the very essence of her complaint. In this respect it is to be noted that neither Dr Akkuş nor Dr Çetin had any particular experience of dealing with rape victims [. . .]. No reference is made in either of the rather summary reports drawn up by these doctors as to whether the applicant was asked to explain what had happened to her or to account for the bruising on her thighs. Neither doctor volunteered an opinion on whether the bruising was consistent with an allegation of involuntary sexual intercourse [. . .]. Further, no attempt was made to evaluate, psychologically, whether her attitude and behaviour conformed to those of a rape victim. . . The Court notes that the requirement of a thorough and effective investigation into an allegation of rape in custody at the hands of a State official also implies that the victim be examined, with all appropriate sensitivity, by medical professionals with particular competence in this area and whose independence is not circumscribed by instructions given by the prosecuting authority as to the scope of the examination. It cannot be concluded that

the medical examinations ordered by the public prosecutor fulfilled this requirement. (ECHR Trial judgment in *Aydin*, para. 107)

The question arises then as to whether the State, from the outset, had intended to argue that the victim was not raped, but rather had allegedly simply been sexually active and had been involved in consensual sexual activity. Recall that the State never conceded in its submissions to the European Court of Human Rights that Şükran had been raped. The European Court of Human Rights rightfully found that the medical examinations should have been but were not conducted with a view to establishing whether a rape had occurred. However, it is important to note that even had the victim not recently lost her virginity – a time frame consistent with the allegation of when the rape was said to have occurred – but rather had she been sexually active prior to the alleged date of the rape, that would not in itself have discounted the rape allegation.

7.4.4 Was the Full Scope of the State Violations of International Law Set Out by the Court Including Any International Crimes that May Have Been Committed?

The State maintained that it was still investigating the case. The European Commission on Human Rights, however, had found that the Public Prosecutor had *not* adequately investigated the case at the outset when additional evidence critical to the case would have been more likely to have been accessible and the European Court of Human Rights accepted that finding. Note that the European Court of Human Rights did *not* make a finding in *Aydin* that Şükran's rape by agents of the State (while unlawfully in their custody), occurring as it did in a time of internal armed conflict, constituted part of a targeted attack on an identifiable group of civilians (Turkish citizens of Kurdish origin), and as such met the criteria for an international war crime under Protocol II additional to the Geneva Conventions. In this regard, recall also that prior to the girl's torture, four members of a group of Turkish police and village security people had come to her parents' home and questioned her family about alleged recent visits to the house by PKK members (Workers' Party of Kurdistan) and that the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment had confirmed the longstanding and widespread use of various forms of torture and ill-treatment of the Kurdish population by Turkish security forces. (Recall that since approximately 1985, serious disturbances had occurred in the south-east of Turkey between the security forces and the members of the PKK [Workers' Party of Kurdistan].)

The European Court of Human Rights did endorse the position of the complainant that the State had prevented her from obtaining a domestic civil or criminal remedy due to the superficial State investigation of the case up to the time of the European Court of Human Rights proceedings (thus finding that the State had violated Article 13 of the European Convention on Human Rights and Fundamental Freedoms). Recall that under Turkish law at the time, the victim would have to be able to access the findings of a thorough criminal investigation that established that she had been harmed while in State custody before she could access a civil remedy.

Despite finding violations of both Article 3 and Article 13 of the European Convention on Human Rights and Fundamental Freedoms, the European Court of Human Rights made no declaration regarding the State's obligation to bring the perpetrators of the torture to trial domestically in a criminal proceeding. Nor did the Court affirm that the latter was an essential part of the remedy to which *this* victim was entitled under international human rights law (contrast this to the declaration by the Inter-American Court in the torture-murder case *Gómez-Paquiyaury Brothers v. Peru* pertaining to bringing the mastermind of the crimes to justice; the other perpetrators having already been tried). Rather, the European Court of Human Rights in *Aydin* made reference only to the State's obligation under international human rights law to properly *investigate* any allegation of rape and other forms of torture and its obligation also under Turkish law to investigate any allegation of torture or other physical harm to persons while in the custody of agents of the State.

7.4.5 Was There Any Public Acknowledgement of the Grievous International Human Rights Abuses Committed Against Şükran as a Child Victim?

Neither the individual perpetrators nor the State made a public apology to the victim Şükran, or to her father or sister-in-law whom the Court also found had been tortured by the Turkish security forces. Such a public acknowledgement and apology by the State for the human rights abuses suffered by the victims in *Aydin* was not in fact ordered by the European Court of Human Rights. This is in stark contrast to the approach of the Inter-American Court, for example, in the torture-murder case of *Gómez-Paquiyaury Brothers v. Peru* where a public apology was an essential aspect of the remedy ordered by that international human rights court. Is a public acknowledgment and apology by the State – *widely disseminated through various media* – an important component of reparations for non-pecuniary damages especially where the human rights abuses are particularly severe (i.e., such a public acknowledgement and apology recognizes that a public Court judgment alone may not be sufficiently well-known to the general public and other State officials and, hence, diminish the victim's sense of public vindication)?

7.4.6 Were the Principles of the Convention on the Rights of the Child Reflected in the Treatment of the Aydin Case and the Remedy Afforded the Victims?

Turkey signed the United Nations Convention on the Rights of the Child (CRC) on 14 September, 1990, and ratified it on 4 April, 1995. Thus, the State had at least endorsed the Convention on the Rights of the Child in principle prior to the events in the instant case. However, as ratification had not been effected, the State was not

legally bound to follow the tenets of the Convention on the Rights of the Child. It is in times of armed conflict internal or international, however, that States must be especially mindful of the need to protect children and other vulnerable groups. Clearly, no such measures had been taken by Turkey in 1993. The ECHR in *Aydin* made no reference to the CRC or the fact that Turkey had signed the Convention (with certain reservations noted with respect to Articles 17, 29 and 30 of the CRC) indicating its preliminary support in principle for the Convention.

7.4.7 Would Justice Have Been Better Served by Advancing the Aydin Case Before an Alternative International System (in This Case the ICC) Had That Been Possible?

The events giving rise to the complaint in the instant case occurred in 1993 and predate the establishment of the ICC (the ICC only has jurisdiction over international crimes committed post 2001 within the territories of States Parties that have ratified the Rome Statute). However, had the ICC option been available, it may have afforded the victims the opportunity to see the individual perpetrators of the torture and rape of Şükran and the human rights abuses against other family members be tried criminally (i.e., by an international criminal court). Given that four years after the torture of the victims a proper State criminal investigation of the case had yet to be realized (i.e., the State had not established whether torture had occurred in the *Aydin* case and if it did who the perpetrators were), it would appear that the ICC would have been a necessary and viable option had it been available at the time.

7.4.8 Were the Victim and Her Family in Aydin Accorded the Full Measure of Justice Under International Human Rights Law by the European Court of Human Rights?

Given the failure of the European Court of Human Rights in *Aydin*:

- To affirm the State obligation not simply to do a proper investigation, but to bring to justice in a criminal proceeding the individual perpetrators of the torture of the child victim; and
- The rather nominal monetary damages paid to the victim applicant (considering the gravity of the offence); as well as
- The lack of any order from the Court for a State public acknowledgement and apology for the grievous harms done to the victim (including torture) and her family perpetrated by the agents of the State

can it be argued that the victim and her family did not receive the full measure of justice owed to them under the European Court of Human Rights system?

7.4.9 What Was the Nature of the Reparations Ordered by the Court, to Whom Were They to Be Paid and Is There Any Special Significance of the Reparations that Ought to Be Recognized in Terms of Promoting the Rights of the Child?

There were no special increased reparations awarded to Şükran Aydın on account of her having been a child when she was tortured by Turkish authorities. Thus there was no acknowledgement of the right of the child to special protection under international law or the especially grave nature of the offence given the fact of there being a child victim involved. The latter is especially noteworthy in that the ECHR itself acknowledged the absolute prohibition on torture under international law (including the European Convention) even in times of internal unrest:

As it has observed on many occasions, Article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment. (ECHR Trial judgment in Aydın, para. 81, emphasis added)

Yet, the monetary damages arguably did not reflect the especially heinous nature of the crime namely; a child being tortured by State authorities. Note that no punitive damages were awarded for the victim's suffering despite the applicant's request that the monetary award reflect the especially grave nature of the State's violation of Article 3 in particular:

As to non-pecuniary damage she claimed GBP 30,000 by way of compensation for the mental anguish and physical pain which she suffered as a result of the ill-treatment to which she was subjected while in custody, and an additional GBP 30,000 in respect of the physical and enduring psychological suffering resulting from the rape. In addition she requested the Court to award a further GBP 30,000, to be paid to a charitable institution in Turkey, by way of aggravated damages for the practice of ill-treatment amounting to torture and of intimidation in relation to proceedings under the Convention. Finally, she invited the Court to express its condemnation of the serious violations of Articles 3 and 25 of the Convention of which she had been the victim by awarding the sum of GBP 30,000 by way of exemplary or punitive damages. (ECHR Trial judgment in Aydın, para. 127)

The ECHR instead ordered an award of "GBP 25,000 by way of compensation for non-pecuniary damage, to be converted into Turkish liras at the exchange rate applicable at the date of settlement" as reparation for the torture suffered by the child victim as well as for the enduring psychological harms caused by that torture especially the rape (ECHR Aydın judgment, para. 131). (The Court also awarded certain legal costs.) The question arises as to whether this paltry sum implicitly reflects the court's tacit acceptance of the notion advanced by the State that the victim should not be left in a better position financially than she would otherwise have been had the crimes not occurred? However, it is unclear why, given the level of victim suffering involved, and the fact that the State failed to protect the child victim, that she should not receive non-pecuniary damages that put her in a better financial situation than she was prior to her victimization. Can

it be argued that given that she is not to blame for her own victimization, she should not suffer lesser financial recompense for suffering than what would seem just had the crimes occurred in a more affluent State? Further, can the argument be made that as no amount of money can fully restore the victim to the state of well-being psychologically that she enjoyed before the crimes were committed against her by agents of the State; and that therefore no figure can be deemed to be excessive, but that the court must consider what is reasonable in the specific case given the particulars of the human rights abuses and the circumstances under which they were committed?

7.4.10 Did the ECHR Err in Failing to Find a Violation of Article 25 of the European Convention on Human Rights and Fundamental Freedoms?

The ECHR did not find a violation of Article 25 of the European Convention – interference of the applicant’s right to pursue a complaint with the European Commission on Human Rights – thus rejecting the Commission’s findings and demanding, in effect, that the victim produce concrete evidence of intimidation and harassment:

It is to be noted that neither the applicant nor her family have adduced any concrete and independent proof of acts of intimidation or harassment calculated to hinder the conduct by her of the proceedings which she brought before the Convention institutions. The Commission has relied heavily on the failure of the authorities to provide more than a simple denial of the substance of her allegations that her house was raided, her husband beaten by police officers and that she and members of her family were repeatedly and without due justification contacted and questioned by the authorities about her application to the Commission. However, before the Court the Government reaffirmed that the allegations of intimidation and harassment had not been substantiated. They acknowledged that contacts and questioning did take place but have sought to justify these by referring to the needs of the criminal investigation being conducted into her complaints and to facilitate her attendance at the delegates’ hearings. (ECHR Trial judgment in *Aydin*, para. 116)

Might it be argued that it was unfair to demand of the applicant that she produce hard evidence of intimidation given that she and her family were torture victims and any witnesses to the intimidation may have been too frightened to come forward? Is the evidence of multiple contacts and questioning of the victim and her family (acknowledged by the State) sufficient to establish an Article 25 violation given that the State continued to deny that the torture and rape of Şükran Aydın in 1993 had even occurred (leaving it an open question as to whether in fact the State was motivated to conduct a proper and unbiased investigation)? Indeed, the State was so unsympathetic to the victim in *Aydın* that they suggested to the ECHR that even if it found that Article 3 had been violated, that finding in itself should be full and just satisfaction:

The Government requested the Court to reject the applicant’s claim since she had failed to prove her allegations. *Without prejudice to this position, they suggested that in the event of a finding by the Court that Turkey had breached the Convention such a conclusion would in*

itself constitute just satisfaction. In any event the Court [according to the State] should avoid making any award which would unjustly enrich the applicant, having regard to salary levels in Turkey as well as the general state of the country's economy. (ECHR judgment in Aydin, para. 129, emphasis added)

7.4.11 Does UN Security Council Resolution 1820 Categorize Rape and Other Sexual Violence Occurring in Some Contexts as an International Crime?

In June 2008, the UN Security Council adopted resolution 1820 (UN Security Council resolution 1820, adopted by the Security Council at its 5916th meeting, on 19 June, 2008, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement>), which holds that “rape and other forms of sexual violence” (the victim of which is most often women and girls) “can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide”:

Article 4

[The Security Council] Notes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation.

This categorization of rape and sexual violence as potentially “a war crime, a crime against humanity, or a constitutive act with respect to genocide” particularly when involving targeted civilian vulnerable populations in times of armed conflict reflects an acknowledgement of the gravity of these crimes and their enduring harms psychological and often also physical; and the destructive power of rape and sexual violence upon the community as a whole. The resolution “calls upon” States Parties to conscientiously and vigorously prosecute the perpetrators of such crimes and “stresses the need” that such crimes not be excused under any amnesty provisions which may be part of a national reconciliation strategy. Article 4 also “calls upon” the States Parties “to ensure that women and girls be provided equal protection of the law and access to justice.” It is significant that the language of Article 4 does *not* include the term “demands” in relation to States obligations to *prosecute* perpetrators (though the resolution incorporates, at Articles 2 and 3, the Security Council “demand” for the *prevention* of rape and other forms of sexual violence by requiring the State to afford civilians appropriate protection, and the demand for enforcement of *military* disciplinary procedures and command control over the military as well as other measures. It is unclear how adequate would be the

enforcement or particulars of any military disciplinary procedures for the crime of rape or other sexual violence in any particular context as compared to prosecution in an international criminal court or national non-military criminal court; especially where the practice of rape and other sexual violence against civilians is widespread and involves also perpetrators who are in command positions).

7.4.12 Does UN Security Council Resolution 1820 Concern Sexual Violence of Various Forms Against Both Civilians and Non-Civilian Victims?

United Nations Resolution 1820 refers both to civilian victims of rape and other sexual violence and non-civilian victims. Female adult and child soldiers are also especially vulnerable to rape and other sexual violence and have been routinely victimized in this manner in various jurisdictions in contemporary times (i.e., Article 10 refers to protection of civilians from rape and sexual violence who are involved in “disarmament, demobilization, and reintegration processes,” see the text of UN Resolution 1820 below).

7.4.13 Does UN Security Council Resolution 1820 Acknowledge that UN Peacekeepers Have Sometimes Been Perpetrators of Sexual Violence Against the Very Population They Were Meant to Protect?

The fact that peacekeepers have also been perpetrators of such crimes is noted at Article 7 of the resolution (see the text of UN Resolution 1820 below).

7.4.14 Is There a Continuing Need for the UN Security Council Resolution 1820?

The fact that there is persistent need for such a resolution reflects the fact that rape and sexual violence against targeted civilian groups, including child groups, continues to be a prevalent grave international crime. Consider the Aydin case (which predates UN security resolution 1820) and whether the handling of that rape case by the ECHR in fact meets the standards of resolution 1820, i.e., consider that the ECHR did not call upon the State to bring the alleged perpetrators to trial.

7.4.15 *What Is the Text of the UN Security Council Resolution 1820 Concerning the Use of Rape and Other Forms of Sexual Violence in Situations of Armed Conflict or Post-conflict?*

Below is the text of UN Resolution 1820 concerning sexual violence perpetrated against civilians, especially women and girls in times of armed conflict:

United Nations S/RES/1820 (2008) Resolution 1820 (2008) Adopted by the Security Council at its 5916th meeting, on 19 June, 2008

The Security Council,

Reaffirming its commitment to the continuing and full implementation of resolution 1325 (2000), 1612 (2005) and 1674 (2006) and recalling the Statements of its president of 31 October, 2001 (Security Council/PRST/2001/31), 31 October, 2002 (Security Council/PRST/2002/32), 28 October, 2004 (Security Council/PRST/2004/40), 27 October, 2005 (Security Council/PRST/2005/52), 8 November, 2006 (Security Council/PRST/2006/42), 7 March, 2007 (Security Council/PRST/2007/5), and 24 October, 2007 (Security Council/PRST/2007/40);

Guided by the purposes and principles of the Charter of the United Nations,

Reaffirming also the resolve expressed in the 2005 World Summit Outcome Document to eliminate all forms of violence against women and girls, including by ending impunity and by ensuring the protection of civilians, in particular women and girls, during and after armed conflicts, in accordance with the obligations States have undertaken under international humanitarian law and international human rights law;

Recalling the commitments of the Beijing Declaration and Platform for Action (A/52/231) as well as those contained in the outcome document of the twenty-third Special Session of the United Nations General Assembly entitled “Women 2000: Gender Equality, Development and Peace for the Twenty-first Century” (A/S-23/10/Rev.1), in particular those concerning sexual violence and women in situations of armed conflict;

Reaffirming also the obligations of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol thereto, the Convention on the Rights of the Child and the Optional Protocols thereto, and urging states that have not yet done so to consider ratifying or acceding to them,

Noting that civilians account for the vast majority of those adversely affected by armed conflict; that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group; and that sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities;

Recalling its condemnation in the strongest terms of all sexual and other forms of violence committed against civilians in armed conflict, in particular women and children;

Reiterating deep concern that, despite its repeated condemnation of violence against women and children in situations of armed conflict, including sexual violence in situations of armed conflict, and despite its calls addressed to all parties to armed conflict for the cessation of such acts with immediate effect, such acts continue to occur, and in some situations have become systematic and widespread, reaching appalling levels of brutality,

Recalling the inclusion of a range of sexual violence offences in the Rome Statute of the International Criminal Court and the statutes of the ad hoc international criminal tribunals,

Reaffirming the important role of women in the prevention and resolution of conflicts and in peacebuilding, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution,

Deeply concerned also about the persistent obstacles and challenges to women's participation and full involvement in the prevention and resolution of conflicts as a result of violence, intimidation and discrimination, which erode women's capacity and legitimacy to participate in post-conflict public life, and acknowledging the negative impact this has on durable peace, security and reconciliation, including post-conflict peacebuilding,

Recognizing that States bear primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law,

Reaffirming that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians,

Welcoming the ongoing coordination of efforts within the United Nations system, marked by the inter-agency initiative "United Nations Action against Sexual Violence in Conflict," to create awareness about sexual violence in armed conflicts and post-conflict situations and, ultimately, to put an end to it,

1. *Stresses* that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security, affirms in this regard that effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security, and expresses its readiness, when considering situations on the agenda of the Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence;
2. *Demands* the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians with immediate effect;

3. *Demands* that all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence, which could include, inter alia, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuation of women and children under imminent threat of sexual violence to safety; and requests the Secretary-General, where appropriate, to encourage dialogue to address this issue in the context of broader discussions of conflict resolution between appropriate UN officials and the parties to the conflict, taking into account, inter alia, the views expressed by women of affected local communities;
4. *Notes* that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, *stresses the need for* the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and *calls upon* Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and *stresses* the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation;
5. *Affirms* its intention, when establishing and renewing state-specific sanctions regimes, to take into consideration the appropriateness of targeted and graduated measures against parties to situations of armed conflict who commit rape and other forms of sexual violence against women and girls in situations of armed conflict;
6. *Requests* the Secretary-General, in consultation with the Security Council, the Special Committee on Peacekeeping Operations and its Working Group and relevant States, as appropriate, to develop and implement appropriate training programs for all peacekeeping and humanitarian personnel deployed by the United Nations in the context of missions as mandated by the Council to help them better prevent, recognize and respond to sexual violence and other forms of violence against civilians;
7. *Requests the Secretary-General to continue and strengthen efforts to implement the policy of zero tolerance of sexual exploitation and abuse in United Nations peacekeeping operations*; and urges troop and police contributing countries to take appropriate preventative action, including pre-deployment and in-theater awareness training, and other action to ensure full accountability in cases of such conduct involving their personnel [author's note: emphasis added];
8. *Encourages* troop and police contributing countries, in consultation with the Secretary-General, to consider steps they could take to heighten awareness and the responsiveness of their personnel participating in UN peacekeeping operations to protect civilians, including women and children, and prevent

sexual violence against women and girls in conflict and post-conflict situations, including wherever possible the deployment of a higher percentage of women peacekeepers or police;

9. *Requests* the Secretary-General to develop effective guidelines and strategies to enhance the ability of relevant UN peacekeeping operations, consistent with their mandates, to protect civilians, including women and girls, from all forms of sexual violence and to systematically include in his written reports to the Council on conflict situations his observations concerning the protection of women and girls and recommendations in this regard;
10. *Requests* the Secretary-General and relevant United Nations agencies, inter alia, through consultation with women and women-led organizations as appropriate, *to develop effective mechanisms for providing protection from violence, including in particular sexual violence, to women and girls in and around UN managed refugee and internally displaced persons camps, as well as in all disarmament, demobilization, and reintegration processes*, and in justice and security sector reform efforts assisted by the United Nations [author's note: emphasis added];
11. *Stresses* the important role the Peacebuilding Commission can play by including in its advice and recommendations for post-conflict peacebuilding strategies, where appropriate, ways to address sexual violence committed during and in the aftermath of armed conflict, and in ensuring consultation and effective representation of women's civil society in its country-specific configurations, as part of its wider approach to gender issues;
12. *Urges* the Secretary-General and his Special Envoys to invite women to participate in discussions pertinent to the prevention and resolution of conflict, the maintenance of peace and security, and post-conflict peacebuilding, and encourages all parties to such talks to facilitate the equal and full participation of women at decision-making levels;
13. *Urges* all parties concerned, including Member States, United Nations entities and financial institutions, to support the development and strengthening of the capacities of national institutions, in particular of judicial and health systems, and of local civil society networks in order to provide sustainable assistance to victims of sexual violence in armed conflict and post-conflict situations;
14. *Urges* appropriate regional and sub-regional bodies in particular to consider developing and implementing policies, activities, and advocacy for the benefit of women and girls affected by sexual violence in armed conflict;
15. *Also requests* the Secretary-General to submit a report to the Council by 30 June, 2009 on the implementation of this resolution in the context of situations which are on the agenda of the Council, utilizing information from available United Nations sources, including country teams, peacekeeping operations, and other United Nations personnel, which would include, inter alia, information on situations of armed conflict in which sexual violence has been widely or systematically employed against civilians; analysis of the prevalence and trends of sexual violence in situations of armed conflict; proposals for strategies to minimize the susceptibility of women and girls

to such violence; benchmarks for measuring progress in preventing and addressing sexual violence; appropriate input from United Nations implementing partners in the field; information on his plans for facilitating the collection of timely, objective, accurate, and reliable information on the use of sexual violence in situations of armed conflict, including through improved coordination of UN activities on the ground and at Headquarters; and information on actions taken by parties to armed conflict to implement their responsibilities as described in this resolution, in particular by immediately and completely ceasing all acts of sexual violence and in taking appropriate measures to protect women and girls from all forms of sexual violence;

16. *Decides* to remain actively seized of the matter.

7.4.16 How Has the International Community Addressed the Issue of Peace Keepers and Humanitarian Aid Workers Who Sexually Offend Against Children They Were Sent to Protect and Serve?

The fact that humanitarian aid workers, UN peacekeepers (personnel with the UN Department of Peacekeeping Operations [DPKO]), have at times been the perpetrators of sexual crimes against child civilians during times of armed strife or post-conflict is documented in the 2008 Save the Children (UK) report prepared by Corinna Csaky titled: “No One to Turn to: The under-reporting of child sexual exploitation and abuse by aid workers and peacekeepers.” The latter report defines the term *sexual exploitation* as “Any actual or attempted abuse of a position of vulnerability, differential power or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another;” and *sexual abuse* as “The actual or threatened physical intrusion of a sexual nature, whether by force or under equal or coercive conditions.” The report deals with sexual abuse and exploitation of children under the age of consent in the jurisdictions studied. The author of the report makes the point that though the report focused on sexual abuse and exploitation involving various forms of coercive pressures (such as inducements of food and other non-monetary items), and forced sex between the children and the adult humanitarian aid workers or UN peacekeepers and others affiliated with international organizations, this is not to suggest that the child is considered to have the legal capacity to consent under any scenario. The report also makes the point that the incidence of such crimes by the personnel of foreign nations deployed by international aid organizations or by the United Nations Department of Peacekeeping Operations is found to be higher where the local context already involves high rates of such sexual abuse and exploitation of children by nationals in various sectors of society (*No One to*

Turn To 2008, p. 9 available at http://www.savethechildren.org.uk/en/docs/No_One_to_Turn_To.pdf).

The Save the Children (UK) report “*No One to Turn To*” (2008, p. 1, available at http://www.savethechildren.org.uk/en/docs/No_One_to_Turn_To.pdf) states that the incidence of sexual exploitation and abuse of vulnerable children by humanitarian aid workers and UN peacekeepers and others affiliated with international organizations is seriously underreported mostly as the figures reported are dependent upon the willingness of vulnerable children and/or their families reporting these crimes and further:

[...] children and their families are not speaking out because of a mix of stigma, fear[of retaliation or retribution], ignorance [author’s note: i.e., of fundamental human rights, etc.] and powerlessness [author’s note: not knowing how to report, lack of legal services, awareness that past reports have not been dealt with, inability of the State to prosecute perpetrators who have left the country, etc.]. In addition, it appears that at the grassroots level international agencies are not yet perceived as responding effectively to allegations – with the consequence that victims and others cannot see the point of reporting abuse. Together, these two factors are a major impediment to stamping out this problem.

The study is based in large part on data collected via fieldwork in Southern Sudan, Côte d’Ivoire and Haiti. The data were collected via “38 focus group discussions with a total of 341 people living in chronic emergencies in [the] three countries. This included 129 girls and 121 boys aged between 10 and 17 years, as well as 36 men and 54 women [...]. [In addition there were] individual in-depth interviews with several of these people [...] as well as meetings with 30 humanitarian, peace and security professionals working at national, regional and international levels” (No One To Turn To 2008, p. 3, available at http://www.savethechildren.org.uk/en/docs/No_One_to_Turn_To.pdf).

The problem of the sexual exploitation and abuse of children by international aid workers and peacekeepers is apparently widespread in various jurisdictions globally according to Save the Children (*No One to Turn To* 2008, p. 10, available at http://www.savethechildren.org.uk/en/docs/No_One_to_Turn_To.pdf). The Save the Children report provides insights into to some of the factors that can be expected to mitigate against accurate reporting and prevention, and suggests some strategies for combating these sexual crimes perpetrated by those sent to serve and protect. Shockingly, the report found that the perpetrators engaged in a wide range of sexual exploitation and abuse including child rape and this included *trading sex for food* and other items, *forced sex*, *verbal sexual abuse*, *child prostitution*, *child pornography*, *sexual slavery*, *indecent sexual assault*, and *child trafficking linked with commercial sexual exploitation* (*No One to Turn To* 2008, p. 5, available at http://www.savethechildren.org.uk/en/docs/No_One_to_Turn_To.pdf).

The Save the Children 2008 *No One to Turn To* report states their study revealed that: UN peacekeepers (UN Department of Peacekeeping Operations [DPKO]) are most often mentioned as the perpetrators of such sex crimes against women and

children (which the report notes may be due to the higher incidence of military personnel perpetrating such crimes and/or the more effective monitoring and transparency in reporting of the DPKO) and that UN peacekeepers are mentioned as perpetrators of this sexual violence more so than other United Nations personnel (*No One to Turn To* 2008, p. 5, http://www.savethechildren.org.uk/en/docs/No_One_to_Turn_To.pdf).

The report cites various factors as likely responsible for the high incidence of DPKO personnel involved in committing such crimes (*No One to Turn To* 2008, p. 8, available at http://www.savethechildren.org.uk/en/docs/No_One_to_Turn_To.pdf):

Peacekeepers are capable of exerting particular influence over the communities in which they serve, especially over children and young people. This is largely due to the fact that they are armed and provide much-needed physical security within contexts of extreme fragility. Furthermore, peacekeeping forces contain a significant number of military personnel with discriminatory attitudes to women.

The *No one to Turn To* report suggests that preventing and reducing the incidence of sexual exploitation and abuse of children by peacekeepers and humanitarian aid workers will require (p. 2; for detailed discussion of these measures see also pp. 22–26 of the same report available at http://www.savethechildren.org.uk/en/docs/No_One_to_Turn_To.pdf):

- a) Effective local complaints mechanisms [...] set up in-country to enable people to report abuses against them.
- b) A new global watchdog [...] to monitor and evaluate the efforts of international agencies to tackle this abuse and to champion more effective responses.
- c) Tackling the root causes or drivers of abuse [...] [becoming] a greater priority for governments, donors and others in the international community, including the development of stronger child protection systems at the national level.

Since at least 2002, the United Nations has attempted to prevent and mitigate the problem of UN peacekeepers and international and domestic aid workers and others affiliated with international organizations becoming sex perpetrators against child victims in the States where these peacekeepers and others are deployed (i.e., see, for instance the UN annual reports of the Secretary-General's bulletin, *Special Measures for Protection from Sexual Exploitation and Sexual Abuse* A/59/782 [15 April, 2005]; A/60/861 [24 May, 2006]; and A/61/957 [15 June, 2007]). Clearly, the current measures have been less than effective and these perpetrators continue to deny the gravity of the harms they are inflicting and acting largely with impunity. This author suggests that in addition to the prevention and mitigation strategies advocated by Save the Children (UK) in the aforementioned report, it is necessary to treat these sexual offences when committed by domestic or international humanitarian aid workers, or other workers associated with governmental or non-governmental international organizations and/or international peacekeepers as international crimes (namely crimes against humanity amounting to torture; war crimes and/or constituent elements in genocide – depending on the specific fact pattern). The perpetrators then would be subject to prosecution by the relevant international

criminal court where the mechanism for prosecution of the crimes as international crimes is not present and/or viable domestically for any reason (including not meeting international human rights standards of just procedures), and where the State in which the crimes took place recognizes the jurisdiction of the international criminal court in question. The rationale for this approach is that domestic and international humanitarian aid workers and UN peacekeepers who would take advantage of the circumstances of vulnerable children given the chaos or weaknesses in State institutions in times of armed conflict and post-conflict situations; natural emergencies and other exigencies are no different than any other perpetrators (i.e., State security forces or police, military personnel at any level, rebel troops or commanders, etc.) who do the same. That is, they exploit the same type of national situations and contribute to systemic attacks on civilians (as well as on ex child soldiers and others who are being demobilized) in times of particular need for those populations. These perpetrators who are humanitarian aid workers or UN peacekeepers and others affiliated with international organizations also create enormous and lasting harm to the victims directly and to the concept and implementation of an international human rights and humanitarian legal and moral order which is intended to ensure fundamental human rights and freedoms. In doing so, these specific perpetrators who were supposed to serve and protect in fact do the opposite. That is, they contribute to a weakening of international peace and security just as surely as do any other perpetrators of international crimes. Effectively prosecuting these particular perpetrators would serve to highlight that the international community is willing in practical terms to vigorously address the problem using the severe sanctions available under international criminal law.

7.4.17 What Is the Contribution of the International Criminal Court (ICC) Trust Fund for Victims to Assisting the Victims of International Crimes Involving Sexual Violence?

On 10 September, 2008, the Board of Directors of the Trust Fund for Victims (TFV) of the International Criminal Court (ICC) announced a global appeal for 10 million pounds sterling to assist 1.7 million victims of sexual violence within the jurisdiction of the ICC. The TFV provides support for victims to participate in the judicial process of the ICC and for rehabilitative/reintegration services for the victims (“Global appeal for 10 million pounds sterling to assist 1.7 million victims of sexual violence launched,” ICC-CPI-20080910-PR353_ENG, available online at <http://www.icc-cpi.int/press/releases/420.html>):

[...] the Chair of the Board of Directors, Madame Simone Veil, explained that the funds will serve to support programmes focusing on communities most affected by situations where the ICC is operating, namely Uganda, the Democratic Republic of the Congo (DRC), Central African Republic (CAR) and Darfur, Sudan. “Women and girls are most often the

primary victims of war and civil disturbance – they are victims of rape, abuse and the destruction of families. The Board of Directors of the Trust Fund for Victims believes administering targeted support for those most vulnerable under the jurisdiction of the ICC is necessary”, said Madame Veil.

In an encouraging demonstration of support and as a first response to the appeal a sum of 500,000 was donated towards this appeal by the government of Denmark. Speaking at the briefing, Ambassador HE Ms Kirsten Malling Biering of Denmark commented, “Rape and sexual violence as a means of war is gruesome and devastating for the victims. The crimes also represent an attack on women in general – their standing in society and their fundamental rights.”

Chapter 8

International Criminal Tribunal for Rwanda

Case 5: The Prosecutor v. Sylvester Gacumbitsi (Case No. ICTR-2001-64-A)

The full judgment is available at http://69.94.11.53/ENGLISH/cases/Gacumbitsi/judgement/judgement_appeals_070706.pdf (last accessed February 5, 2009).

8.1 Excerpt from the Appeal Judgment 7 July, 2006

[Author's note: Internal footnotes have been omitted. For long quotes set apart in the text and for most internal quotes, the content of the footnotes in the original has been referenced in the body of the text through author's notes.]

IN THE APPEALS CHAMBER

Before: Judge Mohamed Shahabuddeen, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Judgement of: 7 July, 2006

[. . .]

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January, 1994 and 31 December, 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of appeals by Sylvestre Gacumbitsi ("Appellant") and the Prosecution against the Judgement rendered by

Trial Chamber III on 17 June, 2004 in the case of *The Prosecutor v. Sylvestre Gacumbitsi* (“Trial Judgement”).

I. Introduction

A. Background

2. The Appellant, Sylvestre Gacumbitsi, was born in 1943 in Kigina Sector, Rusumo Commune, Kibungo Prefecture, Rwanda. The Appellant was *bourgmestre* of Rusumo Commune in April 1994, a position he had held since 1983. As such, he was the highest-ranking local administrative official.
3. The Appellant was tried on the basis of an indictment dated 20 June, 2001 (“Indictment”), which charged him with individual criminal responsibility for certain crimes committed against the Tutsi population of Kibungo Prefecture between 6 and 30 April 1994. The Trial Chamber found the Appellant guilty of genocide (Count 1), and dismissed the alternative charge of complicity in genocide (Count 2). It also convicted him of extermination and rape as crimes against humanity (Counts 3 and 5, respectively), but acquitted him of murder as a crime against humanity (Count 4). It imposed a single sentence of thirty years’ imprisonment.

B. The Appeals

4. The Appellant appeals his convictions and challenges his sentence. He divides his allegations of error into five categories; the Appeals Chamber will refer to these as “grounds of appeal” and the specific alleged errors as “sub-grounds”. The Appellant alleges errors in certain interlocutory decisions of the Trial Chamber (Ground 1); and errors relating to his convictions for genocide, extermination as a crime against humanity, and rape as a crime against humanity (Grounds 2, 3, and 4, respectively). The Appellant submits that his sentence should be reduced to fifteen years in the event that his convictions are not quashed on appeal (Ground 5). The Prosecution responds that all grounds of appeal raised by the Appellant should be dismissed.
5. The Prosecution presents six grounds of appeal. It avers that the Trial Chamber erred in various respects in sentencing (Ground 1), in acquitting the Appellant of murder as a crime against humanity (Ground 2), in failing to find him criminally responsible for certain rapes (Ground 3), in its enunciation of the elements of rape (Ground 4), in refusing to consider joint criminal enterprise (“JCE”) as a mode of liability because it had not been pleaded adequately in the Indictment (Ground 5), and in holding that the Appellant lacked authority to order participants in the attack in Rusumo Commune other than communal policemen (Ground 6). The Appellant objects to all grounds of appeal raised by the

Prosecution, except Ground 4 (elements of rape), with respect to which the Appellant does not take a position.

C. Standards of Appellate Review

6. The Appeals Chamber now recalls some of the applicable standards of appellate review pursuant to Article 24 of the Statute of the Tribunal (“Statute”). The Appeals Chamber reviews only errors of law which invalidate the decision of the Trial Chamber and errors of fact which have occasioned a miscarriage of justice.
7. As regards errors of law, the Appeals Chamber has recently stated:

Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant’s arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law [author’s note: *Ntakirutimana*, appeal judgment, para. 11 (internal citations omitted). See also, e.g., *Kamuhanda*, appeal judgment, para. 6; *Niyitegeka*, appeal judgment, para. 7].

8. As regards errors of fact, it is well established that the Appeals Chamber will not lightly overturn findings of fact made by a Trial Chamber.

Where the Defence alleges an erroneous finding of fact, the Appeals Chamber must give deference to the Trial Chamber that received the evidence at trial, and it will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. Furthermore, the erroneous finding will be revoked or revised only if the error occasioned a miscarriage of justice [author’s note: *Krstic*, appeal judgment, para. 40 (internal citations omitted). See also, e.g., *Kamuhanda*, appeal judgment, para. 7; *Kajelijeli*, appeal judgment, para. 5; *Ntakirutimana*, appeal judgment, para. 12].

9. A party cannot merely repeat on appeal arguments that did not succeed at trial, unless it can demonstrate that the Trial Chamber’s rejection of those arguments constituted an error warranting the intervention of the Appeals Chamber. Arguments which do not have the potential to cause the impugned decision to be reversed or revised may immediately be dismissed by the Appeals Chamber and need not be considered on the merits.
10. In order for the Appeals Chamber to assess the appealing party’s arguments, the appealing party must provide precise references to relevant transcript pages or paragraphs in the decision or judgement to which the challenge is being made. Further, “the Appeals Chamber cannot be expected to consider a party’s submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies.” Finally, the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and will dismiss arguments which are evidently unfounded without providing detailed reasoning.

II. The Appeal of Sylvestre Gacumbitsi

A. Interlocutory Decisions (Ground of Appeal 1)

[...]

B. Genocide (Ground of Appeal 2)

36. The Trial Chamber convicted the Appellant of planning, instigating, ordering, committing, and aiding and abetting the crime of genocide pursuant to Article 6 (1) of the Statute. The Appellant asserts that this conviction was based on errors in law and in fact. Specifically, he argues that the Trial Chamber erred in law in its legal characterization of the *dolus specialis* for genocide; that his conviction for committing genocide should be vacated because the Indictment did not allege his personal participation in the killing with sufficient specificity; and that the Trial Chamber erred in its assessment of the evidence in a number of respects. [...]
 37. [...] The Trial Chamber's references in paragraphs 293 and 295 should therefore have been to Articles 2(2)(a) and 2(2)(b) of the Statute, which specify underlying acts of genocide. The Appellant was charged under Count 1 of the Indictment with genocide through "killing or causing serious bodily or mental harm to members of the Tutsi population", a reference to Articles 2(2)(a) and 2(2)(b) of the Statute, and the Trial Chamber plainly intended to convict him under both of these provisions. The Appellant has not raised this point in his appeal. The Appeals Chamber corrects the error *proprio motu*, but considers that it did not affect the verdict.
1. Legal Characterization of the *Mens Rea* Element of the Crime of Genocide
38. The Appellant challenges the Trial Chamber's assessment of the question of *mens rea* for genocide. He observes that the Trial Chamber held that genocidal intent can sometimes, as here, be inferred from the accused's acts and their factual context. The Appellant suggests that the inferential approach is inconsistent with the notion of *dolus specialis* or specific intent because it removes from the Prosecution the burden of proving that the offender sought to destroy, in whole or in part, a protected group as such. The Prosecution responds that the Trial Chamber's inferential approach was consistent with well established legal principles and amply supported by the evidence and factual findings in this case, including those connecting the Appellant to other perpetrators of the genocide.
 39. The Appeals Chamber finds that the Trial Chamber correctly recognized that genocide is a crime requiring "specific intent". The Prosecution is required, under Article 2(2) of the Statute, to prove that the accused possessed the

specific “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”.

40. The Tribunal’s jurisprudence conclusively establishes that genocidal intent can be proven through inference from the facts and circumstances of a case. By its nature, intent is not usually susceptible to direct proof. Only the accused himself has first-hand knowledge of his own mental state, and he is unlikely to testify to his own genocidal intent. Intent thus must usually be inferred. Here, the Trial Chamber stated:

It is possible to infer the genocidal intent inherent in a particular act charged from the perpetrator’s deeds and utterances considered together, as well as from the general context of the perpetration of other culpable acts systematically directed against that same group, notwithstanding that the said acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership in a particular group, while excluding members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.[...] Evidence of genocidal intent can be inferred from “the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing” [author’s note: trial judgment, paras. 252, 253].

41. This approach is consistent with the Appeals Chamber’s previous holdings. For instance, the Rutaganda Appeal Judgement states:

The Appeals Chamber concurs with the Appellant that in order to find a person guilty of genocide, it must be established that such a person was personally possessed of the specific intent to commit the crime at the time he did so. Nonetheless, as stated by the Appeals Chamber in *Kayishema/Ruzindana*, “explicit manifestations of criminal intent are [...] often rare in the context of criminal trials”. In the absence of explicit, direct proof, the *dolus specialis* may therefore be inferred from relevant facts and circumstances. Such an approach prevents perpetrators from escaping convictions simply because such manifestations are absent [author’s note: *Rutaganda*, appeal judgment, para. 525 (internal citations omitted)].

Specifically, relevant facts and circumstances could include “the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.” The Appeals Chamber emphasizes that the inferential approach does not relieve the Prosecution of its burden to prove each element of its case, including genocidal intent, beyond reasonable doubt. Rather, it is simply a different means of satisfying that burden.

42. In this case, in support of its finding that the Appellant possessed the requisite genocidal intent, the Trial Chamber cited the Appellant’s urging of the *conseillers de secteur* in his commune, at a meeting on 9 April, 1994, “to incite the Hutu to kill the Tutsi” the Appellant’s similar statements made directly to the Hutu population on three separate occasions on 13 and 14 April, 1994;

his instigation of the rape of Tutsi women and girls on 17 April, 1994; and his personal killing of a Tutsi named Murefu on 15 April, 1994, which signalled “the beginning of the attack at Nyarubuye Parish” [author’s note: trial judgment, para. 259, emphasis added]. The Trial Chamber also referred to its earlier findings of fact. For instance, it found that at the 9 April, 1994 meeting, the Appellant instructed the conseillers to return to their secteurs and organize meetings at which they were to instruct the Hutu “to separate themselves from the Tutsi” and then “to kill all the Tutsi, so that the Inkotanyi would no longer have any accomplices.” It also found that on 14 April, 1994, at Rwanteru commercial centre, the Appellant “addressed about one hundred people and incited them to arm themselves with machetes and to participate in the fight against the enemy, specifying that they had to hunt down all the Tutsi.” And it found that later that same day, at Gisenyi trading centre, the Appellant urged about forty people “to kill all the Tutsi and throw their bodies into the River Akagera”.

43. [...] The Appellant offers no reasonable alternative explanation for the above-described actions and utterances. His repeated exhortations to crowds of people that they should kill all the Tutsis, even considered apart from his other actions, leave room for no other reasonable inference [author’s note: regarding genocidal intent].
44. The Appellant further argues that the Trial Chamber improperly relied on the “acts of other perpetrators” to prove the Appellant’s genocidal intent without establishing a nexus between perpetrators and the Appellant. This contention is without merit. In establishing the Appellant’s mental state the Trial Chamber relied principally on the Appellant’s own actions and utterances – which, as detailed above, provided ample evidence of his mindset – and not those of others. The only aspect of the Trial Chamber’s analysis that relates to the actions of others is its reference to “the scale of the massacres”, which the Trial Chamber cited in support of its finding that the Appellant “acted with intent to destroy a substantial part of the targeted group.” In the Appeals Chamber’s view, it is appropriate and consistent with the Tribunal’s jurisprudence to consider, in determining whether the Appellant meant to target a sufficiently substantial part of the Tutsi population to amount to genocide, that the Appellant’s actions took place within the context of other culpable acts systematically directed against the Tutsi population. The Trial Chamber’s findings discussed above clearly establish that the Appellant was an active participant in those culpable acts.

[...]

59. In addition, by a differently composed majority, the Appeals Chamber holds, Judge Güney dissenting, that even if the killing of Mr. Murefu were to be set aside, the Trial Chamber’s conclusion that the Appellant “committed” genocide would still be valid. *The Trial Chamber convicted the Appellant of “ordering” and “instigating” genocide on the basis of findings of fact detailing certain conduct that, in the view of the Appeals Chamber, should be*

characterized not just as “ordering” and “instigating” genocide, but also as “committing” genocide [author’s note: emphasis added].

60. As the Trial Chamber observed, the term “committed” in Article 6(1) of the Statute has been held to refer “generally to the direct and physical perpetration of the crime by the offender himself” [author’s note: trial judgment, para. 285; see *Kayishema and Ruzindana*, appeal judgment, para. 187; *Tadic*, appeal judgment, para. 188. [...]]. *In the context of genocide, however, “direct and physical perpetration” need not mean physical killing; other acts can constitute direct participation in the actus reus of the crime.* [Author’s note: for instance, it has been recognized that selection of prisoners for extermination played an integral role in the Nazi genocide. See, e.g., Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October, 1946, p. 63, London: His Majesty’s Stationary Office, 1946. Emphasis added.] Here, the accused was physically present at the scene of the Nyarubuye Parish massacre, which he “directed” and “played a leading role in conducting and, especially, supervising”. It was he who personally directed the Tutsi and Hutu refugees to separate – and that action, which is not adequately described by any other mode of Article 6(1) liability, was as much an integral part of the genocide as were the killings which it enabled. Moreover, these findings of fact were based on allegations that were without question clearly pleaded in the Indictment.

61. The Appeals Chamber is persuaded that in the circumstances of this case, the modes of liability used by the Trial Chamber to categorize this conduct – “ordering” and “instigating” – do not, taken alone, fully capture the Appellant’s criminal responsibility. *The Appellant did not simply “order” or “plan” genocide from a distance and leave it to others to ensure that his orders and plans were carried out; nor did he merely “instigate” the killings. Rather, he was present at the crime scene to supervise and direct the massacre, and participated in it actively by separating the Tutsi refugees so that they could be killed. The Appeals Chamber finds by majority, Judge Güney dissenting, that this constitutes “committing” genocide* [author’s note: emphasis added].

[...]

76. The Appellant contends that the Trial Chamber committed a logical error when it found, on the basis of Witness TAS’s and TAW’s testimony, that the Appellant exhorted a crowd consisting of a Hutu majority at Nyakarambi market to “let no one escape”. He reasons that some Tutsis must have been present, and yet there is no allegation that anyone was killed at Nyakarambi on that day. This is a *non sequitur*. The Trial Chamber did not hold that the Appellant was giving instructions for immediate killings, but rather that he was seeking “to prepare the Hutu population for the elimination of the Tutsi.”

[...]

C. Crimes against Humanity: Extermination (Ground of Appeal 3)

83. The Trial Chamber convicted the Appellant of planning, instigating, ordering, and aiding and abetting extermination as a crime against humanity. It referred to its earlier factual findings on the Appellant's role in the massacre at Nyarubuye Parish, and found that the Appellant had the requisite *mens rea* for extermination in that he intended to participate in that massacre and had knowledge of the widespread and systematic attack against Tutsi civilians in Rusumo in April 1994. The Appellant challenges this conviction.

1. The Requisite Intent for the Crime of Extermination

84. The Appellant first appears to submit that the Trial Chamber applied an incorrect legal standard on the requisite intent for crimes against humanity. In the Appellant's view, "the mental element must be proved by the existence of a widespread practice, which implies planning and tolerance of such act by the State." The Appeals Chamber rejects this contention. As stressed by the Trial Chamber, the existence of a policy or plan can be evidentially relevant, but it is not a separate legal element of a crime against humanity. In particular, the ICTY Appeals Chamber has emphasized that proof of a plan or policy is not a prerequisite to a conviction for extermination. The same can be said of "tolerance of such act by the State."

85. The Appellant further submits that the Trial Chamber erred in fact in finding that he had the requisite intent for the crime of extermination. He avers that the Prosecution has not shown that he took any action to plan the extermination of Tutsis. In particular, he contends that the meetings of 8 and 9 April 1994 only dealt with security issues and that Witness TBH (who testified as to the meeting of 9 April 1994) was manipulated by the Prosecution. The Appellant also argues that he refuted the existence of the weapons allegedly distributed. He alleges that he could not have planned the extermination of Tutsis at the same time as he was arresting the people harming the Tutsis and their property, and that if he had planned to exterminate the Tutsis "he would not have waited for seven days" to do so when he had the capacity to do so earlier.

86. The Appeals Chamber hold that the Trial Chamber applied the correct *mens rea* requirement for the crime of extermination. In accordance with the case-law of the Tribunal, the Trial Chamber explained that for crimes against humanity "the accused must have acted with knowledge of the broader context of the attack, and with knowledge that his act formed part of the widespread and systematic attack against the civilian population." While the Trial Chamber did not expressly outline the *mens rea* requirement specific to the crime of extermination, it implicitly applied the correct requirement by finding that the actions of the Appellant revealed his "intention to participate in a large scale massacre in Nyarubuye." As the Appeals Chamber recently explained:

the crime of extermination requires proof that the accused participated in a widespread or systematic killing or in subjecting a widespread number of people or systematically subjecting a number of people to conditions of living that would inevitably lead to death, *and that the accused intended by his acts or omissions this result.*

87. Moreover, the Appellant's argument is premised on a misinterpretation of the facts. The Trial Chamber did find that the Appellant took steps to plan the genocide and extermination of Tutsis in Rusumo Commune, a conclusion that was reasonable, as discussed earlier.
88. The actions of the Appellant in planning the extermination of Tutsis from 8 through 15 April, 1994, as well as his subsequent actions from 15 through 17 April, 1994, show that the Appellant had the intent to massacre a large number of individuals, and that he knew that his acts furthered a widespread and systematic attack against the Tutsis. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in assessing the Appellant's *mens rea*.

2. Victims Named in the Indictment

89. The Appellant argues that the Trial Chamber should not have convicted him for extermination because the Prosecution had failed to prove that the individuals specifically mentioned in paragraph 28 of the Indictment were killed at Nyarubuye Parish. The Appeals Chamber disagrees; such a showing was not required for an extermination conviction. Paragraph 28 of the Indictment reads:

As direct consequences of orders or instructions from Sylvestre GACUMBITSI at Nyarubuye paroisse, there were numerous killings of family members and entire families, including UWIRAGIYE, MUGIRANEZA and TUYIRINGIRE, three children. The identity of each victim and the proximate number of fatalities and the exact circumstances of each death cannot be detailed exhaustively due to the overwhelming devastation of the massacres [author's note: emphasis added].

Although this paragraph lists certain specific victims, this is only by way of example. The Appellant was not convicted of personally "committing" extermination. The material fact for his conviction for planning, instigating, ordering, and aiding and abetting that crime was the fact that many refugees were killed as a consequence of the Appellant's orders or instructions. And, indeed, the Trial Chamber found "that many Tutsi who found refuge at Nyarubuye Parish were killed there between 15 and 17 April 1994." The Appellant has not shown that this finding was unreasonable.

[...]

3. Factual Basis for the Conviction

[...]

97. [...] the Trial Chamber [...] simply found that, in light of the “consistent and specific” evidence placing the Appellant at Nyarubuye Parish on 15 April, 1994, the Defence evidence did not raise a reasonable doubt as to his participation in the massacre. The Appellant has not shown that this was unreasonable.
98. For the foregoing reasons, this sub-ground of appeal is dismissed and the appeal under this ground is dismissed in its entirety.

D. Crimes against Humanity: Rape (Ground of Appeal 4)

99. *The Trial Chamber found that, on 17 April, 1994, the Appellant publicly instigated the rape of Tutsi girls*, declaring that sticks should be inserted into their genitals if they resisted [author’s note: emphasis added]. It then found that the rapes of Witness TAQ and seven other Tutsi women were a direct consequence of the Appellant’s instigation, and convicted the Appellant for those rapes. The Appellant challenges his conviction for rape as a crime against humanity.

1. Were the Rapes Part of a Widespread or Systematic Attack?

100. The Appellant submits that the Trial Chamber erred in law in convicting him of rape as a crime against humanity because the rapes in question were not committed in the course of a widespread and systematic attack. He submits that “systematic attack within the meaning of Article 3(g) of the Statute implies a deliberate act or plan” and that this element was not established here because the Prosecution did not prove the existence of preparatory meetings.
101. The Trial Chamber stated:

The attack must be widespread or systematic. The concept of “widespread” attack refers to the scale of the attack and multiplicity of victims. The attack must be “massive or large scale, involving many victims”. The concept of “systematic” attack, within the meaning of Article 3 of the Statute, refers to a deliberate pattern of conduct, but does not necessarily include the idea of a plan. The existence of a policy or plan may be evidentially relevant, in that it may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic. However, the existence of such a policy or plan is not a separate legal element of the crime.

This elucidation of the “widespread or systematic” requirement is in accordance with the case law of this Tribunal and that of the ICTY, and the Appeals Chamber sees no error in it.

102. The Appellant also argues that Article 3(g) of the Statute is directed at crimes of a collective nature, whereas the evidence in this case established, at most, individual or isolated acts. At the outset, it bears noting that it is not rape *per se* that must be shown to be widespread or systematic, but rather the attack

itself (of which the rapes formed part). In the case at hand, the Trial Chamber reasonably concluded that there was a widespread and systematic attack against Tutsis in Rusumo Commune. Its further conclusion that the rapes formed part of this attack was also reasonable in light of the finding that “the victims of rape were chosen because of their Tutsi ethnic origin, or because of their relationship with a person of the Tutsi ethnic group”.

103. The Appellant specifically contends that the rape of Witness TAQ was isolated because she had known her attacker previously. But this fact does not mean that her rape was isolated from the widespread and systematic attack. Indeed, the genocide and extermination campaign in Rwanda was characterized in significant part by neighbours killing and raping neighbours. Moreover, as the ICTY Appeals Chamber has recognized, even in the event that “personal motivations can be identified in the defendant’s carrying out of an act, it does not necessarily follow that the required nexus with the attack on a civilian population must also inevitably be lacking.” Whether or not the perpetrator and victim are acquainted, the question is simply whether the totality of the evidence proves a nexus between the act and the widespread or systematic attack. The Appellant has not shown that the Trial Chamber erred in holding that this requirement was satisfied here.
104. Accordingly, this sub-ground of appeal is rejected.

2. Assessment of the Evidence

105. The Appellant submits that the Prosecution witnesses who testified as to rapes were not credible. As the Trial Chamber acquitted the Appellant in relation to the rapes recounted by Witnesses TAO, TAS, and TAP, it is not necessary to discuss the contentions of the Appellant with respect to these witnesses. As to Witness TAQ, the Appellant refers to his arguments under his third ground of appeal, which have already been dismissed. He adds that the witness did not see him on 17 April, 1994, but only heard his voice through a megaphone, which causes vocal distortion; moreover, this difficulty was compounded by the fact that there were three persons talking at the same time. Finally, he reiterates that Witness TAQ knew her assailant, which, he suggests, means that her rape was not triggered by the Appellant’s instigation. In his Reply, the Appellant adds that the Trial Chamber erred in finding a causal link between his statements and the rapes, and that no reasonable trier of fact would have relied only on Witness TAQ’s testimony to prove such a link with respect to the rape of seven other women.
106. With respect to the Appellant’s argument concerning vocal distortion, the Trial Chamber concluded that “the witness knew the Accused sufficiently well, because of their relationship, to be able to recognize his voice over the megaphone without seeing him.” The Appellant has not shown that this conclusion was unreasonable, nor has he shown that the fact that there were other individuals also speaking made it unreasonable to rely on Witness

TAQ's testimony. Moreover, there is no cogent reason why the Trial Chamber should only have accepted Witness TAQ's account of her own rape and not that of the rapes she witnessed. As noted above, the Trial Chamber reasonably concluded that Witness TAQ was credible.

107. As noted above, the acquaintance between Witness TAQ and her assailant does not mean that her rape cannot constitute a crime against humanity. Likewise, it does not demonstrate that the Appellant could not have instigated the attack. The critical question is whether the Appellant's words substantially contributed to the commission of the rape. As to that question, the Trial Chamber found:

on 16 April 1994, around 9 a.m., the Accused, who was driving around in Rubare cellule, Nyarubuye secteur, using a megaphone, asked that Hutu young men whom girls had refused to marry should be looked for so that they should have sex with the young girls, adding that "in the event that they the young girls resisted, they had to be killed in an atrocious manner". Placed in context, and considering the attendant audience, such an utterance from the Accused constituted an incitement, directed at this group of attackers on which the bourgmestre had influence, to rape Tutsi women. That is why, immediately after the utterance, a group of attackers attacked Witness TAQ and seven other Tutsi women and girls with whom she was hiding, and raped them [author's note: emphasis added].

Given these factual findings, which have not been shown to be unreasonable, it was reasonable for the Trial Chamber to conclude that the Appellant's words substantially contributed to the rapes of Witness TAQ, as well as that of the seven other Tutsis.

108. Accordingly, this ground of appeal is dismissed in its entirety.

E. Sentencing (Ground of Appeal 5)

[...]

111. Given that, as the Appellant expressly concedes in his Reply Brief, he has not raised any error of the Trial Chamber in relation to the sentence imposed, the Appeals Chamber rejects the request to reduce the sentence. It is well established that the Appeals Chamber will not substitute its own sentence for that imposed by the Trial Chamber absent a showing that the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow applicable law.

III. The Appeal of the Prosecution

[...]

**B. Responsibility for Rapes Committed in Rusumo Commune
(Ground of Appeal 3)**

126. Although the Appellant was convicted of eight rapes under Count 5 of the Indictment, the Trial Chamber acquitted him of certain other rapes that had been recounted by Prosecution Witnesses TAO, TAS, and TAP. The Trial Chamber found that these rapes had taken place, but that the Prosecution had not proven that the Appellant had instigated them. On appeal, the Prosecution argues that the Trial Chamber should have convicted the Appellant for these rapes, either for instigation or under other modes of Article 6(1) or Article 6 (3) liability.

1. Instigation

(a) Legal Requirements for Instigation

127. The Prosecution argues that the Trial Chamber erred in law by requiring it to establish that the Appellant's instigation was a condition *sine qua non* of the commission of the rapes. Instead, it contends that to establish culpability for instigation, it suffices to show that the accused's instigation "substantially contributed" to the commission of the crime – that is, that he "set in motion a chain of events that were the foreseeable consequence of his instigation of the crime." The Prosecution concludes that the totality of the evidence in this case establishes beyond reasonable doubt that this standard was satisfied.

128. The Trial Chamber held that conviction for instigation requires proof "of a causal connection between the instigation and the *actus reus* of the crime." It found "no evidence of a link" between the Appellant's words and the rapes recounted by Witnesses TAS, TAO, and TAP.

129. *As the Kordic and Cerkez Appeal Judgement established, "it is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused" rather, "it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime"* [author's note: emphasis added]. Thus, the Prosecution has correctly stated the causation requirement for instigation. However, there is no indication that the Trial Chamber misunderstood this requirement. Its reference to a "causal connection between the instigation and the *actus reus* of the crime" does not specify what kind of causation must be proven, and without more it cannot be inferred that the Trial Chamber required that the instigation be the *sine qua non* of the rapes.

130. While the Trial Chamber did not use the phrase "substantially contributing", its language made clear that it found that this standard was not satisfied. Specifically, it found "no evidence establishing a link" – substantial or otherwise – between the Appellant's words and the rapes recounted by

Witnesses TAS, TAO, and TAP. Accordingly, the Trial Chamber did not err in law, and this sub-ground of appeal is dismissed.

(b) Evidence Supporting Instigation

131. In the alternative, the Prosecution argues that the Trial Chamber erred by failing to draw the only reasonable conclusion supported by the totality of the evidence and by its own factual findings: that the Appellant was responsible for instigating all the rapes established. *For instance, the Prosecution notes, the Trial Chamber found that on or about 17 April, 1994, he Appellant drove around Nyarubuye secteur with a megaphone inciting Hutu men to rape Tutsis and to kill atrociously those who resisted. Such rapes were then carried out, including by inserting sticks in the victims' genitals, and some victims died. The specific rapes recounted by Witnesses TAO, TAS, and TAP were perpetrated around mid-April 1994 in Rusumo Commune; some of them were perpetrated within Nyarubuye secteur, including by the Nyarubuye conseiller. The Prosecution points to the findings concerning the Appellant's knowledge of the rapes, his authority as bourgmestre, and his role in the genocide, and cites the testimony of Witness TAS that those who raped her told her that the Appellant had ordered the rape and killing of Tutsi women and girls [author's note: emphasis added].*

(i) The Rape of Witness TAS

132. Witness TAS, a Hutu woman married to a Tutsi man, testified that, on an unspecified date, she was raped by two Hutu men, one of whom told her that the Appellant had authorized the rape of Tutsis but that no decision had yet been taken concerning Hutu women who were married to Tutsis. The Trial Chamber concluded that the rape of Witness TAS had been established, but found that her uncorroborated hearsay testimony concerning the Appellant's instructions was insufficient to prove that he had instigated the rape.
133. There is no evidence that the rape of Witness TAS took place after the Appellant's statements instigating rapes on 17 April, 1994, and no direct evidence that, prior to that date, the Appellant had instigated rape. The only evidence to the latter effect was Witness TAS's account of her attacker's statement, which the Trial Chamber did not find reliable. No error has been shown in this finding. Although the Trial Chamber is not precluded as a matter of law from relying on uncorroborated hearsay testimony to establish an element of a crime, it is not obligated to do so. Accordingly, the Trial Chamber did not err in declining to find that the Appellant instigated the rape of Witness TAS.

(ii) The Rapes of Witness TAP and her Mother

134. Witness TAP testified that one day in April 1994, after the President died, she heard loud noises, gunfire, buildings collapsing, and explosions coming from Nyarubuye Parish. She explained that the following day, a group of thirty

unidentified attackers sexually assaulted and killed her mother, and subsequently raped her. The Trial Chamber accepted Witness TAP's account of the rapes, but was not persuaded that there was a "sufficient nexus" between the Appellant's words on 17 April, 1994 and those rapes to establish his responsibility for them.

135. As with the rape of Witness TAS, there is no evidence that the rapes recounted by Witness TAP took place after 17 April, 1994, the date of the Appellant's instigation. The Prosecution did not establish the date on which the rapes in question took place. Witness TAP situated the rapes temporally as the day after which she heard loud noises from Nyarubuye Parish. The Appeals Chamber notes that the principal attack at Nyarubuye Parish, a possible source of the sounds testified to by Witness TAP, took place on 15 April, 1994. This would mean that the rapes in question took place on 16 April 1994, one day before the Appellant's instigation of rapes. As no other evidence shows that the Appellant's actions or words substantially contributed to the rapes of Witness TAP and her mother, the Trial Chamber did not err in finding that the Prosecution had not established beyond reasonable doubt that the Appellant instigated these rapes.

(iii) The Rapes Recounted by Witness TAO

136. Witness TAO, a Tutsi man, testified that at some point after the attack at Nyarubuye Parish on 15 April, 1994 his wife was taken to the house of the *conseiller* of Nyarubuye Sector, Isaïe Karamage. Witness TAO testified that his wife spent two or three days there, and that she told him afterward that the *conseiller* had raped her every night. A few days later, Witness TAO witnessed the rape and killing of his wife by unknown attackers.
137. The Trial Chamber noted that Witness TAO's testimony regarding the rapes of his wife by Mr. Karamage was hearsay, but it nevertheless considered it reliable, "especially as other witnesses testified that *there were similar incidents of rape at the same house, or at least, that women and girls gathered there*" [author's note: emphasis added]. The Trial Chamber also accepted that Witness TAO witnessed the rape and killing of his wife by unknown attackers. However, the Trial Chamber found that the Prosecution had not proven a link between the Appellant's words on 17 April, 1994 and the rapes recounted by Witness TAO, and that the Appellant could not be convicted for them.
138. Although at least some of the rapes in question appear to have been committed after the Appellant instigated rape, *there is no evidence that the Appellant's instigation substantially contributed to them* [author's note: emphasis added]. The Prosecution did not establish that Mr. Karamage and the other attackers were aware of the Appellant's statements of 17 April, 1994. The Prosecution's suggestion that "[i]t is only reasonable to conclude that, even if some perpetrators of the other rapes did not directly hear the [Appellant's] instigation, they were told by others about it, or were inspired by the actions of others who had heard it" is speculative and plainly does not establish that this was the *only* reasonable conclusion. Thus, the Prosecution has not shown an error

in the Trial Chamber's conclusion that no nexus was proven between the instigation and the rapes.

2. Other Modes of Liability under Article 6(1) of the Statute

139. The Prosecution also submits that the Trial Chamber erred in failing to convict the Appellant for planning, ordering, committing through a joint criminal enterprise, and aiding and abetting the rapes recounted by Witnesses TAO, TAS, and TAP. It submits that the Appellant had the requisite *mens rea* for any of these modes of liability because he acted "with the full awareness of the substantial likelihood that indiscriminate rape of Tutsis would occur in Rusumo." As to the *actus reus*, the Prosecution argues that the only reasonable conclusion is that the Appellant's public call for the indiscriminate rape of Tutsis, taken together with all the other proven facts, establishes that he aided and abetted the rapes in question. The Prosecution makes no attempt to explain how the evidence establishes the *actus reus* of planning or ordering rape, and so the Appeals Chamber will not consider its assertion of error in this regard. Its submissions regarding joint criminal enterprise will be addressed in Section III.D below.
140. The Prosecution states that the causation standard for aiding and abetting "is that the acts have a substantial effect on the commission of the crime." The Appeals Chamber agrees, but finds that the Prosecution has not established that this standard was satisfied. *As discussed in the previous subsection, the evidence at trial was insufficient to prove beyond reasonable doubt that the Appellant's words on 17 April, 1994 had any effect on the rapes in question. The Prosecution does not point to any other specific acts or omissions that support a conviction for aiding and abetting* [author's note: emphasis added]. Accordingly, this sub-ground of appeal is dismissed.

3. Article 6(3) Liability

141. The Prosecution challenges the Trial Chamber's holding that the Appellant lacked superior authority over the *conseillers*, gendarmes, soldiers, and *Inter-ahamwe* in Rusumo Commune at the time of the events. It argues that the Trial Chamber erred in law by requiring proof that the Appellant was a superior in a formal administrative hierarchy rather than examining whether he exercised effective control. It further claims that because overwhelming evidence established that the Appellant possessed such effective control, he should have been convicted for the rapes recounted by Witnesses TAO, TAP, and TAS under Article 6(3) of the Statute.
142. The Trial Chamber did not enter a formal legal finding concerning the Appellant's Article 6(3) responsibility for rape, instead stating:

Having found the Accused criminally liable under Article 6(1) of the Statute for instigating others to commit rape in Rusumo commune in April 1994, the Chamber does not deem it necessary to enquire whether he is equally responsible pursuant to Article 6(3) of the Statute, given the similarity of the acts charged and the lack of evidence of a superior-subordinate relationship between the Accused and the perpetrators of the rapes.

As to the first part of this statement, it is true that convictions should not be entered under both Articles 6(1) and 6(3) of the Statute for the same crime based on the same conduct. The Appellant's Article 6(1) conviction for rape only extended to some of the rapes alleged, however. The Trial Chamber therefore had to consider whether the Appellant was responsible for the other rapes under Article 6(3) of the Statute, that is those recounted by Witnesses TAO, TAP, and TAS. It in fact implicitly did so, concluding that there was no evidence of a superior-subordinate relationship. Its holding on this point was further elaborated in its factual findings:

On the evidence tendered, the Chamber cannot find that the Accused had superior authority over the *conseillers*, gendarmes, soldiers and *Interahamwe* that were in his commune at the time of the events under consideration. The law did not, *per se*, place him in such a position. Although his responsibilities regarding the maintenance of law and order afforded him the power to take legal measures that would be binding on everyone in the *commune*, the Prosecution has not adduced any evidence that such power placed him, *ipso facto*, in the position of a superior within a formal administrative hierarchy vis-à-vis each category of persons mentioned above.

143. This analysis focuses on the Appellant's *de jure* authority - specifically, whether the "law" placed him in power and whether he was "a superior within a formal administrative hierarchy". The Trial Chamber does not appear to have considered the Appellant's *de facto* authority. This was an error. A superior "possesses power or authority over subordinates either *de jure* or *de facto*; it is not necessary for that power or authority to arise from official appointment." To establish liability under Article 6(3) of the Statute, the following must be shown:

- A crime over which the Tribunal has jurisdiction was committed;
- The accused had effective control over the perpetrators of the crime (i.e., the material ability to prevent or punish the commission of crimes);
- The accused knew or had reason to know that the crime was going to be committed or had been committed; and
- The accused did not take necessary and reasonable measures to prevent or punish the commission of the crime by a subordinate.

144. The Trial Chamber found that the Appellant knew or had reason to know of the rapes recounted by Witnesses TAO, TAS, and TAP. The key question is whether the Appellant had effective control over the perpetrators. Attempting to show effective control, the Prosecution, in its Appeal Brief, points to Trial Chamber findings concerning the Appellant's general authority as *bourgmestre* to impose law and order in the commune, as well as his leading role in the genocidal campaign. Yet it cannot be extrapolated from these findings that he

exercised effective control over every person who was present in the commune during the time in question. The Prosecution advances no arguments specifically addressing the relationship between the Appellant and the perpetrators of the particular rapes described by Witnesses TAO, TAS, and TAP.

145. The Appeals Chamber therefore cannot conclude that the Prosecution met its burden of proving beyond a reasonable doubt that the Appellant had effective control over the perpetrators of the rapes recounted by Witnesses TAO, TAS, and TAP. Accordingly, the Appeals Chamber affirms the Trial Chamber's finding that the Appellant cannot be convicted under Article 6(3) of the Statute for these rapes.
146. This sub-ground of appeal is dismissed, and the appeal under this ground is dismissed in its entirety.

C. Elements of Rape as a Crime against Humanity (Ground of Appeal 4)

147. The Prosecution's fourth ground of appeal seeks a clarification of the law relating to rape as a crime against humanity or as an act of genocide. The Prosecution argues that non-consent of the victim and the perpetrator's knowledge thereof should not be considered elements of the offence that must be proved by the Prosecution; rather, subject to the limitations of Rule 96 of the Rules, consent should be considered an affirmative defence.
148. The Prosecution argues that the crime of rape only comes within the Tribunal's jurisdiction when it occurs in the context of genocide, armed conflict, or a widespread or systematic attack against a civilian population – circumstances in which genuine consent is impossible. In support, it quotes a report by a Special Rapporteur to the UN Commission on Human Rights:

The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negate the need for the Prosecution to establish lack of consent as an element of the crime.

149. The Prosecution posits that rape should be viewed in the same way as other violations of international criminal law, such as torture or enslavement, for which the Prosecution is not required to establish absence of consent. Further, it contends that Rule 96(ii) of the Rules presumes that consent is a defence that must be supported by credible evidence introduced by the accused.
150. The Trial Chamber found that the circumstances in this case were so coercive as to negate any possibility of consent. The Prosecution therefore does not allege an error invalidating the verdict. However, it maintains, and the Appeals Chamber agrees, that the matter should be considered as one of "general significance" for the Tribunal's jurisprudence.
151. In the *Kunarac* case, the ICTY Appeals Chamber defined rape as follows:

the actus reus of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim

by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

However, it immediately emphasized that “the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.”

152. The Appeals Chamber adopts and seeks to further elucidate the position expressed by the ICTY Appeals Chamber in the *Kunarac et al.* Appeal Judgement. Two distinct questions are posed. First, are non-consent and the knowledge thereof elements of the crime of rape, or is consent instead an affirmative defence? Second, if they are elements, how may they be proved?
153. With respect to the first question, *Kunarac* establishes that non-consent and knowledge thereof are elements of rape as a crime against humanity. The import of this is that the Prosecution bears the burden of proving these elements beyond reasonable doubt. If the affirmative defence approach were taken, the accused would bear, at least, the burden of production, that is, the burden to introduce evidence providing prima facie support for the defence.
154. As the Prosecution points out, Rule 96 of the Rules does refer to consent as a “defence”. The Rules of Procedure and Evidence do not, however, redefine the elements of the crimes over which the Tribunal has jurisdiction, which are defined by the Statute and by international law. The Appeals Chamber agrees, moreover, with the analysis of the Trial Chamber in the *Kunarac* case:

The reference in the Rule 96 to consent as a “defence” is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an aspect of the definition of rape in national jurisdictions, it is generally understood [...] to be absence of consent which is an element of the crime. The use of the word “defence”, which in its technical sense carries an implication of the shifting of the burden of proof to the accused, is inconsistent with this understanding. The Trial Chamber does not understand the reference to consent as a “defence” in Rule 96 to have been used in this technical way.

Rather than changing the definition of the crime by turning an element into a defence, Rule 96 of the Rules must be read simply to define the circumstances under which evidence of consent will be admissible. Thus, it speaks to the second part of the present inquiry: how may non-consent be proven?

155. The answers both Tribunals have given to this second question resolve as a practical matter the objections raised by the Prosecution with respect to the elements approach. The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all of the relevant and admissible evidence in

determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim's relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim. Indeed, the Trial Chamber did so in this case.

156. Under certain circumstances, the accused might raise reasonable doubt by introducing evidence that the victim specifically consented. However, pursuant to Rule 96(ii) of the Rules, such evidence is inadmissible if the victim:
- (a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or (b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.

Additionally, even if it admits such evidence, a Trial Chamber is free to disregard it if it concludes that under the circumstances the consent given was not genuinely voluntary.

157. As to the accused's knowledge of the absence of consent of the victim, which as *Kunarac* establishes is also an element of the offence of rape, similar reasoning applies. Knowledge of nonconsent may be proven, for instance, if the Prosecution establishes beyond reasonable doubt that the accused was aware, or had reason to be aware, of the coercive circumstances that undermined the possibility of genuine consent.

D. Joint Criminal Enterprise (Ground of Appeal 5)

158. The Appeals Chamber, following ICTY precedent, has recognized that an accused before this Tribunal may be found individually responsible for "committing" a crime within the meaning of Article 6(1) of the Statute under one of three categories of "joint criminal enterprise" ("JCE") liability. The present ground of appeal concerns the Appellant's liability for murder, genocide, extermination and rape under the first and third categories. The first (or "basic") category encompasses cases in which "all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention" to commit the crime that is charged. The third (or "extended") category concerns cases in which the crime charged, "while outside the common purpose, is nevertheless a natural and foreseeable consequence of executing that common purpose."
159. At paragraph 289 of the Trial Judgement, the Trial Chamber stated:

The Prosecution seems to allege that the Accused participated in a joint criminal enterprise. However, the Chamber cannot make a finding on such allegation since it was not pleaded clearly enough to allow the Accused to defend himself adequately.

160. The Prosecution submits that this holding was in error. It observes that the Indictment charged that the Appellant acted “in concert with” others in pursuit of a “common scheme, strategy, or plan”. The Prosecution argues that this language is the functional equivalent of “joint criminal enterprise” and sufficed to put the Appellant on notice, particularly in conjunction with the factual allegations in the Indictment and the “collective” nature of the crimes charged. The Prosecution further contends that any vagueness in the Indictment was cured by its Pre-Trial Brief and asserts that it consistently advanced the JCE theory at trial. It argues that the Appellant should have been convicted on this theory for committing murder, genocide, extermination, and rape.

[...]

162. [...] Thus, *Kvocka* unambiguously established that failure to plead a JCE theory, including the category of JCE and the material facts supporting the theory, constitutes a defect in the indictment. It held, however, that the defect in that case was cured by the Prosecution’s subsequent submissions.
163. The Appeals Chamber adopts the holding and rationale of the ICTY Appeals Chamber in *Kvocka*. The mode of liability under Article 6(1) (including the JCE theory) must be pleaded in the indictment, or the indictment is defective. As *Krnojelac* makes clear, however, such defects may be cured by the provision of timely, clear, and consistent information – for example, in a pre-trial brief. This approach is consistent with the Appeals Chamber’s approach to all other pleading failures.

[...]

2. Allegations in the Indictment

165. The words “joint criminal enterprise” are not contained in the Indictment. This absence does not in and of itself indicate a defect. As the Appeals Chamber noted in *Ntakirutimana*, the *Tadic* Appeal Judgement used interchangeably the expressions “joint criminal enterprise”, “common purpose”, and “criminal enterprise”. It is possible that other phrasings might effectively convey the same concept. The question is not whether particular words have been used, but whether an accused has been meaningfully “informed of the nature of the charges” so as to be able to prepare an effective defence.
166. In this regard, two of the Prosecution’s contentions are readily dismissed. First, the Appellant plainly could not have been expected to infer the Prosecution’s reliance on a JCE theory from the mere fact that the Indictment “explicitly charged the Appellant with collective crimes: genocide, complicity in genocide, extermination, murder and rape in connection with the massacres that took place at various locations”. “Collective crimes” in this sense, *i.e.* crimes that involve multiple responsible parties or that take place in the

context of mass violence, are alleged in every case before this Tribunal. But the Statute and Tribunal's jurisprudence indicate that an individual can participate in such crimes in various ways involving different kinds of interactions with other people – for instance, ordering, aiding and abetting, “committing” through JCE, “committing” through direct physical perpetration, and so forth. As the *Kvocka* Appeal Judgement makes clear, an accused cannot be expected to infer the mode of liability; it must be charged.

167. Second, the Prosecution's assertion that the allegations in the Indictment that the Appellant was responsible for “committing” crimes should be read to encompass a JCE theory is similarly untenable and inconsistent with *Kvocka*, as the Prosecution in fact conceded at oral argument. It is not enough for the generic language of an indictment to “encompass” the possibility that JCE is being charged. Rather, JCE must be pleaded specifically. Otherwise, an accused could reasonably infer that references to “committing” crimes are meant to refer to acts that he personally perpetrated.
168. The Prosecution's other argument is based on paragraphs 22 and 25 of the Indictment, which read as follows:

22. From those first days of April 1994 through 30 April 1994, Sylvestre GACUM-BITSI ordered, directed or *acted in concert with* local administrative official in Kibungo *préfecture*, including *bourgmestres* and *conseillers de secteur*, to deny protection to civilian Tutsi refugees and to facilitate attacks upon them by communal police, *Interahamwe*, civilian militias and local residents.[. . .]

25. Sylvestre GACUMBITSI, in his position of authority and *acting in concert with others*, participated in the planning, preparation or execution of a common scheme, strategy or plan to exterminate the Tutsi, by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent. [Emphases added]

169. The Appellant and his trial counsel have, however, used French throughout the proceedings. Although the Indictment was written in English, it is the French translation that is critical to determining whether the Appellant received proper notice of the charges against him, to the extent that any distinctions in phrasing are relevant. Paragraphs 22 and 25 of the translation read: [. . .]
170. As a threshold matter, these paragraphs are found in a portion of the Indictment alleging material facts in support of the genocide and complicity in genocide counts only. They are not incorporated elsewhere in the Indictment and, therefore, cannot support the Prosecution's reliance on a JCE theory with respect to the murder, extermination, and rape counts.
171. With respect to the genocide count, the Appeals Chamber finds, by majority, Judge Shahabuddeen and Judge Schomburg dissenting, that the paragraphs relied upon by the Prosecution were not sufficient to provide notice to the Appellant that he was being charged with participation in a joint criminal enterprise. First, taken alone, the words “acted in concert with” (“*a agi deconcert avec*”), as used in paragraph 22 of the Indictment, do not suffice to meet the pleading requirements outlined above.

172. Paragraph 25 of the Indictment comes closer to providing the necessary notice, as it clearly refers to concerted action among a plurality of persons in support of “a common scheme, strategy or plan to exterminate the Tutsi” (*“d’un plan, d’une stratégie ou d’un dessein communs visant à exterminer les Tutsis”*). This language is similar to that employed in *Tadic* and seems to encompass the critical elements of a JCE charge. However, in then proceeding to state that the accused participated in the common scheme “by his own affirmative acts or through persons he assisted or by his subordinates with his knowledge and consent”, the Indictment could be read to invoke three established modes of liability other than JCE: “committing” through direct, personal perpetration, aiding and abetting, and Article 6(3) superior responsibility. The Appellant could have interpreted the paragraph, taken as a whole, to refer only to those modes of liability and not to JCE, and he cannot therefore be said to have received clear notice of the JCE theory. This is especially so because, at the time of the Indictment, JCE was still an unfamiliar mode of liability in this Tribunal, although it had been employed at the ICTY.
173. As noted, the Prosecution also argues that the material facts set forth in the Indictment were sufficient to provide notice of the JCE theory. Specifically, the Prosecution states that the Indictment identified (i) the nature or essence of the JCE; (ii) the period over which it existed; (iii) the identity of its participants; and (iv) the nature of the accused’s participation. But even assuming the Indictment can be construed as containing all the material facts necessary to support a JCE theory, these facts were not clearly identified as being intended to plead such a theory. The mere inclusion in an indictment of scattered facts that might relate to a mode of liability does not suffice to put an accused on notice that the mode of liability is being alleged.
174. For these reasons, the Appeals Chamber finds, by majority, Judge Shahabuddeen and Judge Schomburg dissenting, that the Trial Chamber did not err in finding the Indictment defective.

3. Whether Defects in the Indictment were Cured

175. The sole post-Indictment submission to which the Prosecution points in support of its contention that any defects in the Indictment were cured is its Pre-Trial Brief. However, that brief did not provide any clear indication to the Appellant that he was being charged as a JCE participant. It nowhere referred to a joint criminal enterprise, a common criminal purpose, or any other synonym. Part II of the Pre-Trial Brief (Factual Allegations) was divided into chapters including “Planning”, “Preparing”, and “Executing” (sub-divided into “Instigating”, “Ordering, Leading and Supervising”, and “Killing”). As to “Executing”, the Pre-Trial Brief explained:

During the month of April 1994, Sylvestre Gacumbitsi used his position as the Bourgmestre of Rusumo Commune and as an influential member of the MRND political party to execute the campaign of looting, raping and killing of the Tutsi civilians. Sylvestre Gacumbitsi ordered his subordinates from the local administration, communal policemen, members of the Interahamwe and Hutu civilians to attack and destroy the Tutsi civilian population. He instigated, led and supervised some of these attacks. Sylvestre Gacumbitsi, by his own hands, killed Tutsi civilians.

This description does not give any indication that the Prosecution was pursuing a JCE theory. Nor is any such indication to be found in Part III of the Prosecution Pre-Trial Brief (Legal Issues). In fact, when discussing modes of liability in relation to each count, the Pre-Trial Brief does not even refer to “acting in concert with others” or to “a common scheme, strategy or plan” (in contrast to paragraphs 22 and 25 of the Indictment). It simply states that “the accused Sylvester [*sic*] Gacumbitsi, by virtue of the acts attributed to him, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of” genocide, or that “[t]he accused planned, instigated, ordered, committed, or aided and abetted in” the extermination, murder, and rape. Thus, if anything, the Pre-Trial Brief is less clear than the Indictment with respect to joint criminal enterprise, and cannot be found to have cured the Indictment’s defects.

176. The Prosecution also mentions certain submissions during the trial, although it concedes that these are “not relevant to the question whether the Respondent was unfairly prejudiced in the conduct of his defence” by defects in the Indictment.
177. The Appeals Chamber has previously stated that “in some instances, information contained in an Opening Statement of the Prosecution may cure a defective indictment.” The Appeals Chamber need not decide now whether and under what circumstances such a statement might be sufficient to plead the mode of liability, however, because no assistance is provided to the Prosecution by its Opening Statement in this case. The Prosecution points to the following statement made during its opening address:

Today, Your Honours, Gacumbitsi stands charged with 5 counts: The count of genocide, or complicity in genocide in the alternative. He is also charged Your Honours with extermination, murder and rape, as crimes against humanity, all arising from culpable acts we allege he committed in concert with others as part of the common scheme whose singular objective was the total destruction of the Tutsi ethnic group.

Even had it been timely, this statement was not, on its own, sufficient to correct the defect in the Indictment and the Pre-Trial Brief. It was not further developed; the Prosecution did not connect it, for instance, to specific factual allegations that supported the JCE claim. Nor did it specify to which category of JCE it meant to allude. The indictment places an accused on notice of the charges he faces. For a subsequent submission to be understood to clarify vagueness in an indictment, the implications of that submission must be clearer than the Prosecution’s statement was here.

178. Only in its Closing Brief did the Prosecution provide further details on its JCE theory, and that submission obviously came too late. Thus, the defect in the Indictment was not cured by the provision of timely, clear, and consistent information, and the Trial Chamber did not err in refusing to consider the JCE theory.
179. Accordingly, this ground of appeal is dismissed in its entirety.

E. Authority for Ordering (Ground of Appeal 6)

180. The Trial Chamber found that the Appellant ordered crimes committed by the communal policemen, but did not find that he ordered crimes committed by the *conseillers*, gendarmes, soldiers, and *Interahamwe* who were in his commune at the time of the events under consideration. The Prosecution challenges this. First, it argues that the Trial Chamber erred in law by requiring proof of a formal superior-subordinate relationship in order to find that the Appellant had the authority or power to order. Second, it contends that the Trial Chamber failed to draw the only reasonable conclusion on the evidence: that the Appellant was a superior to, and possessed the capacity to order, not only the communal policemen, but also the other perpetrators of the crimes. The Appellant responds that the Trial Chamber correctly stated the law and that the factual findings and evidence cited by the Prosecution do not show when or how he gave orders to the other assailants.

1. Alleged Error of Law

181. The Appeals Chamber agrees with the Prosecution that ordering does not require the existence of a formal superior-subordinate relationship. But the Trial Chamber did not misapprehend the law in this respect. It held:

The Trial Chamber is of the opinion that the issue must be determined in light of the circumstances of the case. The authority of an influential person can derive from his social, economic, political or administrative standing, or from his abiding moral principles. Such authority may also be de jure or de facto. When people are confronted with an emergency or danger, they can naturally turn to such influential person, expecting him to provide a solution, assistance or take measures to deal with the crisis. When he speaks, everyone listens to him with keen interest; his advice commands overriding respect over all others and the people could easily see his actions as an encouragement. Such words and actions are not necessarily culpable, but can, where appropriate, amount to forms of participation in crime, such as “incitement” and “aiding and abetting” provided for in Article 6(1) of the Statute. In certain circumstances, the authority of an influential person is enhanced by a lawful or unlawful element of coercion, such as declaring a state of emergency, the de facto exercise of an administrative function, or even the use of threat or unlawful force. The presence of a coercive element is such that it can determine the way the words of the influential person are perceived. Thus, mere words of exhortation or encouragement would be perceived as orders within the meaning of Article 6(1) referred to above. Such a situation does not, ipso facto, lead to the conclusion that

a formal superior-subordinate relationship exists between the person giving the order and the person executing it. As a matter of fact, instructions given outside a purely informal context by a superior to his subordinate within a formal administrative hierarchy, be it *de jure* or *de facto*, would also be considered as an “order” within the meaning of Article 6(1) of the Statute.

The Chamber recalls its factual finding that Sylvestre Gacumbitsi had superior authority only over the communal police. *The Prosecution failed to show that he also had superior authority over the conseillers, Interahamwe, gendarmes or any other persons who participated in the attacks. Moreover, the Prosecution failed to demonstrate that, in the absence of a formal superior-subordinate relationship between the Accused and the population and attackers, the circumstances of the case suggest that the Accused's words of incitement were perceived as orders within the meaning of Article 6(1) of the Statute.* (emphasis added).

182. Thus, after finding that no formal superior-subordinate relationship existed, the Trial Chamber proceeded to consider whether, under the circumstances of the case, the Appellant's statements nevertheless were perceived as *orders* [author's note: emphasis added]. This is in accordance with the most recent judgements of the Appeals Chamber. In the Semanza Appeal Judgement, the Appeals Chamber explained:

As recently clarified by the ICTY Appeals Chamber in *Kordic and Cerkez*, the *actus reus* of “ordering” is that a person in a position of authority instruct another person to commit an offence. No formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is proof of some position of authority on the part of the accused that would compel another to commit a crime in following the accused's order.

The Appeals Chamber notes that this element of “ordering” is distinct from that required for liability under Article 6(3) of the Statute, which does require a superior-subordinate relationship (albeit not a formal one but rather one characterized by effective control). Ordering requires no such relationship - it requires merely authority to order, a more subjective criterion that depends on the circumstances and the perceptions of the listener.

183. Accordingly, this sub-ground of appeal is dismissed.

2. Alleged Error of Fact

184. The Trial Chamber found that, as *bourgmestre*, the Appellant was the highest authority and most influential person in the commune, with the power to take legal measures binding all residents. His role in the genocide demonstrated his authority: he convened meetings with the *conseillers*; asked them to organize meetings to tell people to kill Tutsis, and verified that these meetings had been held; and directly instructed *conseillers*, other leaders, and the Hutu population to kill and rape Tutsis. The Trial Chamber pointed to several instances in which the Appellant “instructed”, “ordered”, or “directed” the attackers in general, not just the communal policemen:

- On 14 April, 1994, after giving a speech telling people “to arm themselves with machetes and [...] to hunt down all the Tutsi”, the Appellant led assailants to Kigarama, where they engaged in an attack on Tutsis “carried out under [the Appellant’s] personal supervision”.
- At Nyarubuye Parish on 15 April, 1994, the Appellant “*instructed* the communal police and the *Interahamwe* to attack the refugees and prevent them from escaping”, which they did.
- On 16 April, 1994, the Appellant “directed” an attack at Nyarubuye Parish, during which the assailants “finished off” survivors and looted the parish building.
- On 17 April, 1994, the Appellant ordered a group of attackers to kill fifteen Tutsi survivors of previous attacks at Nyarubuye Parish, which they immediately did.

185. These findings made clear that the Appellant had authority over the attackers in question and that his orders had a direct and substantial effect on the commission of these crimes. In view of these facts, no reasonable trier of fact could find that the Appellant’s words were not perceived as orders by the attackers in general, not just the communal police, to commit these crimes.

186. In *Semanza*, the Appeals Chamber found that the Trial Chamber had unreasonably failed to conclude that Laurent Semanza was liable for ordering a massacre. This conclusion was based on the facts that Mr. Semanza had “directed attackers, including soldiers and *Interahamwe*, to kill Tutsi refugees who had been separated from the Hutu refugees” and that the refugees “were then executed on the directions” of Mr. Semanza. The Appeals Chamber concluded as follows:

On these facts, no reasonable trier of fact could hold otherwise than that the attackers to whom the Appellant gave directions regarded him as speaking with authority. That authority created a superior-subordinate relationship which was real, however informal or temporary, and sufficient to find the Appellant responsible for ordering under Article 6(1) of the Statute [author’s note: *Semanza*, appeal judgment, para. 363].

The Trial Chamber in the *Kamuhanda* case reached a similar conclusion under similar facts, and the Appeals Chamber affirmed it [author’s note: *Kamuhanda*, appeal judgment, para. 76 (holding that “a reasonable trier of fact could conclude from the fact that the order to start the massacre was directly obeyed by the attackers that this order had direct and substantial effect on the crime, and that the Appellant had authority over the attackers, regardless of their origin”)]. The present case is materially indistinguishable from these cases.

187. Accordingly, the Trial Chamber erred in fact by not convicting the Appellant for ordering the crimes committed by all attackers, not just the communal policemen, at Nyarubuye Parish on 15, 16, and 17 April, 1994 and on 14 April, 1994 at Kigarama. This sub-ground of appeal is upheld.

F. Sentencing (Ground of Appeal 1)

188. The Prosecution contends that the Trial Chamber considered irrelevant factors in mitigation of sentence, and that it failed to take sufficient account of the gravity of the crimes and the degree of the Appellant's criminal responsibility. In the Prosecution's view, there were no mitigating factors in this case that would justify imposing less than the maximum sentence of life imprisonment. In response, the Appellant asserts that this ground of the Prosecution's appeal must fail in its entirety.

1. The Appellant's Use of the Communal Police

189. The Prosecution contends that the Appellant's "reliance on the police, armed, uniformed, and responsible for public security, to launch attacks during the widespread or systematic killings of Tutsi civilians, was a circumstance that should have been seen as extremely aggravating."

190. The Trial Judgement does not expressly mention the Appellant's use of the police as an aggravating circumstance. However, it did not need to do so. It clearly described and gave weight to the Appellant's abuse of his powers as *bourgmestre*, of which his use of the police was merely a part. The Trial Chamber stated:

In the instant case, the Chamber finds that the status of the Accused in April 1994, as *bourgmestre* and the most important and influential personality of Rusumo commune, is an aggravating circumstance, insofar as the Accused participated in the crimes committed and was one of the ringleaders, in terms of planning the crimes, inciting their commission and sometimes driving attackers to the massacre sites. By so doing, he betrayed the trust that the people of his commune had placed in him. His active participation in the said crimes explains why he could not take measures to prevent or to punish the perpetrators, when he had the opportunity to do so. *The seriousness of the crimes committed, particularly genocide, but also the particularly atrocious rapes that some victims suffered, further constitute aggravating circumstances* [author's note: trial judgment, para. 345, emphasis added].

191. The Appeals Chamber finds no discernible error in the Trial Chamber's analysis.

2. The Appellant's Formal Status as a Superior

192. The Prosecution argues that the Trial Chamber erred in relying on the fact that the Appellant's formal status as a superior was confined to the communal police because this ignored the fact that the Appellant instigated and aided and abetted other participants in the attacks. In response, the Appellant denies that he had any authority over the soldiers and gendarmes who participated in the attacks.

193. In its conclusion on aggravating and mitigating circumstances, the Trial Chamber stated:

[. . .] the Chamber is not persuaded that the Accused had superior responsibility over the perpetrators of the crimes committed in Rusumo commune in April 1994, with

the exception of the communal policemen of Rusumo. Accordingly, the Chamber cannot take into account the aggravating circumstances submitted by the Prosecution [author's note: *Gacumbitsi*, trial judgment, para. 353].

The Appeals Chamber recalls its holding above that the Trial Chamber erred in not holding the Appellant liable for ordering the crimes committed not only by the police but also by the “other perpetrators”. This error will be taken into account in the Appeals Chamber’s consideration of the gravity of the crime for the purpose of determining the Appellant’s sentence. In light of this determination, the Appeals Chamber does not consider it necessary to determine whether, had the Trial Chamber’s holdings concerning the Appellant’s authority over the other attackers been correct, it should nonetheless have considered the Appellant’s authority as an aggravating factor in sentencing.

3. The Appellant’s Prior Good Character, Accomplishments, and Relationships with Tutsis

194. The Prosecution submits next that the Trial Chamber accorded undue weight in mitigation to the Appellant’s prior good character and accomplishments. It argues that, if anything, these are aggravating factors, since, as the Trial Chamber found, the Appellant abused the trust he had earned through his prior good character and his position as *bourgmestre*. Moreover, the Prosecution argues, the Trial Chamber erred in considering that the Appellant’s good relationship with the Tutsis before April 1994 could serve as a mitigating factor in light of the horrific and discriminatory crimes the Appellant committed against the Tutsis between April and June 1994.

195. The Appeals Chamber in the *Semanza* case considered similar arguments, as follows:

397 Trial Chambers of both International Tribunals have to a greater or lesser extent taken into account an accused’s previous good character in mitigation, as well as accomplishments in functions previously held. For instance, in *Niyitegeka* the Trial Chamber considered in mitigation that the accused was a person of good character prior to the events “and that as a public figure and a member of the MDR, he advocated democracy and opposed ethnic discrimination.” Similarly, in *Ntakirutimana*, the Trial Chamber found as a mitigating factor that Elizaphan Ntakirutimana was a “highly respected personality within the Seventh-Day Adventist Church of the West-Rwanda Field and beyond” and that he led an “exemplary life as a church leader.” The Trial Chamber also noted Gérard Ntakirutimana’s good character, and that he had testified that his return to Rwanda in 1993 was prompted by “his hope to contribute to development and to promote peace within his country.” In the *Obrenovi* Sentencing Judgement, the ICTY Trial Chamber held that “prior to the war Dragan Obrenovi} was a highly respected member of his community who did not discriminate against anybody.”

398 The Appeals Chamber is of the view that it was within the Trial Chamber’s discretion to take into account as mitigation in sentencing the Appellant’s previous good character and accomplishments as *bourgmestre*. Precedent does not support the Prosecution’s position that “being a successful academic, politician or administrator is irrelevant” as a mitigating factor in crimes of genocide and crimes against humanity. Notwithstanding, the Appeals Chamber notes that in most cases the

accused's previous good character is accorded little weight in the final determination of determining the sentence. However, in this case, the Trial Chamber does not indicate how much weight, if any, it attaches to the Appellant's previous character and accomplishments. Thus, it is not clear that these mitigating factors unduly affected the sentence, given the nature of the offences. Consequently the Appeals Chamber finds no discernible error on the part of the Trial Chamber.

399 Finally, the Appeals Chamber finds no merit in the Prosecution's argument that there exists a contradiction in the Trial Chamber's reasoning that the Appellant's position of influence was an aggravating factor, whereas his previous accomplishments as bourgmestre were considered in mitigation [author's note: *Semanza*, appeal judgment, paras. 397–399 (internal citations omitted)].

196. These findings are directly transposable to the case at hand. There is no indication that the Trial Chamber abused its discretion, and the Prosecution's arguments in this respect are dismissed.

4. Alleged Irrelevant Factors in Mitigation

197. The Prosecution submits that the Trial Chamber gave weight to irrelevant considerations, including the fact that the Appellant's family lives in Rwanda and has good relationships with its neighbors from all ethnic groups and the fact that the Appellant's active involvement in the events was of a short duration. The Appellant responds that the fact that his family lives at peace with other groups in Rwanda shows that he did not commit any reprehensible act because, had he done so, his family would have been targeted in revenge.

198. The Appeals Chamber finds that the Trial Chamber erred in considering that the good relationships of the Appellant's family with its neighbors constituted a factor in mitigation. While there is no exhaustive list of what constitutes a mitigating circumstance, the fact that the Appellant's family has good relationships with its neighbors of all ethnic groups cannot be considered to constitute an "individual circumstance" of the Appellant and should not be considered in sentencing. Nevertheless, it is unclear what weight, if any, the Trial Chamber gave to this factor. In these circumstances, the Appeals Chamber will not increase the Appellant's sentence as a result of the Trial Chamber's error.

199. The Prosecution also submits that it is "hardly a mitigating factor that the [Appellant's] active involvement in the events was of short duration." The Trial Chamber, however, did not consider the short duration of the Appellant's involvement to be a mitigating factor. Rather, the Trial Chamber merely noted that the duration of the Appellant's involvement was not so long that it might constitute an aggravating factor. The Appeals Chamber sees no error in this observation.

5. Gravity of the Crimes and Degree of Criminal Culpability

200. The Prosecution contends that the Trial Chamber committed an error by failing to impose a sentence reflecting the gravity of the crimes and of the

Appellant's degree of criminal culpability. It submits that the Trial Chamber should have considered the Appellant as one of the most serious offenders, deserving the highest penalty available at the Tribunal.

201. The Trial Chamber properly stated the legal principles on which the Prosecution relies. After noting that the crimes committed were very serious, it stated that "the penalty should, first and foremost, be commensurate with the gravity of the offence" and that "secondary or indirect forms of participation are generally punished with a less severe sentence."
202. The Prosecution argues, however, that the Trial Chamber failed to apply these principles properly because the sentence it imposed was inconsistent with those issued in comparable cases. It contends that the correct sentence for extermination as a crime against humanity, especially when combined with other serious offences including rape, is life imprisonment. And for genocide, it claims, the principle that the default punishment is life imprisonment is clearly established:

In addition to the [Appellant], the ICTR has, to date, found eighteen people guilty of crimes under Article 2 of the Statute. Out of these eighteen, eleven have been sentenced to imprisonment for the remainder of their lives. In two of the remaining cases, *Ruzindana* and *Gérard Ntakirutimana*, the Tribunal passed a sentence of 25 years' imprisonment. In only five instances, where the accused was found guilty of genocide, have sentences of less than 25 years' imprisonment been imposed. These include the sentences of Semanza, who received 15 years for complicity in genocide, Imanishimwe, who was sentenced to 15 years' imprisonment for genocide, and Elizaphan Ntakirutimana, who was sentenced to 10 years' imprisonment for genocide. The other two cases are Omar Serushago, who received 15 years' imprisonment, and Ruggiu, who received 12 years' imprisonment for incitement to commit genocide, following their guilty pleas.

It further notes that, contrary to the present case, exceptional circumstances in mitigation were found in the cases of Omar Serushago and Georges Ruggiu in that they both pleaded guilty, were found to have co-operated substantially with the Prosecutor, and had expressed genuine remorse for their participation in the offences. Similarly, Élizaphan Ntakirutimana received only ten years of imprisonment because of mitigating factors including his advanced age and fragile health.

203. In response, the Appellant refers to the Penal Code of Rwanda, which he submits provides that no sentence for a fixed term shall be longer than twenty years or thirty years in case of several offences. The Appellant also refers to the *Semanza* Trial Judgement, where the Trial Chamber stated that it was not convinced that the accused in that case deserved life imprisonment. The Appellant further argues that the comparative analysis engaged in by the Prosecution is not helpful because the differences between the various cases are more important than the similarities and because the sentence must be individualized.
204. *The Appeals Chamber is of the view that, although the Trial Chamber correctly noted that the sentence should first and foremost be commensurate with the gravity of the offences and the degree of liability of the convicted person, it*

then disregarded these principles in imposing a sentence of only thirty years' imprisonment on the Appellant [author's note: emphasis added]. The Appeals Chamber recalls that the Appellant played a central role in planning, instigating, ordering, committing, and aiding and abetting genocide and extermination in his commune of Rusumo, where thousands of Tutsis were killed or seriously harmed. The Trial Chamber also found the Appellant guilty of instigating rape as a crime against humanity, noting that he had exhibited particular sadism in specifying that where victims resisted, they should be killed in an atrocious manner. The Appellant was thus convicted of extremely serious offences. Moreover, unlike in most of the other cases in which those convicted for genocide have received less than a life sentence, there were no especially significant mitigating circumstances here. Instead, the Appellant was a primary player, a leader in the commune who used his power to bring about the brutal massacre and rape of thousands [author's note: emphasis added].

205. The Appeals Chamber is, as noted above, fully cognizant of the margin of discretion to which Trial Chambers are entitled in sentencing. This discretion is not, however, unlimited. *It is the Appeals Chamber's prerogative to substitute a new sentence when the one given by the Trial Chamber simply cannot be reconciled with the principles governing sentencing at the Tribunal. This is such a case [author's note: emphasis added].* The Appeals Chamber concludes that in light of the massive nature of the crimes and the Appellant's leading role in them, as well as the relative insignificance of the purported mitigating factors, the Trial Chamber ventured outside its scope of discretion by imposing a sentence of only thirty years' imprisonment. The Appeals Chamber therefore upholds this sub-ground of the Prosecution's appeal.

6. Implications of the Appeals Chamber's Findings on the Sentence

206. Furthermore, the Appeals Chamber has held that the Appellant was responsible for ordering the acts of genocide, extermination, murder, and rape committed not only by the communal police, but also by the other perpetrators who participated in the attacks at Nyarubuye Parish and at Kigarama. Additionally, the Appeals Chamber has found by majority, Judge Güney and Judge Meron dissenting, that the Appellant aided and abetted the murders of two of his Tutsi tenants, Marie and Béatrice, whom he expelled from their home and who were killed later that night. Consequently, it will enter a new conviction for murder as a crime against humanity under Count 4 of the Indictment. The Appeals Chamber has also found that the Trial Chamber erred in failing to give proper weight to the gravity of the crimes committed by the Appellant and to his central role in those crimes. The Appeals Chamber considers that the maximum sentence is warranted in the Appellant's case and that there are no significant mitigating circumstances that would justify imposing a lesser sentence than imprisonment for the remainder of his life.

IV. Disposition

207. For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT to Article 24 of the Statute and Rule 118 of the Rules;

NOTING the written submissions of the parties and their oral arguments presented at the hearing on 8 and 9 February 2006;

SITTING in open session;

CORRECTS, *proprio motu*, the reference to Articles 2(3)(a) and 2(3)(b) of the Statute in paragraphs 293 and 295 of the Trial Judgement to Articles 2(2)(a) and 2(2)(b) of the Statute;

DISMISSES the Appellant's appeal in its entirety;

ALLOWS, in part, by majority, Judge Güney and Judge Meron dissenting, the Prosecution's second ground of appeal, **FINDS** that the Appellant aided and abetted the murder of his Tutsi tenants, Marie and Béatrice, and **ENTERS** a conviction for murder as a crime against humanity under Count 4 of the Indictment;

ALLOWS, in part, the Prosecution's sixth ground of appeal and **HOLDS** that the Appellant is responsible for ordering the crimes committed by all attackers at Nyarubuye Parish on 15, 16, and 17 April 1994 and on 14 April 1994 at Kigarama;

ALLOWS, in part, the Prosecution's first ground of appeal and **QUASHES** the sentence of thirty years' imprisonment imposed on the Appellant by the Trial Chamber;

DISMISSES the Prosecution's appeal in all other respects;

ENTERS a sentence of imprisonment for the remainder of the Appellant's life, subject to credit being given under Rule 101(D) of the Rules for the period already spent in detention from 20 June 2001;

RULES that this Judgement shall be enforced immediately pursuant to Rule 119 of the Rules;

ORDERS, in accordance with Rules 103(B) and 107 of the Rules, that Sylvestre Gacumbitsi is to remain in the custody of the Tribunal pending his transfer to the State in which his sentence will be served.

[...]

Mohamed Shahabuddeen	Presiding Judge
Mehmet Güney	Judge
Liu Daqun	Judge
Theodor Meron	Judge
Wolfgang Schomburg	Judge

Presiding Judge Shahabuddeen appends a separate opinion.

Judge Liu and Judge Meron append a separate opinion.

Judge Schomburg appends a separate opinion.

Judge Güney appends a partially dissenting opinion.

Judge Meron appends a partially dissenting opinion.

Signed on the 28th day of June 2006 at The Hague, The Netherlands,
and issued this 7th day of July 2006 at Arusha, Tanzania.
[...]

8.2 Notes and Questions

8.2.1 *Who Were the Child Victims in Prosecutor v. Sylvestre Gacumbitsi?*

The child victims in this case were children identified as members of the ethnic Tutsi population of Rwanda who resided in the Kibungo Prefecture with the crimes being committed between 6–30, April, 1994. These children were subjected to genocide, brutal rapes and other physical and mental injuries at the hands of extremist Hutus who had been in some cases ordered; in other cases incited, or aided and abetted by the defendant Sylvestre Gacumbitsi.

8.2.2 *Did International Justice in This Case Affirm Respect for the Human Rights of the Child?*

8.2.2.1 *Were the Child Victims Regarded as Having Juridical Personality in Their Own Right or Were the Children's Rights Subsumed Under Those of the Parents or Other Adult Family Members?*

The “special protections” to be accorded children under international humanitarian law in times of armed conflict were *not* given consideration at either the trial or appeal level criminal proceedings in *Gacumbitsi* in assessing the gravity of the crimes committed against the child victims. Thus, the child victims’ rights in the instant case were largely, if not completely, subsumed under the rights of the “family” as a whole:

As direct consequences of orders or instructions from Sylvestre GACUMBITSI at Nyarabuye paroisse, *there were numerous killings of family members and entire families, including UWIRAGIYE, MUGIRANEZA and TUYIRINGIRE, three children.* (Appeal judgment in *Gacumbitsi*, para. 89)

Thus, the child victims of genocide in the instant case, though mentioned by name and, hence, regarded as individuals in their own right in that regard, were not, in actuality, considered separately as having distinct additional rights entitlements. (It is unclear from the judgments in the instant case whether any of the victims who provided testimonials were child victims at the time of the crimes.)

8.2.2.2 Was the International Obligation to Afford Children Special Protection Acknowledged and the Nature of the Offence Considered Aggravated by the Fact that the Victims Were Children?

In the instant case, there was no consideration by the trial or appeal chambers of the International Criminal Tribunal for Rwanda, as mentioned, of the international obligation to afford children special protection. Thus, there was no specification that the fact that there were child victims would be counted as an “aggravating factor” which would increase the gravity of the offence and the sentence imposed. This was the case though the fact that there were child victims was specifically referred to several times in the trial and appeal judgments:

In this case, in support of its finding that the Appellant possessed the requisite genocidal intent, the Trial Chamber cited the Appellant’s urging of the conseillers de secteur in his commune, at a meeting on 9 April, 1994, “to incite the Hutu to kill the Tutsi” the Appellant’s similar statements made directly to the Hutu population on three separate occasions on 13 and 14 April, 1994; *his instigation of the rape of Tutsi women and girls on 17 April, 1994* [. . .]. (Appeal judgment in *Gacumbitsi*, para. 42, making reference to the trial chamber judgment, para. 259; emphasis added)

As direct consequences of orders or instructions from Sylvestre GACUMBITSI at Nyarubuye paroisse, there were numerous killings of family members and entire families, including UWIRAGIYE, MUGIRANEZA and TUYIRINGIRE, three children. (Appeal judgment in *Gacumbitsi*, para. 89; emphasis added)

The Trial Chamber found that, on 17 April, 1994, the Appellant publicly instigated the rape of Tutsi girls, declaring that sticks should be inserted into their genitals if they resisted. (Appeal judgment in *Gacumbitsi*, para. 99; emphasis added)

[. . .] the Trial Chamber found [that] *on 16 April, 1994, around 9 a.m., the Accused, who was driving around in Rubare cellule, Nyarubuye secteur, using a megaphone, asked that Hutu young men whom girls had refused to marry should be looked for so that they should have sex with the young girls, adding that “in the event that they the young girls resisted, they had to be killed in an atrocious manner.”* (Appeal judgment in *Gacumbitsi*, para. 107; emphasis added)

The Prosecution points to the findings concerning the Appellant’s knowledge of the rapes, his authority as bourgmestre, and his role in the genocide, and *cites the testimony of Witness TAS that those who raped her told her that the Appellant had ordered the rape and killing of Tutsi women and girls.* (Appeal Judgment in *Gacumbitsi*, para. 131; emphasis added)

8.2.3 Was There Any Public Acknowledgement of the International Crimes Committed Against Child Victims in the Gacumbitsi case?

As mentioned, both the trial and appeal courts in the instant case made reference to child victims in their judgments though the defendant made no special mention of the children. As with the other international criminal courts generally, the public

sentencing is considered in and of itself sufficient public acknowledgement of the international crimes committed.

8.2.4 Were the Principles of the Convention on the Rights of the Child Reflected in the Treatment of the Case by the International Criminal Court of Rwanda and in the Remedy Afforded the Victims?

Rwanda ratified the Convention on the Rights of the Child (CRC) 23 February, 1991 (CRC adopted 20 November, 1989, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 [entered into force 2 September, 1990]). This was three years *prior to* the crimes for which the defendant in the instant case was indicted, 15 years prior to the appeal judgment and 13 years before the trial judgment in the case. Yet, despite the atrocities committed against child victims by Sylvestre Gacumbitsi, there was no consideration given to the guarantees of protection which had been promised to children in Rwanda as a consequence of the ratification of the CRC and the high standard of duty of all State agents such as Gacumbitsi as bourgmestre in enforcing those guarantees (which included also the guarantees of protection from sexual abuse at Article 34 and right to life at Article 6). Can it be argued then that the fact that both levels of the International Criminal Tribunal for Rwanda in *Gacumbitsi*: (1) failed to take judicial notice of the right of children under international humanitarian law to special protection during armed conflict; and (2) failed to consider the entitlement to special protection for children in the assessment of the gravity of the crimes committed and in sentencing served to undermine respect for both the children's independent worth as persons, and for the international commitment to enforce the special protections accorded children under international law?

8.2.5 Was There Reliance on National Sentencing Provisions, and if So, Did This Hinder or Facilitate the International Accountability of the State and Its Agents for the International Crimes?

8.2.5.1 Did the Trial Court Give Due Consideration to the Gravity of the Crimes Given the Initial Sentence Imposed?

May one conclude that the trial court, in sentencing the defendant to only 30 years (reversed on Appeal to a life sentence), had failed to fully give due consideration to the gravity of the crimes committed and the appropriate sentence under international criminal law in the particular circumstances of the case? Consider that the crime of the systematic murder of civilians during armed conflict as part of an attempted

genocide is *jus cogens*. Should some or all potential mitigating factors in a case involving genocide normally be considered to be far outweighed by the extraordinary breadth, moral depravity and heinousness of the crime of genocide directed as it is toward the extermination of a people (the nature of the crime then itself constituting an aggravating factor of monumental proportion)? In this regard, recall the words of Trial Chamber I of the International Criminal Tribunal of Rwanda:

Regarding the crime of genocide, in particular, the preamble to the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international cooperation to liberate humanity from this scourge. *The crime of genocide is unique because of its element of dolus specialis (special intent) which requires that the crime be committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group as such, as stipulated in Article 2 of the Statute; hence the Chamber is of the opinion that genocide constitutes the crime of crimes, which must be taken into account when deciding the sentence. (The Prosecutor v. Jean Kambanda, Case no.: ICTR 97-23-S, trial judgment, para. 16; emphasis added)*

Note: a life sentence was imposed by the Trial Court and upheld on appeal in the Kambanda case. Kambanda was Prime Minister of the Interim Government of Rwanda from 8 April, 1994 to 17 July, 1994 during the attempted genocide of the civilian Tutsi population of Rwanda when he had control over the senior members of the military and government officials that orchestrated the genocide.

8.2.5.2 What Rationale Did the Appeal Court Give for Increasing the Sentence to Life Imprisonment in the Instant Case?

The Prosecutor in *Gacumbitsi* argued in that case for the maximum penalty under international criminal law; namely life imprisonment:

The Prosecution contends that the Trial Chamber committed an error by failing to impose a sentence reflecting the gravity of the crimes and of the Appellant's degree of criminal culpability. It submits that the Trial Chamber should have considered the Appellant as one of the most serious offenders, deserving the highest penalty available at the Tribunal. (Appeal judgment in *Gacumbitsi*, para. 200)

It appears that the trial court in imposing a 30 year sentence relied on the State sentencing guidelines as described by the defendant:

In response, the Appellant refers to the Penal Code of Rwanda, which he submits provides that no sentence for a fixed term shall be longer than twenty years or thirty years in case of several offences. (Appeal judgment in *Gacumbitsi*, para. 203)

The Appeals Chamber is of the view that, although the Trial Chamber correctly noted that the sentence should first and foremost be commensurate with the gravity of the offences and the degree of liability of the convicted person, it then disregarded these principles in imposing a sentence of only thirty years imprisonment on the Appellant. The Appeals Chamber recalls that the Appellant played a central role in planning, instigating, ordering, committing, and aiding and abetting genocide and extermination in his commune of Rusumo, where thousands of Tutsis were killed or seriously harmed. The Trial Chamber also found the Appellant guilty of instigating rape as a crime against humanity, noting that

he had exhibited particular sadism in specifying that where victims resisted, they should be killed in an atrocious manner. The Appellant was thus convicted of extremely serious offences. Moreover, unlike in most of the other cases in which those convicted for genocide have received less than a life sentence, *there were no especially significant mitigating circumstances here. Instead, the Appellant was a primary player, a leader in the commune who used his power to bring about the brutal massacre and rape of thousands.* (Appeal judgment in *Gacumbitsi*, para. 204; emphasis added)

Might it be contended that the trial court (given its sentence of the defendant to 30 years imprisonment for aiding and abetting genocide and crimes against humanity) inadvertently sent a very painful and disturbing message to the victims of heinous international crimes regarding the possibility for international accountability? That message being that adequate international accountability may at times be hard to come by via an international criminal court though in this particular case ultimately the trial sentencing decision was reversed and a life sentence imposed.

8.2.6 What Type of International Criminal Court Is the International Criminal Tribunal for Rwanda?

Note that the International Criminal Tribunal for Rwanda (ICTR) is an ad hoc tribunal set up via United Nations Security Council Resolution 955, Adopted by the Security Council at its meeting 8 November, 1994. The ICTR was set up to deal specifically with the Rwandan genocide and other international crimes that occurred during that period committed by persons in the territory of Rwanda or by Rwandans in neighbouring States. It is a forerunner of the permanent International Criminal Court in The Hague though it is itself but a temporary court.

Chapter 9

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991

Case 6: Prosecutor v. Miroslav Bralo (Case No. IT-95-17-S)

The full judgment is available at <http://www.icty.org/x/cases/bralo/tjug/en/bra-sj051207-e.pdf> (last accessed 23 February, 2009).

9.1 Excerpt from the Judgment of 7 December, 2005

[Author's note: internal footnotes have been omitted.]

UNITED NATIONS

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Judgement of: 7 December, 2005

PROSECUTOR v. MIROSLAV BRALO

Sentencing Judgement

The Office of the Prosecutor:

Mr. Mark Harmon

Counsel for Counsel for Miroslav Bralo:

Mr. Jonathan Cooper

[...]

I. Introduction and Procedural History

A. Introduction

1. Miroslav Bralo was indicted by 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 (“Tribunal”) in a sealed indictment confirmed on 10 November 1995 by Judge McDonald. [...]

[...]

B. The Plea Agreement

5. In the Plea Agreement, Bralo agrees to plead guilty to the eight charges contained in the Indictment, being:
 1. Persecutions on political, racial and religious grounds, a crime against humanity punishable under Articles 5(h) and 7(1) of the Statute of the Tribunal (“Statute”), (Count 1);
 2. Murder, a violation of the laws or customs of war, punishable under Articles 3 and 7(1) of the Statute, (Count 2);
 3. Torture or inhuman treatment, a grave breach of the Geneva Conventions of 12 August 1949, punishable under Articles 2(b) and 7(1) of the Statute, (Count 3);
 4. Torture, a violation of the laws or customs of war, punishable under Articles 3 and 7(1) of the Statute, (Count 4);
 5. Outrages upon personal dignity including rape, a violation of the laws or customs of war, punishable under Articles 3 and 7(1) of the Statute, (Count 5);
 6. Unlawful confinement, a grave breach of the Geneva Conventions of 12 August, 1949, punishable under Articles 2(g) and 7(1) of the Statute, (Count 6);
 7. Unlawful confinement, a grave breach of the Geneva Conventions of 12 August, 1949, punishable under Articles 2(g) and 7(1) of the Statute, (Count 7); and
 8. Inhuman treatment, a grave breach of the Geneva Conventions of 12 August, 1949, punishable under Articles 2(b) and 7(1) of the Statute, (Count 8).
6. The Agreement also states that Bralo and the Prosecution agree that the guilty pleas “represent a full accounting of [Bralo’s] criminal behaviour for the events charged” and that “no promises or inducements have been made by the Prosecutor” to persuade Bralo to enter into the Agreement.
7. The Factual Basis appended to the Agreement sets out the facts underlying the charges against Bralo. The Trial Chamber may rely upon these facts, discussed in Section II below, as proved, and base its determination of sentence upon them.

[...]

II. Factual Basis of Guilty Plea

10. Miroslav Bralo, also known as “Cicko,” was born in Kratine, in the municipality of Vitez, now in Bosnia and Herzegovina, on 13 October, 1967. In the evening of 15 April, 1993, he was released from Kaonik prison, on the condition that he agree to participate in an attack on the village of Ahmići to be carried out the following day by forces of the Croatian Defence Council (“HVO”). Upon his release, he was taken to a building known as the “bungalow” that was being used as the headquarters of the “Jokers,” which was the anti-terrorist platoon of the 4th Military Police Battalion of the HVO. He thereupon became a member of the “Jokers” and was given weapons and a uniform.
11. Early the following morning while it was still dark, Bralo and other members of the “Jokers” walked to Nadioci, where they entered the home of Osman Salkić, a Bosnian Muslim. Two other members of the “Jokers” then killed Osman Salkić and his wife, Rediba Salkić, and Bralo killed their daughter, Mirnesa Salkić, using a knife.
12. Later that morning, Bralo and others participated in a surprise attack on the village of Ahmići, with instructions to ethnically cleanse the village, to kill the Muslim men of military age, to burn all Muslim residences, and to expel all the Muslim residents from the village. In the course of the attack, Bralo set fire to numerous homes belonging to the Muslim inhabitants of Ahmići, using incendiary materials including incendiary bullets, and aided and abetted others in setting fire to further Muslim residences. In addition, he captured, interrogated, and shot and killed an adult male of unknown identity. He and another member of the “Jokers” also planted explosives in and around the lower mosque in Ahmići, which they then detonated, destroying the mosque.
13. In a separate incident occurring between 16 April and 1 May, 1993, Bralo and an HVO soldier took custody of fourteen Bosnian Muslim men, women and children, all members of the Salkić and Mehmet Čeremić families who had fled their homes following the attacks on Ahmići and Nadioci. While transporting these fourteen persons towards Kaonik, the soldier accompanying Bralo informed him of his intention to kill some of them. *Bralo then assisted this soldier by taking the group to a clearing in a forest, and standing guard while the soldier shot and killed all fourteen men, women and children. Of these victims, two were approximately seven years old, one was eight, one was ten, one was eleven, one was thirteen, one was fourteen, and two were approximately sixteen years old* [author’s note: emphasis added].
14. On an occasion between 21 April and 10 May, 1993, HVO soldiers arrested three unarmed Muslim men in the area of the village of Kratine. Subsequently, Bralo, who believed these men to be soldiers seeking either to gain intelligence about the HVO military lines, or to join up with other military units, took these detained men to a barn and, along with others, interrogated and beat them. Several hours later, Bralo took the detainees to a wooded area and killed them.

15. On yet another occasion, on or about 15 May, 1993, members of the “Jokers” took a Bosnian Muslim woman (“Witness A”) to the “bungalow,” where she was interrogated. While she was held in the “bungalow,” she was repeatedly raped and sexually assaulted by Bralo. At one point while she was being interrogated, Bralo beat a Bosnian Croat man in her presence and threatened to kill her. He raped her in front of other soldiers and ejaculated repeatedly over her body. He also bit her about the body, including her nipples.
16. Witness A was then taken from the “bungalow” to another house in the Nadioci area, where she was detained by the “Jokers,” including Bralo, until some time in July 1993. During that period she was again repeatedly raped by members of the “Jokers,” with the knowledge of Bralo. *Bralo failed to release her, even though he was in a position to effect her release* [author’s note: emphasis added].
17. Between 21 April and 10 May, 1993, Bralo was assigned to the digging of trenches in and around the village of Kratine. In that period, Bosnian Muslim prisoners were directed to work on the trench-digging operations, to the orders of Bralo and others, and did so under adverse weather conditions with limited food and rest. Bralo and other members of the “Jokers” prevented these prisoners from escaping and Bralo forced them to practice a Catholic religious ritual. In addition, the Bosnian Muslim detainees were used as “human shields” to protect the HVO forces from sniper-fire from the Army of Bosnia and Herzegovina. Bralo was aware that these detainees under his control were at risk of injury or death as a result.

III. Applicable Law

A. The Statute and Rules

18. The provisions of the Statute relevant to sentencing are as follows:

Article 24

Penalties

1. The penalties imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

[...]

19. The Rules also contain provisions on sentencing, of which the following are of immediate relevance in the present case:

[...]

Rule 101

Penalties

- (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.
- (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as:
 - (i) any *aggravating* circumstances [author's note: emphasis added];
 - (ii) any *mitigating* circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction [author's note: emphasis added];
 - (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia;
 - (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute.
- (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

[...]

B. General Considerations

- 21. As a preliminary matter, the Trial Chamber draws attention to the purposes of punishment in the context of the Tribunal. The Tribunal was established to prosecute individuals who committed serious violations of international humanitarian law in the course of conflicts in the states of the former Yugoslavia, as a measure to contribute to the restoration and maintenance of peace in that region. That aim must be borne in mind by a Trial Chamber in the sentencing process.
- 22. In previous cases before the Tribunal, Trial Chambers and the Appeals Chamber have set out three broad purposes of punishment in this particular context. The first of these has been termed "retribution," with the qualification that it is "not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these [international] crimes." Thus, retribution as a purpose of punishment is here used to denote the concept that whatever sentence is imposed on a convicted person amounts to an expression of condemnation by the international community at the horrific nature of the crimes committed, and must therefore be proportionate to his specific conduct. The second purpose of punishment is that of deterrence, either

individual or general. The Appeals Chamber has held that, while a Trial Chamber may properly consider deterrence as a purpose of punishment that might influence its determination of sentence, it should not give “undue prominence” to deterrence in its overall assessment of an appropriate sentence. Rehabilitation of the individual offender is also considered as a legitimate purpose of punishment, albeit one that should not be given “undue weight.”

23. In light of these general considerations, the Trial Chamber now turns to the factors to be considered in determining sentence, being: the gravity of the offences and the individual circumstances of Bralo, including any aggravating or mitigating circumstances; and the general practice regarding prison sentences in the courts of the former Yugoslavia.

IV. Sentencing Factors

A. The gravity of the crimes and aggravating circumstances

24. The most important factor to be taken into account by the Trial Chamber in its determination of sentence is the gravity of Bralo’s criminal conduct. The Prosecution has placed considerable emphasis on the gravity of the crimes committed. The Defence “acknowledge[s] the gravity of the offending,” including “not only the suffering of those directly affected in 1993, but also the continued suffering of those directly or indirectly affected in every month of every year from that date to this.”
25. While noting that the matter is not one in dispute between the parties, the Trial Chamber must nonetheless analyse the various indicia put forward by the Prosecution in order to assess the gravity of the crimes committed by Bralo and reach the necessary conclusions with regard to the appropriate sentence for those crimes. In this regard, the Trial Chamber relies only upon facts contained in the Factual Basis agreed between the parties, in addition to the statements concerning the impact of the crimes on the various victims appended to the Prosecution Brief.
26. In addition, the Prosecution asserts that there are three main aggravating factors that the Trial Chamber should consider: the large number of victims; *the youth of the victims*; and the exacerbated humiliation and degradation of Witness A by Bralo. *The Defence has not made any submissions concerning these matters, but stated at the Sentencing Hearing its agreement that the three categories put forward by the Prosecution should be considered as aggravating factors* [author’s note: emphasis added].
27. The aggravating circumstances identified by the Prosecution are all factors which may add to the gravity of the offences. *Seeking to analyse the gravity of the crimes separately from any aggravating circumstances would be an artificial exercise* [author’s note: emphasis added]. Therefore, the Trial Chamber here examines the crimes of which Bralo has been convicted to assess their

inherent gravity, along with any circumstances that serve to make the gravity of Bralo's criminal conduct worse. By taking this approach, the Trial Chamber also avoids any possible double-counting of particular factors, which would be impermissible. *The determination of which factors may count in aggravation is a matter for the discretion of the Trial Chamber, although it is only those factors that have been proved beyond a reasonable doubt that it may consider* [author's note: emphasis added].

1. Nature of the crimes

28. The Trial Chamber notes first that the crimes of which Bralo has been convicted are of the utmost gravity. Count 1 of the Indictment is a charge of persecution as a crime against humanity, an extremely serious offence involving a deliberate intention to discriminate against a particular group of people in the context of a widespread or systematic attack on a civilian population. Similarly, the remaining counts of the Indictment are a catalogue of serious, violent offences, namely murder, rape, torture, unlawful confinement, and inhuman treatment, constituting grave breaches of the Geneva Conventions and/or violations of the laws or customs of war. Bralo has explicitly acknowledged his personal culpability for these crimes, in addition to recognising their gravity.
29. Beyond the inherently shocking nature of these crimes, the Trial Chamber also takes account of the specific manner in which they were committed by Bralo. In the course of his persecution of the Bosnian Muslim residents of Nadioci and Ahmići, who were the targets of attack on 16 April 1993, Bralo killed a young woman – Mirnesa Salkić – with a knife, while his associates murdered her parents. In addition, he shot and killed an unidentified adult male after capturing and interrogating him. Moreover, Bralo set fire to many houses belonging to the Muslim residents of Ahmići using incendiary materials, aided and abetted others in doing so, and participated in the destruction of the lower mosque in Ahmići by setting and detonating approximately four kilos of explosives. At some time after the attack on Ahmići, Bralo aided another member of the HVO in the killing of fourteen Bosnian Muslim civilians.
30. There can therefore be little doubt that Bralo was a willing participant in one of the most brutal attacks upon a community in the entire conflict in Bosnia and Herzegovina. As a consequence of this attack, the Muslim community of Ahmići was decimated and those who survived the killing were driven from their homes, which were razed or burned. According to the report of the Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia, all of the approximately 180 Muslim homes in Ahmići were destroyed and all of the surviving Muslim residents fled or were forced to leave. A clearer example of “ethnic cleansing” would be difficult to find. The scale of the attack and the number of victims who were persecuted by Bralo in its course serve to further aggravate the seriousness of his criminal conduct,

which is a factor taken into account by the Trial Chamber in its determination of sentence.

31. *The Trial Chamber also finds that in some circumstances a crime can be aggravated by the youth of the victim involved. Such is the case, for example, where an accused is convicted of rape or sexual assault, or where he has committed murder. The fact that many of those who were killed, displaced, and traumatised by the attack on Ahmići were children, and that, of the fourteen members of the Salkić and Čeremić families who were killed by an HVO soldier with the assistance of Bralo, nine were children, are important considerations. The Trial Chamber therefore finds that this aspect of the commission of the crime of persecution by Bralo in the present case is a factor that aggravates the gravity of the crime [author's note: emphasis added].*
32. Count 2 of the Indictment relates to the murder of three captured Muslim men, one of whom was Fuad Kermo, by Bralo. The beating and cold-blooded killing of persons detained during an armed conflict is a brutal crime. Belief that they were enemy agents is irrelevant. It is the very essence of international humanitarian law that individuals who are captured and detained – civilian or combatant – must be treated in accordance with the law, and Bralo violated this fundamental rule three times over. Once again, the fact that there were multiple murder victims is an element which serves to aggravate the seriousness of Bralo's criminal conduct.
33. The Factual Basis for Counts 3 to 6 of the Indictment describes the horrific ordeal of a Bosnian Muslim woman – Witness A – at the hands of Bralo and other members of the “Jokers,” over a lengthy period of time. Her brutal rape and torture, and her imprisonment for approximately two months to be further violated at the whim of her captors, are crimes of a most depraved nature. The Trial Chamber emphasises once again that international humanitarian law, along with basic principles of humanity, require that individuals who are detained during an armed conflict must be treated humanely, and that the rape and torture of a woman in this context is a most heinous crime requiring unequivocal condemnation.
34. With regard to the exacerbated humiliation and degradation of Witness A by Bralo, the Trial Chamber finds that this should be considered as a factor which further aggravates the gravity of an already extremely serious offence. Bralo threatened Witness A's life while she was being interrogated, he raped her in front of an unknown number of other people over an extended period of time, and he bit her and ejaculated repeatedly over her body during his prolonged assault of her. These actions demonstrate a desire to debase and terrify a vulnerable woman, who was at the complete mercy of her captors. It is therefore incumbent upon the Trial Chamber to take into account these particular circumstances as having aggravated the gravity of his rape of Witness A.
35. The charges contained in counts seven and eight of the Indictment pertain to the role of Bralo in the detention of Bosnian Muslim civilians, who were used as labourers in the digging of trenches in and around the village of Kratine. Bralo was among members of the HVO who guarded these detainees and

directed their work, in adverse weather conditions and with limited food or rest, under threat of physical harm. The enthusiasm of Bralo for this task, and his desire to humiliate these Muslim detainees, is evidenced by his conduct in forcing them to perform a Catholic religious ritual before work began. Moreover, the detainees were also at risk of being struck by sniper-fire from the Army of Bosnia and Herzegovina, as their positioning was such that they were used, by Bralo and others, as “human shields” to protect the HVO forces from such sniper attack. Bralo was aware of the prospect that the detainees under his control might be injured or killed as a result of their positioning in this way, and yet did nothing to alleviate the situation. He must therefore be considered as a knowing participant in yet another crime involving the serious mistreatment of detained civilians, a reprehensible offence. The fact that there were numerous victims of the crimes charged in counts seven and eight is also taken into account by the Trial Chamber as a factor that aggravates the gravity of these crimes.

2. Impact on victims

36. In addition to examining the manner in which Bralo committed the crimes of which he has been convicted, the Trial Chamber takes into consideration the submissions of the Prosecution on the impact of these crimes on his victims. It notes that the Defence has explicitly acknowledged the suffering of Bralo’s victims, both at the time of commission of his crimes, and in the months and years afterwards. The Defence has further agreed with the Prosecution that the victim impact statements provided to the Trial Chamber are both powerful and affecting. These statements are discussed here in turn, relating to Counts 1, 2 and 3–6 of the Indictment.
37. The Prosecution has submitted several statements from people who survived the attack on Ahmići and whose relatives were killed in the course of that attack. The Trial Chamber appreciates the willingness of these victims to describe their ordeal and the consequences of the attack upon their lives since. *Elver Ahmić, who turned fourteen years old in 1993, watched as his mother and eight-year old brother were killed on 16 April of that year. He was also wounded in the attack, and still has medical problems as a result of bullets and shrapnel that remain in his body, along with the emotional pain caused by the death of his mother and brother. Adnan Zec, who was thirteen years old at the time of the attack, also witnessed his mother, father and eleven-year old sister being killed and was himself injured. His statement expresses the mental and physical trauma that he has experienced since the time of the attack and the heavy toll that the loss of his family has exacted upon him. In his statement, Abdullah Ahmić describes how HVO soldiers executed his father on the day of the attack, and also attempted to kill him by shooting him in the head. His physical and psychological health has suffered enormously as a consequence of the attack [author’s note: emphasis added]. Fatima Ahmić and Ćazim Ahmić*

also lost their spouses in the attack and have described the serious hardships that they now face in their daily lives. *A statement was also given by a person whose family members were part of the group of fourteen men, women and children killed by Bralo and another soldier as they escorted them towards Kaonik following the attack on Ahmići* [author's note: emphasis added]. The loss of these family members has caused this person immense distress, manifesting itself in serious physical and psychological problems.

38. The Trial Chamber further notes the statement made by the widow of one of the men murdered by Bralo, as well as that of a care-worker who works with her. She has experienced, and continues to experience, constant fear and emotional distress as a result of the loss of her husband and her expulsion from her home.
39. Finally, the Trial Chamber has read a summary of an interview with Witness A, the woman who was so brutally raped and mistreated by Bralo and other members of the "Jokers." The trauma experienced by Witness A at the time of her detention and rape, and on an ongoing basis, is undeniable, and the Trial Chamber appreciates her agreement to once again describe her ordeal and its consequences.
40. These statements paint a picture of shattered lives and livelihoods, and of tremendous ongoing pain and trauma. The Trial Chamber is therefore mindful of the suffering of these victims, and of all of the other Muslim residents of Ahmići and Nadioci who were persecuted or otherwise abused by Bralo in the course of the attacks on their villages. It observes that the consequences of the persecution, murders, rape, and other crimes committed by Bralo are profound and long-lasting and takes this into consideration in its determination of sentence.
41. *In conclusion, the Trial Chamber finds that Bralo committed a range of appalling crimes, the gravity of which is aggravated by the particular manner in which he committed them, including the number of victims (Counts 1, 2 and 7–8), the youth of some of his victims (Count 1), and the degree of humiliation and degradation of Witness A (Counts 3–6)* [author's note: emphasis added].

B. Mitigating Circumstances

42. Mitigating circumstances may result in an adjustment of the sentence that would otherwise be imposed on a convicted person. The acceptance of certain circumstances as mitigatory in nature does not detract from the gravity of the crime committed, nor diminish the responsibility of the convicted person or lessen the degree of condemnation of his actions. Indeed, such circumstances may be unconnected with the commission of the crime itself, and can arise many months or years after the event. While aggravating circumstances must be proved beyond a reasonable doubt, mitigating circumstances need only be proved on a balance of probabilities.

1. Arguments of the Parties

43. The Defence submits that there are a number of mitigating circumstances that the Trial Chamber should consider in the present case. In its Sentencing Brief, it lists these as:

- the prior good character of Bralo;
- the immediate background to the commission of the offences;
- the use of Bralo by his superiors;
- the time period covered by the Indictment;
- the sheltering of others by Bralo;
- his steps towards rehabilitation;
- his voluntary surrender;
- his guilty pleas;
- his remorse;
- his co-operation of value to the Tribunal; and
- his co-operation of value to the people of Ahmići.

The Defence also requests that the Trial Chamber take into account the circumstances of the individual offences, and the personal circumstances of Bralo, although these are not explicitly listed as mitigating factors. Given that these additional circumstances are pleaded, in essence, as mitigatory in nature, the Trial Chamber will consider them along with the other mitigating circumstances asserted. Moreover, among the additional material submitted by the Defence to the Trial Chamber on 29 November, 2005 was a memorandum from Tim McFadden, the Chief of the United Nations Detention Unit in the Hague, relating to Bralo's good conduct while in detention. The Trial Chamber regards the inclusion of this statement as the submission by the Defence of evidence of a further proposed mitigating factor, and discusses it accordingly below.

44. In its Sentencing Brief, the Prosecution argues that mitigating circumstances should not be given too much weight in a case of this nature. It further states that the low rank of the perpetrator of a crime is not a mitigating circumstance. It does, however, agree that Bralo should be given credit for his voluntary surrender to the Tribunal, and for his guilty plea. With regard to the family circumstances of Bralo, the Prosecution states that these should not be given any significant weight in a case of this gravity.
45. At the Sentencing Hearing, the Prosecution reiterated that Bralo was entitled to plead his voluntary surrender and his guilty plea as mitigating circumstances. The Prosecution further acknowledged that Bralo was genuinely remorseful, and that this should also be taken into account as a mitigating circumstance. However, with regard to substantial co-operation by Bralo with the Office of the Prosecutor, the Prosecution disputed that such co-operation had occurred.

2. Discussion

[...]

(a) Personal background of Bralo and prior character

[...]

48. While prior good character and the family circumstances of an accused may, in some cases, be taken into account as mitigating factors, the Trial Chamber finds that in the present case they have only limited bearing on the sentence to be imposed. *Where an accused has been convicted of extremely serious crimes, committed in a particularly brutal manner, the fact that he may have no history of offending does not necessarily militate in favour of a more lenient sentence* [author's note: emphasis added]. Moreover, the family circumstances of this Accused are of minor relevance to his sentence, and he was not of such a young age at the time of commission of his crimes that this should be taken into consideration by the Trial Chamber. *Therefore, the Trial Chamber notes the mitigating family and personal circumstances of Bralo, but ascribes little weight to them in its determination of sentence* [author's note: emphasis added].

(b) Circumstances of Bralo prior to and surrounding his commission of the offences, and use of Bralo by his superiors

49. The Defence submits that the political situation in Vitez was very unstable in 1991, and that in September of that year Bralo was conscripted into the HVO. It states that for more than a year, he underwent military training and was involved in active combat with Serb forces. It asserts that, in February 1993, Bralo's home was targeted in a grenade attack, which broke the windows and brought down some of the roof. The Defence states that Bralo chased down the individual he believed responsible for the attack, who was one of his neighbours, and shot and killed him. He then used explosives to destroy this man's house. Subsequently, Bralo was arrested by the local police and taken to prison in Kaonik.

50. According to the Defence, after spending several weeks in prison, Bralo was released on 15 April, 1993, on the condition that he participate in the attack on Ahmići that was planned for the following day, as a member of the "Jokers". [...]

51. The Trial Chamber is aware of the deteriorating political and military situation in the municipality of Vitez, and indeed in central Bosnia, in the 1992–1993 period. It further notes that tension and animosity between the Bosnian Croat and Muslim communities in the region escalated in mid-1992, resulting in armed conflict between the HVO and the army of Bosnia and Herzegovina. *The Defence requests that the Trial Chamber be mindful of the "enormous*

pressures placed on many people of good character and of bad character” in this particular context. While it is notorious that such pressures existed, the Trial Chamber nonetheless finds that they cannot be considered in any way relevant to the sentence to be imposed upon Bralo for the crimes of which he has been convicted [author’s note: emphasis added]. Large sections of the population of Vitez municipality, and indeed of many parts of Bosnia and Herzegovina, were subjected to the same or similar pressures, and yet did not respond in the same manner as Bralo.

52. Moreover, the Trial Chamber finds that the attack on Bralo’s home in February 1993, and his subsequent killing of the person he believed responsible for that attack, cannot serve as a *mitigating* circumstance in the present case. *Indeed, it is surprising that the Defence should bring evidence of a prior violent crime apparently committed by Bralo, but for which he has not been convicted, as a mitigating factor [author’s note: emphasis added].* If this evidence has been brought in order to demonstrate some kind of justifiable fear felt by Bralo in the context of the breakdown of community relations between the Croat and Muslim communities in his home area, then the *Trial Chamber reiterates that the tensions that existed in the region at the relevant time can in no way act in mitigation of the sentence to be imposed upon Bralo for his commission of serious, violent crimes [author’s note: emphasis added].*
53. Separately, the Trial Chamber notes the Defence submission that, as a consequence of his actions in February 1993, Bralo was held in custody in Kaonik prison until 15 April of that year. The Factual Basis for the Plea Agreement between the Prosecution and Bralo also indicates that he was released from this prison on the condition that he participate in the attack on Ahmići. The Trial Chamber therefore accepts that Bralo was under some pressure to become a member of the “Jokers” and to be actively involved in combat operations carried out by the HVO. *There is no evidence to suggest that he attempted to resist this pressure, but the question is nonetheless raised of whether he was acting under duress when he committed his crimes and, or alternatively, whether his crimes were committed as a result of superior orders. Duress and superior orders are separate, but related, concepts and either may count in mitigation of sentence [author’s note: emphasis added].*
54. *Bralo has not, however, alleged any form of duress emanating from his superiors such that he was compelled to commit the crimes of which he has been convicted [author’s note: emphasis added].* Nor has he specifically pleaded superior orders as a factor in mitigation of sentence. He has taken full personal responsibility for those crimes and has acknowledged *that* he knew them to be wrong. It is the duty of any person involved in an armed conflict to comply fully with the relevant norms of international humanitarian law and, while Bralo may have been pressured to participate in combat activities, he remained legally and morally obliged to conduct himself in accordance with those norms. *Once again, the Trial Chamber recalls the particularly brutal treatment of Witness A by Bralo, his participation in the killing of numerous civilians, including children, and his humiliation of civilian detainees by forcing them to perform*

a religious ritual [author's note: emphasis added]. All of his actions display his complete contempt at the time for the laws governing armed conflict, along with a shocking disregard for the value of human life and dignity.

55. *In addition, the Trial Chamber notes that Bralo did indeed have a choice with regard to his continued participation in the combat activities of the HVO following his release from prison* [author's note: emphasis added]. The Defence has stated in its Sentencing Brief that he chose, in late 1994, not to fight any more, and refused to leave his bed in Nadioci. It has not been argued that he suffered any negative consequences in the sense of disciplinary or other action following his refusal to fight at that point. Bralo therefore could, and should, have refused to participate in combat activities at an earlier stage if he was given orders that he knew to be unlawful, or was required to engage in activities that he knew to be illegal. While the Trial Chamber has not received evidence of the orders that he was given to kill civilians and destroy civilian homes in the context of the attack on Ahmići, such orders are referred to in the Factual Basis, and their existence is therefore not questioned. However, these orders would have been so manifestly unlawful that Bralo should have refused to implement them. No evidence has been submitted, and no argument made, that he made any attempt to resist the undertaking of the crimes he committed.
56. The Trial Chamber therefore finds that Bralo's circumstances in the period leading up to and surrounding the commission of his crimes do not amount to mitigating circumstances. The Chamber also finds that any orders given to Bralo to kill civilians and destroy homes would have been manifestly unlawful, such that they have no mitigatory value in the determination of sentence in the present case. While it may be the case that Bralo was used by his superiors as a "weapon of war," once again the Trial Chamber finds that this has no bearing upon the appropriate punishment that he should receive for his crimes.

(c) Time period covered by the Indictment

[...]

58. In the present case, however, there is only one person accused and convicted of the crimes charged in the Indictment and there cannot therefore be any comparison between the timeframe of the offences committed by this person and any co-accused. In addition, the crimes of which Bralo has been convicted were perpetrated over a period from 15 April, 1993, to some time in July 1993, that is, over eleven to fifteen weeks. The Trial Chamber does not consider this to be a short period of time and notes that Bralo has been convicted on the basis of a series of violent and depraved acts, rather than for a single act or set of acts committed on one occasion. The Trial Chamber does not, therefore, attribute any weight to the time period of the Indictment as a mitigating circumstance.

(d) Sheltering of others

59. The Defence submits that there is evidence that Bralo sheltered and assisted some people in the same time period as his crimes were committed. It provides statements from three people who say they were helped and protected by Bralo in this period. The Trial Chamber notes that, in some cases, substantial assistance to, or protection of vulnerable individuals by an accused person may constitute mitigating circumstances. For example, where an accused person participated in the detention of a number of people, and where he assisted some of those detainees, or alleviated their suffering in some way, this may be considered as a factor in mitigation of sentence. In the present case, of the people who have given statements to the effect that they were helped by Bralo, one states that he and Bralo were old friends, and the others had a family connection to him. The Trial Chamber finds that the fact that he chose to act in this manner with regard to these particular people demonstrates that he was capable of moral action. It does not, however, have any bearing on the sentence that he should receive in punishment for his particular crimes.

(e) Voluntary surrender, guilty plea, remorse, and steps towards rehabilitation

60. *Bralo's voluntary surrender and guilty plea before the Tribunal are inextricably linked to his remorse and steps towards rehabilitation, and are therefore considered here together* [author's note: emphasis added].
61. The Defence submits, and the Prosecution does not dispute, that Bralo surrendered voluntarily to the Tribunal in 2004, when he learned of the Indictment against him. *The Trial Chamber agrees that the voluntary surrender of an accused person should be considered as a mitigating circumstance, and thus will give credit to Bralo for this* [author's note: emphasis added].
62. The Defence also submits that the fact that Bralo pleaded guilty to the charges against him, and indeed voluntarily gave information that led to the addition of a new charge to the Indictment, are important mitigating circumstances. *The Prosecution agrees that Bralo's guilty plea constitutes a mitigating factor, as it spares witnesses from being required to come and give evidence; it was made long before trial and therefore results in the saving of limited resources; and it may contribute to the process of reconciliation in the region of central Bosnia* [author's note: emphasis added].
63. The Trial Chamber notes that Bralo pleaded guilty to an Indictment that contains significantly fewer charges than the indictment that was originally filed against him. However, the Plea Agreement between the parties states unequivocally that the guilty pleas were not entered on the basis of any promises or inducements on the part of the Prosecution. Furthermore, while some counts were removed from the Indictment, it is noteworthy that a new charge of persecution as a crime against humanity was added,

- based partly on information supplied by Bralo* [author's note: emphasis added].
64. The entering of a guilty plea prior to trial, to charges of the seriousness of those contained in the Indictment, is a significant step for an accused person to take. Substantial human and practical benefits flow from a plea of guilty, particularly one tendered at an early stage in the proceedings. Victims and witnesses who have already suffered enormous psychological and physical harm are not required to travel to the Hague to recount their experiences in court, and potentially re-live their trauma. In addition, scarce legal, judicial and financial resources that would otherwise be expended in preparing for and conducting a lengthy and expensive trial may be redeployed in the interests of securing the wider objectives of the Tribunal.
 65. *Furthermore, where the plea, and the circumstances in which it came to be made, involves a profound acknowledgement of personal responsibility, it may demonstrate that an accused is genuinely remorseful* [author's note: emphasis added].
 66. *As additional evidence of his genuine remorse, the Defence submits that Bralo took steps to atone for his crimes, prior to his surrender and transfer to the Hague. It states that, between late 1999 or early 2000 and his surrender in 2004, he worked in the community at Majcino Celo and Citluk, in south-eastern Bosnia and Herzegovina, and has provided witness statements to this effect. The Defence argues that there is evidence to suggest that, in the period after the armed conflict, Bralo found it increasingly difficult to cope with his conscience, but that he made a significant positive contribution to those with whom he lived* [author's note: emphasis added].
 67. The Defence also refers to Bralo's statement, which is appended to its Sentencing Brief, acknowledging his responsibility for his crimes and apologising to his victims. In addition, it has submitted evidence that Bralo has attempted to assist in the location and exhumation of the bodies of those who were killed by him and others during the attack on Ahmići, and in the identification of areas that were mined by the HVO during the conflict. The Defence argues that these actions demonstrate his remorse, his desire for personal rehabilitation, and his desire to assist in the rehabilitation of the communities so badly damaged by the conflict in which he was involved.
 68. *At the Sentencing Hearing, the Prosecution stated that it was of the view that Bralo is genuinely remorseful and has "embarked on a personal voyage of reconciliation and atonement"* [author's note: emphasis added].
 69. The Trial Chamber accepts that, after the end of the armed conflict, Bralo was devastated by the trauma of the conflict and the part that he played in it. *He attempted to surrender himself to the Tribunal in 1997, despite being unaware of the actual existence of an indictment against him* [author's note: emphasis added]. He also engaged in community work in a different region of Bosnia and Herzegovina. His efforts to assist in the location of the remains of his victims and others killed in the course of the conflict, and to aid de-mining operations, are to be commended, and the Trial Chamber is mindful of

the statement given by Zaim Kablar, who has been involved in the location and exhumation of bodies in central Bosnia, and who has described the importance of Bralo's contribution to finding the remains of several of his victims, and the positive effect that this has had on the families of those victims and the local community. His acknowledgement of responsibility for his crimes and expressions of regret directed to his victims are important indicators that he has undergone a personal transformation. The Trial Chamber is confident that this transformative process will continue as he serves his sentence and that his punishment will have a further rehabilitative effect.

70. *The Trial Chamber therefore considers that Bralo's plea, taken with his behaviour following the appalling events of the Indictment, and particularly the efforts he has made to try to atone for his crimes, demonstrate that he is genuinely remorseful* [author's note: emphasis added].
71. *The Trial Chamber further recognises that Bralo's guilty plea, combined with his genuine remorse, is likely to have a positive effect on the rehabilitation of the victims of his crimes, and their communities* [author's note: emphasis added]. As stated by Mehmed Ahmic, the current President of the Ahmići Municipality Council, Bralo is the first person charged by the Tribunal with crimes committed in that area who has admitted his criminal conduct. It accepts his view that this acknowledgement of wrongdoing is extremely important for the entire community in its continuing process of recovery and reconciliation.
72. *The Trial Chamber accordingly considers that Bralo's voluntary surrender, his plea of guilty, the steps he has taken to atone for his crimes, and his genuine remorse, are all significant mitigating factors* [author's note: emphasis added].

(f) Co-operation with the Office of the Prosecutor

73. Rule 101(B)(ii) clearly states that "substantial co-operation with the Prosecutor" by a convicted person may count as a mitigating circumstance in sentencing. In its Sentencing Brief, the Defence includes a section on "positive co-operation of value to the Tribunal." In this section, it states that (a) Bralo handed over documents to UN authorities in 1997, which have been used in at least one trial; (b) Bralo renders himself compellable before the Tribunal as a witness in future proceedings, and has placed no restriction on the use of the Factual Basis for the Plea Agreement in other cases; and (c) Bralo has supplemented the Factual Basis with a further detailed statement, which may be the basis for further enquiries by the Prosecution.
74. [...] *The Defence proposed a kind of deposition procedure as a possible manner in which such formal questioning could take place, emphasising Bralo's desire that it be done on the record rather than behind closed doors, in order to minimise the threats to his and his family's safety that would be consequent upon any hint that a private deal had been struck by him with the Prosecution* [author's note: emphasis added]. [...] The Defence finally argued

that the Factual Basis for the Plea Agreement may be being used in another case, which is not the subject of public proceedings, and it sought to know whether this was indeed the case as it might be evidence that goes to Bralo's cooperation.

75. In response to the proposal for some kind of deposition proceedings, the Prosecution stated at the Sentencing Hearing that this would not amount to "substantial co-operation" within the meaning of Rule 101(B)(ii). It further argued that any person could be compelled to appear as a witness before the Tribunal, and that Bralo's willingness to be so compelled could not therefore amount to a positive act of co-operation. The Prosecution cited the *Blaskić* Judgement and the *Todorović* Judgement in support of the view that any evaluation of the co-operation of an accused person depends on the extent and quality of the information that he provides. It also argued that the written statement given by Bralo, and appended to the Defence Brief, is incomplete, in that there are areas which he did not discuss. The Prosecution further compared the purported co-operation of Bralo with the types of co-operation that it has received from other accused in other cases, in which original documentation has been provided; the accused person has submitted himself to interviews with the Prosecution; and the accused has given actual testimony in cases. Finally, the Prosecution stated that it was not able to confirm whether or not the Factual Basis was being used in another case, due to its confidentiality obligations, but noted that it had provided the Trial Chamber on an *ex parte* basis with information that could be analysed to determine its value as evidence of cooperation by Bralo with the Prosecution.
76. *There exists, therefore, a profound difference between the submissions of the Prosecution and the Defence over whether Bralo has provided "substantial co-operation" that should be taken into account as a mitigating circumstance* [author's note: emphasis added]. This dispute does not concern the facts of what Bralo has or has not done, but rather the meaning to be attached to his acts or omissions and the value to be placed on them as evidence of co-operation. The Trial Chamber concurs with the finding in the *Vasiljević* Trial Judgement, which was upheld on appeal, that the amount of co-operation given by an accused need not be "substantial" for it to be taken into account in the first place. In other words, the Trial Chamber can assess any purported co-operation given by Bralo to the Prosecution and determine its value and the weight to be given to it, if any, as a mitigating circumstance. *The Trial Chamber also agrees with the Blaskić Trial Chamber that "the evaluation of the accused's cooperation depends both on the quantity and quality of the information he provides"* [author's note: emphasis added].
77. In the Prosecution's view, co-operation of a nature that should be considered as a factor in mitigation of punishment has not occurred in the present case. The Trial Chamber notes, however, that the Prosecution has not disputed that Bralo did provide some documents to the international forces in Bosnia and Herzegovina in 1997, which have been used in other proceedings before the Tribunal. Without having itself received this information, it is difficult for

the Trial Chamber to assess its quantity and quality, but it takes into account its provision nonetheless.

78. In addition to the provision of documentary material, the Trial Chamber takes into consideration the professed willingness of Bralo to provide further information to the Prosecution in the form of some kind of deposition. It notes, however, that Bralo has refused to meet privately with the Prosecution for an interview, which is the normal procedure for the taking of information from an accused or convicted person, out of a fear that this would have consequences for his and his family's safety. Whether or not these fears are justified, it remains the case that it is the function of the Prosecution to gather information and evidence for use in trials before the Tribunal, and it is not for a Trial Chamber to interfere in that evidence-gathering process. It is in the context of a particular trial that the Chamber hearing that particular case is empowered to issue orders for the taking of depositions pursuant to Rule 71. Therefore, this Trial Chamber cannot issue a general order for a deposition to be taken from Bralo, which does not relate to specific trial proceedings. Nonetheless, for the purposes of assessing Bralo's "substantial co-operation" with the Prosecution, the Trial Chamber takes into account his willingness to be available to give some kind of deposition to the Prosecution, as discussed at the Sentencing Hearing.
79. *The Trial Chamber finds, however, that his willingness to give oral or written testimony in future cases has limited value, for it does not go beyond what is required of any individual who is called to give evidence to the Tribunal* [author's note: emphasis added].
80. Finally, with regard to the use that may be made of the Factual Basis agreed between Bralo and the Prosecution, the Trial Chamber finds that this is also of limited value as evidence of cooperation from Bralo. While he has placed no restriction on the use of the Factual Basis, and therefore is not being obstructive, it does not necessarily follow that he is being positively co-operative with the Prosecution. Therefore, even if the Factual Basis is being used by the Prosecution in other cases before the Tribunal, its use does not imbue it with value as evidence of co-operation from Bralo.
81. *In conclusion, the Trial Chamber finds that there is not evidence of "substantial" cooperation from Bralo with the Prosecution. There is evidence of some co-operation, in the form of provision of documents and a willingness to give information, albeit in a prescribed format, and the Trial Chamber gives that appropriate weight as moderate co-operation* [author's note: emphasis added].

(g) Behaviour in the United Nations Detention Unit

82. The Defence has submitted a statement from Tim McFadden, Chief of the United Nations Detention Unit in the Hague, which describes Bralo's behaviour in detention as good. The Trial Chamber notes that good behaviour in detention may be considered as a mitigating circumstance, and accordingly takes it into account in the determination of sentence in the present case.

3. Conclusion

83. The Trial Chamber therefore finds that Bralo is entitled to have the following mitigating circumstances taken into consideration:

- (1) his family and personal circumstances;
- (2) his guilty plea long before trial;
- (3) his remorse and efforts to atone for his crimes;
- (4) his voluntary surrender to the Tribunal;
- (5) his co-operation with the Prosecution; and
- (6) his good behaviour in detention.

While the Trial Chamber gives little weight to the first, fifth and sixth of these circumstances, it does consider that Bralo's guilty plea and the time at which it was tendered, along with his remorse and efforts to atone for his crimes, and his voluntary surrender, together warrant substantial modification of the sentence that would otherwise be appropriate.

C. The General Practice Regarding Prison Sentences in the Courts of the former Yugoslavia

84. The Prosecution correctly points out in its Sentencing Brief that the Trial Chamber is required to take into account the sentencing practices of the courts of the former Yugoslavia. While a Trial Chamber should have "recourse to" and should "take into account" the general practice regarding prison sentences in the courts of the former Yugoslavia, it is not bound by such practice. In the *Krstić* case, the Appeals Chamber endorsed the position enunciated in the *Kunarac* Trial Judgement:

Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice. The Trial Chamber notes that, because very important underlying differences often exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia.

85. The Criminal Code of the Socialist Federative Republic of Yugoslavia ("SFRY") was adopted in 1976, and served as the applicable law in the entire territory of the former Yugoslavia until 1991. Following the break-up of SFRY, most of the newly formed countries adopted their own criminal codes between 1994 and 1998, drawing heavily on the provisions of the SFRY Criminal Code. Therefore, at the time relevant to this Indictment, the law that was applicable in Bosnia and Herzegovina was the SFRY Criminal Code.

86. The Trial Chamber takes into consideration the offences and the punishments that could have been imposed under the criminal law of the former Yugoslavia. Article 34 of the SFRY Criminal Code establishes the types of punishment that may be imposed in that jurisdiction, including capital punishment and imprisonment. Further, Article 38 of the SFRY Criminal Code sets out the terms of imprisonment: although imprisonment could not usually exceed 15 years, this was extended to a maximum of 20 years for those crimes otherwise eligible for the death penalty. In 1977, the death penalty was abolished in some republics of the SFRY by constitutional amendment, but Bosnia and Herzegovina was not among them. *When Bosnia and Herzegovina abolished the death penalty in 1998, it was replaced by imprisonment of 20–40 years for the gravest criminal offences in the Federation of Bosnia and Herzegovina and with life imprisonment in the Republika Srpska in October 2000* [author's note: emphasis added].
87. The Prosecution directs the attention of the Trial Chamber to Article 142 of the SFRY Criminal Code, entitled "Criminal Offences Against Humanity and International Law," which covers crimes committed during armed conflict. Article 142 of the SFRY Criminal Code permits a range of sentence from five years as a minimum to the maximum penalty of death for violations of international law in times of war or armed conflict.
88. *The Trial Chamber finds that of the provisions within the SFRY Criminal Code, Article 142 most closely reflects the criminal conduct for which Bralo has been convicted under count 1 to 8 of the Indictment. In the former Yugoslavia, such criminal conduct would have been eligible for the death penalty, or twenty years in lieu of the death penalty, based on the discretion of the judge* [author's note: emphasis added]. Subsequent to the abolition of the death penalty, the Trial Chamber finds that long-term imprisonment is foreseen. *The Trial Chamber also notes that Article 41(1) of the SFRY Criminal Code directs courts in that jurisdiction to take into consideration all of the relevant circumstances, including the personal circumstances of the convicted person and his conduct after the commission of the offences, in their determination of the appropriate punishment to be imposed* [author's note: emphasis added].
89. The Trial Chamber takes all of these factors relating to sentencing practices in the former Yugoslavia into consideration in making its determination in this case.

V. Trial Chamber's Determination of Sentence

A. Submissions of the Parties

90. Following all of the arguments raised in its Sentencing Brief, the Prosecution requests that the Trial Chamber impose a minimum term of imprisonment of 25 years on Bralo. It further clarified at the Sentencing Hearing that it was requesting a mandatory minimum of 25 years imprisonment, before Bralo

could be considered for release. Citing the case of *Dragan Nikolić*, the Prosecution argued that it is permissible for a Trial Chamber to specify a minimum term of imprisonment.

91. While the Defence did not specify in its Sentencing Brief the sentence that it believes appropriate in the present case, in response to the Prosecution argument about the mandatory minimum sentence of 25 years, it stated at the Sentencing Hearing that this would amount to a sentence of 40 to 50 years in a country which gives between one third and one half of credit for good behaviour.

[...]

B. Findings

93. The Trial Chamber takes note of the sentences imposed in the cases cited by the Defence, and other prior cases before the Tribunal. However, in none of these cases have individuals been convicted of exactly the same crimes as Miroslav Bralo, committed in the same manner, and with the same aggravating and mitigating circumstances. It is the duty of this Trial Chamber to ensure that the punishment of Bralo is tailored to fit the particular crimes of which he has been convicted, taking into account their gravity and their individual circumstances. Therefore, while other cases may provide guidance on sentencing ranges, they cannot determine the most appropriate sentence to be imposed on Miroslav Bralo.
94. With regard to the imposition of a mandatory minimum sentence, the Trial Chamber notes that, while it may choose to recommend a minimum term of imprisonment to be served by Bralo, this has occurred only rarely in cases before the Tribunal. Article 28 of the Statute and Rules 123, 124 and 125 of the Rules provide for a procedure whereby the State in which a convicted person is serving his sentence must notify the Tribunal of the eligibility of the convicted person for early release, and the President of the Tribunal then determines whether such release is appropriate, taking into account the considerations specified in Rule 125. *Therefore, when a Trial Chamber sentences a convicted person to a certain number of years' imprisonment, it does so in the awareness that there is a possibility of early release under the law of whatever State the sentence is served in, but also that the President of this Tribunal ultimately determines the matter* [author's note: emphasis added]. In the circumstances of the present case, the Trial Chamber finds it unnecessary to make a recommendation on the minimum sentence to be served by Bralo before he should be eligible for early release.
95. The Trial Chamber has conducted a careful review of the sentences that have been imposed by this Tribunal in other cases. In light of this sentencing practice, and taking account only of the gravity of the crimes committed by Bralo, including the aggravating circumstances, the Trial Chamber finds that a sentence of at least 25 years' imprisonment would be warranted.

However, having carefully weighed the mitigating circumstances that have also been found, the Trial Chamber concludes that a single sentence of 20 years' imprisonment is a proportionate and appropriate punishment.

C. Credit for Time Served

96. Miroslav Bralo is entitled to credit for the time he has spent in detention since his transfer to the custody of the Tribunal on 12 November, 2004.

VI. Disposition

97. For the foregoing reasons, the Trial Chamber

PURSUANT TO the Statute and the Rules,
SENTENCES Miroslav Bralo to a single sentence of 20 years' imprisonment;
STATES that, pursuant to Rule 101(C) of the Rules, he is entitled to credit for time served from 21 November, 2004, up to and including the day of this Judgement;

ORDERS that, pursuant to Rule 103(C) of the Rules, Miroslav Bralo remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

[...]

Iain Bonomy, Presiding

Patrick Robinson

O-Gon Kwon

Dated this seventh day of December 2005

At The Hague

The Netherlands

9.2 Notes and Questions

9.2.1 *Who Were the Child Victims in Prosecutor v. Miroslav Bralo?*

The child victims in the instant case were the children of Bosnian Muslims and the children of those accused of being collaborators with Bosnian Muslims who were victimized by Bralo during the conflict from April to July 1993. The aforementioned children and their parents were targeted by the anti-terrorist platoon of the 4th Military Police Battalion of the Croatian Defence Council (HVO) for forced transfer and systematic attacks which included murder, torture and pillage

amongst other international crimes. The objective of the HVO perpetrators was so-called “ethnic cleansing” by elimination of the Bosnian presence in the disputed territory of central Bosnia and Herzegovina.

9.2.2 Did International Justice in This Case Affirm Respect for the Human Rights of the Child?

9.2.2.1 Were the Child Victims Regarded as Having Juridical Personality in Their Own Right or Were the Children’s Rights Subsumed Under Those of the Parents or Other Adult Family Members?

In this case, the children were, to some degree, regarded as having juridical personality since they were permitted to testify about the facts of the case (though proffer of their statements was via the Prosecutor to the Court). Indeed, the child survivors of the attack on Ahmići in effect provided testimony also on behalf of their murdered parents (the reversal of the norm where parents act on behalf of their children in seeking justice). Furthermore, the harms the children suffered as persons in their own right were testified to and not just the harms suffered by the adult members of the families. Thus, the separate harms suffered by the children were considered by the ICTY trial court and these were not simply subsumed under the harms suffered by the parents or the families as a whole.

9.2.2.2 Was the International Obligation to Afford Children Special Protection Acknowledged and the Nature of the Offence Considered Aggravated by the Fact that the Victims Were Children?

The aggravating factor of there being child victims was taken into consideration by the ICTY trial court:

The Trial Chamber also finds that in some circumstances a crime can be aggravated by the youth of the victim involved. Such is the case, for example, where an accused is convicted of rape or sexual assault, or where he has committed murder. The fact that many of those who were killed, displaced, and traumatised by the attack on Ahmići were children, and that, of the fourteen members of the Salkić and Čeremić families who were killed by an HVO soldier with the assistance of Bralo, nine were children, are important considerations. The Trial Chamber therefore finds that this aspect of the commission of the crime of persecution by Bralo in the present case is a factor that aggravates the gravity of the crime. (Prosecutor v. Miroslav Bralo, Trial judgment, para. 31, emphasis added)

However, the question can be raised as to whether this aggravating factor concerning the youth of some of the victims in actuality impacted the sentencing in that Bralo received only 20 years rather than the possible life term which the ICTY trial court might have imposed for such grave crimes as those for which he

was convicted, and the ICTY trial court did *not* make a recommendation regarding any *minimum sentence* to be served by Bralo and considered that he could *potentially* be eligible for early release under the normal State early release standards. This, when in fact Bralo personally participated in the murder of children at Ahmići among other crimes against humanity which are considered to be jus cogens and held to be among the gravest of international crimes. One can ask whether the gravity of the crime of the systematic murder of children can in reality be mitigated in any way by factors such as those the ICTY Trial Court appears to have held were legitimate as mitigators in this case. Does consideration of such mitigators as in the instant case undermine the notion of children's entitlements to special protection in that those who would violate that fundamental guarantee are not held to full account? Consider in this regard whether Bralo's relatively low sentence sends a symbolic message which, in effect, serves to mitigate the perceived gravity of his crimes (i.e., the systematic persecution including the murder of Bosnian Muslim children which he himself personally carried out)?

9.2.3 Was There Any Public Acknowledgement of the International Crimes Committed Against Child Victims in Prosecutor v. Miroslav Bralo Aside from the Judgment Itself?

There was a public acknowledgement of the international crimes committed against child victims in the instant case. This by virtue of Bralo's guilty plea and its associated confirmation of facts acknowledging that Bralo had committed particular grave international crimes against child victims. The charges upheld on counts related to the victimization of children also serve as something of a public acknowledgement. The therapeutic value of this public acknowledgement, however, may have been undercut by what many would regard as a rather light sentence of 20 years given the gravity of the offences for which defendant Bralo was convicted. Consider also that Bralo may have calculated that his public expression of remorse for his crimes might serve as a mitigating factor. He appended such an expression of remorse to his defence attorney's brief regarding sentencing wherein Bralo accepted personal responsibility for the crimes he committed. Further, at the sentencing hearing "Bralo made a short oral statement, apologising to the victims of his crimes and their families, and to all of those who experienced the horrors of war through me or my co-fighters" (*Prosecutor v. Miroslav Bralo*, trial judgment, para. 9).

The fact that Bralo pleaded guilty, surrendered prior to his formal indictment being formulated or issued, and that he expressed remorse may have been an expression of his attempts to posture so as to be in the best position to plead mitigation given: (a) the high likelihood of his arrest in the case, and (b) the gravity of the international crimes which he not only did not seek to prevent

others under his command committing, but which he himself personally engaged in with great enthusiasm according to the findings of the court. Consider in this regard that, in fact, Bralo argued that his professed remorse, his guilty plea and his surrender, among things, should be held to be significant mitigating factors (*Prosecutor v. Miroslav Bralo*, trial judgment, para. 43).

Note that “The only mitigating circumstance that Trial Chambers are specifically required to consider *as a matter of law*, pursuant to Rule 101(B)(ii) of the Rules, is cooperation with the Prosecution” (*Prosecutor v. Miroslav Bralo*, ICTY appeal judgment, para. 11, emphasis added). In Bralo’s case, both the Trial and Appeal Courts held that he did *not* contribute substantial information to the Prosecutor, and that therefore his cooperation should be considered as but moderate and given moderate weight as a mitigating factor. However, his alleged remorse and acts of atonement post-conflict as well as his guilty plea were weighted heavily as mitigating factors in the case:

The Appeals Chamber notes that the Trial Chamber, having determined the weight to be accorded to the mitigating evidence, concluded that “Bralo’s guilty plea and the time at which it was tendered, along with his remorse and efforts to atone for his crimes, and his voluntary surrender, together warrant substantial modification of the sentence that would otherwise be appropriate.” (*Prosecutor v. Miroslav Bralo*, appeal judgment, para. 81)

The question arises then as to whether the court ought to have considered the guilty plea, the *alleged* indicators of remorse and atonement post-conflict and cooperation with the Prosecutor, allegedly deriving from remorse, in mitigation. In the instant case, the Appeal Court upheld the sentence which did take account of the alleged mitigating factors (which factors need to be shown only on a balance of probabilities) stating:

In the present case, in particular in light of the seriousness of the crimes committed and with specific regard to the aggravating circumstances not challenged by the Appellant, the Appeals Chamber considers that the Appellant failed to demonstrate that the sentence imposed upon him was so unreasonable as to amount to an abuse of discretion by the Trial Chamber and failed to show that the imposed sentence contradicted the principles governing sentencing at the International Tribunal. (*Prosecutor v. Miroslav Bralo*, appeal judgment, para. 86)

However, is it just to consider, as did the ICTY in the instant case, that one can atone for the gravest of intentional crimes simply by ostensibly expressing remorse; being cooperative with the Prosecutor, and doing some pro-social activities post the commission of the heinous international crimes? Put differently, is it in fact conceptually sound to suggest that there can be factors other than duress, mental disorder or defect and being a child (perpetrator) which mitigate crimes that are an affront to humanity? Is humanity less offended when there are, for instance, outward displays of what is intended to convey remorse, cooperation with the Prosecutor or a guilty plea? If so, does this not offend the human dignity of the victim especially when the crimes are grave international crimes committed against children?

9.2.4 Were the Principles of the Convention on the Rights of the Child Reflected in the Treatment of the Case and the Remedy Afforded the Victims?

There was no direct reference to the Convention on the Rights of the Child (CRC) in the ICTY trial court's judgment in the instant case. This though the former Yugoslavia was a party to the Convention and the CRC was in force at the time that the ICTY Trial Court heard the case and during the time period in which the defendant Bralo committed his crimes. (The crimes were committed by Bralo in 1993 and the CRC came into force in 1990.) The Convention on the Rights of the Child was signed by the former Yugoslavia on 26 January, 1990 and ratified 3 January, 1991. Thus, the State through its agents was obligated to, for instance, ensure children's well being (Article 3); to protect children against torture, cruel, inhumane or degrading treatment (Article 37) and to respect the children's right to life and best possibility for survival and good development (Article 6).

Despite the ICTY trial judgment not considering the Convention on the Rights of the Child, the fact that child witnesses did testify (via affidavits provided to the Prosecutor which were then submitted to the court) is in accord with Article 12 of the Convention on the Rights of the Child concerning the child's right to be heard in judicial proceedings where their rights will be impacted (i.e., in this case the children's right to a just judicial remedy for the harms they suffered as victims of a State sponsored genocidal program aimed at so-called ethnic cleansing):

The Prosecution has submitted several statements from people who survived the attack on Ahmići and whose relatives were killed in the course of that attack. [. . .] *Elver Ahmić, who turned fourteen years old in 1993*, watched as his mother and eight-year old brother were killed on 16 April of that year. He was also wounded in the attack, and still has medical problems as a result of bullets and shrapnel that remain in his body, along with the emotional pain caused by the death of his mother and brother. *Adnan Zec, who was thirteen years old at the time of the attack*, also witnessed his mother, father and eleven-year old sister being killed and was himself injured. His statement expresses the mental and physical trauma that he has experienced since the time of the attack and the heavy toll that the loss of his family has exacted upon him. In his statement, Abdullah Ahmić describes how HVO soldiers executed his father on the day of the attack, and also attempted to kill him by shooting him in the head. His physical and psychological health has suffered enormously as a consequence of the attack. (*Prosecutor v. Miroslav Bralo*, trial judgment, para. 37, emphasis added)

Further, the ICTY trial court's acknowledgement that children are entitled to "special protection" under international law is consistent with various provisions of the Convention on the Rights of the Child mentioned previously. However, the relatively light sentence imposed on Bralo (considering the gravity of his crimes), in the view of some, might be considered as inconsistent with recognition of the especially high duty of care of those in authority (agents of the State) under the Convention on the Rights of the Child to protect children given their status as vulnerable members of society. In this regard, recall that Bralo was assigned by the

State to the anti-terrorist platoon of the 4th Military Police Battalion of the Croatian Defence Council (“HVO”) and given low level command authority.

9.2.5 Did Reliance on National Sentencing Provisions with Respect to the Possibility of Early Release in the Instant Case Hinder or Facilitate the International Accountability of the State and Its Agents for the International Crimes?

The ICTY Trial Court in this case, in accord with the procedural rules of the Court, sentenced Bralo with the possibility of him having early release at some future point. This reality was allegedly tempered by the fact that early release of the defendant could not, according to the rules, be effectuated without the approval of the Chief Justice of the ICTY court. Nevertheless, is there justification in raising questions as to whether the mandate and jurisdiction of an international criminal court are properly respected when national sentencing guidelines regarding early release possibilities and eligibility criteria are permitted to impact upon the ultimate sentence served? Consider that one of the prime functions of the ICTY is as follows:

In previous cases before the Tribunal, Trial Chambers and the Appeals Chamber have set out three broad purposes of punishment in this particular context. The first of these has been termed “retribution,” with the qualification that it is “not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these [international] crimes.” Thus, retribution as a purpose of punishment is here used to denote the concept that *whatever sentence is imposed on a convicted person amounts to an expression of condemnation by the international community at the horrific nature of the crimes committed, and must therefore be proportionate to his specific conduct.* (*Prosecutor v. Miroslav Bralo*, trial judgment, para. 22, emphasis added).

The ICTY Trial Court in *Prosecutor v. Miroslav Bralo* allowed for the possibility of the State considering Bralo eligible in future for “early release” – reflecting the general practice of the ICTY international court in sentencing – rather than imposing a life term for his grave crimes and declined to set a minimum sentence. Can one argue then that the ICTY trial court in effect from that point had allowed the State to largely usurp its ability to fashion a sentence which served as an “expression of condemnation by the international community at the horrific nature of the crimes committed”?

9.2.6 What Type of International Criminal Court Is the ICTY?

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia is an ad hoc tribunal established via Security Council Resolutions 808

dated 22 February, and 827 dated 25 May, 1993. The question arises as to whether socio-political considerations played any role in the analysis of the case or the sentencing decision in *Prosecutor v. Miroslav Bralo*. In the instant case, the Trial Court did *not* consider as a mitigating factor the circumstances that provided the socio-political context for the crimes committed:

The Trial Chamber is aware of the deteriorating political and military situation in the municipality of Vitez, and indeed in central Bosnia, in the 1992–1993 period. It further notes that tension and animosity between the Bosnian Croat and Muslim communities in the region escalated in mid-1992, resulting in armed conflict between the HVO and the army of Bosnia and Herzegovina. The Defence requests that the Trial Chamber be mindful of the “enormous pressures placed on many people of good character and of bad character” in this particular context. *While it is notorious that such pressures existed, the Trial Chamber nonetheless finds that they cannot be considered in any way relevant to the sentence to be imposed upon Bralo for the crimes of which he has been convicted. Large sections of the population of Vitez municipality, and indeed of many parts of Bosnia and Herzegovina, were subjected to the same or similar pressures, and yet did not respond in the same manner as Bralo.* (*Prosecutor v. Miroslav Bralo*, trial judgment, para. 51, emphasis added)

The Trial court in the instant case declined to consider the socio-political context in which the defendant’s international crimes occurred as mitigating factors given amongst other reasons: the gravity of the international crimes committed by Bralo; the fact that he did not plead a defence of duress created by his military superiors but only maintained that he had been under some pressure in that he was released from prison on the condition he “[. . .] participate in the attack on Ahmići,” and was therefore “under some pressure to become a member of the “Jokers” and to be actively involved” (*Prosecutor v. Miroslav Bralo*, appeal judgment, para. 23) and the court’s finding that there was evidence that Bralo had the possibility to choose not to engage in these unlawful acts and to decline both to perpetrate the atrocities himself or to facilitate their commission by others in the HVO but did not. Why Bralo received a rather light sentence of 20 years given the gravity of his crimes and whether his position with the State (appointment to an anti-rebel military unit in a low level command position as a condition of his release from prison) played any significant role in mitigation is an open question. (Similar questions regarding sentencing and the potential impact of socio-political context on the Court arise in case 7 regarding international crimes committed in Sierra Leone by commanders of the CDF, a pro-government force which participated in an extended and bloody internal conflict in that jurisdiction.)

Chapter 10

The Special Court for Sierra Leone

Case 7: *Prosecutor v. Moinina Fofana and Allieu Kondewa*

The full judgment is available at
<http://www.unhcr.org/refworld/publisher,SCSL,,,484417252,0.html>.

10.1 Excerpt from the Judgment in the Appeals Chamber of 28 May, 2008

[Author's note: internal footnotes have been omitted.]

[...]

Before: Justice George Gelaga King, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando
Justice Jon M. Kamanda

Registrar: Herman von Hebel

Date: 28 May, 2008

[...]

APPEALS CHAMBER of the Special Court for Sierra Leone (“Appeals Chamber”) comprised of Hon. Justice George Gelaga King, Presiding, Hon. Justice Emmanuel Ayoola, Hon. Justice Renate Winter, Hon. Justice Raja Fernando, and Hon. Justice Jon Moadeh Kamanda;

SEISED of appeals from the Judgment rendered by Trial Chamber I (“Trial Chamber”) on 2 August, 2007, in the case of *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T (“CDF Trial Judgment” or “Trial Judgment”);

HAVING CONSIDERED the written and oral submissions of both Parties and the Record on Appeal;

HEREBY RENDERS its Judgment.

I. Introduction

A. The Special Court for Sierra Leone

1. In 2000, following a request from the Government of Sierra Leone, the United Nations Security Council authorised the United Nations Secretary-General to negotiate an agreement with the Government of Sierra Leone to establish a Special Court to prosecute persons responsible for the commission of crimes against humanity, war crimes, other serious violations of international humanitarian law and violations of Sierra Leonean law during the armed conflict in Sierra Leone.
2. As a result, the Special Court for Sierra Leone was established in 2000 by an agreement between the United Nations and the Government of Sierra Leone (“Special Court Agreement”) with a mandate to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November, 1996.
3. The Statute of the Special Court (“Statute”) empowers the Special Court to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, other serious violations of international humanitarian law and specified crimes under Sierra Leonean law.

B. Procedural and Factual Background

1. The Armed Conflict in Sierra Leone: The Kamajors and the Civil Defence Forces

(a) The Kamajors

4. When the civil conflict in Sierra Leone began in 1991, the military decided to enlist Kamajors as vigilantes to scout the terrain. Because the Kamajors were limited in number, the community leaders and their chiefs made arrangements to encourage the Kamajors to expand their defence by increasing their manpower through initiation. The Kamajors were then placed by their paramount chiefs at the disposal of government soldiers and they acted as allies in the defence of their areas against the rebels. After each deployment, the Kamajors would be returned to their respective communities. In 1996 after the death of Chief Lebbie Lagbeyor, the head of the Kamajors in the Southern Region, the paramount chiefs of the Southern Region appointed Regent Chief Samuel Hinga Norman as Chairman of the Kamajors for the region.
5. The term “Kamajor” originally referred to a “Mende” male who possessed specialized knowledge of the forest and the use of medicines associated with the bush. Kamajors not only procured meat but also protected communities from

“natural and supernatural threats said to reside beyond the village boundaries.” While referred to as Kamajors by the Mende, other ethnic groups refer to them by different names.

6. The emergence of the Kamajor Society may be traced back to the Eastern Region Defence Committee (“ERECOM”), of which Dr. Alpha Lavalie was Chairman and Dr. Albert Joe Demby was Treasurer. The Kamajor Society was formed at the local level in 1991, and was structured by Dr. Lavalie in 1992, immediately after the military coup by President Strasser’s National Provisional Ruling Council.
7. On 30 November, 1996, the Government of Sierra Leone and the Revolutionary United Front (“RUF”) signed the Abidjan Peace Accord, but the war resumed less than two months later. At this time there was general dissatisfaction among soldiers in the military, primarily due to complaints about their welfare, particularly their rations of rice. After President Ahmad Tejan Kabbah was overthrown in a military coup on 25 May, 1997, the Kamajors went underground in the bush. However, following an announcement on the BBC rallying the Kamajors, Kapras, Gbethis, Tamaboros and Donsos, they assembled again in Pujehun District and took up arms to fight against the Armed Forces Revolutionary Council (“AFRC”).

(b) The Civil Defence Forces

8. Upon President Kabbah’s arrival in exile in Conakry after the coup, the Organisation of African Unity (“OAU”) designated the Economic Community of West African States (“ECOWAS”) to restore President Kabbah’s government to power. ECOWAS in turn mandated its Monitoring Group (“ECOMOG”) to carry out the task. In a bid to re-establish his government, President Kabbah created the Civil Defense Forces (“CDF”) to coordinate the activities within the various militia groups and with ECOMOG. The CDF was a security force comprised mainly of Kamajors who fought in the conflict in Sierra Leone between November 1996 and December 1999. The CDF supported the elected government of Sierra Leone in its fight against the RUF and the AFRC. President Kabbah appointed the Vice-President Albert Joe Demby as Chairman of the CDF, and Sam Hinga Norman (“Norman”) as the National Coordinator. In his capacity as National Coordinator, Norman was responsible for coordinating the activities of the CDF/Kamajors in supporting the military operations of ECOMOG to reinstate President Kabbah’s government. Norman was also responsible for obtaining assistance and logistics from ECOMOG in Liberia.
9. ECOMOG collaborated with the CDF operationally, particularly in the Bo-Kenema axis. In addition, the Nigerian contingent of ECOMOG supplied the CDF with logistics such as arms, ammunition, fuel, food, money, intelligence and medical care.
10. Alleging that Norman, Moinina Fofana (“Fofana”) and Allieu Kondewa (“Kondewa”) were individually responsible pursuant to Article 6(1) and/or Article 6(3) of the Statute for alleged crimes committed by the Kamajors, the

Prosecution charged Norman, Fofana and Kondewa under Article 15 of the Statute in an 8-Count Indictment with crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law in violation of Articles 2, 3 and 4 of the Statute.

2. The Indictment

11. The original Indictments against Fofana and Kondewa, approved on 24 June, 2003, were later consolidated with the Indictment against Norman, on 5 February, 2004.
12. The Consolidated Indictment (“Indictment”) charged the three persons pursuant to Article 2 of the Statute with crimes against humanity, namely: murder and “other inhumane acts” in Counts 1 and 3, respectively, pursuant to Article 3 of the Statute; violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, namely: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, pillage, acts of terrorism and collective punishments in Counts 2, 4, 5, 6 and 7, respectively; and, pursuant to Article 4 of the Statute, with a serious violation of international humanitarian law, namely: enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities in Count 8.
13. Upon Norman’s death on 22 February, 2007, after the completion of the trial but before pronouncement of Judgment, the Trial Chamber on 21 May, 2007 ruled that the trial proceedings were terminated against him and that the Judgment in relation to the remaining two Accused would be based on the evidence adduced on the record by all of the parties.

3. The Charges

- a. The allegations that formed the basis of the charges against Fofana and Kondewa, as contained in the Indictment, were that:

“The CDF, largely Kamajors, engaged the combined RUF/AFRC forces in armed conflict in various parts of Sierra Leone – to include the towns of Tongo Field, Kenema, Bo, Koribondo and surrounding areas and the Districts of Moyamba and Bonthe. Civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were termed ‘**Collaborators**’ and specifically targeted by the CDF. Once so identified, these ‘**Collaborators**’ and captured enemy combatants were unlawfully killed. Victims were often shot, hacked to death, or burnt to death. Other practices included human sacrifices and cannibalism.”

“These actions by the CDF, largely Kamajors, which also included looting, destruction of private property, personal injury and the extorting of money from civilians, were

intended to threaten and terrorize the civilian population. Many civilians saw these crimes committed; others returned to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property. Typical CDF actions and the resulting crimes included:

- a. *Between 1 November, 1997 and about 1 April, 1998*, multiple attacks on Tongo Field and surrounding areas and towns during which Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors screened the civilians and those identified as ‘**Collaborators**,’ along with any captured enemy combatants, were unlawfully killed.
 - b. *On or about 15 February, 1998* Kamajors attacked and took control of the town of Kenema. In conjunction with the attack and following the attack, both at and near Kenema and at a nearby location known as SS Camp, Kamajors continued to identify suspected ‘**Collaborators**,’ unlawfully killing or inflicting serious bodily harm and serious physical suffering on an unknown number of civilians and captured enemy combatants. Kamajors also entered the police barracks in Kenema and unlawfully killed an unknown number of Sierra Leone Police Officers.
 - c. *In or about January and February 1998*, the Kamajors attacked and took control of the towns of Bo, Koribondo, and the surrounding areas. Thereafter, the practice of killing captured enemy combatants and suspected ‘**Collaborators**’ continued and as a result, Kamajors unlawfully killed or inflicted serious bodily harm and serious physical suffering on an unknown number of civilians and enemy combatants. Also, as of these attacks in and around Bo and Koribondo, Kamajors unlawfully destroyed and looted an unknown number of civilian owned and occupied houses, buildings and businesses.
 - d. *Between about October 1997 and December 1999*, Kamajors attacked or conducted armed operations in the Moyamba District, to include the towns of Sembahun and Gbangbatoke. As a result of the actions Kamajors continued to identify suspected ‘**Collaborators**’ and others suspected to be not supportive of the Kamajors and their activities. Kamajors unlawfully killed an unknown number of civilians. They unlawfully destroyed and looted civilian owned property.
 - e. *Between October 1997 and December 1999*, Kamajors attacked or conducted armed operations in the Bonthe District, generally in and around the towns and settlements of Talia, Tihun, Maboya, Bolloh, Bembay, and the island town of Bonthe. As a result of these actions Kamajors identified suspected ‘**Collaborators**’ and others suspected to be not supportive of the Kamajors and their activities. They unlawfully killed an unknown number of civilians. They destroyed and looted civilian owned property.
 - f. *In an operation called “Black December,”* the CDF blocked all major highways and roads leading to and from major towns mainly in the southern and eastern Provinces. As a result of these actions, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants.”
15. It was alleged that all acts or omissions charged in the Indictment as crimes against humanity were committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone, stated as referring to “persons who took no active part in the hostilities, or were no longer taking an active part in the hostilities.”
 16. In regard to the status, standing and functions of Norman, Fofana and Kondewa within the CDF structure, and the individual criminal responsibility of Fofana and Kondewa, it was stated in the Indictment, that, at all times relevant to this Indictment:

- (i) "... Norman was the National Coordinator of the CDF. As such he was the principal force in establishing, organizing, supporting, providing logistical support, and promoting the CDF. He was also the leader and Commander of the Kamajors and as such had *de jure* and *de facto* command and control over the activities and operations of the Kamajors."
- (ii) "... Fofana was the National Director of War of the CDF and Kondewa was the High Priest of the CDF. As such, together with Norman, Fofana and Kondewa were seen and known as the top leaders of the CDF. Fofana and Kondewa took directions from and were directly answerable to Norman. They took part in policy, planning and operational decisions of the CDF."
- (iii) "... Fofana acted as leader of the CDF in the absence of Norman and was regarded as the second in command. As National Director of War, he had direct responsibility for implementing policy and strategy for prosecuting the war. He liaised with field commanders, supervised and monitored operations. He gave orders to and received reports about operations from subordinate commanders, and he provided them with logistics including supply of arms and ammunition. In addition to the duties listed above at the national CDF level, Fofana commanded one battalion of Kamajors."
- (iv) "... Kondewa, as High Priest had supervision and control over all initiators within the CDF and was responsible for all initiations within the CDF, including the initiation of children under the age of 15 years. Furthermore, he frequently led or directed operations and had direct command authority over units within the CDF responsible for carrying out special missions."
- (v) "... Norman, as National Coordinator of the CDF and Commander of the Kamajors knew and approved the recruiting, enlisting, conscription, initiation, and training of Kamajors, including children below the age of 15 years. ... Norman, ... Fofana, as the National Director of War of the CDF; and ... Kondewa as the High Priest of the CDF, knew and approved the use of children to participate actively in hostilities."
- (vi) "In the positions referred to in the aforementioned paragraphs, ... Norman, ... Fofana and ... Kondewa, individually or in concert, exercised authority, command and control over all subordinate members of the CDF."
- (vii) "The plan, purpose or design of ... [these three] and subordinate members of the CDF was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone. Each Accused acted individually and in concert with subordinates, to carry out the said plan, purpose or design."
- (viii) "... [The three] by their acts or omissions are individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this indictment, which crimes each of them planned, instigated, ordered, committed, or in whose planning, preparation or execution each Accused otherwise aided and abetted, or which crimes were within a common purpose, plan or design in which each Accused participated or were a reasonably foreseeable consequence of the common purpose, plan or design in which each Accused participated."

In addition, or alternatively, pursuant to Article 6(3) of the Statute, ... [each of them] while holding positions of superior responsibility and exercising command and control over their subordinates, ... [is] individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. Each Accused is responsible for the criminal acts of his subordinates in that he knew or had reason

to know that the subordinate was about to commit such acts or had done so and each Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. Summary of the Judgment

17. The Trial Chamber found that Fofana and Kondewa were not guilty of crimes against humanity (murder and ‘other inhumane acts’ under Counts 1 and 3, respectively) because it was not proved beyond reasonable doubt that the civilian population was the primary object of the attack, although the requirement of a widespread attack was established. It, however, found that the general requirements for war crimes and other serious violations of international humanitarian law were satisfied because an armed conflict occurred in Sierra Leone from March 1991 to January 2002, the alleged crimes were closely related to the armed conflict and the perpetrators were aware of the protected status of the victims who were either civilians or captured enemy combatants.
18. The Appeals Chamber will consider the findings that led to the verdicts when it deals with the several grounds of appeal. It suffices to state that Fofana was found individually criminally responsible not as direct perpetrator but either as a secondary participant or as a person bearing superior responsibility, while the same can be said of Kondewa, except in respect of Count 8 where he was found guilty of enlisting child soldiers and in respect of Count 2 where he was found guilty of unlawful killing of a town commander in Talia (Base Zero).

5. The Verdict and Sentences

19. On 2 August, 2007, a majority of the Trial Chamber, Justice Thompson dissenting, found Fofana and Kondewa guilty under Counts 2 and 4 and convicted them of: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment respectively, charged in Counts 2 and 4, respectively; and pillage and collective punishments charged in Counts 5 and 7, respectively. Fofana and Kondewa were found not guilty of the crimes against humanity of murder and “other inhumane acts” charged in Counts 1 and 3, respectively; and, of acts of terrorism charged in Count 6. A majority of the Trial Chamber, Justice Thompson dissenting, found Kondewa guilty of enlisting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities as charged in Count 8 and convicted him accordingly. The majority of the Trial Chamber, Justice Itoe dissenting, found Fofana not guilty of the same charge (Count 8).
20. On 9 October, 2007, the Trial Chamber sentenced Fofana and Kondewa to terms of imprisonment for all of the crimes for which they were convicted.

21. Fofana was sentenced to six (6) years imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 2); six (6) years imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 4); three (3) years imprisonment for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5) and four (4) years imprisonment for collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7). The Trial Chamber ordered that the sentences shall be served concurrently and shall take effect as from 29 May, 2003, when Fofana was arrested and taken into the custody of the Special Court.
22. Kondewa was sentenced to eight (8) years imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 2); eight (8) years imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 4); five (5) years imprisonment for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5); six (6) years imprisonment for collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7); seven (7) years imprisonment for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities, and other serious violation of international humanitarian law (Count 8). The Trial Chamber ordered that the sentences shall be served concurrently and shall take effect as from 29 May, 2003, when Kondewa was arrested and taken into the custody of the Special Court.

C. The Appeal

1. Notices of Appeal

23. The Prosecution and Kondewa appealed and filed their respective Notices of Appeal on 23 October, 2007. There was no appeal by Fofana.
24. In its Notice of Appeal, the Prosecution filed ten (10) Grounds of Appeal. Kondewa filed six (6) Grounds of Appeal.

2. The Grounds of Appeal

25. Kondewa complained in Grounds 1, 2, 3 and 5 of his Grounds of Appeal, respectively, that the majority of the Trial Chamber erred both in law and in

fact in finding that the Prosecution had proved beyond reasonable doubt: first, that he was individually criminally responsible as a superior, pursuant to Article 6(3) for the crimes committed in Bonthe Town and the surrounding areas under Counts 2, 4, 5 and 7; second, that he was individually criminally responsible pursuant to Article 6(1) for committing murder as a war crime as charged under Count 2 of the Indictment in Talia/Base Zero; third, that he was individually criminally responsible as a superior pursuant to Article 6(3) for pillage under Count 5 in the Moyamba District; and fourth, that he was individually criminally responsible pursuant to Article 6(1) for committing the crime of enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities.

26. In Ground 4 of his Grounds of Appeal, Kondewa complained that the majority of the Trial Chamber erred in law in failing to establish the correct *mens rea* requirement for aiding and abetting and the determination of individual criminal responsibility pursuant to Article 6(1) for Counts 2, 4, and 7 in Tongo Fields and in Ground 6 that the Majority of the Trial Chamber erred in law in entering cumulative convictions under Count 7 as well as under Counts 2 to 5.
27. The Prosecution by its Grounds of Appeal complained that the Trial Chamber erred in law and in fact in holding as follows: first, that “the evidence adduced does not prove beyond a reasonable doubt that the civilian population was the primary object of the attack” (Ground 1); second, that the evidence adduced did not establish beyond reasonable doubt: (i) that Fofana and Kondewa bear individual criminal responsibility under Article 6(1) of the Statute for the planning, instigating or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Trial Chamber found were committed in Kenema District (Ground 3), and in the towns of Tongo Field, Koribondo and Bo District (Ground 4) during the timeframe charged in the Indictment; (ii) that Fofana and Kondewa bear individual criminal responsibility under Article 6(3) of the Statute for those crimes committed in Kenema District (Ground 3); and (iii) that Fofana planned, ordered or committed the crime of enlisting children under 15 years of age into armed forces or groups, or their active use in hostilities and his individual criminal responsibility pursuant to Article 6(3) of the Statute as a superior for the enlistment or use of child soldiers to participate actively in hostilities (Ground 5).
28. The Prosecution further alleged a number of errors of law and of fact: (i) in relation to the Trial Chamber’s acquittal of Fofana and Kondewa (on Count 6) of terrorism as a war crime (Ground 6) and (ii) in refusing to consider acts of burning for the purposes of the war crime of pillage as charged under Count 5 of the Indictment (Ground 7).
29. In Grounds 8 and 9 the Prosecution alleged mixed errors of law and fact and of procedure, respectively, in that the Trial Chamber denied leave for the Prosecution to amend the Indictment in order to add four new counts of sexual violence (Ground 8) and in preventing the Prosecution from “leading, eliciting or adducing” evidence of sexual violence (Ground 9).

30. Finally, in its Ground 10, the Prosecution, in respect of its appeal against sentence, complained that the Trial Chamber erred in law and in fact and committed a procedural error, “in that there has been a discernible error in the exercise of the Trial Chamber’s sentencing discretion” in the sentencing of Fofana and Kondewa.

D. Some Guiding Principles on Appellate Review

31. Before the Appeals Chamber embarks on a detailed consideration of the Parties’ Grounds of Appeal, it is expedient to state at the threshold, albeit in general terms, some of the principles of appellate review that will guide it.
32. **In regard to errors of law:** On appeal, pursuant to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence (“Rules”), only arguments relating to errors in law that invalidate the decision of the Trial Chamber would merit consideration. Some International Criminal Tribunals hold the view that in exceptional circumstances, the Appeals Chamber may consider legal issues raised by a party or *proprio motu* [on its own motion] although such may not lead to the invalidation of the judgment if it is nevertheless of general significance to the Tribunal’s jurisprudence.
33. **In regard to errors of fact:** On appeal where errors of fact are alleged also pursuant to Article 20 of the Statute and Rule 106 of the Rules, the Appeals Chamber will not lightly overturn findings of fact reached by a Trial Chamber. Where it is alleged that the Trial Chamber committed an error of fact, the Appeals Chamber will give a margin of deference to the Trial Chamber that received the evidence at trial. This is because it is the Trial Chamber that is best placed to assess the evidence, including the demeanour of witnesses. The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same finding or where the finding is wholly erroneous. The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.
34. The Appeals Chamber adopts the statement of general principle contained in the ICTY Appeals Chamber decision in *Kupreškić*, as follows:

“... the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is wholly erroneous may the Appeals Chamber substitute its own finding for that of the Trial Chamber.”
35. **In regard to procedural errors:** Although not expressly so stated in Article 20 of the Statute, not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the

same token, procedural errors that could be corrected or waived or ignored (as immaterial or inconsequential) without injustice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice.

36. **In regard to appellate review of the exercise of discretionary powers by the Trial Chamber:** The guiding principles can be succinctly stated. The Trial Chamber's exercise of discretion will be overturned if the challenged decision was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The scope of appellate review of discretion is, thus, much limited: even if the Appeals Chamber does not agree with the impugned decision, it will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously. Where the issue on appeal is whether the Trial Chamber correctly exercised its discretion in reaching its decision the Appeals Chamber will only disturb the decision if an appellant has demonstrated that the Trial Chamber made a discernible error in the exercise of discretion. A Trial Chamber would have made a discernible error if it misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.

[...]

B. Prosecution's Fifth Ground of Appeal and Kondewa's Fifth Ground of Appeal: Enlisting Children Under the Age of 15 Years into an Armed Force or Group and/or Using Them to Participate Actively in Hostilities

1. Introduction

115. Kondewa, in his Fifth Ground of Appeal, contends that the majority of the Trial Chamber, Justice Thompson dissenting, erred in law and fact in finding him criminally responsible for "enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities," an other serious violation of international humanitarian law punishable under Articles 4.c. and 6(1) of the Statute.
116. On the other hand, the Prosecution, in its Fifth Ground of Appeal, submits that the Trial Chamber erred in failing to describe clearly the full extent of Kondewa's responsibility, because its finding related to Kondewa's liability for enlistment only in respect of one child, namely Witness TF2-021. The Prosecution submits that Kondewa should be held responsible for committing, or alternatively aiding and abetting recruitment, by the enlistment and/or use, of children other than Witness TF2-021. With regard to Fofana the Prosecution submits that the Trial Chamber erred in acquitting him and avers that he

should be held liable under Article 6(1) for aiding and abetting child recruitment.

117. Although the Grounds of Appeal raised by Kondewa and the Prosecution advance different arguments, they raise similar issues regarding the criminal responsibility of Fofana and Kondewa under Article 6(1) for child enlistment or the use of children to participate actively in hostilities. Therefore, the Appeals Chamber will consider these Grounds together in this part of the Judgment.

2. The Findings of the Trial Chamber

118. Concerning Fofana's criminal responsibility under Article 6(1), the Trial Chamber found that the evidence adduced by the Prosecution did not establish beyond reasonable doubt that Fofana planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of child enlistment or use of children to participate actively in hostilities. The Trial Chamber's reasoning was two fold. First, Fofana's mere presence at commanders' meetings does not demonstrate that he encouraged anyone to make use of child soldiers or that he aided and abetted in the planning, preparation or execution of the crime. Second, Fofana's presence at Base Zero, where child soldiers were present, is not sufficient by itself to establish that Fofana had any involvement in the commission of the crime. The Trial Chamber further held that evidence that the CDF as an organisation was involved in the recruitment of children and the use of them to participate actively in hostilities did not demonstrate that Fofana was personally involved in such crimes.
119. In finding Kondewa responsible under Article 6(1) of the Statute, the Trial Chamber relied on the evidence of Witness TF2-021 who testified that he and approximately 20 other young boys were initiated into the CDF, that they were given military training and that soon afterwards, initiates were sent into battle. The Trial Chamber found that the evidence is "absolutely clear" that on this occasion the initiates had taken the first step in becoming fighters. Consequently, the Trial Chamber found that when Kondewa was initiating the boys, he was also "performing an act analogous to enlisting them for active military service." The Trial Chamber also found that Witness TF2-021 was eleven years old when Kondewa enlisted him and that Kondewa knew or had reasons to know that the boy was under fifteen years of age. The Trial Chamber further held that "although the Chamber found this evidence entirely sufficient to establish enlistment beyond a reasonable doubt, [Witness] TF2-021 was given a second initiation, into the Avondo Society, headed by Kondewa himself, when he was thirteen years old."
120. The Trial Chamber decided not to consider evidence relating to Kondewa's criminal liability for use of child soldiers because the Indictment charged use of child soldiers as an alternative to enlistment.

3. Kondewa's Liability

(a) The Prosecution's Fifth Ground of Appeal: Whether the Trial Chamber's Findings Reflect the Full Extent of Kondewa's Liability

(i) Submissions of the Parties

121. In support of its submission, in respect to its Fifth Ground of Appeal, the Prosecution refers to the evidence of Witness TF2-021 that he was initiated into the CDF along with approximately 20 other young boys who were of the same age group as him. The Prosecution submits that based on the evidence of Witness TF2-021 the only reasonable inference which a reasonable trier of fact could make was that "at least some, if not all, of these other 20 boys ... were under the age of 15." The Prosecution supports its argument that no reasonable trier of fact could have concluded that Kondewa enlisted only one child by pointing to evidence that other children under 15 years were present at Base Zero and that they performed several roles there.
122. First, the Prosecution argues that the evidence clearly showed that the provision of initiation by Kondewa to under-aged children present at Base Zero was directly assisting the commission of the crime. Kondewa specifically assisted, encouraged and supported the initiation of children, with the knowledge that his conduct would assist the enlistment and/or use of children. The Prosecution refers to the opinion of its Expert Witness TF2-EW2 that initiation was a stepping stone to recruitment as a soldier and the evidence of Witness TF2-014 that Kamajors went to war at an early age provided that they had been initiated. Second, the Prosecution argues that Kondewa encouraged the commission of enlistment by his speeches at the passing out parades in December 1997 and January 1998. The Prosecution submits that Kondewa's encouragement is evident from the Trial Chamber's finding that no Kamajor would go to war without Kondewa's blessing. According to the Prosecution, Kondewa's awareness that his conduct aided and abetted the commission of enlistment may be inferred from the Trial Chamber's various findings, including Kondewa's presence at commanders' meetings at which Norman praised junior Kamajors.
123. Kondewa responds that the evidence on which he was found to be individually criminally responsible for the enlistment of one child was so flawed that it is impossible from that evidence to reach the further conclusion that he enlisted or aided and abetted the enlistment of more than one child. Kondewa submits that it is unclear how the evidence of Witnesses TF2-EW2 and TF2-014 demonstrates that initiations were a substantial contribution to the crime of enlistment. Kondewa further submits that the Prosecution's argument concerning his liability for aiding and abetting child enlistment "fails primarily on the ambiguity of the testimony of Witness TF2-021 and the Trial Chamber's own confusion as to its interpretation."

(ii) Discussion

124. The Prosecution submits that although the Trial Chamber found Kondewa responsible for enlisting Witness TF2-021, it was in error in not finding him responsible for enlisting and/or using other children.
125. The Appeals Chamber is of the view that the crime of enlisting children under the age of 15 years into armed forces or groups and of using them to participate actively in hostilities may be committed irrespective of the number of children enlisted by the accused person.

a. Whether Kondewa Committed or Aided and Abetted the Recruitment by Enlisting More Than one Child

126. The Appeals Chamber will now determine whether the Trial Chamber erred in failing to find Kondewa responsible for committing and/or aiding and abetting the enlistment of children other than Witness TF2-021.
127. The Trial Chamber accepted and considered evidence of several witnesses including three former child soldiers in determining Kondewa's responsibility for child enlistment; but relied solely on the evidence of Witness TF2-021 in arriving at its conclusion. The Trial Chamber found that the evidence of Witness TF2-021 was "pivotal in making its factual findings," and noted that "the events in question occurred when he was very young and [that] his testimony comes many years after the events in question." Nevertheless, the Trial Chamber found the testimony of Witness TF2-021 "highly credible and largely reliable."
128. The Appeals Chamber notes the Trial Chamber's finding that at the age of 11 years, Witness TF2-021 was initiated by Kondewa, his "sowe" or initiator, into the Kamajor society at Base Zero. According to the Witness there were approximately 400 initiates, 20 of whom the Witness estimated to be almost the same age group as him. The Trial Chamber found that these other young boys were also initiated by Kondewa. As part of the initiation ceremony, the boys "were told that they would be made powerful for fighting and were given a potion to rub on their bodies as protection . . . before going [into] war."
129. In the absence of evidence concerning the ages of the other boys, the Appeals Chamber finds that no reasonable trier of fact could have found that the testimony of Witness TF2-021 sufficiently establishes the age of the 20 young boys who were initiated with him.
130. The Trial Chamber accepted the evidence provided by two other former child soldiers who underwent initiation. The Trial Chamber found that Witness TF2-140 was initiated into the Kamajor society at the age of 14 years along with adults as well as other children who were 10 or 11 years old. Initiation fees were paid to the district initiator who then sent the fees to Kondewa, the High Priest of the Kamajors. The Trial Chamber also found that Witness TF2-004 was initiated at Liya by Muniro Sherif along with many others, including children as young as 10 years old.
131. The Trial Chamber reached its conclusion about Kondewa's responsibility for the enlistment of children by relying solely on the evidence of Witness TF2-

021. The Trial Chamber did not find that Kondewa was involved in the initiation process of Witnesses TF2-140 and TF2-004.

132. In view of the lack of evidence of the ages of the boys who were initiated along with Witness TF2-021, as well as the absence of evidence indicating that Kondewa was involved in the initiations of Witness TF2-140 and Witness TF2-004, the Appeals Chamber finds, Justice Winter dissenting, that the Trial Chamber was correct in not finding Kondewa liable for committing or aiding and abetting the crime of enlistment of children other than Witness TF2-021. The Prosecution's Fifth Ground of Appeal therefore fails in this respect.

b. Whether Kondewa Committed or Aided and Abetted the Use of Child Soldiers

133. Although the Prosecution has charged Kondewa in Count 8 with the use of children below the age of 15 years in hostilities, as an alternative to the charge of enlisting them as child soldiers, the Trial Chamber held that having found him individually criminally responsible for enlisting children as child soldiers, it did not need to consider the evidence in relation to the alternative charge. The Appeals Chamber holds, in the circumstances, that it cannot consider any evidence or pronounce a verdict on the alternative charge. Even if the Appeals Chamber were to consider the evidence, it would still have come to the conclusion as it earlier did that there was absence of evidence concerning the ages of the alleged children.
134. The Appeals Chamber opines that the Trial Chamber should have considered any evidence on the alternative charged and made findings upon such evidence even though, at the end, a verdict would be pronounced on only one of the alternative charges.
135. The Prosecution's Fifth Ground of Appeal therefore fails in this respect.

(b) Kondewa's Fifth Ground of Appeal: Committing the Crime of Enlistment of Children

(i) Submissions of the Parties

136. In his Fifth Ground of Appeal, Kondewa contends that the majority of the Trial Chamber, Justice Thompson dissenting, erred in law and in fact in finding him criminally responsible under Article 6(1) for committing the crime of enlisting a child under the age of 15 years into an armed force or group. Specifically, Kondewa submits that the Trial Chamber's evaluation of the evidence was wholly erroneous, and, he advances three main arguments in support of this contention. First, Kondewa argues that the Trial Chamber's conclusion that initiation is analogous to enlistment for active military service amounts to an error because it conflates initiation and enlistment. Second, Kondewa submits that the Trial Chamber erred in its findings regarding the second initiation of Witness TF2-021 into the Avondo Society, in that it suggested that enlistment is a crime that may recur numerous times in relation to the same child within the same fighting group. Third, Kondewa submits that

the Trial Chamber based its findings on ‘unclear’ witness testimony and contradictory conclusions on the meaning of this testimony.

137. The Prosecution concedes that initiation is not *necessarily* military recruitment and that it was originally meant to serve other purposes. However, the Prosecution argues that the Trial Chamber was correct to consider evidence of initiation in determining whether the crime of child enlistment was committed because initiation was the means by which children were accepted as fighters into the CDF.
138. The Prosecution’s response to Kondewa’s second argument is three fold: first, that the Trial Chamber did not expressly find that Witness TF2-021’s second initiation into the Avondo Society was an actual act of enlistment, second, that even if it was the case that the Trial Chamber erred in law by finding that Witness TF2-021 was initiated a second time, Kondewa has failed to demonstrate how this error invalidates the Trial Chamber’s decision, and third, that on the basis of the foregoing submissions, the Appeals Chamber need not consider whether enlistment is a recurring crime, that is, whether a person who has already been enlisted into an armed group and is a member of the group may be enlisted again. The Prosecution, however, submits that it does not concede that any subsequent acts of enlistment would not amount to a crime under international law. Regarding Kondewa’s third argument, the Prosecution submits that the evidence relied on by the Trial Chamber was not unreliable or contradictory. The Prosecution asserts that any reasonable trier of fact would have reached the same conclusion as the Trial Chamber based on the evidence adduced.

(ii) Discussion

a. Alleged Error in Finding that Initiation was Enlistment

139. The Appeals Chamber affirms that the crime of recruitment by way of conscripting or enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities constitutes a crime under customary international law entailing individual criminal responsibility. Pursuant to Article 4.c. of the Statute, the crime of conscripting or enlisting children or using them to participate actively in hostilities, constitutes another serious violation of international humanitarian law. The *actus reus* requires that the accused recruited children by way of conscripting or enlisting them or that the accused used children to participate actively in hostilities. These modes of recruiting children are distinct from each other and liability for one form does not necessarily preclude liability for the other.
140. According to the Trial Chamber in the AFRC Trial Judgment, enlistment means “accepting and enrolling individuals when they volunteer to join an armed force or group.” The act of enlisting presupposes that the individual in question voluntarily consented to be part of the armed force or group. However, where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence.

141. It is apparent to the Appeals Chamber that there is a paucity of jurisprudence on the question of how direct an act must be to constitute “enlistment” under Article 4.c., as well as the possible modes of enlistment. The Appeals Chamber holds that for enlistment there must be a nexus between the act of the accused and the child joining the armed force or group. There must also be knowledge on the part of the accused that the child is under the age of 15 years and that he or she may be trained for combat. Whether such a nexus exists is a question of fact which must be determined on a case-by-case basis.
142. On the particular facts of this case, it is clear that the enlistment of Witness TF2-021 had taken place before he was initiated by Kondewa. The evidence shows that the Witness had first been captured by the rebels in 1995 and was later captured by the CDF in 1997. Upon his capture by the CDF, Witness TF2-021 was forced to carry looted property by the CDF. This act, in the opinion of the Appeals Chamber constituted enlistment. For this conclusion, the Appeals Chamber draws support from paragraph 4557 of the ICRC Commentary to Article 4(3)(c) of Additional Protocol II referred to by the Trial Chamber itself.
143. Paragraph 4557 of the Commentary states:
- “The principle of non-recruitment also prohibits accepting voluntary enlistment. Not only can a child not be recruited, or enlist himself, but furthermore he will not be ‘allowed to take part in hostilities’, *i.e.* to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.”
144. In the context of this case, in which the armed group is not a conventional military organisation, “enlistment” cannot narrowly be defined as a formal process. The Appeals Chamber regards “enlistment” in the broad sense as including any conduct accepting the child as a part of the militia. Such conduct would include making him participate in military operations.
145. In these circumstances, the Appeals Chamber, Justice Winter dissenting, holds the view that Witness TF2-021 had already been enlisted before Kondewa initiated him into the Kamajors.

(iii) Conclusion

146. For the above reasons, the Appeals Chamber, Justice Winter dissenting, grants Kondewa’s Fifth Ground of Appeal and reverses the verdict of guilt and substitutes a verdict of not guilty on Count 8.

4. Fofana’s Liability

(a) Prosecution’s Fifth Ground of Appeal: Fofana’s Liability for Aiding and Abetting Enlistment and Use

(i) Submissions of the Parties

147. In its Fifth Ground of Appeal, the Prosecution contends that the majority of the Trial Chamber erred in acquitting Fofana of child enlistment and/or the

use of children to participate actively in hostilities. The Prosecution argues that Fofana is criminally responsible under Article 6(1) for aiding and abetting child enlistment and/or use of children to participate actively in hostilities.

148. According to the Prosecution, Fofana provided practical assistance to the CDF/Kamajors which had a substantial effect on the military enlistment or active use of children under the age of 15 years in hostilities. In support of its contention, the Prosecution relies on the Trial Chamber's findings that Fofana played a central role in the organisational life, operations, decision-making and the activities of the CDF which engaged in massive enlistment of children and also used them in active hostilities. In addition, Fofana provided logistical support in the form of weapons and ammunitions for major attacks in which children were used. The Prosecution submits that the only reasonable inference to draw from the foregoing evidence and findings of the Trial Chamber is that the logistical support provided by Fofana also supplied the children involved in combat activities and that Fofana thereby assisted in the commission of the crime.
149. Furthermore, the Prosecution submits that Fofana encouraged the military enlistment of children and/or their active use in hostilities "in ways that had substantial effect on the commission of those crimes." The Prosecution submits that Fofana's presence and speech at a passing out parade during which Norman praised junior Kamajor fighters, coupled with his position as a superior in the CDF, constitutes encouragement for the purpose of aiding and abetting.
150. Regarding Fofana's *mens rea*, the Prosecution relies on the following evidence in arguing that the only reasonable conclusion which could be reached was that Fofana knew or ought to have known that he assisted and encouraged child enlistment and/or use: first, Fofana's presence at commanders' meeting during which Norman praised junior Kamajor fighters; second, Fofana's presence at Base Zero where child soldiers were also seen; third, the testimony of Witness TF2-140 that he acted as part of the security team for Fofana's household; fourth, Fofana's close association with Kondewa whom the Trial Chamber found to have enlisted a child; and finally, Fofana's role of authority in the CDF.
151. Fofana responds that the Prosecution failed to demonstrate how the Trial Chamber's decision to acquit him amounts to an error. Fofana acknowledges that the CDF as an organisation enlisted child soldiers, but submits that this is insufficient proof that he was personally involved in the crime of enlistment. Fofana submits that his mere presence at events and his position of authority in the CDF do not amount to encouragement or assistance for the purpose of aiding and abetting. Furthermore, Fofana submits that the Prosecution failed to establish that he possesses the requisite *mens rea* for aiding and abetting child enlistment.

(ii) Discussion

152. The Appeals Chamber notes that the Trial Chamber accepted and considered the foregoing evidence in determining Fofana's criminal responsibility, but found that it did not establish beyond reasonable doubt that Fofana is responsible for child enlistment or use pursuant to any of the modes of liability under Article 6(1), including aiding and abetting. The Prosecution merely proffers arguments based on evidence which the Trial Chamber considered and rejected, but does not point to any error in the reasoning of the Trial Chamber. The Appeals Chamber emphasises that on appeal, a party cannot merely repeat arguments which did not succeed at trial in the hope that the Appeals Chamber will consider them afresh, unless that party can demonstrate that rejecting them constituted an error which warrants the intervention of the Appeals Chamber.
153. The Appeals Chamber finds, Justice Winter dissenting, that the Prosecution has failed to demonstrate that no reasonable trier of fact could have found that Fofana was not responsible for aiding and abetting child enlistment and their use to participate actively in hostilities.

5. Conclusion

154. For the reasons stated, the Appeals Chamber, Justice Winter dissenting, dismisses the Prosecution's Fifth Ground of Appeal in its entirety, grants Kondewa's Fifth Ground of Appeal, reverses the verdict of guilt on Count 8 and substitutes the verdict of not guilty.

[...]

D. Prosecution's Eighth Ground of Appeal: Denial of Leave To Amend the Indictment in Order To Charge Sexual Crimes

410. Under its Eighth Ground of Appeal, the Prosecution alleges that the Trial Chamber erred in law, in fact and in procedure in dismissing, by Decision of 20 May, 2004, the Prosecution's motion for leave to amend the Indictment to include charges of sexual violence. The relief sought by the Prosecution is limited to a reversal by the Appeals Chamber of the legal reasoning employed by the Trial Chamber to arrive at the erroneous decision and a declaration to that effect. The Prosecution does not request the Appeals Chamber to substitute any additional conviction or to order any further trial proceedings.

1. Procedural History

411. On 9 February, 2004, the Prosecution filed a Motion before the Trial Chamber seeking leave to amend the Indictment against Norman, Fofana and Kondewa

- to add four new counts of gender-based crimes, namely: rape, as a crime against humanity under Article 2.g. of the Statute (Count 9); sexual slavery and any other forms of sexual violence as crimes against humanity under Article 2.g. of the Statute (Count 10); other inhumane acts, as a crime against humanity under Article 2.i. of the Statute (Count 11); and outrages upon personal dignity as a war crime under Article 3.e. of the Statute (Count 12).
412. On 20 May, 2004, the Trial Chamber issued a decision by majority, Justice Boutet dissenting, denying the Prosecution's motion ("Indictment Amendment Decision"), on the ground that granting the amendment would have prejudiced the Accused and violated their right to be tried without undue delay and would constitute an abuse of process.
413. On 4 June, 2004, the Prosecution sought leave to appeal against the Indictment Amendment Decision due to "exceptional circumstances" and to avoid irreparable prejudice pursuant to Rule 73(B) of the Rules. On 2 August, 2004, a majority of the Trial Chamber, Justice Boutet dissenting, refused the Prosecution's application ("Trial Chamber's Decision on Leave to Appeal").
414. On 30 August, 2004, the Prosecution filed an appeal against the Trial Chamber's Decision on Leave to Appeal. On 17 January, 2005, the Appeals Chamber ruled that it had no jurisdiction to entertain the Prosecution's appeal without leave of the Trial Chamber, and it therefore did not consider the merits of the Indictment Amendment Decision ("Appeals Chamber's Decision on Leave to Appeal").

2. Introduction

415. Under Ground Eight, the Prosecution requests that the Appeals Chamber find that the Trial Chamber committed an error of law, of fact, and/or a procedural error in denying its request in the Indictment Amendment Decision. The Prosecution contends that the alleged errors have invalidated the Trial Judgment and/or occasioned a miscarriage of justice, within the meaning of Article 20(1) of the Statute, so as to prevent any consideration in the Judgment of gender-based crimes. The Prosecution does not seek the remittal of the case to the Trial Chamber for consideration of additional counts on gender crimes, should the Appeals Chamber uphold the Prosecution's request in this ground.
416. Kondewa responds that the Appeals Chamber lacks jurisdiction to entertain this ground of appeal. First, he submits that the Rules do not allow for interlocutory appeals to be brought at this stage of the proceedings. He relies on the Appeals Chamber's Decision on Leave to Appeal which held that the Appeals Chamber had no jurisdiction to entertain the Prosecution's appeal against the Trial Chamber's Decision on Leave to Appeal. Second, Kondewa contends that the principle of *res judicata* bars the Appeals Chamber from dealing with the issue. He avers that the matter has already been adjudicated in the Appeals Chamber's Decision on Leave to Appeal. Third, Kondewa asserts that this Ground of Appeal falls outside the scope of Article 20(1) of

the Statute. He argues that “[t]o bring a ground of appeal within the purview of Article 20(1)(b) there must be an error of law which renders the decision invalid, *i.e.*, . . . errors on a point of law which, if proven, affect the guilty verdict.” Kondewa contends that the Prosecution has not demonstrated that the Indictment Decision affected the verdict in this case or rendered any part of the Trial Judgment invalid. He further argues that the Prosecution has failed to demonstrate “an error of fact . . . [that] invalidates the decision in the judgment or occasions a miscarriage of justice,” within the meaning of Article 20(1)(c).

3. Discussion

(a) Whether the Appeals Chamber Lacks Jurisdiction

417. Kondewa’s submissions with regard to the scope and effect of the Appeals Chamber’s Decision on Leave to Appeal are misguided. The Appeals Chamber did not hold that, as a general rule, it cannot hear appeals against interlocutory decisions when a Trial Chamber denies a party leave to appeal. Instead, the Appeals Chamber held that it lacked jurisdiction to hear *interlocutory appeals*, within the meaning and purpose of Rule 73(B), when leave to appeal was denied. The Appeals Chamber held that it is precluded from hearing an interlocutory appeal under Rule 73(B) unless leave is granted. However, it did not hold that it is precluded from entertaining the issue if raised in an appeal on the merits at the post-judgment stage.
418. The legal effect of a Trial Chamber’s decision not to grant leave to appeal is confined to the interlocutory stage and does not concern the Appeals Chamber’s competence to examine the issue if raised at the post-judgment stage. Indeed, the Appeals Chamber explicitly affirmed that its lack of jurisdiction over appeals against interlocutory decisions where leave to appeal has been denied pertains exclusively to appeals lodged “in the course of the trial.”
419. The Appeals Chamber considers that this holding is equally applicable at the Special Court and therefore rejects Kondewa’s submission in this regard.

(b) Res Judicata

420. Kondewa submits that the principle of *res judicata* bars the Appeals Chamber from entertaining the Prosecution’s Eighth Ground of Appeal, in view of the Appeals Chamber’s Decision on Leave to Appeal which already adjudicated the issue.
421. As Kondewa submitted, lack of jurisdiction due to the principle of *res judicata* arises when the subject matter in dispute is the same, it came before a court of competent jurisdiction, which rendered a decision that binds every other court. Had the Appeals Chamber dealt with the merit of the applicant’s submission, it would have been prevented by the principle of *res judicata*

from reconsidering the issue on post-judgment appeal, unless it decided to reconsider its previous decision. In this case, however, the Appeals Chamber declined to adjudicate the issue for want of jurisdiction. As a result, it refrained from examining the merit of the Prosecution's submission, that is, whether the Trial Chamber erred in denying the Prosecution leave to amend the Indictment in order to charge sexual violence. The principle of *res judicata*, therefore is not applicable. Kondewa's contentions therefore are misplaced and the Appeals Chamber rejects Kondewa's submission in this respect.

(c) Whether the Ground of Appeal Falls Outside the Scope of Article 20 of the Statute

422. Kondewa submits that the Prosecution failed to identify a procedural error, an error of law or an error of fact arising from the Indictment Amendment Decision that invalidates the Trial Chamber's finding in its Judgment or occasions a miscarriage of justice. Appellate proceedings at the Special Court are governed by Article 20 of the Statute and Rule 106 of the Rules. According to these provisions, the Appeals Chamber may hear appeals on the grounds of: (a) a procedural error; (b) an error on a question of law invalidating the decision; and (c) an error of fact which has occasioned a miscarriage of justice.
423. In order for the Appeals Chamber to hear an error of law, such error must have invalidated *the decision*. The Prosecution argues that the Indictment Amendment Decision was based on an error of law which rendered this interlocutory decision "invalid," and consequently invalidated "the final judgment to the extent that it contains no verdict on certain charges that would have been pronounced upon had there been no error in [the] interlocutory decision."
424. Appeals against interlocutory decisions issued by the Trial Chamber may, as a matter of law, be challenged at the post-judgment appeal stage. Nonetheless, it is incumbent upon the Appellant to show that the alleged error(s) contained in the impugned decision invalidates the verdict. The Appeals Chamber may decide without further reasoning not to examine an alleged error of law raised on appeal which, even if upheld, has no chance to affect the verdict. Similarly, submissions of a party on error of fact which does not lead to a miscarriage of justice and does not have the potential to cause the impugned judgment to be reversed or revised may be dismissed and need not to be considered on the merits.
425. In the instant case, the Prosecution merely requests the Appeals Chamber to declare that the Indictment Amendment Decision contains an error of law and or of fact. The Prosecution notes that, "if the present Ground of Appeal is upheld, in order for any verdict to be reached on the individual responsibility of the Accused for the additional counts of gender crimes, the Appeals Chamber would . . . have to remit the case to the Trial Chamber for further

trial proceedings on those counts.” The Prosecution “accepts that this would not be practicable,” and therefore, does not seek any other remedy than a finding that the Trial Chamber erred in the impugned decision.

426. In view of the scope of the Prosecution’s request and its failure to seek any remedy other than a mere finding of an error of law in the Indictment Amendment Decision, coupled with the fact that the alleged errors under this ground of appeal do not relate to Counts contained in the Indictment upon which the verdict was made, the Appeals Chamber finds that the Prosecution has not shown that the error of law would invalidate the decision or that an error of fact would lead to a miscarriage of justice. The findings in the Trial Judgment were made upon the charges brought by the Prosecution in the Indictment. The Trial Chamber’s decision refusing leave to amend the Indictment does not, as such, affect any of the legal and factual findings set forth in the Trial Judgment. It is also recalled that the amendment of the Indictment sought by the Prosecution was aimed at including new and additional charges based on various acts of sexual violence. Denying the amendment did not preclude the Prosecution from charging the Accused with these crimes, since it is within the Prosecution’s discretion to bring, alongside the original indictment, a separate indictment regarding the new allegations it intended to bring in the case.
427. In view of the foregoing, the Appeals Chamber finds that the consideration of this Ground of Appeal would be an academic exercise. The Appeals Chamber, Justice Winter dissenting, concludes that the Prosecution’s Eighth Ground of Appeal is an unnecessary exercise and that it fails in its entirety.

E. Prosecution’s Ninth Ground of Appeal: Alleged Error Concerning Admissibility of Evidence of Sexual Violence

1. Introduction and Procedural Background

428. In the Prosecution’s Ninth Ground of Appeal, the Prosecution alleges that the Trial Chamber erred in law and in fact and/or procedure in denying its request to lead and adduce evidence of sexual violence under Count 3, other inhuman acts, a crime against humanity, punishable under Article 2.i. of the Statute and Count 4, violence to life, health and physical or mental well-being, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.a. of the Statute.
429. On 9 February, 2004, the Prosecution filed a motion before the Trial Chamber seeking leave to amend the Indictment to add four new counts of sexual violence. The Trial Chamber, on 20 May, 2004, Justice Boutet, dissenting, denied the Prosecution’s motion to amend the Consolidated Indictment (“Indictment Amendment Decision”). The Trial Chamber, by majority, also denied the Prosecution’s request for leave to appeal this decision.

430. On 3 June, 2004, the trial commenced. On 2 November, 2004 the majority of the Trial Chamber, Justice Boutet dissenting, orally stated that evidence on crimes of a sexual nature and/or forced marriage is not admissible under existing Counts 3 and 4 of the Indictment in light of the Trial Chamber's Indictment Amendment Decision denying the Prosecution's request for leave to amend the Indictment to add four new counts relating to sexual violence.
431. On 15 February, 2005, the Prosecution filed an urgent motion for a ruling on the admissibility of evidence ("Admissibility of Evidence Motion"). The Prosecution sought a ruling as to the effect of the Indictment Amendment Decision and, in particular, whether that decision precluded the admissibility of evidence of sexual crimes under Counts 3 and 4 of the Indictment.
432. In a decision dated 23 May, 2005, the Trial Chamber by a majority, Justice Boutet dissenting, ruled that evidence concerning the commission of sexual crimes was not admissible in relation to Counts 3 and 4 of the Indictment and that a written decision would follow shortly. On 22 June, 2005, the Trial Chamber issued a Majority decision stating the reasons for the decision rendered on 23 May, 2005 ("Reasoned Admissibility of Evidence Decision").
433. The Trial Chamber found that because the allegations of sexual violence were not specifically pleaded in the Indictment, to admit evidence of sexual violence would infringe the Accused's rights under Article 17(2) and (4) of the Statute, either because the Accused would not have been properly informed of the nature of the case against him or the admission of such evidence would require a lengthy delay in the trial proceedings, thus violating the Accused's right to a fair and expeditious trial. The Trial Chamber held that the admission of evidence of sexual violence would prejudice the rights of the accused because: first, Counts 3 and 4 of the Indictment contained no specific factual allegations concerning sexual violence, and therefore, evidence cannot be properly adduced; second, admitting the disputed evidence at that very late and crucial stage of the trial, derogates significantly from Article 17(4)(a) of the Statute which guarantees every accused the right to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charges against him; and third, "nothing in the records seems to support the Prosecution's assertion that evidentiary material under reference had been disclosed to the Defence in 'some form' over 12 months ago," especially in light of the fact that specific allegations are not contained in the Indictment.
434. On 27 June, 2005, the Prosecution requested leave of the Trial Chamber to appeal the Reasoned Admissibility of Evidence Decision. This was denied, by a majority, Justice Boutet dissenting, on 9 December, 2005.

2. Submissions of the Parties

435. The Prosecution challenges the Reasoned Admissibility of Evidence Decision, arguing that the Trial Chamber erred in law, procedure and fact in finding that evidence of a sexual nature was not admissible in relation to

- Counts 3 and 4. The Prosecution submits that the Trial Chamber erred in law in reaching the conclusion that notice of facts underpinning a charge can only be provided on the face of an Indictment and nowhere else, and therefore, the Trial Chamber committed a procedural error by exercising its discretion to deny the Admissibility of Evidence Motion on the wrong legal principle.
436. The Prosecution submits that it is settled law that a defective indictment can be cured where there has been timely, clear and consistent information provided to the accused detailing the factual basis of the charges against him. Furthermore, it submits that, as a matter of law, the war crime of violence to life, health and physical and mental well being of persons, in particular cruel treatment can include crimes of a sexual nature. In light of these legal principles, the Prosecution contends that had the Trial Chamber exercised its discretion correctly and applied the correct legal principle it would have found that the Prosecution did provide timely, clear and consistent information that crimes of a sexual nature were being alleged under Counts 3 and 4 of the Indictment, over twelve months before it sought to lead evidence of sexual violence, through its pre-trial, supplemental pre-trial briefs, and opening statement. To the extent that the Trial Chamber found that “nothing in the record seems to support the Prosecution’s assertion that the evidentiary material under reference had been disclosed to the Defence ‘in some form’ over 12 months ago,” the Prosecution contends that the Trial Chamber erred in fact.
437. The Appeals Chamber observes that Kondewa’s submission in response refers the Appeals Chamber to paragraphs relating to his response to the Prosecution’s Eight Ground of Appeal. However, his references are inconsistent and confusing and often contain arguments which are specific to the Prosecution’s Eighth Ground of Appeal. The Appeals Chamber will only address Kondewa’s arguments that clearly relate to the Prosecution’s Ninth Ground of Appeal.
438. Kondewa’s principal argument in response to this ground is that “the Rules do not allow for interlocutory appeals to be brought at this stage of the proceedings and that the Appeals Chamber does not have jurisdiction to hear Ground 9.” Kondewa argues that the Admissibility of Evidence Motion is governed exclusively by Rules 73(A) and (B) and that under these rules, the Appeals Chamber has already found that it has no jurisdiction to entertain the appeal without leave of the Trial Chamber. Furthermore, Kondewa asserts that the Prosecution’s reliance on Article 20(1)(b) and (c) as a source of jurisdiction is misplaced because the Prosecution has failed to show that its allegations concerning errors of law and fact either invalidated the Trial Judgment or occasioned a miscarriage of justice nor does the Prosecution seek clarification on an important point of law. Thus, under Article 20(1)(b) and (c) Kondewa asserts that the Appeals Chamber has no jurisdiction to hear this Appeal.
439. Fofana raises six arguments in response to the Prosecution’s arguments. First, Fofana notes that the evidence the Prosecution seeks to introduce under

existing Counts 3 and 4 was the very same evidence it was to adduce in order to prove four counts of sexual violence had it been allowed to amend the indictment. Fofana thus submits that it is fundamentally unfair for the Prosecution to now seek to introduce evidence through the backdoor that was rejected by the Trial Chamber in refusing to grant leave to amend the Indictment. Second, he submits that the evidence, if it is admitted by the Appeals Chamber, is irrelevant because it will not go to the proof of any Count in the Indictment. Fofana argues that the failure of the Prosecution to plead gender-based crimes is fatal to the admissibility of the evidence because a mere allegation of inhumane acts is too vague to comply with Rule 47(C) and too vague to help the accused prepare his defence. Third, Fofana submits that the Trial Chamber was correct in refusing to admit evidence of sexual violence as it would have necessitated a reasonably lengthy adjournment for the Defence to carry out investigations on the proposed evidence and his rights under Article 17(4)(c) of the Statute would have been violated. Fourth, Fofana claims that had the Trial Chamber admitted this evidence of sexual violence it would have indirectly overturned the Trial Chamber's ruling refusing to grant the Prosecution leave to amend the Indictment to include counts of sexual violence. Fifth, Fofana argues that the evidence sought to be adduced would be prejudicial to the accused persons. Sixth, Fofana argues that an Indictment cannot be "cured" at the Special Court, because the Rules differ from the Rules at ICTY and the ICTR.

3. Discussion

440. In this ground of appeal, the Prosecution alleges that the Trial Chamber committed both an error of law and of fact in refusing to admit evidence of sexual violence under existing Counts 3 and 4 of the Indictment.
441. The Appeals Chamber is of the opinion that acts of sexual violence may constitute "other inhumane acts" as alleged in Count 3 of the Indictment as well as "cruel treatment," as alleged in Count 4 of the Indictment.
442. Counts 3 and 4 of the Indictment do not explicitly list the acts of sexual violence that amounts either to an "other inhumane act" under Article 2.i. of the Statute or "cruel treatment" under Article 3.a. of the Statute. The Indictment on its face was defective with respect to allegations relating to sexual violence.
443. However, case law at the *ad hoc* Tribunals recognizes that in limited circumstances, a defect in the indictment may be "cured" if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charge. While a vague indictment not cured by timely, clear and consistent notice causes prejudice to the accused, the defect may be deemed harmless if the Prosecution can demonstrate that the accused's ability to prepare his defence was not materially impaired. Factors to be considered in this respect include, among others, information

provided in the Prosecution's pre-trial brief or its opening statement, the timing of the communications, the importance of the information to the ability of the accused to prepare his defence and the impact of the newly-disclosed material facts on the Prosecution's case. The Appeals Chamber adopts these principles.

444. The Appeals Chamber notes that the Prosecution's Pre-Trial Brief, filed on 2 March, 2004, clearly notes that in relation to Bonthe District, "[t]he evidence will demonstrate that their daughters and wives [civilians] were systematically raped and held in sexual slavery." The Prosecution's Supplemental Pre-Trial Brief, filed on 22 April, 2004, alleged that under Counts 3 and 4 of the Indictment, in relation to Bonthe District, both Fofana and Kondewa were being held responsible pursuant to Article 6(1) of the Statute for subjecting women and girls to "sexual assaults, harassment, and non-consensual sex, which resulted in widespread proliferation of sexually transmitted diseases, unwanted pregnancies and severe mental suffering . . .," as well as for "committing unlawful physical violence and mental harm or suffering through sexual assaults as well as other acts during the attacks in Bonthe District." Furthermore, the Prosecution's opening statement, delivered on 3 June, 2004, referred to the testimony of several witnesses relating to evidence of sexual violence or forced marriage.
445. The Appeals Chamber therefore is satisfied that by the time the Prosecution filed its Admissibility of Evidence Motion, the Accused had timely and consistent notice for nearly one year that acts of sexual violence were being alleged in relation to Bonthe District under Counts 3 and 4 of the Indictment.
446. Fofana argues that the Trial Chamber was correct in refusing to admit evidence of sexual violence because the "evidence sought to be adduced would be prejudicial to the interest of the accused persons. Such evidence would cast a cloak of doubt on the image of innocence that the Accused enjoys under law, until the contrary is proved." The Appeals Chamber is of the view that the right to a fair trial enshrined in Article 17 of the Statute cannot be violated by the introduction of evidence relevant to any allegation in the trial proceedings, regardless of the nature or severity of the evidence. The Appeals Chamber concludes that evidence of sexual violence was relevant to charges in the Indictment and that the Trial Chamber was in error in prospectively denying the admittance of such evidence. Further, the accused were put on notice of such evidence, which is not prejudicial in itself.
447. The Appeals Chamber notes that in filing its Urgent Motion for a Ruling on the Admissibility of Evidence on 15 February, 2005, the Prosecution sought "clarification as to the extent to which the [Trial Chamber's Indictment Amendment Decision] limit[ed] the adduction of particular relevant and admissible evidence, under existing counts of the Consolidated Indictment." At that stage of the proceedings, the Prosecution had attempted to tender

- only one witness' testimony concerning sexual violence in evidence. The Trial Chamber denied the Prosecution's request to tender such evidence. The Prosecution did not appeal this denial, but three months later filed its Admissibility of Evidence Motion.
448. The Appeals Chamber is of the view that filing a motion seeking clarification pursuant to Rules 73 and 90(f) of the Rules is not the proper procedure by which to seek a ruling on the admissibility of evidence. Under Rules 73 and 90(f), the Trial Chamber has broad discretion over the admissibility of relevant evidence. Debates over the admissibility of evidence at trial assist the Chamber to better ascertain the context of the evidence and to assess its relevance and probative value. Thus, the Rules provide that as a general rule a party should seek to tender evidence at trial. If a party wishes to appeal the Trial Chamber's decision concerning the admissibility of evidence at that juncture, Rule 73(B) provides that a party may seek leave to appeal such a decision from the Trial Chamber.
449. The Appeals Chamber acknowledges that in certain situations there may be unusual evidentiary circumstances that would cause unfair prejudice to a party or undue delay in the trial should a party be permitted to seek a ruling on the admissibility of evidence in advance of tendering such evidence. Here, in its Admissibility of Evidence Motion, the Prosecution argued that it brought the motion to "avoid unnecessary arguments prior to the testimony of a number of witnesses" and because "a ruling on this motion would avoid numerous debates during hearings, interruptions to the testimony of witnesses, and serve the interests of judicial economy and a fair trial." The Appeals Chamber, however, finds that nothing in the Prosecution's Admissibility of Evidence Motion concerning the proposed evidence indicates that tendering this evidence piece by piece at trial would have caused undue delay in the trial or unfairly prejudiced a party.
450. The Appeals Chamber, Justice King dissenting, finds that the Trial Chamber erred in denying a hearing of evidence of acts of sexual violence on the basis that such acts had not been alleged in the Indictment. The Appeals Chamber holds that the Trial Chamber erred in dismissing the Admissibility of Evidence Motion for the reasons that it did.

4. Conclusion

451. Although the Prosecution's Ninth Ground of Appeal has not raised an error of law that invalidates the decision, *i.e.*, the conviction of the Accused on the Counts to which the evidence would have related, the Appeals Chamber, Justice King dissenting, has exercised its discretion to consider this ground as guidance to the Trial Chamber.

[...]

6. Manifest Inadequacy of the Sentence

553. In view of the findings that the Trial Chamber has taken into consideration factors which it should not have considered in the exercise of its sentencing discretion, the Appeals Chamber will substitute its own discretion without the need to pronounce on the Prosecution's complaint that the sentence was manifestly inadequate.

7. Conclusions on Sentencing

554. The Appeals Chamber recalls the standard of review of sentencing decisions that have earlier been set out in this Judgement. Relying on those standards, the Appeals chamber notes that it has decided that the Trial Chamber was in error in taking into consideration "just cause" and motive of civic duty in exercising its sentencing discretion.
555. A careful perusal of the sentencing judgement shows clearly that those considerations formed the most important factors that influenced the exercise of the Trial Chamber's discretion. Indeed, the Trial Chamber stated that the fact that Fofana and Kondewa "stepped forward in the efforts to restore democracy to Sierra Leone, and, for the main part, they acted from a sense of civic duty . . . significantly impacted the influence to the reduction of the sentences to be imposed for each count." In the circumstances, the Appeals Chamber comes to the conclusion that the Trial Chamber proceeded on an erroneous basis and that it is entitled to revise the sentences handed down by the Trial Chamber.
556. The Appeals Chamber takes note of the extensive reiteration by the Trial Chamber in its Sentencing Judgment of its findings in regard to the responsibility of the accused persons and also its findings as to the gravity of the offences.
557. The Appeals Chamber gratefully adopts these findings, while having regard to such instances in which the Appeals Chamber has set aside the convictions of Kondewa. To put the exercise of its discretion in proper perspective, and for ease of reference, the Appeals Chamber deems it fit to quote, albeit at some length, some of the significant findings of the Trial Chamber that the Appeals Chamber cannot ignore.
558. Such findings are as follows:

"46. With respect to the crimes for which Fofana was found liable under Article 6(3), the Chamber has examined the gravity of the crimes committed by subordinates under his effective control. Many of these crimes, as described in the Judgement, were of a very serious nature, and were committed against innocent civilians. The Chamber considers actions such as the mutilation and the targeted killing of Limba civilians and the killing and mutilation of Chief Kafala (whom the CDF/Kamajors considered a collaborator) in Koribondo, to be indicative of the brutality of the offences committed by Fofana's subordinates. The Chamber also notes the gruesome murder of two women in Koribondo who had sticks inserted and forced into their

genitals until they came out of their mouths. The women were then disembowelled, and while their guts were used as checkpoints, parts of their entrails were eaten.

47. The Chamber also finds that many of the offences for which Fofana was convicted under Article 6(1) were committed on a large scale and with a significant degree of brutality. In particular, the Chamber notes the murder of 150 Loko, Limba and Temne tribe members in Talama, the killings of 20 men on the January 15th of 1998 at the NDMC Headquarters in Tongo, who were hacked to death with machetes, and the killing of 64 civilians in Kamboma, who were placed in two separate lines and killed, after which their corpses were rolled into a swamp, as indicative of the scale and brutality of the crimes that Fofana was found to have aided and abetted in the Tongo Field area. Furthermore, the Chamber finds that the crimes were particularly serious insofar as they were committed against unarmed and innocent civilians, solely on the basis that they were unjustifiably perceived and branded as rebel collaborators.

48. The Chamber notes that many of the victims of these crimes were young children and women, and therefore belong to a particularly vulnerable sector of society. For instance, we note our findings of the hacking to death by the CDF/Kamajors of a boy named Sule at a checkpoint in the Tongo area, the murder of a 12 year old boy in Talama, the murder of an unidentified woman who was alleged to have cooked for the rebels in Bo, and the atrocious murder of the two women in Koribundo as described earlier.

49. The Chamber considers these crimes to have had a significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community. The testimony of witnesses heard by the Chamber during the trial, and appended to the Prosecution Brief in Annex D, indicates the impact which events such as amputations and the loss of family members have had on the lives of victims and witnesses. As appropriately described and summarized by our sister Trial Chamber II, victims who had their limbs hacked off not only endured extreme pain and suffering, if they survived, but lost their mobility and capacity to earn a living or even to undertake simple daily tasks. They have been rendered dependent on others for the rest of their lives. In particular, the Chamber notes the lasting effect of these crimes on victims such as TF2-015, who was the only survivor of an attack on 65 civilians who were hacked to death by machetes or shot, and who was himself hacked with a machete and rolled into a swamp on top of the dead bodies in the belief that he was dead.

50. With respect to the form and degree of Fofana's participation, the Chamber notes that he was found liable for the crimes in Tongo Field as an aider and abettor under Article 6(1) of the Statute. The jurisprudence of the ICTY and ICTR indicates that aiding and abetting as a mode of liability generally warrants a lesser sentence than that to be imposed for more direct forms of participation. The Chamber also notes that while Fofana was found liable for aiding and abetting, he was not present at the scenes of the crimes and that the degree of his participation amounted only to encouragement.

51. With respect to the crimes for which Fofana was convicted under Article 6(3), the Chamber has considered the gravity of Fofana's conduct in failing to prevent the crimes. It finds that the gravity of the offence committed by Fofana given his leadership role as a superior who failed to prevent his subordinates from committing crimes, is greater than that of the actual perpetrators of the crimes. In this case, the fact that Fofana's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity. This factor therefore, in our opinion, increases the seriousness of the crimes for which he has been convicted.

52. ...

53. With respect to the crimes for which Kondewa was found liable under Article 6 (3), the Chamber has examined the gravity of the crimes committed by the subordinates under his effective control. Many of these crimes, as described in the Judgement, were of a serious nature. The Chamber notes, in particular, that the CDF/Kamajors in Bonthe stripped Lahia Ndokoi Koroma naked and tied him, a particularly humiliating and degrading act. With respect to Kondewa's liability under Article 6(1), he was convicted for the same crimes as Fofana in the Tongo area; the scale and the barbaric nature of such crimes has been described above.

54. As is the case with Fofana, the Chamber notes that many of the victims of these crimes were young children and women, and were therefore particularly vulnerable. It notes, in particular, the two incidents involving children in the Tongo area described above with respect to Fofana, and the killing of a boy called Bendeh Battiamia by Rambo Conteh in Bonthe.

...

58. Furthermore, with respect to his liability under Article 6(3), the Chamber finds, as it did with Fofana, that given his leadership role as a superior who failed to prevent his subordinates from committing crimes, the gravity of the offence committed by Kondewa is greater than that of the actual perpetrators of the crimes. The Chamber finds that in this case, the fact that Kondewa's failure to prevent was ongoing, rather than an isolated occurrence, had the implicit effect of encouraging his subordinates to believe that they could commit further crimes with impunity, and therefore increases the seriousness of the crimes for which he has been convicted.

...

60. The Chamber considers that, given his role as a former Chiefdom Speaker, a community elder and the CDF National Director of War, Fofana breached a position of trust in committing the offences for which he has been convicted.

62. The Chamber finds that given the cultural context, Kondewa, in his role as High Priest who blessed the CDF/Kamajors before they went to battle, and as someone widely respected for his mystical powers and abilities to immunize people against harm, held a unique and prominent position in the community. The Chamber therefore finds that he also breached a position of trust in committing the crimes for which he was convicted.

...

85. In executing this legitimate mission however, at a later stage that appears in the Indictment, and instead of limiting themselves and directing these attacks on legitimate military targets and objectives where collateral damage, if any ensued at all, could be perceived as justifiable, the Accused Persons and their Kamajors, as has been elucidated in the factual and legal findings of the Judgement, went beyond these acceptable military and legal limits and carried out killings and other atrocities against unarmed civilians who they characterised and designated as 'rebel collaborators'. We find that these atrocities were perpetrated, even though the evidence clearly established, and we so found, that the victims in fact, were disarrayed Sierra Leoneans including children fleeing for their lives and for safety from the bloody exchange of enemy fire, and further, that these civilian captives or fugitives, were unarmed and were not in the least, participating in hostilities. In fact, we note here that the crimes for which they have been found guilty were perpetrated by the Accused Persons and CDF/Kamajor fighters when combat activities and operations against the enemy AFRC forces were already over."

559. Notwithstanding these findings and the significant finding that the accused persons and their subordinates went beyond “acceptable military and legal limits” the Trial Chamber, importing a consideration of “just cause” and “civic duty” into the exercise of its discretion concluded that their sentences deserved to be reduced.
560. The Appeals Chamber has already decided that these were inappropriate considerations and will now review the sentences, taking into consideration the gravity of the offences as found and described by the Trial Chamber and taking note of legitimate mitigating circumstances which the Trial Chamber has taken note of and the fact that in the case of Kondewa, the Appeals Chamber, Justice Winter dissenting, had not found any allegation of “committing” established against him.
561. In exercising its sentencing discretion, the Appeals Chamber re-emphasizes that it is an international court with responsibility to protect and promote the norms and values of the international community, expressed not only as part of customary international law but also, in several international instruments.
562. Shortly after the Special Court was established, the Appeals Chamber had occasion to pronounce on its character and decided, without hesitation, that it is an international court. In the *Decision of Constitutionality and Lack of Jurisdiction*, the Appeals Chamber stated that the Special Court “is an international tribunal exercising its jurisdiction in an entirely international sphere and not within the system of the national courts of Sierra Leone . . .” The Appeals Chamber came to the same conclusion in the *Decision on Immunity from Jurisdiction*.
563. The Appeals Chamber here emphasizes that the crimes of which the accused have been convicted are international crimes and not political crimes, in which consideration of national interest may be a relevant issue. What has to be paramount are international interests in protecting humanity. Such offences as Fofana and Kondewa have been convicted of are of the nature of such “offences that do not affect the interests of one State alone, but shock the conscience of mankind.” They are not political offences. The Appeals Chamber gratefully adopts the opinion of the Supreme Military Tribunal of Italy quoted in *Tadic* (Jurisdiction) as follows:

Crimes against the laws and customs of war cannot be considered political offences, as they do not harm a political interest of a particular State, nor a political right of a particular citizen. They are, instead, crimes of *lese-humanite* (*reatu di lesa umanita*) and, as previously demonstrated, the norms prohibiting them have a universal character, not simply a territorial one. Such crimes, therefore, due to their very subject matter and particular nature are precisely of a different and opposite kind from political offences. The latter generally, concern only the States against whom they are committed; the former concern all civilised States, and are to be opposed and punished, in the same way as the crimes of piracy, trade of women and minors, and enslavement are to be opposed and punished, wherever they may have been committed . . .”

564. What should be one of the paramount considerations in the sentencing of an accused person convicted of crimes against humanity and war crimes is the revulsion of mankind, represented by the international community, to the crime

and not the tolerance by a local community of the crime; or lack of public revulsion in relation to the crimes of such community; or local sentiments about the persons who have been found guilty of the crimes. In describing what it described as the “*Justice Phase*” of the armed conflict that took place in Sierra Leone, the Appeals Chamber stated this in “*Decision on Immunity from Jurisdiction*”: The *Justice Phase* is that phase in which participants in the armed conflict have to answer for crimes committed in the course of the armed conflict. The *Justice Phase* itself involves separating what is in the exclusive domain of the municipal authority to be resolved under municipal law from what is in the concurrent jurisdiction of that authority and of the international community to be resolved by application purely of international law.” The Appeals Chamber had earlier stated in that Decision that: “The parties, whether from the Government side or the insurgents, were . . . subjected to the obligations imposed by international law in a situation of internal armed conflicts.”

565. In assessing the appropriate sentence, the obligation of the Appeals Chamber is, therefore, to impose sentences that reflect the revulsion of the international community to such crimes as those for which the accused persons have been convicted, after taking into consideration all factors that may be considered, legitimately, in mitigation as well as in aggravation.
566. In revising the sentences, the Appeals Chamber, Justice King and Justice Kamanda dissenting, takes into consideration those factors that the Majority of the Trial Chamber have, legitimately, taken into consideration. It also takes note of the opinion of the Majority of the Trial Chamber that Fofana and Kondewa have been found responsible mainly as aiders and abettors and the gravity of their respective responsibility as superiors in respect of some of the crimes.
567. Having taken all the circumstances of the case into consideration, the Appeals Chamber, Justice King and Justice Kamanda dissenting, revises the sentences on Fofana and Kondewa in respect of Counts 2, 4, and 5 and imposes sentences on Fofana and Kondewa on Counts 1 and 3 as follows:
- i. In respect of Moinina Fofana the sentences of six (6) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to fifteen (15) years imprisonment on each of those Counts, and the sentence of three (3) years imposed on Count 5 is increased to five (5) years imprisonment;
 - ii. In respect of Allieu Kondewa, the sentences of eight (8) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to twenty (20) years imprisonment on each of those Counts, and the sentence of five (5) years imposed on Count 5 is increased to seven (7) years imprisonment;
 - iii. In respect of Counts 1 and 3, the Appeals Chamber, Justice King and Justice Kamanda dissenting, imposes sentences of 15 years imprisonment on Fofana on each of those Counts and sentences of 20 years imprisonment on Kondewa on each of those Counts;

The Appeals Chamber orders that the sentences imposed on Fofana, and Kondewa respectively, shall run concurrently;

V. Disposition

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence;

NOTING the written submissions of the Parties and their oral arguments presented at the hearings on 12 and 13, March, 2008;

SITTING in open session;

WITH RESPECT TO KONDEWA'S GROUNDS OF APPEAL;

DISMISSES, Justice King dissenting, Ground One and **UPHOLDS** the conviction of Kondewa pursuant to Article 6(3) of the Statute for murder, cruel treatment and pillage committed in Bonthe District;

ALLOWS Ground Two and **REVERSES** the verdict of guilty for Kondewa pursuant to Article 6(1) of the Statute for murder committed in Talia/Base Zero;

ALLOWS Ground Three and **REVERSES** the verdict of guilty for Kondewa pursuant to Article 6(3) of the Statute for pillage committed in Moyamba District;

DISMISSES, Justice King dissenting, Ground Four and **UPHOLDS** the conviction of Kondewa for aiding and abetting, pursuant to Article 6(1) of the Statute, for the crimes committed in Tongo Fields;

ALLOWS, Justice Winter dissenting, Ground Five and **REVERSES** the verdict of guilty for Kondewa for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities;

ALLOWS Ground Six and **HOLDS**, Justice Winter dissenting, that the Trial Chamber erred in respect of the convictions of Fofana and Kondewa for collective punishments;

WITH RESPECT TO THE PROSECUTION'S GROUNDS OF APPEAL;

ALLOWS, Justice King dissenting, Ground One and **SETS ASIDE** the verdict of not guilty against Fofana and Kondewa for crimes against humanity;

NOTES that Ground Two has been abandoned;

DISMISSES Ground Three and does not enter convictions for Fofana and Kondewa for the crimes committed in Kenema District;

DISMISSES Ground Four and does not enter additional convictions for Kondewa for instigating crimes committed in Tongo Fields or for aiding and abetting crimes committed in Koribondo, Bo District and Kenema District; and does not enter additional convictions for Fofana for instigating and planning the crimes in Tongo Fields or for planning or aiding and abetting the crimes committed in Koribondo, Bo District and Kenema District;

DISMISSES, Justice Winter dissenting, Ground Five and does not enter additional convictions for Kondewa and convictions for Fofana for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities;

DISMISSES Ground Six and does not enter convictions of Fofana and Kondewa for acts of terrorism;

DISMISSES Ground Seven and **HOLDS** that destruction of property not amounting to appropriation does not constitute the crime of pillage;

DISMISSES, Justice Winter dissenting, Ground Eight and **HOLDS** that the Prosecution has not showed that the alleged error relating to the amendment of the Indictment constitutes an error of law invalidating the decision;

ALLOWS, Justice King dissenting, Ground Nine and **HOLDS** that the Trial Chamber erred in denying the hearing of evidence of acts of sexual violence;

ALLOWS Ground Ten and **HOLDS**, Justice King dissenting, that the Trial Chamber erred in finding that “just cause” can be a mitigating factor, although rejecting all other arguments raised by the Prosecution, Justice Winter dissenting with respect to accepting the expression of remorse and the purpose of reconciliation in mitigation;

CONSEQUENTLY REVISES, Justice King and Justice Kamanda dissenting, the sentences in respect of Counts 2, 4, and 5 as follows:

In respect of Moinina Fofana the sentences of six (6) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to fifteen (15) years imprisonment on each of those Counts, and the sentence of three (3) years imposed on Count 5 is increased to five (5) years imprisonment;

In respect of Allieu Kondewa, the sentences of eight (8) years imposed by the Trial Chamber on each of Counts 2 and 4 are increased to twenty (20) years imprisonment on each of those Counts, and the sentence of five (5) years imposed on Count 5 is increased to seven (7) years imprisonment;

CONSEQUENTLY;

FINDS in respect of Moinina Fofana;

COUNT 1: Murder, a crime against humanity, punishable under Article 2.a. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 2: Violence to life, health and physical or mental well-being of persons, in particular murder, punishable under Article 3.a. of the Statute, **GUILTY**, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 3: Other inhumane acts, a crime against humanity, punishable under Article 2.i. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the other inhumane acts committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the other inhumane acts committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, punishable under Article 3.a. of the Statute, **GUILTY**, of aiding and abetting under Article 6(1) of the Statute the cruel treatment committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the cruel treatment committed in Koribondo and Bo District; and **SENTENCES** Fofana to fifteen (15) years of imprisonment;

COUNT 5: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute, **GUILTY**, of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Bo District; and **SENTENCES** Fofana to five (5) years of imprisonment;

COUNT 6: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute, **NOT GUILTY**;

COUNT 7: Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute, **NOT GUILTY**, by majority;

COUNT 8: Conscription or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an other serious violation of international humanitarian law, punishable under Article 4.c. of the Statute, **NOT GUILTY**, by majority;

FINDS in respect of Allieu Kondewa;

COUNT 1: Murder, a crime against humanity, punishable under Article 2.a. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 2: Violence to life, health and physical or mental well-being of persons, in particular murder, punishable under Article 3.a. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the murders committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the murders committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 3: Other inhumane acts, a crime against humanity, punishable under Article 2.i. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the other inhumane acts committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the other inhumane acts committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 4: Violence to life, health and physical or mental well-being of persons, in particular cruel treatment, punishable under Article 3.a. of the Statute, **GUILTY**, by majority, of aiding and abetting under Article 6(1) of the Statute the cruel treatment committed in Tongo Fields and of superior responsibility under Article 6(3) of the Statute for the cruel treatment committed in Bonthe District; and **SENTENCES** Kondewa to twenty (20) years of imprisonment;

COUNT 5: Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.f. of the Statute, **NOT GUILTY**, of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Moyamba District; and **GUILTY**, by majority, of superior responsibility under Article 6(3) of the Statute, for the crimes committed in Bonthe District; and **SENTENCES** Kondewa to seven (7) years of imprisonment;

COUNT 6: Acts of terrorism, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute, **NOT GUILTY**;

COUNT 7: Collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute, **NOT GUILTY**, by majority;

COUNT 8: Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities, an other serious violation of international humanitarian law, punishable under Article 4.c. of the Statute, **NOT GUILTY**, by majority;

ORDERS that the sentences shall run concurrently;

ORDERS that Moinina Fofana shall serve a TOTAL TERM OF IMPRISONMENT OF FIFTEEN (15) YEARS, subject to credit being given under Rule 101(D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

ORDERS that Allieu Kondewa shall serve a TOTAL TERM OF IMPRISONMENT OF TWENTY (20) YEARS, subject to credit being given under Rule 101 (D) of the Rules of Procedure and Evidence for the period for which he has already been in detention;

RULES that this Judgment shall be enforced immediately pursuant to Rule 119 of the Rules of Procedure and Evidence;

ORDERS, in accordance with Rule 102 of the Rules of Procedure and Evidence that Moinina Fofana and Allieu Kondewa remain in the custody of the Special Court for Sierra Leone pending the finalisation of arrangements to serve their sentences.

Issued on 28 May, 2008 at Freetown, Sierra Leone.

Justice George Gelaga King (Presiding)

Justice Emmanuel Ayoola

Justice Renate Winter

Justice Raja N. Fernando

Justice Jon M. Kamanda

Justice King appends a Partially Dissenting Opinion to the Judgment and a Dissenting Opinion to the Sentencing.

Justice Winter appends a Partially Dissenting Opinion.

Justice Kamanda appends a Partially Dissenting Opinion.

[...]

VII. Partially Dissenting Opinion of Honourable Justice Renate Winter

[Author's note: Internal footnotes have been omitted. For long quotes set apart in the text of Justice Winter's Opinion and for most internal quotes, the content of the

footnotes in the original has been referenced in the body of the text through author's notes.]

A. Introduction

1. Introducing my partially dissenting opinion, I would like to comment on a few general matters that have come to my mind during my evaluation of legal issues in regard to the appeals process of this case.
2. First and foremost, I consider it a primordial duty of an Appeals Chamber to address parties' arguments that raise important issues of law or fact that bear on the innocence or guilt of an accused or the fairness of the trial, even on the basis that either the parties' pleadings are defective or that it would be an academic exercise which maybe perceived as unnecessary to consider a given ground of appeal, as a possible remedy was not sought by a party. It seems to me that it is a key function of an Appeals Chamber to clarify legal issues, to provide guidance where appropriate to trial chambers and to remedy errors of facts in the interest of the parties as well as in the interest of justice.
3. I, furthermore, deem it necessary to state that to evaluate evidence and findings using an overall approach is the right and the duty of an Appeals Judge (and not only of an Appeals Judge). I will not accept that evidence and findings relevant for one ground of appeal cannot be used for another one if relevant there as well, for the sole reason that they have not been properly raised by a party. An indictment, a decision and a judgement have, in my view, always to be looked at as a whole.
4. The Special Court for Sierra Leone, being a "hybrid" international criminal court, must never look into the "righteousness" of any particular political cause. Not being a domestic court, it cannot also accept any cultural consideration as excuses for criminal conduct. The principle of individual criminal responsibility requires that an accused be held responsible for his acts or omissions, whatever his status. In the case where concrete acts or omissions of an accused have an impact on the commission of the crime in question, it is irrelevant, for instance, if this accused believes that he has supernatural powers or if he uses the cultural superstitions of people involved.
5. As to sentencing, it is not only important in my view to state which mitigating or aggravating circumstances might apply in determining the appropriate sentence. It is also mandatory for a court for both mitigating and aggravating circumstances, to evaluate their specific weight. There are, for example, mitigating circumstances that are purely formal in the context of the Sierra Leone armed conflict, such as a clear criminal record in a time where the rule of law (police administration, prosecution and trials at court) existed to a lesser extent in several parts of the country. I believe that a sentencing judgement has to address this issue, in order to clarify for the convicted persons as well as for the public concerned the reasons for which the specific punishment has been pronounced.

6. With these considerations in mind, I must dissent from the Majority's Decision on Grounds Five (child soldiers) and Six (collective punishments – partially) of Kondewa's Appeal and Grounds Five (child soldiers) and Eight (amendment of the Indictment to charge sexual crimes), and Ten (sentence-partially) of the Prosecution's Appeal.

B. Kondewa's Fifth Ground of Appeal and Prosecution's Fifth Ground of Appeal

1. Introduction

1. I do not agree with the Majority's decisions first, to acquit Kondewa for liability under Article 6(1) of the Statute for "committing" the crime of enlisting Witness TF2-021, a child under the age of 15 into an armed force or group; second, in finding that "it cannot consider any evidence or pronounce a verdict on whether Kondewa aided and abetted the 'use' of child soldiers;" and third, in finding Fofana not guilty of aiding and abetting the use and enlistment of child soldiers.

2. Kondewa's Liability for Enlistment and Use of Children

(a) Kondewa's Fifth Ground of Appeal: Enlistment of Witness TF2-021

8. In this Judgment, the Majority overturns the Trial Chamber's finding that Kondewa was guilty of enlisting Witness TF2-021 into the CDF. In overturning the Trial Chamber's decision, the Majority finds that:

"[I]t is clear that the enlistment of Witness TF2-021 had taken place before he was initiated by Kondewa. The evidence shows that the Witness had first been captured by the rebels in 1995 and was later captured by the CDF in 1997. Upon his capture by the CDF, Witness TF2-021 was forced to carry looted property by the CDF." [Author's note: CDF appeal judgment, para. 142]

9. I do not agree with this interpretation and analysis on the facts of this particular case. In finding that the act of forcing Witness TF2-021 to carry looted property constituted enlistment, the Majority misapplies the concept of enlistment as it relates to the circumstances surrounding the CDF's recruitment of children under the age of fifteen. While I agree that in certain circumstances the "use" of a child soldier may constitute enlistment, based on the Trial Chamber's findings of facts in relation to Witness TF2-021, this particular "use" could not have constituted enlistment.
10. Article 4.c. of the Statute punishes "*conscripting or enlisting* children under the age of 15 years into armed forces or groups or *using* them to participate actively in hostilities" (emphasis added). Our earlier interlocutory decision in this case held that conscripting and enlisting children under the age of fifteen

into an armed force or group and/or using children to participate actively in hostilities is prohibited under customary international law.

11. Enlistment entails “accepting and enrolling individuals when they volunteer to join an armed force or group.” As the Majority points out, it includes any conduct accepting the child as part of an armed force or group. In my opinion, the key test to determine whether an act in question constitutes enlistment is whether the act substantially furthers the process of a child’s enrolment and acceptance into an armed force or group.
12. In finding that Kondewa’s initiation of Witness TF2-021 did not constitute enlistment, the Majority implicitly considers that only one act could constitute enlistment. I disagree with this proposition and find that enlistment may in some circumstances be a process involving several acts which may substantially further the enrolment and acceptance of a child under the age of fifteen into an armed force or group. Religious initiation, military training and the signing of a certificate declaring a child fit for combat may all be acts that substantially further a child’s enlistment. In other circumstances, enlistment may be a very short process and may constitute a single act, such as abducting a child and giving him/her a gun. In certain armed forces or groups there may be no clear record of a child’s enlistment, but there may be several instances of the “use” of a child.
13. In the situation where there are no formal or informal processes for enlisting individuals, especially children, the “use” of a child to participate actively [in] hostilities may amount to enlistment. However, where the evidence demonstrates the existence of a process that contributes to the enrolment and acceptance of a child into an armed force or group, logic dictates that “use” of a child cannot constitute enlistment. Accordingly, the types of acts which constitute the crime of enlistment must necessarily depend on the particular circumstances of each case.
14. In the CDF, as opposed to AFRC, the Trial Chamber findings demonstrate a clearly defined enlistment process which consisted of a child receiving ritualized initiation and military training. Although the purpose of this procedure changed as the war evolved, initiation and military training remained the cornerstones of enlistment in the CDF at all times during the conflict.
15. The Trial Chamber’s findings and the evidence in the trial record reveal that the initiation of Witness TF2-021 and the other twenty boys was a major part of the process of enrolling them and accepting them into the CDF. Witness TF2-014 testified that Kamajors went to war at an early age provided that they had been initiated. Expert Witness TF2-EW2 testified that initiation was a stepping stone to recruitment as a soldier because it was used as a means to prepare men and young boys to participate in the fighting groups. The Trial Chamber, nonetheless, acknowledged that initiation into the Kamajor society alone did not always amount to enlistment, and therefore, was very careful to evaluate whether a particular instance of initiation amounted to enlistment.

16. In the circumstances of Kondewa's initiation of Witness TF2-021 and the twenty boys around his age, the Trial Chamber considered the following evidence:

In 1997, when the witness was eleven years old he was captured by Kamajors and forced to carry looted property. The Kamajors subsequently took him to Base Zero for initiation. At Base Zero, the witness was initiated along with around 20 other young boys. Kondewa performed the initiation and told the boys that they would be made powerful for fighting. He gave them a potion to rub on their bodies before going into battle.

After receiving training, TF2-021 was sent on his first mission to Masiaka, where he shot a woman in the stomach and left her there on the ground. On subsequent missions, he fought with the Kamajors at Kenema, SS Camp, Joru and Daru. In 1999 TF2-021 was flown by helicopter into Freetown with three other small boys and their commanders where they were given guns and sent to support ECOMOG who were fighting the rebels at Congo Cross. [Author's note: CDF trial judgment, para. 968(i)-(iii)]

17. The Trial Chamber concluded that the evidence clearly showed that on this occasion, the initiates had become fighters." The Trial Chamber also found Witness TF2-021 was eleven years old when he was initiated by Kondewa.
18. The Trial Chamber also found that Kondewa knew or had reason to know he was initiating an eleven year old boy into the CDF because Kondewa regularly performed initiation ceremonies, issued certificates confirming *e.g.* the age of eleven and would have known the difference between an eleven year old boy and a fifteen year old boy. On the basis of these findings, it is clear that Kondewa's initiation of Witness TF2-021 in 1997 was the condition *sine qua non* for Witness TF2-021's enrolment and acceptance into the CDF. Therefore, it was reasonable for the Trial Chamber to conclude that given these circumstances, when Kondewa was initiating the boys "he was also performing an act analogous to enlisting them for active military service." [Author's note: CDF trial judgment, para. 970]
19. Furthermore, the act of carrying looted property that the Majority of the Appeals Chamber finds constituted enlistment, cannot be deemed as conduct accepting a child into an armed group or force. When Witness TF2-021, upon his capture in 1997, was forced to carry looted property by the CDF, he was not participating in active hostilities or in any activity that involves the CDF as a military organization, but was instead being forced to assist CDF soldiers in the illegal appropriation of property for the soldiers' private use. Nothing in the evidence indicates he (or the soldiers for whom he was carrying looted property) was participating actively in hostilities. Looting is a term of art used by international courts to denote the appropriation of property for private purposes rather than military necessity. The Trial Chamber understood looting to refer to the appropriation of property for private purposes. This act of carrying loot, therefore, could not have constituted enlistment into an armed force or group or the use of a child to participate actively in hostilities because it was done for private purposes.
20. I, therefore, dismiss Kondewa's Fifth Ground of Appeal and affirm the Trial Chamber's conviction of Kondewa for committing the crime of enlistment of

Witness TF2-021 into the CDF, punishable under Articles 4.c. and 6(1) of the Statute.

3. Prosecution's Fifth Ground of Appeal: Kondewa's Responsibility For Enlisting Children (More Than One) Under Age of Fifteen Years into an Armed Force Or Group

21. Having concluded that the evidence established beyond a reasonable doubt that Kondewa committed the crime of enlisting *a child* under the age of 15 into an armed force or group, I am of the opinion that the Trial Chamber should also have found Kondewa guilty of committing the crime of enlisting more than one child. The Trial Chamber found that Kondewa initiated Witness TF2-021 along with around twenty other young boys. Witness TF2-021 testified that he estimated the boys to be in *almost* the same age group as him, that means slightly younger than him. The Trial Chamber also found "beyond a reasonable doubt that Kondewa, in these circumstances, when initiating the *boys*, was also performing an act analogous to enlisting them for active military service." [Author's note: CDF trial judgment, para. 970]
22. On the basis of these findings alone, the Trial Chamber was required to enter a conviction against Kondewa for enlisting children rather than only Witness TF2-021.
23. The Majority of the Appeals Chamber concluded as well that in the absence of evidence concerning the age of the other boys, no reasonable trier of fact could have found the testimony of Witness TF2-021 sufficient to establish the age of the twenty young boys. However, as mentioned before, Witness TF2-021 testified that he estimated the boys to be in *almost* the same age group as him. Given that Witness TF2-021 was eleven when Kondewa initiated him, it is therefore logical and reasonable to conclude that the other twenty boys were younger than fifteen. The Trial Chamber found no reason to doubt his testimony. On the contrary, the Trial Chamber found that his testimony was "highly credible and largely reliable," and that the "intensity of his experience has left him with an indelible recollection of the events in question" [author's note: CDF trial judgment, para. 282]. In light of the fundamental principle that a Trial Chamber is in the best position to evaluate and assess the evidence, I find that the Majority's conclusion is without merit.
24. Other Trial Chamber findings circumstantially show that Kondewa initiated many more than 20 boys under the age of 15 and that these initiations qualified as enlistments into armed forces. In addition to the testimony given by Witness TF2-021, the Trial Chamber also accepted the evidence provided by two other former child soldiers who underwent initiation before participating in active military service. The Trial Chamber found that Witness TF2-140 was initiated into the Kamajor society at the age of 14 along with adults as well as other children who were 10 or 11 years old. Initiation fees were paid to the district

initiator who then sent the fees to Kondewa, the High Priest of the Kamajors who was responsible for all of the initiators. The Trial Chamber also found that Witness TF2-004 was initiated at Liya by Muniro Sherif along with many others, including children as young as 10 years old. On the same day that he was initiated, TF2-004 left Liya to go fight in Zimmi. The purpose of the initiation was to fight the war.

25. Furthermore, the Trial Chamber found that the CDF as an organization was involved in the recruitment of children under the age of 15 into an armed force or group. In particular, in 1999, the CDF registered over 300 children under the age of 14 in a disarmament, demobilization and reintegration program in the Southern Province in Sierra Leone.
26. The Trial Chamber found that Kondewa performed initiations at Base Zero where he was present during its entire existence and where numerous child soldiers were also present. The Trial Chamber also found that Kondewa used child soldiers as body guards at Base Zero.
27. Given that Kondewa, as the High Priest of the entire CDF organisation, accepted initiation fees of children under the age of 15 years, was the head of all CDF initiators, performed initiations at Base Zero and the fact that no Kamajor would go to war without his blessings, Kondewa must have either personally, or through an initiator subordinate to him, enlisted many children under the age of 15 years into the CDF. In light of this evidence, I find that no reasonable trier of fact could have failed to conclude that the only reasonable inference from the evidence was that Kondewa enlisted many children under the age of 15 years into the armed forces.
28. I, therefore, hold that the Trial Chamber erred in failing to find that Kondewa enlisted children into the CDF and grant the Prosecution's Fifth Ground of Appeal in this respect and enter a conviction for Kondewa for enlisting many children into the CDF.

4. Prosecution's Fifth Ground of Appeal: Kondewa's Liability for Aiding and Abetting the Use of Child Soldiers

29. In relation to Kondewa's liability for aiding and abetting the "use" of child soldiers, the Majority finds that it cannot consider any evidence or pronounce a verdict on whether Kondewa was liable for the "use" of child soldiers because the Trial Chamber declined to examine this issue. The Appeals Chamber corrected the Trial Chamber's error of law in considering that the Trial Chamber should have considered the evidence on the alternative charge. In light of the standard of appellate review, the Appeals Chamber was in a position to consider existing evidence concerning Kondewa's "use" of child soldiers, especially where the Trial Chamber had made findings demonstrating Kondewa's aiding and abetting the "use" of child soldiers. Therefore, I find the Majority's statement misplaced. I now turn to the merits of the Prosecution's appeal.

30. As demonstrated above, Kondewa initiated many children under the age of fifteen into the CDF. The Trial Chamber findings show that Kondewa was aware in performing these initiations for children that the purpose of initiation of many of the children was to prepare them to become fighters. Initiations were of paramount importance in Kamajor society as a prerequisite to participation in active military service. No Kamajor would go to war without Kondewa's blessings. Moreover, Kondewa's job included the preparation of herbs which the initiates smeared onto their bodies to protect themselves from bullets. He himself told initiates that the initiation would make them powerful for fighting. Furthermore, he also knew or had reason to know as demonstrated already that the children were under the age of fifteen years. On the basis of this evidence, I am also satisfied that Kondewa's initiation of these children offered practical assistance to the CDF's "use" of children under the age of fifteen to participate in active hostilities and that it had a substantial effect on the commission of this crime.
31. Therefore, I find that the Trial Chamber and the Majority of the Appeals Chamber erred in failing to find Kondewa liable for aiding and abetting the use of children under the age of 15 to participate actively in hostilities. I grant the Prosecution's Fifth Ground of Appeal in this respect and I enter a conviction accordingly.

5. Prosecution's Fifth Ground of Appeal: Fofana's Liability for Enlistment and Use of Child Soldiers

32. The Majority declines to address the merits of the Prosecution's argument under this sub-ground of appeal because the Prosecution "merely proffers arguments based on evidence which the Trial Chamber considered and rejected, but does not point to any error in the reasoning of the Trial Chamber." [Author's note: CDF appeal judgment, para. 152] I cannot agree with the Majority's position.
33. In paragraphs 4.5 to 4.26 of the Prosecution's Appeal Brief, the Prosecution sets forth in great detail the Trial Chamber's factual findings and other evidence in the trial record and more importantly demonstrates that these findings indicate that the Trial Chamber erred in fact in finding that Fofana was not guilty of aiding and abetting the enlistment and use of children under the age of fifteen to participate actively in hostilities. I now turn to the merits of the Prosecution's appeal.
34. Based on the Trial Chamber's findings, in my opinion, no reasonable trier of fact could have come to any conclusion other than that Fofana was aware that children were both enlisted in the CDF and "used" to participate actively in hostilities. Fofana was present at the passing out parade in early January 1998, where children involved in operations were present. At a subsequent commander's meeting held on the same day, where Fofana was present, Norman commented that "adult fighters were doing less than children, just eating and

looting.” Children were present at this meeting. Fofana also was one of the architects of the Black December Operation, an operation where children were present everywhere on the frontlines and in support roles. The Trial Chamber also found that Fofana was present at Base Zero for its entire existence, and was the overall boss of Base Zero and that child soldiers were present at various times at Base Zero. At Base Zero, Kondewa also initiated children into the CDF, and the child initiates were trained for war there.

35. Moreover, child soldiers were present throughout CDF operations. Children who appeared to be under the age of fifteen years were conscripted, enlisted, or used to participate actively in hostilities in the following locations: Kenema, Base Zero, Bo, Daru, Masiaka, Port Loko, Yele, and Ngiehun. They participated directly in combat, often leading the Kamajors into combat, and they served at monitoring checkpoints. Thus, the only conclusion available to any reasonable Trial Chamber is that Fofana knew that children under the age of fifteen were being enlisted and used to participate actively in hostilities because Fofana, was the ‘Director of War’ for the CDF. He was part of the High Command and actually made many decisions along with Norman and Kondewa and was the overall boss of the Commanders at Base Zero. Significantly, he was also the one responsible for the receipt and provision of logistics to the frontline, including the provision of manpower. Given that he had to have known that the CDF was enlisting and “using” children in active military service, his provision of logistics, manpower, and strategic directions provided practical assistance and had a substantial effect on the commission of the crime of enlisting and using children under the age of fifteen to participate actively in hostilities.
36. Therefore, no reasonable trier of fact could [not] have found that Fofana aided and abetted the commission of this crime.
37. Furthermore, there is ample evidence in the trial record that Fofana, as a leader in the High Command of the CDF, did not take a stand in public or at any of the commanders’ meetings against the enlistment or use of children under the age of 15 in military activities. Although Fofana did not enlist or use child soldiers personally, I am satisfied that his high position within the CDF command structure and his physical presence at meetings where child soldiers were either present or were discussed, constituted tacit approval, encouragement and moral support to the commanders and Kamajors to continue to enlist and use children under the age of 15 to participate actively in hostilities. Fofana’s tacit approval served to leave no doubt in the minds of the Kamajors that they enjoyed his full support in their enlistment and use of child soldiers. I am thus satisfied that Fofana’s conduct had a substantial effect on the commission of this crime.
38. I, therefore, grant the Prosecution’s Fifth Ground of Appeal in this respect as well and find Fofana responsible under Article 6(1) for aiding and abetting the crimes of enlistment of children under the age of 15 into armed forces or groups and the use of children under the age of 15 to participate actively in hostilities, crimes punishable under Article 4.c. of the Statute.

6. Conclusion

39. For the foregoing reasons I dismiss Kondewa's Fifth Ground of Appeal and grant the Prosecution's Fifth Ground of Appeal in its entirety.

C. Kondewa's Sixth Ground of Appeal: Cumulative Convictions

1. Introduction

40. In paragraph 160 of Kondewa's Sixth Ground of Appeal, he submits that:

"[t]he Majority of the Trial Chamber erred in law in entering convictions under Count 7 as well as under Counts 2–5 stating it was permissible to do so even where the underlying facts for the conviction are the same." [Author's note: Kondewa appeal brief, para. 160]

41. The gravamen of Kondewa's submissions on this ground, as he elaborates in the subsequent paragraphs of his appeal, is that "the Trial Chamber erred in law in extending the content of 'punishments' in the collective punishments count to acts broader than those specifically set out in the Indictment" [author's note: Kondewa appeal brief, para. 168]. Kondewa submits that because of the manner in which the crimes are alleged in the Indictment, the acts constituting "punishment" under Count 7 are based on same underlying conduct alleged in Counts 2, 4 and 5 of the Indictment. Thus, according to him, "the crimes of Counts 2, 4 and 5 are absorbed into Count 7" [author's note: Kondewa appeal brief, para. 173].
42. Though inartfully phrased, Kondewa's entire submission in this ground concerns whether the Trial Chamber could enter cumulative convictions for murder, cruel treatment, pillage and collective punishments. I agree with the Majority that "because each of these crimes requires proof of materially distinct elements, cumulative convictions are permissible in this instance" [author's note: CDF appeal judgment, para. 225]. In my view, Kondewa's Sixth Ground of Appeal should be rejected on that basis alone.
43. For the reasons set out in the following paragraphs, I disagree with Majority holding on this ground.

2. Whether Kondewa Raised The Argument On Appeal

44. Although there is no appeal against the finding of guilt for collective punishment as such, the Majority endeavors to correct a purported error of law notwithstanding that the Parties do not allude to or brief the question. Kondewa advances no arguments *whatsoever* regarding any error of law in the definition of the elements of the crime "collective punishments." In my view, it is unusual for an Appeals Chamber to undertake to define the elements of a crime without the parties having raised it on appeal.

45. Nonetheless, I recognize that in the case of an error of law the Appeals Chamber has the discretionary power to correct the error *proprio motu* if the interests of justice so require. The interests of justice are particularly acute when an accused has been convicted of a crime as a result of legal error. In such instances, I endorse the Appeals Chamber's discretionary exercise of its inherent powers as the final appellate body. Nevertheless, for the reasons that follow, the Trial Chamber's error of law does not invalidate the convictions.

3. Whether 'Collective Punishments' Is A Specific Intent Crime

46. I agree with the Majority that collective punishments is a specific intent crime, however, in my view, the elements are more clearly defined as: (i) an indiscriminate sanction directed against protected persons for their perceived conduct; and (ii) the specific intent to punish persons or groups of persons collectively for their perceived conduct.
47. Having found an error of law, the Majority determined that it "must . . . re-examine the Trial Chamber's factual findings on collective punishments in light of the Appeals Chamber's definition of the elements of this crime." This application of the standard of review by the Majority is inexplicably inconsistent with the Majority's approach to the review of the legal errors found in Kondewa's Fifth Ground of Appeal in relation to the enlistment and use of child soldiers. In principal, I support the approach to appellate review taken by the Majority here, however, I believe it is important to enunciate and apply a consistent standard.
48. In my view, when the Appeals Chamber establishes that the Trial Chamber erred in law, it is necessary for the Appeals Chamber to apply the corrected law to the factual findings of the Trial Chamber. When the legal error found by the Appeals Chamber creates a requirement for an additional factual finding before a conviction of guilt can be entered, the Appeals Chamber must establish that it is convinced beyond reasonable doubt that the additional legal requirement is satisfied before the conviction is affirmed on appeal.
49. Here, the legal error described by the Majority only creates an additional requirement with respect to the *mens rea* for collective punishments, therefore, the Appeals Chamber must give deference to the Trial Chamber's findings on the *actus reus* of collective punishments.

4. Whether The Factual Findings Prove Collective Punishments

50. With respect to collective punishments, the Trial Chamber found the following:
- (i) In relation to the commission of murder and cruel treatment in Tongo, the Trial Chamber found both Fofana and Kondewa liable pursuant to Article 6(1) for aiding and abetting in the preparation of the commission of

collective punishments under Count 7 [author's note: CDF trial judgment, paras. 763–764].

- (ii) In relation to the commission of murder and cruel treatment in Koribondo, the Trial Chamber found Fofana liable as a superior, pursuant to Article 6 (3), for the commission of collective punishments under Count 7 [author's note: CDF trial judgment, para. 798].
- (iii) In relation to the commission of murder, cruel treatment and pillage in Bo District, the Trial Chamber found Fofana liable as a superior pursuant to Article 6(3), for the commission of collective punishments under Count 7 [author's note: CDF trial judgment, para. 846].
- (iv) In relation to the commission of murder, cruel treatment and pillage in Bonthe District, the Trial Chamber found Kondewa liable as a superior pursuant to Article 6(3), for the commission of collective punishments under Count 7 [author's note: CDF trial judgment, para. 903].

51. According to the Majority, the Trial Chamber's numerous findings concerning murder, cruel treatment and pillage in Tongo, Koribondo, Bo and Bonthe reveal that the victims:

"were being targeted in these places because of their *identities* or their locations at the time of the Kamajor's attacks. In particular, the Kamajors targeted individuals who were identified or accused of being rebels or collaborators, or who were related to rebels. In addition, the Kamajors targeted Loko, Limba and Temne tribe members, policemen and civilians in close proximity to the National Diamond Mining Company (NDMC) headquarters in Tongo. Finally, many other civilians appear to have been targets of murder, cruel treatment and pillage merely by chance, due to the indiscriminate nature of the attacks on these locations." [Author's note: CDF appeal judgment, para. 228]

52. The Majority concludes that "the individuals who came under attack in Tongo, Koribondo, Bo District and Bonthe District were being targeted due to their perceived identities, their locations, or by sheer chance," and not due to omissions or acts which they may or may not have committed [author's note: CDF appeal judgment, para. 228]. The Majority, in my view, erred in the following ways:

53. *First*, the Majority erroneously distinguishes between victims targeted because of their identity as collaborators and victims punished collectively for omissions or acts for which they may or may not be responsible. The distinction does not withstand minimal scrutiny, and it is expressly contradicted by the Majority's holdings elsewhere, Justice King dissenting, that:

"In relation to the attack on Tongo, Norman told the Kamajors that 'there is no place to keep captured or war prisoners like the juntas, *let alone their collaborators*' [author's note: CDF trial judgment, para. 321] and that '*all collaborators should forfeit their properties*' [author's note: CDF trial judgment, para. 322]. In relation to the attack on Koribondo, Norman instructed the Kamajors . . . that 'anyone left in Koribondo should be *termed an enemy or a rebel and killed*' [author's note: CDF trial judgment, para. 329]. He further said that the capture of Koribondo had failed '*because the civilians had given their children to the juntas in marriage*' and thus, they were all '*spies and*

collaborators;’ and, therefore, ‘anybody that was met there should be killed’ and nothing should be left ‘not even a farm or . . . a fowl’ [author’s note: CDF trial judgment, para. 335]. In relation to the attack on Bo, Norman told the Kamajors to ‘kill enemy combatants and people who had connections with or supported the rebels and who were therefore worse than the combatants;’ he referred to them as ‘collaborators’ [author’s note: CDF trial judgment, para. 332]. At several occasions, Norman also ordered the Kamajors to kill police officers [author’s note: CDF trial judgment, paras. 446, 578] [because they were juntas] [author’s note: CDF appeal judgment, para. 283, citing CDF trial judgment, para. 462].

The above findings of the Trial Chamber demonstrate that the ‘all out offensive’ military attacks against towns and villages occupied by the rebels and juntas encompassed also an element of targeting civilians perceived or alleged [to be] “collaborators.” In the view of the Appeals Chamber, it is without a reasonable doubt that this policy has been pursued by the Kamajors, through killings of definite individuals in view of any perceived or alleged relationship with the rebels, the commission of mass-killings of groups of civilians, a recurrent targeting of police officers and indiscriminate shootings at civilians, the burning of their houses or looting of their properties” [author’s note: CDF appeal judgment, para. 318].

54. The Appeals Chamber, therefore, found that collaborators were people perceived to have supported the rebels. The Kamajors distinguished collaborators from other civilians on the basis of the perceived support they gave to rebels. The Kamajors targeted collaborators for murder, cruel treatment or pillage because of this distinction. The Majority now refers to this distinction as their ‘identity;’ but any such identity is derivative of perceived conduct, namely: support for the rebels. To target protected persons for murder, cruel treatment or pillage *because* they are perceived to support the rebels is exactly the same as intentionally punishing them as a group for omissions or acts for which they may or may not be responsible.
55. *Second*, the findings quoted above and additional findings discussed below are tantamount to findings that the CDF/Kamajors, typically acting on Norman’s orders, had the specific intent to punish collaborators collectively and that civilians were seen as collaborators because of their conduct. In my view, these findings, relied upon by the Appeals Chamber in another context, satisfy the burden of proof beyond reasonable doubt for specific intent and, coupled with the following findings on Fofana’s and Kondewa’s *mens rea* for aiding and abetting and superior responsibility, militate that their convictions for collective punishments are upheld.
56. In relation to Tongo, Fofana and Kondewa were convicted pursuant to Article 6 (1) for aiding and abetting in the preparation of the commission of collective punishments under Count 7. The relevant question, here, is whether Fofana and Kondewa had knowledge of the principal perpetrator’s specific intent. Fofana and Kondewa were present when Norman issued the orders for collective punishment. The only reasonable conclusion is that, upon hearing these orders, Fofana and Kondewa must have known of his intent to collectively punish collaborators.
57. In relation to Koribondo and Bo District, Fofana was convicted pursuant to Article 6(3) for superior responsibility for collective punishments under Count

7. The relevant question on this ground is whether he knew or had reason to know that collective punishments were about to be committed or were committed by his subordinates with specific intent. The Trial Chamber found that prior to the Koribondo and Bo attacks, Norman gave “specific instructions for these two attacks” to Nallo with Fofana in attendance [author’s note: CDF trial judgment, para. 334]. According to the Trial Chamber, Norman stated that the Kamajors had been unsuccessful in capturing Koribondo “because the civilians had given their children to the juntas in marriage and thus they were all spies and collaborators. *Therefore*, anybody that was met [in Koribondo] should be killed and nothing should be left not even a farm or a fowl” [author’s note: CDF trial judgment, para. 335].

58. Regarding Bo, the Trial Chamber made the following findings relevant to collective punishments:

“[Norman] told Nallo to kill Paramount Chief Veronica Bagni of Valunia chieftom, *because she was against the Kamajor movement; ... MB Sesay because he gave money to the juntas and prepared the ronko which the juntas wore* so that they could not be differentiated from the Kamajors. ... Nallo was to kill Ali Fataba and burn his house *because he was a collaborator who supplied fuel to the juntas*. He should kill Cecil Hanciles *for liaising between the juntas and the civilians*. He was to kill Brima Tolly, if he saw him, and to burn his house and loot his property *because the juntas ate and spent time at the house*. Norman ordered Nallo to kill the police officers *who used to work under the AFRC junta*. Nallo carried out the orders as far as burning and looting but did not see most of the people. He would have killed them had he seen them because the law given by the National Coordinator was that if Kamajors did not follow their orders they would cut off your ear or kill you” [author’s note: CDF trial judgment, para. 336].

59. Norman gave these instructions to Nallo, who was the direct subordinate of Fofana, and Fofana was present at the meeting. Without any doubt Fofana had every reason to know of Norman’s intention to punish collectively the collaborators for their support for rebels.
60. Fofana was also present at an early January 1998 commanders’ meeting held in preparation for the attack on Bo [author’s note: CDF trial judgment, para. 332]. At the meeting, Norman addressed the group and according to the Trial Chamber’s finding he “told [the Kamajors] to kill enemy combatants and people who had connections with or supported the rebels and who were therefore worse than the combatants” [author’s note: CDF trial judgment, para. 332]. He referred to these non-combatants who supported the rebels as “collaborators” [author’s note: CDF trial judgment, para. 332].
61. Therefore, Fofana was aware of Norman’s orders in relation to Koribondo and Bo which were direct commands to commit collective punishments and prove Norman’s specific intent regarding collective punishments. His knowledge of the orders demonstrates beyond reasonable doubt that Fofana, at the very least, had reason to know his subordinates would commit collective punishments.
62. In relation to Bonthe District, Kondewa was convicted pursuant to Article 6(3) for superior responsibility for collective punishments under Count 7. The

relevant question for this ground is whether he knew or had reason to know that collective punishments were about to be committed or were committed by his subordinates with specific intent. The Appeals Chamber, Justice King dissenting, accepted the Trial Chamber's findings that Morie Jusu Kamara sent several reports to Kondewa about the situation in Bonthe and that based on these reports three delegations came to Bonthe to investigate the situation. The first two delegations acted under Kondewa's instructions and the third was led by Kondewa himself. The Appeals Chamber, Justice King dissenting, accepted that the evidence showed that Kamara reported to Kondewa about events in Bonthe in his capacity as *de facto* commander of the Kamajors who carried out the attack. Kondewa has not challenged the Trial Chamber's finding that he "knew that the attack on Bonthe Town involved the commission of criminal acts by the Kamajors under the command of Morie Jusu Kamara" [author's note: compare CDF trial judgment, para. 874]. Kondewa also does not challenge that he "had reasons to know that the Kamajors under his effective control were about to commit or were committing criminal acts in Bonthe District, particularly that they were targeting suspected 'collaborators'" [author's note: compare CDF trial judgment, para. 875]. These findings, to which the Appeals Chamber must defer, demonstrate beyond reasonable doubt that Kondewa, at the very least, had reason to know that collective punishments were committed or were about to be committed in Bonthe.

63. In summary, the Trial Chamber's findings of fact prove beyond reasonable doubt that both the principal perpetrators and Fofana and Kondewa had the requisite *mens rea* to support Fofana's and Kondewa's convictions for collective punishments. For these reasons, I uphold Fofana's and Kondewa's convictions under Article 6(1) and Article 6(3) for collective punishments under Count 7.

D. Prosecution's Eighth Ground of Appeal: Denial of Leave To Amend the Indictment in Order To Charge Sexual Crimes

1. Introduction

64. I concur with the findings of the Appeal Chamber in respect to the Prosecution's Ground Eight contained in paragraphs 417–421 of the Appeal Judgment, rejecting Kondewa's submissions that (i) the Appeals Chamber lacks jurisdiction to entertain this ground of appeal; and (ii) the principle of *res judicata* prevents the Appeals Chamber from entertaining this ground of appeal on the merits.
65. However, I disagree with the Majority of the Appeals Chamber which decided to summarily dismiss this Ground of Appeal on the basis that it falls outside the scope of the appellate review. As a result, the Majority declined to adjudicate the merits of the Prosecution's submissions that the Trial Chamber erred in denying its request for leave to amend the Indictment. In this respect, I further

consider that the Trial Chamber's Decision on Leave to Amend the Indictment (the "Indictment Amendment Decision"), issued on 20 May, 2004 and hereby challenged by the Prosecution under this Ground of Appeal, contained both errors of law invalidating the decision and errors of facts which have occasioned a miscarriage of justice.

2. The Majority's Decision on Prosecution's Eighth Ground of Appeal

66. The Majority dismissed Ground Eight of the Prosecution's Appeal based on procedural considerations. The Majority considers that the Prosecution has not shown that the alleged error of law would invalidate the decision or that an error of fact would lead to a miscarriage of justice. The Majority notes that the Prosecution does not seek any remedy other than merely a finding of an error of law in the Indictment Amendment Decision. While this factor did not preclude the Appeals Chamber from entertaining Ground Nine of the Prosecution's Appeal, the Majority considered that the alleged errors had no chance to affect the verdict as distinguished from Ground Nine because they do not relate to any count contained in the Indictment upon which the verdict was issued. The Majority further considers that "denying the amendment did not preclude the Prosecution from charging the accused with these crimes, since it is within the Prosecution's discretion to bring, alongside the original indictment, a separate indictment regarding the new allegations it intended to bring in the case" [author's note: CDF appeal judgment, para. 426]. I disagree with the Majority's reasoning.
67. First, this Ground of Appeal falls undeniably, in my opinion, within the scope of the appellate review set out in Article 20(1) of the Statute and Rule 106 of the Rules, whereby the Appeals Chamber may hear appeals arising from "an error on a question of law invalidating the decision." While the challenged "decision" within the meaning of Article 20(1)(b) generally concerns the final judgment of the Trial Chamber in the context of a post-judgment appeal, I consider that it may also refer to an interlocutory decision issued during the course of the trial. In any event, assuming *arguendo* that the "decision" in a post-judgment appeal exclusively refers to the Judgment itself, I hold that, in the instant case, the alleged errors in the Indictment Amendment Decision had the potential, if established, to invalidate the Trial Chamber's verdict on appeal and to occasion a miscarriage of justice. The conclusions reached by the Trial Chamber in the Indictment Amendment Decision significantly altered the trial proceedings in such a way that the proceedings did not address any of the offences alleged in the new counts sought to be included in the Indictment. As a result, the Indictment Amendment Decision affected the Trial Judgment such that it does not address the responsibility, if any, of the accused in relation to these crimes. As a consequence, the alleged errors in the Indictment Amendment Decision rendered the trial proceedings and the judgment invalid.

68. Had the Majority of the Appeals Chamber decided to entertain this Ground of Appeal and had it found that the Indictment Amendment Decision was erroneous, the effective remedy could have been an order remitting the case for retrial. The fact that the Prosecution did not seek any remedy from the Appeals Chamber other than merely a declaration of an error does not alter the fact that, as a matter of law, the alleged error in this Decision had the potential to affect the judgment and to occasion a miscarriage of justice within the meaning of Article 20(1) of the Statute and Rule 106 of the Rules. I further deem it necessary to emphasise that the Prosecution did not ask for the case to be remitted for retrial because it “accepted that this would not be practicable.” In my opinion, the pragmatism of the Prosecution’s position, obviously based on the limited lifespan of the Court, should not be put against the Prosecution to hold that this Ground of Appeal falls outside the scope of appellate review.
69. For these reasons, it is therefore established, in my view, that the Appeals Chamber should have considered this Ground on its merits.
70. Second, I disagree with the Majority’s position with regard to the Prosecution’s discretion to bring a separate indictment charging the Accused with the additional counts. At the outset, I find that the most appropriate course of action for the Prosecution for adding new charges against the Accused was to file a request to amend the Indictment pursuant to Rules 50(A) and 73(A). The Rules expressly provide a procedure to bring new charges by amending the Indictment. At the *ad hoc* tribunals, only in exceptional circumstances and, as far as I am aware, only in one case has a separate indictment been brought against an accused in view of the amount and the distinct gravity of the new charges in completely new locations.
71. The Majority suggests that the relevant procedural remedy for a denial of leave to amend the Indictment is to file a new indictment. I find the argument misplaced. Under Rule 50(A) and Rule 73(B), the available remedy in this situation is to request from the Trial Chamber leave to appeal the Trial Chamber’s Decision, as the Prosecution did. This request, however, was denied by the Majority of the Trial Chamber, Justice Boutet dissenting, on 2 August 2004.
72. It should also be emphasised that six months had elapsed between the Prosecution’s request for leave to amend the Indictment filed on 9 February, 2004 and the Trial Chamber’s denial of leave to appeal the Indictment Amendment Decision on 2 August, 2004. In the meantime, the trial had already started on 3 June, 2004. In this context, given the limited mandate of the Special Court as to its lifespan, it would have been neither reasonable nor appropriate for the Prosecution to file a new indictment against the Accused two months after the start of the trial.
73. Finally, I hold that a review by the Appeals Chamber of the merits of the Prosecution’s submissions against the Indictment Amendment Decision cannot be regarded as an “academic exercise.” Because the Trial Chamber denied leave to appeal, the merits of the Prosecution’s submissions against the Indictment Amendment Decision have never been addressed by this Chamber. Accordingly, refusing to address the merits of the Prosecution’s Ground of

Appeal at the final appeal stage permanently denies the Prosecution the opportunity to have the merits of its contentions adjudicated on appeal, which, in my view, denies it the right to a fair trial. This element, in my opinion, should have compelled the Majority to entertain this Ground of Appeal.

74. Moreover, the Majority Trial Chamber's Decision on Leave to Appeal contained a reversible error of law. Rather than considering the application for leave to appeal on the factors permitted under Rule 73(B) of the Rules and either rejecting or granting the application on the merits of the application, the Majority of the Trial Chamber denied the motion *on merits of the* [sic] *of the decision that would have been appealed*. By doing so, the Trial Chamber effectively substituted itself for the Appeals Chamber, a gross misinterpretation of its authority. The approach of the Trial Chamber amounted in my view to a discernible error in the exercise of its discretion. This procedural error should have constituted a further reason for the Majority of the Appeals Chamber to examine the Indictment Amendment Decision at the post-judgment stage and to entertain this Ground of Appeal on the merits.
75. I will now turn to the consideration on the merits which the Appeals Chamber should have done. The relevant question is whether the Trial Chamber erred in law, in procedure or in fact in denying the Prosecution's Motion for leave to amend the Indictment.

3. The Appeal Against the Indictment Amendment Decision

76. The issue on appeal here is whether the Trial Chamber abused its discretion in reaching the Indictment Amendment Decision. In my view, there are two main issues in this case: whether the Trial Chamber abused its discretion in finding that the Prosecution failed to act with due diligence and whether, in the exercise of its discretion, the Trial Chamber correctly balanced the Accused's right to a fair trial against other factors.

(i) Whether The Prosecution Failed to Act With Due Diligence

77. The Trial Chamber found that the Prosecution failed to act with due diligence in seeking to include new charges in the Indictment that is, on 9 February, 2004. The initial indictments against Norman, and against Fofana and Kondewa, were filed on 3 March, 2003 and 24 June, 2003, respectively. The Trial Chamber held that:

"it is the traditional role and practice for the prosecution to bring *as many counts in an indictment as possible* and to amend them where it becomes necessary. Although it does not impose on the Prosecutor the obligation to bring all the charges that are borne out by the evidence, nothing prevents or prohibits him from preferring and bringing all the charges on which he intends to base his prosecution to the knowledge of the Court and to that of the defense, not only with a view to a proper determination of the case, but also and above all, to serve the overall interests of justice" [author's note: indictment amendment decision, para. 34].

78. I disagree with this approach, which in my view, does not reflect the requirements for Review of Indictments set forth in Rule 47 of the Rules and affirmed by the Special Court's jurisprudence. The confirmation of an indictment requires that, based on the proposed indictment and supporting material, sufficient information must establish reasonable grounds to believe that a person committed the crimes charged, supporting therefore a *prima facie* case. The applicable standard for the confirmation of an indictment is also applicable to its amendment concerning the inclusion of new charges.
79. Accordingly, the Prosecution could only have brought charges of gender-based violence in the Indictment only when sufficient material facts would have sustained a *prima facie* case. The Prosecution submitted that, in June 2003, there were "*indications*" of gender-based crimes; only in October 2003 did it obtain solid "*evidence*" capable of confirmation, meaning "evidence that is sufficient to prove the crimes alleged," and to secure the cooperation of witnesses. I wish to underscore in this respect that victims of gender-based violence generally express greater reluctance to report and testify on those events than victims of other crimes. I note the Prosecution's assertion that "[i]n some instances, it was the existence of the Indictment and subsequent incarceration of the Accused that created the conditions for these potential witnesses to come forward and to give evidence whereas before they were unwilling to do." I do not find any genuine reason to reject the Prosecution's explanation as to why the Indictment Amendment Motion was not put before the Trial Chamber as early as June 2003, and I find that the Trial Chamber erred in law as to the standards for amending the indictment and in fact in finding that "*evidence*" of gender-based violence was "available" eight months prior to the filing of the Indictment Amendment Motion.
80. The Trial Chamber held that it took two years of investigation for the Prosecution to uncover gender offences. If this were true, it would have meant that the Prosecution started investigations for the CDF case in February 2002. This finding was clearly erroneous as the Prosecution Team started full investigation in November 2002, one year before evidence of gender-based violence was verified.
81. The Prosecution explained that it filed the Indictment Amendment Motion on 9 February, 2004, about three months after *prima facie* evidence of gender-based violence was available because it was awaiting a decision on its Motion for Joinder in order to file a single motion for amending the Indictment. The Decision on Joinder was issued on 27 January, 2004 and the Consolidated Indictment was filed on 5 February, 2004. I accept the Prosecution's approach in this regard, which, in my view, complies with the interest of judicial economy.

(ii) Whether The Trial Chamber Correctly Balanced the Rights of the Accused with Other Relevant Factors

82. In addressing whether to grant leave to amend an indictment, the overall consideration for a Trial Chamber is to ensure the accused's right to a fair

hearing. The scope and nature of the amendments, their effect on the case and the consequences on the trial proceedings shall be considered in light of the rights of the accused to be tried without undue delay and to have adequate time to prepare his/her defense, as enshrined in Article 17 of the Statute. Further, international criminal tribunals examine whether the amendment may help to “ensure that the real issues in the case will be determined.” As the ICTY Appeals Chamber held, “the timeliness of the Prosecutor’s request for leave to amend the indictment must be measured within the framework of the overall requirement of the fairness of the proceedings.” In this respect, I consider that the principle of fairness of the proceedings and of equality of arms applies to both, the Defence and the Prosecution which “acts on behalf of and in the interest of the community, including the interest of the victims of the offence charged.”

83. In this case, the proposed amendments to the indictment included new charges based on various acts of gender-based violence, extended the timeframe of certain allegations and added new locations to others. Although the proposed amendments altered the case geographically, temporally and in terms of the nature of the charges against the Accused, I do not consider that the Defence’s statutory rights would have been breached so as to render the trial unfair for the following reasons:
84. The Accused were informed of the potential new charges as of the filing of the Amendment Motion on 9 February, 2004. The supporting material for these new charges was disclosed on 17 February, 2004, which allowed the Accused to initiate preliminary investigations. The Indictment Amendment Decision was issued on 20 May, 2004. The Majority of the Trial Chamber held that the proposed amendments to the Indictment would have required allowing the Accused at least two years to carry out investigations, which would lead to undue delays in the proceedings. This estimation was purely speculative. The Majority of the Trial Chamber arrived at this estimation based on the time it purportedly took the Prosecution to conduct its investigations. First, as stated above, the Prosecution’s investigations covered a one year-period only. Second, the duty of the Prosecution to prove the accused’s guilt beyond reasonable doubt differs from the Defence’s burden to show that the threshold of proof beyond reasonable doubt was not proved. Accordingly, the principle of equality of arms does not necessarily imply that the Accused is entitled to the same amount of time to prepare and present its case. This assessment must be conducted by a Trial Chamber on a case-by-case basis taking into account the specifics of the amendments of the Indictment. Furthermore, to guarantee that the amendments would not prejudice the Accused in the preparation of the case, a Trial Chamber may consider alternatives to denying leave to amend, such as ordering the Prosecution not to present any evidence involving the new facts for a certain period of time after the start of its case. In my opinion, such a decision would have been appropriate in this case in order to ensure, on the one hand, full respect of the rights of the Accused and, on the other, that the right of fair trial be

guaranteed to the opposing party which furthermore acts in the interest of the victims. In my opinion, a decision that substantially impedes a party to duly exercise its duty and mandate infringes the basic principles of “international standards of justice, fairness and due process of law” [author’s note: Security Council Resolution 1315 (2000), para. 6 of the Preamble].

85. I further believe that, in deciding whether to grant leave to amend the indictment, consideration must be given to the impact on and significance of prosecuting the material facts alleged in the amended indictment. In the present case, the denial of the amendments precluded that any of the gender-based violence allegedly committed against women and girls by the Kamajors/CDF during the armed conflict could be prosecuted. Article 15(4) of the Statute specifically addresses the need for the Prosecution to consider employment of prosecutors and investigators specialised in gender-based violence. The Trial Chamber itself stated in another context that this provision “underscore[s] the necessity for international criminal justice to highlight the high profile nature of the emerging domain of gender offences with a view to bringing the alleged perpetrators to justice” [author’s note: *Prosecutor v. Brima, Kamara and, Kanu*, SCSL-2004-16-PT, Decision on prosecution request for leave to amend the indictment against Alex Tamba Brima, Brima Bazzy Kamara and Santigie Kanu, 6 May, 2004, para. 34]. It follows in my view that denying the Prosecution to prosecute acts of gender-based violence committed against women and girls during the armed conflict in Sierra Leone impeded the Special Court’s fulfilment of its mandate.
86. Finally, the approach adopted by the Majority of the Trial Chamber prevented victims of gender-based violence from seeing their case adjudicated before the Special Court. I consider that when an international forum is established to adjudicate gross violations of human rights, it has an inherent duty to fulfil its mandate by providing the victims with proper access to justice. This consideration is particularly relevant in the context of the prosecution of crimes committed in Sierra Leone during the armed conflict since the victims might be prevented from seeking remedy before the national courts in view of the Amnesty included in the Lomé Agreement.
87. For the above reasons, I consider that in denying the Prosecution’s request for leave to amend the Indictment in order to add charges of gender-based violence, the Trial Chamber committed a discernable error of fact and of law in finding that the Prosecution did not act with due diligence and in failing to balance the rights of the accused with other factors, including the rights and duties of the Prosecution and the overall mandate of the Court.
88. I furthermore would like to state that the limited lifespan of the Special Court indirectly influences the practicability of a request as well of an order to remit the case for retrial if the interest of justice asks for it. I consider that neither a Chamber nor the Prosecution should have to deal with a situation where they have to choose between the interest of justice commanding a retrial and the impracticability of such remedy in view of an administrative purpose.

4. Conclusion

89. For the foregoing reasons, I consider that the Prosecution's Eighth Ground of Appeal falls within the scope of appellate review of the Appeals Chamber and should have been entertained by it. I grant Prosecution's Eighth Ground of Appeal and hold that the Trial Chamber erred in fact and in law in dismissing the Indictment Amendment Motion.

E. Whether Reconciliation Can Be Considered in Sentencing

90. I agree with aspects of the Majority decision on sentencing and therefore I only address here those parts with which I disagree. As a preliminary matter, I note that the Majority declined to consider the Trial Chamber's patently erroneous treatment of reconciliation as a mitigating factor because it was not properly noticed by the Prosecution. Conversely, the Majority, in another context, endeavoured to correct a legal error in the interests of justice when it was not even mentioned by the Parties, namely concerning the findings of Fofana's and Kondewa's guilt for collective punishments.

91. I agree with the Majority, in principle, that reconciliation can be a mitigating circumstance. Indeed, the concepts of reconciliation, justice and peace are inextricably linked in post-conflict societies, and the case is no different in Sierra Leone. The Security Council recognized this when it stated:

"Recognizing that, in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

... 1. Requests the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution, ..."

[author's note: UN Security Council Resolution 1513 (2000)].

92. However, some basic conditions connecting the purpose of reconciliation to the perpetrator of the crime must be met in order to make it possible that members of the same society can live again together in peace:

- (i) The perpetrator must admit guilt or at least acknowledge responsibility for what he/she has done.
- (ii) The perpetrator must submit excuses for what he/she has done (to the individual victims if possible, in general if not).
- (iii) The perpetrator must be prepared to assist in the reconciliation or peace process of the given community.

93. Fofana submits that the Trial Chamber rightly concluded that "a manifestly repressive sentence ... [would] not be in the overall interests and ultimate aims and objectives of justice, peace and reconciliation, as mandated by the [sic] UN Security Council Resolution 1315" [author's note: Fofana response brief, para. 207].

94. The necessity of credible justice for reconciliation and peace has been the *raison d'être* of this Special Court since its conception. The belief of the victims that justice in whatever form (e.g., retributive, restorative, etc.) has been done or will be done is of paramount importance to the credibility of justice. This forms the foundation for the social trust upon which reconciliation can be built.
95. It is axiomatic that justice cannot be done unless it is seen to be done. In my view, it is unchallengeable that justice will not be seen to be done, and therefore will not be credible, if the sentence imposed is so lenient that victims cannot accept or even understand it.
96. Kondewa submits that “purpose of reconciliation has however started to gain prominence in international criminal law” [author’s note: Kondewa response brief, para. 9.41] and argues, therefore, that the Trial Chamber correctly held that “a repressive sentence against [him] would be counter-productive” [author’s note: Kondewa response brief, para. 9.43]. He further [sic] argue for justice by victims as well as the call of the international community to end impunity would not have been answered by a harsh sentence.
97. I consider, first, that a sentence which adequately reflects the harm caused to victims is not “harsh” and will not be perceived as such. A sentence that adequately reflects the harm caused to victims is a just sentence. Second, an extremely lenient sentence fails to demonstrate to putative subsequent criminals that impunity will end. This principle of affirmative prevention cannot be outweighed by any purpose of reconciliation.
98. Turning to the requisite conditions for considering reconciliation as a mitigating factor for Fofana and Kondewa, I do not find them satisfied in this case.
99. I cannot see any remorse in the statement that Fofana made through his defence lawyers, (not even personally by himself):
- “Mr Fofana accepts that crimes were committed by the CDF during the conflict in Sierra Leone. Indeed, at least one witness was called on behalf of the Fofana defence, Joseph Lansana, accepting and attesting to crimes committed by the CDF. Mr Fofana deeply regrets all the unnecessary suffering that has occurred in this country” [author’s note: CDF sentencing judgment, para. 63].
100. Fofana’s counsel did not express remorse (*i.e.*, acknowledgement of personal responsibility) or even regret for the suffering of the victims. Rather, he expressed global regret for the situation in Sierra Leone, without connecting this situation to himself in any way.
101. Kondewa’s statements are equally lacking. Kondewa simply said, “Sierra Leoneans, those of you who lost your relations within the war, I plead for mercy today, and remorse, and even for yourselves.” His address to “Sierra Leoneans” writ large can in no way be understood as meaning that he felt remorse. To the contrary, Kondewa had the audacity to ask Sierra Leoneans to have remorse and even if the translation has to account for this wording, nothing indicates any personal remorse.
102. Neither Fofana nor Kondewa has ever acknowledged their own responsibility. In fact, the record on appeal demonstrates to me that they only claim their

criminal culpability could not be proved, not that it did not exist. I am unaware of any instance in which Fofana or Kondewa claimed they did not commit a crime.

103. In my view, empathy with victims as has been accepted as mitigation by the Majority can only be accepted as real and sincere regret in limited circumstances. These circumstances are indicated in the facts of the Orić case cited by the Trial Chamber and relied upon by Fofana and Kondewa. Critically, in that case, Orić expressed empathy several times before he was found guilty. The two convicted persons here only found it worth mentioning that they felt empathy – if they even did that – after they were convicted. From this, it is clear to me that their statements were not expressions of remorse or empathy, but rather were simply calculated to achieve a reduced sentence. I therefore hold that the statements of the two convicted were neither real nor sincere.
104. Moreover, nothing in the statements of the two convicted persons pointed to any excuse for their criminal conduct or the harm they caused. In my view, the absence of this accounting, demonstrates that little weight, if any, could be given to their statements. The weight given to real and sincere expressions of empathy or remorse is evaluated case by case. When a rather cursory, indirect statement is made, it certainly does not show the required state of mind of a convicted person that he/she is prepared to contribute to reconciliation within his/her community, which would merit a mitigated sentence.
105. Under certain circumstances, a convicted person's post-conflict conduct, such as assisting in restoring peace, in addition to showing remorse, can be considered in mitigation. The fact that Fofana demonstrated "commitment to and observance of the Lomé Peace agreement, and . . . work[ed] without any pay with the NGO community in ensuring that members of the CDF remained committed to the peace process within Sierra Leone" indicates that he tried to assist in the reconciliation process of his country. I therefore come to the conclusion that mitigating circumstances, albeit to a very limited amount, can be credited to Fofana. Not having found anything similar in this regard concerning Kondewa, I hold that reconciliation cannot be a reason to reduce his sentence.

Done at Freetown, this May, 28th Day of 2008

Hon. Justice Renate Winter

[. . .]

IX. Annex A – Procedural History

1. Kondewa and Fofana were both indicted on 24 June, 2003 in two separate indictments. Following the joinder of the cases, a consolidated Indictment ("Indictment"), charged Kondewa and Fofana with two crimes against humanity, namely: murder and 'other inhumane acts' (Counts 1 and 3, respectively). The Indictment also charged them with five violations of Article 3 common to

the Geneva Conventions and of Additional Protocol II, namely: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment; pillage; acts of terrorism and collective punishments (Counts 2, 4, 5, 6 and 7, respectively). In addition, the Indictment charged Kondewa and Fofana with one other serious violation of international humanitarian law, namely: enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities (Count 8).

2. On 2 August, 2007, a majority of Trial Chamber I, Justice Thompson dissenting, convicted Fofana and Kondewa of the following: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment; pillage and collective punishments (Counts 2, 4, 5 and 7, respectively). The Trial Chamber found Fofana and Kondewa not guilty of the crimes against humanity of murder and 'other inhumane acts' and of acts of terrorism (Counts 1, 3 and 6, respectively). Finally, a majority of the Trial Chamber, Justice Thompson dissenting, convicted Kondewa of enlisting children under the age of 15 years into an armed group and/or using them to participate actively in hostilities (Count 8). The majority of the Trial Chamber, Justice Itoe dissenting, found Fofana not guilty of the same charge (Count 8).
3. On 9 October, 2007, the Trial Chamber sentenced Fofana and Kondewa to terms of imprisonment for all of the Counts under which they were convicted. The Trial Chamber sentenced Fofana to six (6) years of imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 2); six (6) years of imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 4); three (3) years of imprisonment for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5) and four (4) years of imprisonment for collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7). The Trial Chamber further ordered that the sentences shall be served concurrently. The sentence took effect on 29 May, 2003, when Fofana was arrested and taken into the custody of the Special Court.
4. The Trial Chamber sentenced Kondewa to eight (8) years of imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 2); eight (8) years of imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 4); five (5) years of imprisonment for pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 5); six (6) years of imprisonment for collective punishments, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II (Count 7); seven (7) years of imprison-

ment for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities, an other serious violation of international humanitarian law (Count 8). The Trial Chamber further ordered that the sentences shall be served concurrently. The sentence took effect on 29 May, 2003, when Kondewa was arrested and taken into the custody of the Special Court.

5. The Prosecution and Kondewa filed notices of appeal on 23 October, 2007. On the same date the Prosecution and Kondewa also filed a joint motion for extension of time and page limits for the filing of appeal briefs. On 7 November, 2007 the Appeals Chamber granted the motion, in part, ordering both Parties to file their appeal briefs no later than 11 December, 2007 and limiting the length to no more than 150 pages.
6. In their respective notices of appeal, the Prosecution raised ten (10) grounds of appeal and Kondewa raised six (6) grounds of appeal.
7. On 29 November, 2007, the Prosecution and Kondewa filed a joint motion for extension of time for the filing of response briefs, which was denied by the Appeals Chamber on 6 December, 2007.
8. On 6 December, 2007, Human Rights Watch filed a request for leave to appear as *Amicus Curiae* pursuant to Rule 74 of the Rules of Procedure and Evidence. Fofana filed a response on 10 December, 2007, and the Prosecution filed submissions on 14 December, 2007. The Appeals Chamber denied the request by Human Rights Watch on 21 January, 2008.
9. The Prosecution and Kondewa filed their respective appeal briefs on 11 December, 2007. The Prosecution withdrew its Second Ground of Appeal and therefore did not submit any arguments on that ground. The Prosecution, Fofana and Kondewa filed their response briefs on 21 January, 2008. The Prosecution and Kondewa filed their reply briefs on 28 February, 2008.
10. The Appeals Chamber heard oral arguments on 12 and 13 March, 2008. On 12 March, 2008 Kondewa made an application to amend his Notice of Appeal in relation to his Fourth Ground of Appeal. The Appeals Chamber granted this application.

[...]

10.2 Notes and Questions

10.2.1 *Who Were the Child Victims in the Prosecutor v. Moinina Fofaza and Allieu Kondewa Case?*

The child victims in this case were children *targeted* by the pro-government Kamajors:

Civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were

termed ‘Collaborators’ and specifically targeted by the CDF. Once so identified, these ‘Collaborators’ and captured enemy combatants were unlawfully killed. Victims were often shot, hacked to death, or burnt to death. Other practices included human sacrifices and cannibalism. (*Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, ‘Charges’, para. 11)

The Kumajors had been recruited by the exiled elected President of Sierra Leone Ahmad Tejan Kabbah who had been overthrown in a coup in May 1997 by the dissident members of the Sierra Leone army who named themselves the Armed Forces Revolutionary Council (AFAR) and who asked the Revolutionary United Front (RUF) to join them. The Kumajors made up most of the Civil Defense Forces (CDF) (established by the exiled President) fighting the AFRC and RUF during the period November 1996 – December 1999. The child victims of the CDF were Sierra Leonean who were the children of persons deemed collaborators with the anti-government rebels, but may have included other children as well (i.e., those abducted from neighboring countries to serve as child soldiers though neither the trial nor appeal judgment in the instant case mentions the latter possible additional child victim group). These children and other Sierra Leonian children were targeted specifically to be victims of various international crimes including, amongst others, murder, rape and also, in certain cases, being recruited and used to actively participate in the armed conflict as child soldiers. Further, children younger than age 15 were also recruited and used as child soldiers with direct involvement in the hostilities.

10.2.2 Did International Justice in Prosecutor v. Moinina Fofana and Allieu Kondewa Affirm Respect for the Fundamental Human Rights of the Child?

10.2.2.1 What Was the Definition of “Child Soldier” Relied Upon in the Instant Case, and How Did It Affect the Analysis of the Case with Respect to the Crime of Recruiting and/or Using Child Soldiers Under Age 15 for Active Participation in the Hostilities?

International human rights law relevant to the issue of child soldiering ratified by Sierra Leone: The crimes charged in the instant case relate to the activities of the Civil Defence Forces (security forces made up of militias) that fought in the internal conflict in Sierra Leone from November 1996 to December 1999. The Convention on the Rights of the Child which prohibits the recruitment and use of children under age 15 to actively participate in armed hostilities was ratified by Sierra Leone 2 September, 1990 and, hence, was operative during the time period when the international crimes at issue in *Prosecutor v. Moinina Fofana and Allieu Kondewa* were committed in the territory of Sierra Leone. Note also that the definition of “child soldier” that is relied upon in the Cape Town Principles was

issued in April 1997 also then available during the time period of the crimes charged in this case. “Child soldier,” as defined under the Cape Town Principles, includes any child under age 18 who is part of a governmental or non-governmental armed force – whether allegedly voluntarily “recruited” or “recruited” through coercion – and who is carrying out some kind of function furthering the cause of the armed group, or who is in some kind of bondage to the group such as, but not limited to, sexual slavery in any of its guises:

Any person under 18 years of age who is part of any kind of regular or irregular armed force in any capacity ... other than as purely 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. (Cape Town Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Integration of Child Soldiers in Africa [definition of “child soldier”], from the pamphlet “Cape Town Principles and Best Practices” by Jean Claude Legrand, published by UNICEF April 1997; emphasis added; see Cape Town Principles included in Appendix G.2)

The Cape Town Principle’s definition of “child soldier” is consistent with Article one of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts (CRC-OP-AC, adopted by the UN General Assembly 25 May, 2000, and entered into force 12 February, 2002; included in Appendix G.4) in respect of the age of children protected from direct involvement in hostilities:

Article 1

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

The CRC-OP-AC was ratified by Sierra Leone 15 May, 2002 *after* the international crimes that were charged in the instant case. Sierra Leone made the following declaration with respect to the CRC-OP-AC (Declarations and Reservations to the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict, UN Office of the High Commissioner for Human Rights, available at

<http://www.unhchr.ch/html/menu2/6/crc/treaties/declare-opac.htm>):

Declaration:

With regard to article 3, paragraph 2, of the Optional Protocol to the Convention on the Rights of the Child on the Participation of Children in Armed Conflict, the Government of the Republic of Sierra Leone declares that:

1. The minimum age for voluntary recruitment into the Armed Forces is 18 years;
2. There is no compulsory, forced or coerced recruitment into the National Armed Forces;
3. Recruitment is exclusively on a voluntary basis.

Sierra Leone’s ratification of the CRC-OP-AC thus occurred *subsequent* to the drafting of the statute of the Special Court of Sierra Leone in 2000 and the court’s establishment in January 2002.

The Narrowness of the Definition of Child Soldier in the Statute of the Special Court of Sierra Leone: The Statute of the Special Court of Sierra

Leone, like the Rome Statute of International Criminal Court in The Hague, relies on a narrow, underinclusive definition of “child soldier” (child *under age 15* who is *directly involved* in armed conflict, i.e., who has or is *carrying arms*) when compared, for instance, to the OP-CRC-AC or the Cape Town Principles (which set age 18 as the minimum age for the active participation of persons in armed hostilities and does not restrict the definition to persons of that age range who are carrying, or have carried arms in the hostilities).

Notwithstanding the limited definition of child soldier in the statute of the Special Court of Sierra Leone, all children (persons under age 18), who are or have been part of an armed unit (such as in the CDF), or who are or were affiliated with such a unit in any capacity, are put at risk of grave physical and psychological harms *even if not themselves carrying arms* (as is acknowledged in the Cape Town Principles). Consider then the question of whether there is a need for the definition of “child soldiers” in the enabling statute of any future international criminal court set up to address specific situations (as well as in the Rome Statute) to be broadened to include any child under age 18 years recruited and/ or used in any capacity by governmental or non-governmental armed forces to further their operations even if the children were not themselves carrying arms. This revised definition of “child soldier” then would *not* be limited to children under 15 years who have been directly involved in combat and carrying arms as is the case with the Statute of the Special Court of Sierra Leone. Such a revision would bring these statutes in line with international human rights law as articulated in the CRC-OP-AC. Such revised broader definitions of who is a child soldier would, however, not be applicable retroactively to war crimes involving child soldiering which occurred prior to the broadening of the definition under the applicable international criminal law statute. (Note that as the Special Court of Sierra Leone has a mandate only until the end of 2009, such revisions to the Statute of the Special Court of Sierra Leone are not feasible.)

10.2.2.2 Who Monitors Compliance with the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts?

Note that there is no international body with enforcement power associated with the Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflicts. Rather, the UN Committee on the Rights of the Child monitors the situation with respect to the recruitment and use of child soldiers amongst the various States Parties to the CRC-OP-AC through periodic governmental and NGO reports to the Committee. The Committee thus depends on the cooperation of those states in following through on the Committee’s recommendations for needed changes to ensure better compliance with the CRC-OP-AC.

10.2.3 Does the Recruitment and Use of Children Under Age 15 Years for Active Participation in Armed Conflict Rise to the Level of “a Crime Against Humanity”?

The prohibition against the recruitment and use of child soldiers under age 15 for active participation in hostilities is covered in the Statute of the Special Court of Sierra Leone under Article 4(c): *Other serious violations of international humanitarian law*: “Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities” (the latter being parallel to the war crime offence under Article 8(e)vii of the Rome Statute which uses the same wording and also lists the crime under other serious violations of international humanitarian law rather than under “crimes against humanity”). Can questions be raised, however, about whether there is in fact a legally supportable justification for excluding the crime of recruitment and use of children under age 15 for active participation in armed hostilities from the category of “crimes against humanity” under the statute of the Special Court of Sierra Leone (or under the Rome Statute for that matter)? Does the failure to categorize the recruitment and use of child soldiers under age 15 for active participation in armed conflict as a “crime against humanity” under the Special Court’s statute: (1) unjustly and erroneously undermine the gravity of the offence, and (2) improperly place the crime lower in the implicitly *perceived* hierarchy of international crimes relative to “crimes against humanity” in the eyes of the Special Court of Sierra Leone, and in the public perception than should be the case (even though there is no official ranking of crimes under the Court’s statute and the maximum penalty for any crime is life imprisonment)?

Consider that under Article 7 of the Rome Statute of the ICC (upon which the Statute of the Special Court of Sierra Leone is, in part, modeled) “enslavement” is listed as a crime against humanity as it is under Article 2 of the Statute of the Special Court of Sierra Leone. Recall that consent is *not* a valid legal defence to either “conscription” (coerced recruitment), or to the alleged voluntary recruitment (enlistment), or “self-enlistment” of child soldiers under age 15. Given the foregoing, must the recruitment of children under age 15 and their use as active participants in armed hostilities (as part of a systematic and widespread practice of harm inflicted on the civilian population), then be considered a form of “enslavement” that would qualify the crime as a “crime against humanity”? Consider that the Appeals Court in *Prosecutor v. Moinina Fofana and Allieu Kondewa* endorsed the view that consent is not a valid defence to either “enlistment” or “conscription” of child soldiers under age 15 and on this point cited with approval other authority and the Trial Chamber in the AFRC case to be discussed:

The Appeals Chamber affirms that the crime of recruitment by way of conscripting or enlisting children under the age of 15 years into an armed force or group and/or using them to participate actively in hostilities constitutes a crime under customary international law entailing individual criminal responsibility. Pursuant to Article 4.c. of the Statute, the crime

of conscripting or enlisting children or using them to participate actively in hostilities, constitutes another serious violation of international humanitarian law. The *actus reus* requires that the accused recruited children by way of conscripting or enlisting them or that the accused used children to participate actively in hostilities. *These modes of recruiting children are distinct from each other and liability for one form does not necessarily preclude liability for the other.*

According to the Trial Chamber in the AFRC Trial Judgment, enlistment means “accepting and enrolling individuals when they volunteer to join an armed force or group.” *The act of enlisting presupposes that the individual in question voluntarily consented to be part of the armed force or group. However, where a child under the age of 15 years is allowed to voluntarily join an armed force or group, his or her consent is not a valid defence.* (*Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, paras. 139, 140, emphasis added)

Paragraph 4557 of the Commentary states:

“The principle of non-recruitment also prohibits accepting voluntary enlistment. Not only can a child not be recruited, or enlist himself, but furthermore he will not be ‘allowed to take part in hostilities’, i.e. to participate in military operations such as gathering information, transmitting orders, transporting ammunition and foodstuffs, or acts of sabotage.” (*Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 143, citing with approval the commentary of the Committee of the International Red Cross on the issue of consent and enlistment and use of child soldiers under age 15 for active participation in armed conflict; emphasis added)

Consider also that the Prosecutor in *Prosecutor v. Moinina Fofana and Allieu Kondewa* alleged that sexual violence was perpetrated against, in part, girl soldiers under the age of 15. This would constitute a crime against humanity under Article 2 of the Statute of the Special Court of Sierra Leone:

Article 2

Crimes against humanity

[...] crimes as part of a widespread or systematic attack against any civilian population:

[...]

g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

However, the Court in *Prosecutor v. Moinina Fofana and Allieu Kondewa* declined to hear the evidence due to a flaw in the indictment and certain other procedural reasons. Recall that the Appeal Court in the instant case held (Justice King dissenting), that the Trial Chamber erred in denying the hearing of evidence of acts of sexual violence. Ought this evidence to have been blocked on technical grounds as it was when arguably: (a) there was no intentional misconduct on the part of the Prosecutor; (b) the flaws in the indictment could have been remedied had the Prosecutor been given leave by the Trial Court to make the required amendments to the indictment; and (c) the defendant would have been provided ample notice to defend against the charges and the evidence of alleged sexual crimes against the girl children (many of them child soldiers) and other females?

10.2.4 What Was the Outcome Regarding the Charges Against Fofana of Recruiting and Using Children Under Age 15 for Active Participation in Armed Hostilities?

The majority of the Trial Court, Justice Itoe dissenting, found Fofana *not guilty* on Count 8 regarding the recruitment and use of children under 15 for active participation in armed hostilities (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, “The Verdict and Sentences”, para. 19). The Appeal Court summarized the Trial Court’s reasoning with respect to the acquittal on the child soldier count as follows:

Concerning Fofana’s criminal responsibility under Article 6(1), the Trial Chamber found that the evidence adduced by the Prosecution did not establish beyond reasonable doubt that Fofana planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of child enlistment or use of children to participate actively in hostilities. The Trial Chamber’s reasoning was two fold. First, Fofana’s mere presence at commanders’ meetings does not demonstrate that he encouraged anyone to make use of child soldiers or that he aided and abetted in the planning, preparation or execution of the crime. Second, Fofana’s presence at Base Zero, where child soldiers were present, is not sufficient by itself to establish that Fofana had any involvement in the commission of the crime. The Trial Chamber further held that evidence that the CDF as an organisation was involved in the recruitment of children and the use of them to participate actively in hostilities did not demonstrate that Fofana was personally involved in such crimes. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, “Findings of the Trial Chamber”, para. 118)

Further, the Court of Appeals failed to convict either defendant of the international crime of recruitment and use of child soldiers under 15 for active participation in armed hostilities:

The Appeal Court [...] DISMISSES, Justice Winter dissenting, Ground Five and does not enter additional convictions for Kondewa and convictions for Fofana for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 567)

Can it be argued, however, that in regards to the charge pertaining to Count 8 against Fofana (recruiting and using child soldiers under age 15 for active participation in armed hostilities), the Trial Court has merely restated its conclusions as reasons for the acquittal rather than stating reasons independent of conclusions which support the ruling? Put differently, can it be argued that the Trial Court was obligated to, but did not, provide reasons as to (a) why Fofana’s presence at commanders’ meetings and, hence, knowledge of the use of child soldiers, and his failure to take steps to prevent the recruitment and use of child soldiers under age 15 is not allegedly sufficient to demonstrate his guilt regarding Count 8 (aiding and abetting in the planning, preparation and/or execution of the crime charged under Count 8); (b) why Fofana’s presence at Base Zero, where child soldiers were present, is not sufficient by itself to establish that Fofana had aided and abetted

the commission of the crime given his knowledge that children under age 15 were being recruited and used by the CDF in the armed hostilities, and his failure to prevent the practice, and (c) why the evidence that the CDF, as an organization, was involved in the recruitment of children, some under age 15, and their use to participate actively in hostilities over several years did not demonstrate that Fofana had sufficient knowledge of the practice and was therefore individually also criminally responsible as commander given that he did nothing to stop the practice? If the aforementioned evidence is not sufficient to establish Fofana's individual criminal responsibility with respect to Count 8; then what evidence is required, according to the trial and appeal divisions of the Special Court of Sierra Leone, to prove the involvement of Fofana regarding Count 8? Is the Special Court of Sierra Leone, in its rejection of the aforementioned evidence, setting up some speculative, but unstated and vague criteria which, in effect, sets an unreasonable standard for establishing individual criminal responsibility for the international crime of recruitment and use of child soldiers under age 15 for active participation in armed conflict? Is the failure to prevent or stop the practice of the recruitment and use of child soldiers under age 15 for active participation in armed hostilities, despite knowledge of the activity, not equivalent to encouraging the practice? Recall that the prosecution contended that: (a) Fofana had much more involvement than was found by the Trial Court in the aforementioned crime regarding child soldiers, and that (b) he should have been convicted under 6(1) and 6(3) of the Statute of the Special Court of Sierra Leone which sets out various modes of individual criminal responsibility (including aiding and abetting and failure to prevent or stop the crime where committed by a subordinate).

Note that Article 4(3)(c) of Protocol II of the Geneva Convention (1977) concerning non-international conflicts (acceded to by Sierra Leone in October, 1986 and, hence, operative at the time of the international crimes charged in *The Prosecutor v. Moinina Fofana and Allieu Kondewa*) strictly prohibits both all recruitment and direct and indirect involvement in hostilities of children under age 15 as does the Statute of the Special Court of Sierra Leone. The Special Court of Sierra Leone has jurisdiction over crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II to those conventions, other serious violations of international humanitarian law (including conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities), and certain serious offences under Sierra Leonean law (including certain sexual offences against girls) committed in the territory of Sierra Leone since 30 November, 1996.

Recall that the OP-CRC-AC was ratified by Sierra Leone 15 May, 2002, *after* the time period in which the international crimes occurring in the Sierra Leonean civil conflict took place (which was approximately November 1996 – December 1999), and hence it is not applicable in the instant case. However, note that the CRC Protocol on Children's involvement in Armed Conflict (OP-CRC-AC) under Article 2 prohibits *compulsory recruitment* of *under 18s* by government or non-government

forces, and under Article 4 prohibits *all recruitment by non-State armed groups*. Hence, conscription (compulsory recruitment) of children over 15, but under 18, by the CDF would also have constituted a human rights violation under that Optional Protocol had it been operative at the time. Indeed, all recruitment via conscription or enlistment of persons under age 18 by CDF forces would have been unlawful according to the OP-CRC-AC (had it been ratified at the time). This since the CDF was not a national governmental armed force. In regard to the issue of CDF conscription of child soldiers, note that the Trial Court in the instant case made reference to the coercive practices of the CDF referring, for instance, to the children's "capture" by CDF forces as in the following excerpt:

The evidence shows that the Witness had first been captured by the rebels in 1995 and was *later captured by the CDF* in 1997. Upon his *capture by the CDF*, Witness TF2-021 was forced to carry looted property by the CDF. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 8, emphasis added)

10.2.5 What Was the Outcome Regarding the Charges Against Kondewa of Recruiting and Using Children Under Age 15 for Active Participation in Armed Hostilities?

The majority of the Trial Chamber, Justice Thompson dissenting, found Kondewa personally guilty of the charge of enlisting *one child* under the age of 15 years into an armed group and/or using him to participate actively in hostilities as charged in Count 8 and convicted him accordingly. Kondewa was found guilty as per Article 6 (1) of the Statute of the Special Court of Sierra Leone which provides for assignment of individual criminal responsibility to superiors under certain conditions:

Article 6

Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

[...]

Kondewa was convicted then by the Trial Court of the Special Court of Sierra Leone of recruitment (enlistment) of one child under age 15; namely Witness TF2-

021 (see *The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 116, Prosecutor's fifth ground of appeal regarding recruiting and using children under 15 for active participation in armed hostilities and Kondewa's fifth ground of appeal for the same charge). Kondewa was sentenced to seven years imprisonment by the Trial Court for that charge (Count 8). That sentence was to be served concurrently with the sentences imposed on him by the Trial Court for other international crimes of which he had been convicted (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, "The Verdict and Sentences", para. 22). Note that indictment on the charge of recruitment and/or use of children under 15 for active participation in armed conflict as child soldiers is *not* dependent on whether one or more children were so involved. The Prosecutor maintained that Kondewa was, however, in fact guilty of the charge of recruiting and using children under 15 in direct combat for many more children than just Witness TF2-021. However, Kondewa won his appeal against the charge of recruitment of TF2-021 and thus of recruiting and using any child soldiers under age 15. The Appeal Court considered that he was not personally and individually criminally responsible for such a crime having occurred under his watch as a result of the actions of certain of the militia men under his command. This was the holding of the Appeal Court despite it being undisputed that: (a) Kondewa was the one who supervised and commanded the Kumajors (who made up most of the CDF force) with respect to initiation ceremonies involving the child soldiers (some of which initiation ceremonies he was present for), and (b) Kondewa was responsible for leading or directing the operation of units that included child soldiers as stated in the charges, and undisputed by the parties:

[...] Kondewa, as High Priest had supervision and control over all initiators within the CDF and was responsible for all initiations within the CDF, including the initiation of children under the age of 15 years. Furthermore, he frequently led or directed operations and had direct command authority over units within the CDF responsible for carrying out special missions. (*Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, "The charges", para. 16 (iv))

The Appeal Court held that the child TF2-21 had *already* been enlisted by the rebels into being a child soldier and that therefore his initiation by Kondewa into the CDF was not "enlistment":

It is clear that the enlistment of Witness TF2-021 had taken place before he was initiated by Kondewa. The evidence shows that the Witness had first been captured by the rebels in 1995 and was later captured by the CDF in 1997. Upon his capture by the CDF, Witness TF2-021 was forced to carry looted property by the CDF. (*Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 8)

Is it, however, not routinely the case that such vulnerable children in times of internal conflict are *repeatedly* abducted and captured by various militias; and forced to become child soldiers? Can one argue, in opposition to what the Trial Court in the instant case contended, that the fact that the child witness TF2-021 had had his right to security of the person previously violated by the rebels does *not* negate the fact that the CDF had committed the same offence against the child, nor

exonerate those responsible? The child witness TF2-021 who was at the tender age of eleven at the time of the events in question, and all other children under age 15 in Sierra Leone, were entitled under international law to which Sierra Leone was a party at the time, to special protection from recruitment and use for active participation in armed conflict (i.e., the Convention on the Rights of the Child was ratified by Sierra Leone in September 1990 and Protocol II Additional to the Geneva Convention was acceded to by Sierra Leone in October, 1986 *prior* to the time period of the crimes charged in *The Prosecutor v. Moinina Fofana and Allieu Kondewa*).

The Appeal Court discounted the evidence of witness TF2-021 despite the Trial Chamber of the Special Court of Sierra Leone having regarded his evidence as highly credible and pivotal in their finding that Kondewa had personally initiated TF2-021 and 20 other boys of his age (under 15) as a form of preparation for combat. The Appeal Court cited without questioning the trial chamber findings that:

As part of the initiation ceremony, the boys 'were told that they would be made powerful for fighting and were given a potion to rub on their bodies as protection . . . before going [into] war.' (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 128)

However, the Appeal Court held that:

In the absence of evidence concerning the ages of the other boys, . . . no reasonable trier of fact could have found that the testimony of Witness TF2-021 sufficiently establishes the age of the 20 young boys who were initiated with him. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 129)

Can a legally supportable argument be made nevertheless that, in fact, there is credible evidence for the ages of the other boys at the initiation ceremony in which Witness TF2-021 participated? That evidence being then that provided to the Trial Court by the testimony of Witness TF2-021 which the Trial Court held to be extremely credible? The Appeal Court, however, discounted that evidence based on the *alleged* unreliability of the testimony of Witness TF2-021. That lack of credibility and reliability of the testimony was *inferred* by the Appeal Court *solely based on the age of Witness TF2-021* (eleven) at the time of the Kondewa initiation of the child soldiers at which the boy was present as one of those initiated. In fact, is it reasonable to suggest further that there was corroborating independent evidence for the boy's testimony that children under age 15 had been recruited as child soldiers into the CDF ranks to fight in the conflict? That evidence then being the fact that the CDF had a well-established, and undisputed history of recruiting children under 15 as child soldiers (according to the evidence accepted by the Trial Court, and undisputed even by the defendant; though he claimed their recruitment was unintentional). Recall that the Defendant himself had promised to demobilize the child soldiers including those under 15 during the conflict, but NGOs reported that only a small number of the children were released from the CDF ranks.

Consider the evidence as to whether Kondewa and/or Fofana: (a) were aware of the recruitment and use of child soldiers under age 15 in combat by the CDF, and (b) whether either or both commanders (Moinina Fofana and/or Allieu

Kondewa) had attempted to put an end to such recruitment and/ or to the use of child soldiers under age 15 for active participation in the hostilities and/or to rescue all such children as had been recruited. Based on the evidence, can it be argued that, in fact, neither the Trial Court majority judgment, nor the Appeal Court majority judgment in the instant case fully affirmed the right of the child (as per Article 4(c) of the Statute of the Special Court of Sierra Leone) to be protected from child soldiering if under age 15? Does the final judgment in the case (the Appeal Court final judgment) in respect of the child soldier issue, in practice, ultimately serve to undermine the State's and the international community's obligation to respect the rights of children as persons as stipulated under international human rights and humanitarian law as well as under international criminal law (i.e., the Statute of the Special Court of Sierra Leone)? Put differently, was the right to judicial protection by the Special Court of Sierra Leone and the international community affirmed or denied insofar as the children under age 15 recruited into the CDF forces during the period in question in the instant case is concerned (the right to be protected from child soldiering for children under 15 being stipulated in Article 4(c) of the Statute of the Special Court of Sierra Leone: Other serious violations of humanitarian law)?

Was relevant evidence on the issue of the CDF recruitment and use of children under age 15 for active participation in hostilities simply disregarded as nonprobative by the Appeal Court? The Appeal decision, it will be recalled, affirmed Fofana's acquittal and reversed Kondewa's conviction on Count 8 regarding the child soldier charge. Was the Appeal Court correct or incorrect in its assessment of the command responsibilities of the defendants in the instant case, and whether these responsibilities were executed by the defendants consistent with their obligations under international humanitarian law in respect of prohibitions regarding the use of children under age 15 as child soldiers? Recall in this regard also that Article 6 of the Statute of the Special Court of Sierra Leone sets out the individual criminal liability of superiors for the commission of international crimes committed by subordinates where the former have knowledge that the crimes were about to be committed but did nothing to stop their occurrence, or where the superior in any way instigated or aided and abetted the commission of the crimes? In this regard, consider the comments of Partially Dissenting Justice Winter on the evidence accepted by both levels of court relevant to the issue of the Count 8 charge against Kondewa and Fofana, and their alleged knowledge and participation in the crime charged under Count 8 relating to the recruitment and direct use in armed hostilities of child soldiers under age 15:

14. In the CDF, as opposed to AFRC, the Trial Chamber findings demonstrate a clearly defined enlistment process which consisted of a child receiving ritualized initiation and military training. [...]

15. The Trial Chamber's findings and the evidence in the trial record reveal that the initiation of Witness TF2-021 and the other twenty boys was a major part of the process of enrolling them and accepting them into the CDF. Witness TF2-014 testified that Kamajors went to war at an early age provided that they had been initiated. Expert Witness TF2-EW2 testified that initiation was a stepping stone to recruitment as a soldier because

it was used as a means to prepare men and young boys to participate in the fighting groups. [...]

16. In the circumstances of Kondewa's initiation of Witness TF2-021 and the twenty boys around his age, the Trial Chamber considered the following evidence:

In 1997, when the witness was eleven years old he was captured by Kamajors and forced to carry looted property. The Kamajors subsequently took him to Base Zero for initiation. At Base Zero, the witness was initiated along with around 20 other young boys. Kondewa performed the initiation and told the boys that they would be made powerful for fighting. He gave them a potion to rub on their bodies before going into battle.

After receiving training, TF2-021 was sent on his first mission to Masiaka, where he shot a woman in the stomach and left her there on the ground. On subsequent missions, he fought with the Kamajors at Kenema, SS Camp, Joru and Daru. In 1999 TF2-021 was flown by helicopter into Freetown with three other small boys and their commanders where they were given guns and sent to support ECOMOG who were fighting the rebels at Congo Cross.

17. The Trial Chamber concluded that the evidence clearly showed that on this occasion, the initiates had become fighters. The Trial Chamber also found Witness TF2-021 was eleven years old when he was initiated by Kondewa.

18. *The Trial Chamber also found that Kondewa knew or had reason to know he was initiating an eleven year old boy into the CDF because Kondewa regularly performed initiation ceremonies, issued certificates confirming e.g. the age of eleven and would have known the difference between an eleven year old boy and a fifteen year old boy.* On the basis of these findings, it is clear that Kondewa's initiation of Witness TF2-021 in 1997 was the condition *sine qua non* for Witness TF2-021's enrolment and acceptance into the CDF. Therefore, it was reasonable for the Trial Chamber to conclude that given these circumstances, when Kondewa was initiating the boys "he was also performing an act analogous to enlisting them for active military service." (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, partially dissenting opinion, Justice Winter, paras. 14–18, emphasis added)

24. Other Trial Chamber findings circumstantially show that Kondewa initiated many more than 20 boys under the age of 15 and that these initiations qualified as enlistments into armed forces. In addition to the testimony given by Witness TF2-021, the Trial Chamber also accepted the evidence provided by two other former child soldiers who underwent initiation before participating in active military service. The Trial Chamber found that Witness TF2-140 was initiated into the Kamajor society at the age of 14 along with adults as well as other children who were 10 or 11 years old. Initiation fees were paid to the district initiator who then sent the fees to Kondewa, the High Priest of the Kamajors who was responsible for all of the initiators. The Trial Chamber also found that Witness TF2-004 was initiated at Liya by Muniro Sherif along with many others, including children as young as 10 years old. On the same day that he was initiated, TF2-004 left Liya to go fight in Zimmi. The purpose of the initiation was to fight the war.

25. Furthermore, the Trial Chamber found that the CDF as an organization was involved in the recruitment of children under the age of 15 into an armed force or group. *In particular, in 1999, the CDF registered over 300 children under the age of 14 in a disarmament, demobilization and reintegration program in the Southern Province in Sierra Leone.*

26. The Trial Chamber found that Kondewa performed initiations at Base Zero where he was present during its entire existence and where numerous child soldiers were also present. The Trial Chamber also found that Kondewa used child soldiers as body guards at Base Zero.

27. Given that Kondewa, as the High Priest of the entire CDF organisation, accepted initiation fees of children under the age of 15 years, was the head of all CDF initiators, performed initiations at Base Zero and the fact that no Kamajor would go to war without his blessings, Kondewa must have either personally, or through an initiator subordinate to him, enlisted many children under the age of 15 years into the CDF. [...] (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, partially dissenting opinion, Justice Winter, paras. 24–27, emphasis added)

Based on such evidence as the aforementioned Dissenting Justice Winter held with respect to Kondewa that:

[...] the Trial Chamber erred in failing to find that Kondewa enlisted children into the CDF and grant the Prosecution's Fifth Ground of Appeal in this respect and enter a conviction for Kondewa for enlisting many children into the CDF. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, partially dissenting opinion, Justice Winter, para. 28)

Justice Winter concluded as follows on the issue of Kondewa's culpability with respect to the enlistment and use of child soldiers under 15 for active participation in hostilities:

30. As demonstrated above, Kondewa initiated many children under the age of fifteen into the CDF. The Trial Chamber findings show that Kondewa was aware in performing these initiations for children that the purpose of initiation of many of the children was to prepare them to become fighters. Initiations were of paramount importance in Kamajor society as a prerequisite to participation in active military service. No Kamajor would go to war without Kondewa's blessings. Moreover, Kondewa's job included the preparation of herbs which the initiates smeared onto their bodies to protect themselves from bullets. He himself told initiates that the initiation would make them powerful for fighting. *Furthermore, he also knew or had reason to know as demonstrated already that the children were under the age of fifteen years. On the basis of this evidence, I am also satisfied that Kondewa's initiation of these children offered practical assistance to the CDF's "use" of children under the age of fifteen to participate in active hostilities and that it had a substantial effect on the commission of this crime.*

31. Therefore, I find that the Trial Chamber and the Majority of the Appeals Chamber erred in failing to find Kondewa liable for aiding and abetting the use of children under the age of 15 to participate actively in hostilities. I grant the Prosecution's Fifth Ground of Appeal in this respect and I enter a conviction accordingly. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, partially dissenting opinion, Justice Winter, paras. 30, 31, emphasis added)

With respect to Fofana and the charge under Count 8 relating to the enlistment and use of children under 15 as child soldiers for active participation in hostilities, Justice Winter comments on the evidence thus:

34. Based on the Trial Chamber's findings, in my opinion, no reasonable trier of fact could have come to any conclusion other than that Fofana was aware that children were both enlisted in the CDF and "used" to participate actively in hostilities. Fofana was present at the passing out parade in early January 1998, where children involved in operations were present. At a subsequent commander's meeting held on the same day, where Fofana was present, Norman commented that "adult fighters were doing less than children, just eating and looting." Children were present at this meeting. Fofana also was one of the architects of the Black December Operation, an operation where children were present

everywhere on the frontlines and in support roles. The Trial Chamber also found that Fofana was present at Base Zero for its entire existence, and was the overall boss of Base Zero and that child soldiers were present at various times at Base Zero. At Base Zero, Kondewa also initiated children into the CDF, and the child initiates were trained for war there.

35. Moreover, child soldiers were present throughout CDF operations. *Children who appeared to be under the age of fifteen years were conscripted, enlisted, or used to participate actively in hostilities in the following locations: Kenema, Base Zero, Bo, Daru, Masiaka, Port Loko, Yele, and Ngiehun. They participated directly in combat, often leading the Kamajors into combat, and they served at monitoring checkpoints.* Thus, the only conclusion available to any reasonable Trial Chamber is that Fofana knew that children under the age of fifteen were being enlisted and used to participate actively in hostilities because Fofana, was the ‘Director of War’ for the CDF. He was part of the High Command and actually made many decisions along with Norman and Kondewa and was the overall boss of the Commanders at Base Zero. Significantly, he was also the one responsible for the receipt and provision of logistics to the frontline, including the provision of manpower. *Given that he [author’s note: Fofana] had to have known that the CDF was enlisting and “using” children in active military service, his provision of logistics, manpower, and strategic directions provided practical assistance and had a substantial effect on the commission of the crime of enlisting and using children under the age of fifteen to participate actively hostilities.*

36. [...]

37. Furthermore, there is ample evidence in the trial record that Fofana, as a leader in the High Command of the CDF, did not take a stand in public or at any of the commanders’ meetings against the enlistment or use of children under the age of 15 in military activities. *Although Fofana did not enlist or use child soldiers personally, I am satisfied that his high position within the CDF command structure and his physical presence at meetings where child soldiers were either present or were discussed, constituted tacit approval, encouragement and moral support to the commanders and Kamajors to continue to enlist and use children under the age of 15 to participate actively in hostilities. Fofana’s tacit approval served to leave no doubt in the minds of the Kamajors that they enjoyed his full support in their enlistment and use of child soldiers.* [...]

38. I, therefore, grant the Prosecution’s Fifth Ground of Appeal in this respect as well and find *Fofana* responsible under Article 6(1) for aiding and abetting the crimes of enlistment of children under the age of 15 into armed forces or groups and the use of children under the age of 15 to participate actively in hostilities, crimes punishable under Article 4.c. of the Statute. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, partially dissenting opinion, Justice Winter, paras. 34–38, emphasis added)

In light of the above evidence how was it that: (a) the majority of the Trial Court could find Kondewa guilty as per Article 6 respecting the enlistment and use of only one child under age 15 for active participation in hostilities, and the majority of the Appeal Court acquitted Kondewa of any crime regarding the enlistment or use of child soldiers under age 15, and (b) both the Trial Chamber and the Appeal Court found Fofana *not guilty* of the charges relating to aiding and abetting the recruitment or use of child soldiers under age 15 for active participation in the armed conflict? Is a “reasonable trier of fact”, to use Justice Winter’s terms, compelled to find the reverse; namely that both Fofana and Kondewa are both guilty under Article 6 in relation to the enlistment and/or use of many children under 15 for active participation in the armed conflict? Does

the Appeal judgment in *The Prosecutor v. Moinina Fofana and Allieu Kondewa* (reversing the conviction of Kondewa on Count 8 and affirming Fofana's acquittal at trial regarding the child soldiering charge) communicate an accurate or inaccurate message to the international community about what constitutes a violation of the Statute of the Special Court of Sierra Leone regarding enlistment and use of child soldiers under age 15? Do the judgments in the instant case in regards to Count 8: (a) fail to mitigate the threat to children under age 15 years of being recruited and used as child soldiers for active participation in armed conflict and/or (b) increase the threat to some degree? This by communicating the *false* impression that no prosecutor of an international criminal court will be able to meet what arguably appears to be *in the instant case* unspecified evidentiary requirements for proving the role of superiors in instigating or aiding and abetting the recruitment and/or use of children (either under or over age 15) for active duty in an armed conflict?

Witness TF2-021 was eleven years old when he was initiated by Kondewa according to the Trial Court in the instant case. The Appeal Court held that Kondewa had not enlisted the eleven year old (Witness TF2-021) as a child soldier since the child had previously been abducted and used as a child soldier by the rebel group. Thus, could it be maintained that certain international crimes (i.e., recruitment of children under age 15 as child soldiers in the developing world) are ironically sometimes excused by the international criminal courts precisely due to their commonplace occurrence? Is this what occurred in the instant case when witness TF2-021, having been previously brutalized by his recruitment and use as a child soldier *by the rebels*, was, therefore, considered "damaged goods" already such that his initiation by Kondewa into the Kumajors in preparation for combat was not considered to be a violation of the Statute of the Special Court of Sierra Leone with respect to Article 4(c) Other serious violations of international humanitarian law: Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities?

10.2.6 How Was the Issue of CDF Sexual Violence Against Girls Handled by the Special Court of Sierra Leone in The Prosecutor v. Moinina Fofana and Allieu Kondewa?

The girls who became sexual slaves to the CDF were, according to the Rome Statute, and the Statute of the Special Court of Sierra Leone Statute, the victims of crimes against humanity. The latter statute specifies as a crime against humanity under Article 2(g): "Rape, sexual slavery, enforced prostitution, forced pregnancy

and any other form of sexual violence” when carried out as part of a “widespread or systematic attack against any civilian population”. Such sexual violence is also listed as a violation of international law embodied in the Convention on the Rights of the Child as per Article 34 which requires the State to protect the child from all forms of sexual abuse or exploitation. Recall that the CRC was operative at the time of the events that led to the indictments of Fofana and Kondewa for crimes which occurred between 1996 and 1999 (the CRC having been ratified by Sierra Leone 2 September, 1990).

Note that many of the girls abducted by the CDF were not released by their “bush husbands” for reintegration into the community even at the cessation of hostilities in 2001. Does this then constitute a form of “enslavement” under the Court statute (a crime against humanity)? Notwithstanding the foregoing evidence of sexual violence against girls by the CDF, both the Trial Chamber and the Appeal Court in the instant case, *based on an alleged technical procedural ground*, declined to consider the evidence regarding the role of girls as members of the CDF armed units, and as captives subject to the sexual violence of CDF members. The evidence was discounted in that the Court had denied the prosecution the opportunity to amend the indictment to include counts relating to sexual violence including “forced marriage”:

[...] the Prosecution alleged mixed errors of law and fact and of procedure, respectively, in that the Trial Chamber denied leave for the Prosecution to amend the Indictment in order to add four new counts of sexual violence [...] and in preventing the Prosecution from “leading, eliciting or adducing” evidence of sexual violence [...] (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 29)

The Trial Court held that the accused’s right to a fair trial would be compromised by admission of the evidence on sexual violence due to an alleged late disclosure of the evidence and an alleged lack of factual specifics regarding the sexual crimes. *The evidence was, however, admissible according to the Appeals Court* since the Prosecutor had given ample notice of (a) the allegations of sexual violence by the CDF against civilians, and of (b) the evidence to be relied upon even though the indictment itself had been flawed in this regard:

444. The Appeals Chamber notes that the Prosecution’s Pre-Trial Brief, filed on 2 March, 2004, clearly notes that in relation to Bonthe District, “the evidence will demonstrate that their daughters and wives [civilians] were systematically raped and held in sexual slavery.” The Prosecution’s Supplemental Pre-Trial Brief, filed on 22 April, 2004, alleged that under Counts 3 and 4 of the Indictment, in relation to Bonthe District, both Fofana and Kondewa were being held responsible pursuant to Article 6 (1) of the Statute for subjecting *women and girls* to “sexual assaults, harassment, and non-consensual sex, which resulted in widespread proliferation of sexually transmitted diseases, unwanted pregnancies and severe mental suffering . . . ,” as well as for “committing unlawful physical violence and mental harm or suffering through sexual assaults as well as other acts during the attacks in Bonthe District.” Furthermore, the Prosecution’s opening statement, delivered on 3 June, 2004, referred to the testimony of several witnesses relating to evidence of sexual violence or forced marriage.

445. The Appeals Chamber therefore is satisfied that by the time the Prosecution filed its Admissibility of Evidence Motion, the Accused had timely and consistent notice for nearly one year that acts of sexual violence were being alleged in relation to Bonthe District under Counts 3 and 4 of the Indictment. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, paras. 444, 445, emphasis added)

Notwithstanding the foregoing, the Appeals Court nevertheless upheld the ruling of the Trial Court blocking admission of the evidence of CDF sexual violence against women and girls (for instance against girls abducted into the CDF units). The Appeal Court ruled that: (a) the Trial Court had not made an error of law in this regard, (b) blocking of such evidence would not result in a miscarriage of justice, and (c) consideration of the appeal on this issue fell outside the scope of appellate review since the Trial Court had declined to provide the prosecutor with leave to appeal its refusal to allow amendments to the indictment to include sexual violence charges. However, the end result is that, as Dissenting Justice Winter points out, the accused were not held accountable for the alleged crimes of sexual violence. Recall that the defendants had notice of the sexual crimes alleged via the Prosecutor's pre-trial brief, supplementary pre-trial brief and opening statement. Thus, did the refusal of the Trial Court to admit the evidence of CDF sexual violence against the children in particular, and the Appeal Court's upholding of that decision, in effect, undermine (a) the child victims' fundamental protection rights under international law; (b) the child victims' right to be heard as to their sexual victimization, and (c) the right of the child victims to access a judicial remedy in regards to the sexual violence in terms of having the perpetrators brought to justice for those crimes of sexual violence?

It was suggested by Justice Winter that consideration of the sexual violence evidence would have required a retrial and that the prosecutor did not request a retrial as this would have been impractical. At the same time Justice Winter held that:

[...] refusing to address the merits of the Prosecution's Ground of Appeal [author's note: relating to the denial to admittance of the evidence regarding sexual violence including forced marriage] at the final appeal stage permanently denies the Prosecution the opportunity to have the merits of its contentions adjudicated on appeal, which, in my view, denies it the right to a fair trial. [...] (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, partially dissenting opinion, Justice Winter, para. 73)

Consider then the procedural niceties focused upon by the Appeal Court in this case in ultimately declining the appeal regarding the refusal of the Trial Court to admit the evidence on sexual violence (i.e., the suggestion by the Appeal Court that the Prosecutor ought to have brought a separate indictment regarding the sexual violence charges when the Prosecutor was faced with the Trial Court's denial of his request to amend the original indictment. This even though the Trial Court's denial of leave to amend the indictment was issued 6 months after the Prosecutor's motion and two months after the trial proper had started). Does such a focus in upholding the trial court's blocking the evidence in regards to sexual violence itself amount to procedural unfairness for the victims in that fundamental due process was accorded

the defendants in giving them notice of the sexual violence charges but yet that matter was not tried?

10.2.7 Should the Alleged Acts of Sexual Violence Against Children Committed by the CDF Have Been Dealt with Under Article 5(a) of the Statute of the Special Court of Sierra Leone Which Deals with Crimes of Violence (Including Sexual Violence) Against Girl Children Under Sierra Leonean Law?

Note that the alleged role of Fofana and Kondwa in aiding and abetting or not preventing sexual violence against girl children by the CDF was also not dealt with by the Special Court under the Statute of the Special Court of Sierra Leone Article 5 (a) provisions regarding crimes of violence against girls (as the evidence was not admitted into trial due to the alleged irreversible procedural technical errors of the Prosecutor in this regard).

10.2.8 Were the Child Victims Regarded as Having Juridical Personality in Their Own Right and the Right to “Special Protection” as Children Under International Law, or Were the Child Victims’ Rights Subsumed in Some Way Under the Rights of the Adult Victims?

In the instant case, the Prosecutor did not formulate the charges relating to murder and other charges relating to inhumane treatment as being “aggravated” offences due to the fact that there were child victims. Rather, the focus of the charges was on the fact that they were part of a widespread systemic attack against civilians. Thus, might it be correctly argued that the right of children to special protection under international humanitarian law (i.e., Additional Protocol II to the Geneva Conventions), and under international human rights law (i.e., the Convention on the Rights of the Child) was not considered in the charging or sentencing in regards to the counts other than that relating to the recruitment and use of child soldiers. Only the offence relating to recruitment and use of child soldiers under age 15 for active participation in hostilities focused on the status of the victims as children as central to the offence. (However, as discussed, both of the defendants in the instant case were acquitted on the charges regarding child soldiers under age 15. This despite the undisputed evidence, according to the Dissenting Justice, that both commanders had knowledge of the use of child soldiers under 15 for direct involvement in the armed hostilities and the evidence of the long history of the CDF using children under 15 in combat.)

10.2.9 *Was There an Acknowledgement of All the Offences Under International Law Committed by the Defendants?*

According to the prosecution, and to the partially dissenting Justice Winter, the acquittal of the defendants on Count 8 regarding aiding and abetting the enlistment and use of children under age 15 for active participation in armed hostilities was unfounded. If the dissenting justice and the prosecutor's view on this issue is correct, then the Appeal Court in the instant case failed to properly acknowledge the offence of superiors contributing in some way (aiding or abetting), or failing to intervene to stop the crime charged in Count 8. Consider then the Appeal Court's references to the elements required for individual criminal responsibility:

51. The Trial Chamber held that the *actus reus* of instigating requires "an act or omission, covering both express and implied conduct of the Accused, which is shown to be a factor substantially contributing to the conduct of another person committing the crime," and that there must be a "causal relationship between the instigation and the perpetration of the crime . . . although it is not necessary to prove that the crime would not have occurred without the Accused's involvement." The Trial Chamber also held that the *mens rea* of instigating is an intention "to provoke or induce the commission of the crime," or a "reasonable knowledge that a crime would likely be committed as a result of that instigation." Neither of the parties takes issue with the Trial Chamber's definition of instigation.

[...]

54. The Prosecution argues that because the *actus reus* of aiding and abetting is satisfied, the *actus reus* is also satisfied for instigating. However, the Trial Chamber found, relying on ICTY Appeals Chamber jurisprudence, that unlike the *actus reus* of instigating, the *actus reus* of aiding and abetting does not require a causal link between the act of aiding and abetting and the commission of the crime. The Appeals Chamber holds that the *actus reus* of instigating requires a causal link which aiding and abetting does not and accordingly disagrees with the Prosecution's proposition. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, paras. 51, 54)

Is it arguably the case that the type of factual evidence regarding aiding and abetting and superior responsibility with respect to those crimes for which the defendants were found guilty does not differ from that which the Prosecution held pointed to aiding and abetting and superior responsibility (under Article 6(1) and 6(3) respectively of the Statute of the Special Court of Sierra Leone) regarding: (a) the enlistment and/or use of children under age 15 as child soldiers actively participating in the hostilities, and (b) the systematic sexual violence against civilian female children (many of whom were abducted as child soldiers) and adults? Given that both commanders did nothing to stop the aforementioned international crimes, and the well established pattern of activity of the CDF of committing such international crimes, is it reasonable for the Appeals Court to hold, as it did, that while Fofana and Kondewa were present at military strategy meetings, they cannot be held responsible for the commission of the CDF international crimes relating to: (a) the recruitment and use of child soldiers under age 15 as active participants in armed hostilities or to (b) the sexual violence against children

(assuming we accept the Appeal Court holding that the Prosecutor gave sufficient notice of the crimes of sexual violence against children and that such evidence should have been admitted)?

Is it reasonable to hold that the *actus reus* of aiding and abetting should be considered as qualitatively different from that of instigating, the latter being an offence which the Appeal Court held to be more serious in its sentencing consequences than is aiding and abetting? Can it be argued that aiding and abetting by superior officers is an implicit authorization for the instigation of further such atrocities such that the distinction the Appeal Court draws between the two in the instant case is an empty semantic exercise? Recall in respect of the consideration of what role Fofana and Kondewa may have played in facilitating international crimes against children that the Appeal Court acknowledged the following:

In addition to his spiritual responsibilities, Kondewa was, together with Norman and Fofana, one of the three people regarded as what was referred to as the “Holy Trinity” at Base Zero; the three of them were the key and essential components of the leadership structure and were the three people who according to the Trial Chamber actually made the decisions and nobody could make a decision in their absence. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 74)

Given (a) the role of Fofana and Kondewa in the command structure of the CDF and (b) the repeated pattern of atrocities committed against civilians, including children, by the CDF forces under their command, would a reasonable trier of fact still find them not guilty of aiding and abetting and superior responsibility with respect to the recruitment and use of child soldiers under 15 and other inhumane acts committed against children such as sexual violence?

10.2.10 Were the Sentences Meted Out to the Defendants in the CDF Case, The Prosecutor v. Moinina Fofana and Allieu Kondewa, Adequate in Promoting the Rights of the Child?

The fact that many of the most heinous crimes committed by the CDF involved child victims was noted by the Appeal Court. For example:

The Chamber notes that many of the victims of these crimes were young children and women, and therefore belong to a particularly vulnerable sector of society. For instance, we note our findings of the hacking to death by the CDF/Kamajors of a boy named Sule at a checkpoint in the Tongo area, the murder of a 12 year old boy in Talama, the murder of an unidentified woman who was alleged to have cooked for the rebels in Bo, and the atrocious murder of the two women in Koribundo as described earlier. (Cited in the *The Prosecutor v. Moinina Fofana and Allieu Kondewa*, appeal judgment, para. 48)

However, given that the sentencing did *not* take into account the aggravating factor of there being child victims, can it be said that the sentences in the CDF case were in fact not fully consistent with respect for children’s human rights, or the promotion and protection of those rights (including the right to special protection under

international humanitarian law)? Consider that with respect to the crimes of systematic murder and torture as occurred in this case (and acts referred to at points in the appeal judgment by terms such as “cruel treatment” or “other inhumane acts”), both Fofana and Kondewa were found guilty both as aiders and abettors and/or due to their superior responsibility depending on the various instances. Those aforementioned crimes, of which children were also the victims, are *jus cogens* (meaning they are of the highest severity under international law and no State may disregard the need to prosecute such crimes, or attempt to contract out of prosecuting them by any international agreement or treaty). Can it be argued then that the sentences of 15 and 20 years total are inconsistent with the gravity of the offences for which the defendants Fofana and Kondewa were found to be implicated? Fofana was ordered to spend 15 years total imprisonment and Kondewa twenty years total *with all sentences running concurrently for each guilty verdict for each man*. Can the argument also be made that the fact that the sentences for such grave international crimes as systemic murder were set to run concurrently also serves to undermine respect for the human rights of the victims especially the child victims who were entitled to the highest standard of protection under the Additional Protocol II to the Geneva Conventions and other international law?

10.2.11 Was the International Obligation to Afford Children Special Protection Acknowledged and the Nature of the Offence Considered Aggravated by the Fact that the Victims Were Children?

Both the Trial and Appeal Court noted the special vulnerability of the CDF child victims and hence the particular severity of the harms done to them as children:

The Trial Chamber also noted that many of the victims were young children and women, and were therefore particularly vulnerable, and considered the crimes to have had a “significant physical and psychological impact on the victims of such crimes, on the relatives of the victims, and on those in the broader community.” In particular, the Trial Chamber noted the “lasting effect of these crimes on victims such as TF2-015, who was the only survivor of an attack on 65 civilians who were hacked to death by machetes or shot, and who was himself hacked with a machete and rolled into a swamp on top of the dead bodies in the belief that he was dead.” (The Prosecutor v. Moinina Fofana and Allieu Kondewa, appeal judgment, para. 455)

However, is it the case that the Trial and Appeal Court in the instant case did *not*, in their analysis of the case, in actuality consider the vulnerability of children in that they did not fully consider the implications of the special protections that are owed children under international human rights and humanitarian law? Recall in this regard also the fact that though there were child victims of the CDF atrocities, this was not considered an aggravating circumstance with extra penalty attaching. Does the failure of the Trial and Appeal Court to fully consider the special protections owed child victims constitute a significant error in law resulting in a miscarriage of

justice in *The Prosecutor v. Moinina Fofana and Allieu Kondewa*? Had the special duty under international humanitarian law owed children in guaranteeing their protection been considered in the case, would this have affected the analysis of whether or not the defendants had superior responsibility (i.e., with respect to recruitment and use of child soldiers under age 15 for active participation in armed conflict and other violence against children) and perhaps also the sentences imposed? Might it have been legally justifiable, considering the special protections to which children are entitled under international law, for the Trial and Appeal Court in the instant case to hold that Fofana and Kondewa as CDF commanders were under a duty to *proactively* ensure, i.e., that no children under age 15 were targeted for recruitment as child soldiers by the CDF; and that no child of any age was abducted and forced to participate, etc. (especially given the CDF longstanding practice of recruiting child soldiers)?

10.2.12 *Did the Appeal Judgment in Prosecutor v. Moinina Fofana and Allieu Kondewa Itself Serve as Adequate Public Acknowledgement of the International Crimes Committed Against Child Victims by the CDF?*

As noted, there was an acquittal of the defendants on the child soldiering related charges. This, despite the long history of the CDF using child soldiers under age 15 for active participation in the hostilities and the intimate knowledge both defendants had of CDF command operations. There was also a refusal by the Trial Court (upheld on appeal) to admit evidence of sexual violence against children. Is it fair to maintain then that the appeal judgment in the instant case is a public acknowledgement of the *failure* of the international community to hold perpetrators accountable for such crimes as the enlistment and use of child soldiers under age 15 and sexual violence against children? Put differently, does the appeal judgment in *Prosecutor v. Moinina Fofana and Allieu Kondewa* highlight the ease with which perpetrators can *in effect* achieve immunity for the aforementioned crimes based on the court's largely discretionary interpretation of whether the facts rise to the level of aiding and abetting or superior responsibility?

10.2.13 *Were the Principles of the Convention on the Rights of the Child Reflected in the Treatment of the Case and the Remedy Afforded the Victims?*

Though Sierra Leone ratified the CRC in 1990, and the crimes alleged by Fofana and Kondewa occurred between 1996 and 1999, in many respects, as discussed, there was no consideration of the special protections accorded children under international law (as reflected in the failure to consider the crimes as aggravated due to there being child victims and in the sentencing being more severe as a result).

Given the foregoing and the fact that the CDF commanders were not held accountable for the undisputed CDF use of child soldiers under age 15 or their sexual violence against children, is it fair to contend that the principles of the CRC were in fact *not* relied upon in analyzing the case or in the sentencing?

10.2.14 Did the Primacy of the Hybrid International Special Court of Sierra Leone Facilitate International Accountability for the International Crimes Committed Within the State?

Article 8 of the Statute of the Special Court of Sierra Leone stipulates what is the jurisdiction of the Sierra Leonean national courts vs. the Special Court of Sierra Leone with respect to the cases against those most responsible for the international crimes committed during the civil war in Sierra Leone since 1996:

Article 8

Concurrent jurisdiction

The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Yet, being a hybrid international court, was the Special Court of Sierra Leone at risk of being as vulnerable to political and cultural context factors which ought to have been irrelevant as might be a national court? In this regard, was the alleged CDF “political righteousness” in committing atrocities in the name of promoting democracy improperly considered by the Trial Court in the instant case as a mitigating factor? Justice Winter made the following cautionary statement with regard to the operation of hybrid international criminal courts:

The Special Court for Sierra Leone, being a “hybrid” international criminal court, must never look into the “righteousness” of any particular political cause. Not being a domestic court, it cannot also accept any cultural consideration as excuses for criminal conduct. The principle of individual criminal responsibility requires that an accused be held responsible for his acts or omissions, whatever his status. In the case where concrete acts or omissions of an accused have an impact on the commission of the crime in question, it is irrelevant, for instance, if this accused believes that he has supernatural powers or if he uses the cultural superstitions of people involved. (*The Prosecutor v. Moinina Fofana and Allieu Kondewa*, partially dissenting opinion, Justice Winter, para. 4)

The Trial Court in the instant case, at least according to the Prosecutor, had in fact accepted as a mitigating factor that the CDF was ostensibly fighting for democracy. The Appeal Court found that the Trial Court had allegedly *not* committed this error in law (though this is a matter of considerable debate amongst commentators). The Appeal Court stressed that consideration that the CDF were

allegedly pro-democracy was not a proper factor in mitigation. Might it be argued in fact that committing atrocities, as did the CDF, is far removed from being a force which is pro-democracy in that crimes against humanity, war crimes and other such international offences are wholly inconsistent with democratic values which are based on respect for fundamental human rights?

10.2.15 What Were the Special Court of Sierra Leone's Conclusions Regarding the Issue of "Systemic Attacks Against Civilians" by the CDF Forces as an Element to Be Proved Respecting Certain of the Specific International Crimes Charged in the Case?

The Trial Court in *The Prosecutor v. Moinina Fofaza and Allieu Kondewa* held that *systemic attacks against civilians had not been proven by the Prosecutor as an element of certain of the crimes charged*. This, as the objective of the CDF, according to the Trial Court, was the overthrow of the anti-government militia rebels, and the rebels, not civilians, were the primary target according to the Trial Court. However, the Appeal Court (contrary to the submissions of the Prosecutor on that issue) held that the Trial Court did *not* in fact consider the pro-government stance of the CDF as any kind of justification for attacks on civilians which the Appeal Court agreed would be a serious error of law had it occurred. Consider on this point the following excerpts from the appeal judgment:

240. The Prosecution submits that under the case law of the ICTY and ICTR, the expression that the civilian population be the "primary object of the attack" was not intended to mean that widespread or systematic attacks against civilian populations will not constitute crimes against humanity merely because they occurred during attacks on opposing forces or in the course of operations that had a military objective. It further submits that the Trial Chamber erred in law in finding that the fact that CDF "fought for the restoration of democracy" may in any way be a material consideration for the purpose of crimes against humanity.

[...]

247. *In the opinion of the Appeals Chamber, it is manifestly incorrect to conclude that widespread or systematic attacks against a civilian population cannot be characterised as crimes against humanity simply because the ultimate objective of the fighting force was legitimate and/or aimed at responding to aggressors.* The Appeals Chamber deems it necessary to emphasise that rules of international humanitarian law apply equally to both sides of the conflict, irrespective of who is the "aggressor," and that the absolute prohibition under international customary and conventional law on targeting civilians precludes military necessity or any other purpose as a justification. *The Appeals Chamber holds that it is no justification that the perpetrators of a crime against humanity were fighting for the restoration of democracy.*

248. The Trial Chamber's finding shall not be interpreted as legitimizing any unlawful acts committed against the civilians. The Trial Chamber's Judgment, read as a whole, makes it clear that the Trial Chamber underscored the prohibition on targeting civilians and the criminality of any acts directed against such protected persons. In its description of the

applicable law on crimes against humanity, the Trial Chamber recalled that “there is an absolute prohibition against targeting civilians in customary international law”.

249. For these reasons, the Appeals Chamber is unable to find that references by the Trial Chamber to the purpose for which the CDF was fighting was a decisive consideration in its determination of the general requirements for crimes against humanity. (*The Prosecutor v. Moinina Fofaza and Allieu Kondewa*, appeal judgment, paras. 240–249, emphasis added)

The question arises then as to whether a hybrid court is more at risk than is a non-hybrid international court (i.e., with no necessary representation of judges from the State where the crimes took place) of considering what should be irrelevant political factors (i.e., whether the defendants were part of the pro-democracy or pro-government forces or the converse, etc.) in assessing the case.

10.2.16 Was There Any Reliance by the Special Court of Sierra Leone in The Prosecutor v. Moinina Fofaza and Allieu Kondewa on Alleged Mitigating Factors Which Should Have Been Regarded as Merely Irrelevant Culture-Specific Rationales for the Commission of International Crimes by the CDF?

Alleged Culture-Specific Rationales for International Crimes: Can it be argued that the Special Court of Sierra Leone, in some respects at least, did in fact accept culture-specific rationales for the commission of grave international crimes by the CDF? For instance, is the lack of formal education (more common in developing States), and lack of military training of the defendants – accepted by the majority of the Trial and Appeal Court as mitigating factors – in fact but such an indefensible alleged cultural excuse for international crimes? The Appeal Court commented on the issue of lack of formal education and of military training in mitigation as follows:

Under the heading “Lack of Formal Education or Training,” the Trial Chamber stated that it was:

aware that both men were propelled in a relatively short period of time, from civilian life to an effective position of authority in a very brutal and bloody conflict, with no adequate training for the roles which they were to play. The Chamber finds that it is only reasonable to take account of the fact that inexperience in difficult situations, [sic] does increase the likelihood of making the wrong decisions. Whilst this in no way reduces the gravity of the crimes which were committed, the Chamber recognises it as a factor in mitigation of sentence. (*The Prosecutor v. Moinina Fofaza and Allieu Kondewa*, appeal judgment, para. 491)

Consider also the following excerpts from the submissions of the Parties on the issue of lack of formal education and of military training of the defendants as potential mitigating factors, and the Appeal Court’s analysis and conclusions on this issue:

492. At the Sentencing Hearing, counsel for Fofana stated that “Fofana may not necessarily have been young, but he certainly lacked experience and was thrown into the desperate situation and asked to act.

[...]

493. The Prosecution concedes that a Trial Chamber *may* be entitled to take lack of training into account for sentencing purposes, but argues that the circumstances must amount to an accused who has been “very quickly propelled from civilian life to being a military commander, and has been immediately required, without any adequate training, to make numerous quick decisions in the heat of battle while under enemy fire.” According to the Prosecution:

To be a mitigating factor, there must in each individual case be established facts which show that the lack of training affected the ability of the accused to comply with the requirements of international law, and therefore somehow mitigated the moral culpability of the accused.

494. The Prosecution argues that in the present case, these conditions did not exist or were not established by the Trial Chamber.

495. Fofana responds that, as a matter of law, the Trial Chamber could consider as a mitigating circumstance the “difficult circumstances in which a convicted person had to operate.” Moreover, even without this precedent, Fofana submits that the Trial Chamber could determine what constitutes a mitigating circumstance as an exercise of its discretion.

496. Fofana responds that, contrary to the Prosecution’s submissions, the Trial Chamber’s statement that it was “aware” that Fofana and Kondewa were propelled in a relatively short period of time is an indication that the Trial Chamber took into consideration the evidence adduced during the trial to arrive at this conclusion. In particular, Fofana points to the Trial Chamber’s findings that Base Zero (Talia) was established by Norman in September 1997 and that shortly afterwards Fofana was appointed “Director of War,” showing he was rapidly propelled from civilian life to an “effective position of authority.” Fofana argues that the Prosecution has not demonstrated that the Trial Chamber erroneously considered this factor in mitigation.

497. Kondewa responds that “[i]n the *Bisengimana* case, the ICTR Trial Chamber held that the fact that the Accused person was educated amounted to an aggravating circumstance. By parity of reasoning, Counsel submits that the lack of military training and formal education is a mitigating circumstance.” (*The Prosecutor v. Moinina Fofaza and Allieu Kondewa*, appeal judgment, paras. 492–497)

Discussion of the Appeal Court on lack of formal education and of military training of the defendants as potential mitigating factors:

498. As far as mitigating circumstances are concerned, Article 19(2) of the Statute provides that the Trial Chamber should take into account the individual circumstances of the convicted persons. *The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as an aggravating or mitigating circumstance.*

499. Accepting that, as a matter of law, the surrounding conditions including the convicted person’s lack of training can be a mitigating circumstance, the Appeals Chamber opines that the Prosecution has failed to demonstrate that the Trial Chamber erred in considering Fofana’s and Kondewa’s individual circumstances, namely: their inadequate relevant preparation and training for their roles in the armed conflict as a mitigating circumstance. (*The Prosecutor v. Moinina Fofaza and Allieu Kondewa*, appeal judgment, paras. 498, 499, emphasis added)

Lack of Education and lack of Military Training as Alleged Mitigators of Guilt for International Crimes: Can it be argued that one needs no formal education or formal military training to deduce that aiding and abetting, or failing to intervene to do what one can to end the inhumane treatment and systematic murder of civilians is so depraved and morally corrupt that it must be unlawful? If that argument be correct, is it therefore improper to consider level of education and of military training as relevant factors in mitigation (or as aggravating factors)? Does the acceptance of lack of formal education and the fact of civilians being thrust into military command roles as factors in mitigation serve to denigrate the humanity of persons in the developing world who find themselves as victims engulfed in an armed conflict? Consider in this regard that persons in the developing world more often fit the aforementioned lower level of educational and military training profile, and, hence, would be more likely as defendants to make successful use of such factors as mitigators at trial. Does acceptance of the defendant's lack of formal education and/or of military training as mitigators then, *in effect*, hold that persons in the developing world should be held less accountable for international crimes given their disproportionately high lack of education and/or military training relative to accused persons in the developing world? Does the acceptance of such mitigating factors in the prosecution of defendants for crimes against humanity, war crimes and other inhumane acts translate thus into an unjustifiably lower standard of international justice for victims in the developing world (i.e., less chance that the perpetrators of international crimes will be held fully accountable and that the victims will receive a full measure of justice via the sentences that are imposed on the perpetrators)? Does one really need a higher level of formal education or adequate military training to know that preparing an eleven year old for combat via an initiation ceremony (as allegedly did Kondewa) is unjustifiable under any moral or legal standard?

10.2.17 Would Justice Have Been Better Served by Advancing the CDF Case Before the International Criminal Court Had This Been Possible Rather than Before the Hybrid Special Court of Sierra Leone?

The implications of the hybrid nature of the Special Court of Sierra Leone for the proper administration of justice: The issue arises as to whether the hybrid nature of the Special Court of Sierra Leone in fact facilitated or militated to any degree against the proper administration of justice for either or both the defendants and victims. Consider whether the ICC in The Hague would be less impacted by the political context in which the international crimes took place than would be the case for a hybrid court (which includes both State judges and international judges from outside the State where the crimes occurred). Consider in this regard the following appeal court conclusions which address the Trial

Court's consideration of irrelevant factors *in sentencing* such as the allegedly politically righteous objectives of the CDF:

7. Conclusions on Sentencing

554. The Appeals Chamber recalls the standard of review of sentencing decisions that have earlier been set out in this Judgement. Relying on those standards, the *Appeals chamber notes that it has decided that the Trial Chamber was in error in taking into consideration "just cause" and motive of civic duty in exercising its sentencing discretion.*

555. A careful perusal of the sentencing judgement shows clearly that those considerations formed the most important factors that influenced the exercise of the Trial Chamber's discretion. Indeed, the Trial Chamber stated that the fact that Fofana and Kondewa "stepped forward in the efforts to restore democracy to Sierra Leone, and, for the main part, they acted from a sense of civic duty . . . significantly impacted the influence to the reduction of the sentences to be imposed for each count." *In the circumstances, the Appeals Chamber comes to the conclusion that the Trial Chamber proceeded on an erroneous basis and that it is entitled to revise the sentences handed down by the Trial Chamber. (The Prosecutor v. Moinina Fofaza and Allieu Kondewa, appeal judgment, paras. 554, 555, emphasis added)*

563. *The Appeals Chamber here emphasizes that the crimes of which the accused have been convicted are international crimes and not political crimes, in which consideration of national interest may be a relevant issue. What has to be paramount are international interests in protecting humanity.* Such offences as Fofana and Kondewa have been convicted of are of the nature of such "offences that do not affect the interests of one State alone, but shock the conscience of mankind." They are not political offences. [. . .]

564. What should be one of the paramount considerations in the sentencing of an accused person convicted of crimes against humanity and war crimes is the revulsion of mankind, represented by the international community, to the crime and not the tolerance by a local community of the crime; or lack of public revulsion in relation to the crimes of such community; or local sentiments about the persons who have been found guilty of the crimes. [. . .] *(The Prosecutor v. Moinina Fofaza and Allieu Kondewa, appeal judgment, paras. 563, 564, emphasis added)*

Implications of considering the political motivations of those who commit international crimes: Was there a significant delay in reaching the final outcome in the instant case, in part at least, due to the complications arising from the Trial Court's consideration of non-relevant material regarding sentencing? Is there a continuing risk that hybrid courts may, in future, consider irrelevant socio-political factors in their analysis of the case and/or sentencing judgments (i.e., the fact that those who committed atrocities were allegedly pro-democracy), or is this unlikely given the instant case as a precedent ruling on this issue? What might be the psychological impact on surviving victims of having an international court (such as the Special Court of Sierra Leone in *The Prosecutor v. Moinina Fofaza and Allieu Kondewa*) consider in mitigation, to any extent, the perpetrators' alleged pro-democracy objectives? In this regard, in the instant case, consider the gravity of the international crimes for which the defendants were convicted, and the fact that the victims included children:

[. . .] 85. In executing this legitimate mission however, at a later stage that appears in the Indictment, and instead of limiting themselves and directing these attacks on legitimate military targets and objectives where collateral damage, if any ensued at all, could be

perceived as justifiable, the Accused Persons and their Kamajors, as has been elucidated in the factual and legal findings of the Judgement, went beyond these acceptable military and legal limits and carried out killings and other atrocities against unarmed civilians who they characterised and designated as 'rebel collaborators'. *We find that these atrocities were perpetrated, even though the evidence clearly established, and we so found, that the victims in fact, were disarrayed Sierra Leoneans including children fleeing for their lives and for safety from the bloody exchange of enemy fire, and further, that these civilian captives or fugitives, were unarmed and were not in the least, participating in hostilities.* In fact, we note here that the crimes for which they have been found guilty were perpetrated by the Accused Persons and CDF/Kamajor fighters when combat activities and operations against the enemy AFRC forces were already over. (*The Prosecutor v. Moinina Fofaza and Allieu Kondewa*, trial judgment, para. 85, cited by the appeal judgment, para. 558, emphasis added; see para. 558 also for further citations from the trial court detailing the nature of some of the known atrocities committed by the defendants as persons with superior responsibility who did not intervene to end the ongoing atrocities committed by the CDF and/or as aiders and abettors to those atrocities)

10.2.18 Were the Victims and Their Families Accorded Justice Under International Law by the Special Court of Sierra Leone in The Prosecutor v. Moinina Fofaza and Allieu Kondewa?

Consider whether or not the increased sentences of 15–20 years imposed by the Appeal Court are commensurate with the severity of the atrocities for which the defendants were directly or indirectly responsible. Note that the defendants, though central command of the CDF, were not held accountable for certain activities of the CDF which occurred as widespread and systematic violations of international law (i.e., the recruitment and use of children, many of whom were under 15, for active participation in armed conflict and sexual violence against children). In consideration of the sentences imposed then were the victims and their families accorded justice under international law by the Special Court of Sierra Leone in *The Prosecutor v. Moinina Fofaza and Allieu Kondewa*?

10.2.19 What Was the Impact, If Any, of the Decision in The Prosecutor v. Moinina Fofaza and Allieu Kondewa on the Possibility for Rehabilitation and Re-integration of Ex CDF Child Soldiers?

Can it be argued that there was an error in law in the failure of the Special Court of Sierra Leone to hold CDF commanders charged in the instant case accountable (as aiders and abettors and/or persons with superior responsibility) for the CDF pattern of child soldier recruitment and use in hostilities? If so, did this failure

adversely impact the possibility for rehabilitation and re-integration into the community of the surviving CDF child soldiers of any age under 18 (i.e., given the lost opportunity to place the ultimate criminal liability for atrocities committed by child soldiers squarely on those who recruited the children into the CDF forces in the first instance)? Note that the Statute of the Special Court of Sierra Leone was formulated so as to take such a rehabilitative approach to dealing with child soldiers who had committed international crimes in that: (a) the court had no jurisdiction to prosecute children under age 15 for international crimes committed as child soldiers, and (b) with respect to those child soldiers aged 15–18 who had committed such crimes the strategy was to provide the children with educational and rehabilitative training; counseling, vocational training and the like in the hopes of re-integrating them into the community rather than to incarcerate the children:

Article 7 of the Statute of the Special Court of Sierra Leone

Jurisdiction over persons of 15 years of age:

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.

2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Chapter 11

The Special Court for Sierra Leona,

Case 8: *Prosecutor v. Brima, Kamara and Kanu*

The full judgment is available at <http://www.unhcr.org/refworld/publisher,SCSL,CASELAW,48441e412,0.html> (accessed 22 June 2009).

11.1 Excerpt from the Judgment in the Appeals Chamber of February 22, 2008

[Author's note: internal footnotes have been omitted.]

In the Appeals Chamber

Before: Justice George Gelaga King, Presiding Judge
Justice Emmanuel Ayoola
Justice Renate Winter
Justice Raja Fernando
Justice Jon M. Kamanda

Registrar: Herman von Hebel

Date: 22 February 2008

Prosecutor Against

Alex Tamba Brima ("Brima")
Brima Bazzy Kamara ("Kamara")
Santigie Borbor Kanu ("Kanu")
(Case No. SCSL-2004-16-A)

Judgment

[...]

I. Introduction

A. The Special Court for Sierra Leone

1. In 2000, following a request from the Government of Sierra Leone, the United Nations Security Council authorised the United Nations Secretary-General to negotiate an agreement with the Government of Sierra Leone to establish a Special Court to prosecute persons responsible for the commission of crimes against humanity, war crimes, other serious violations of international humanitarian law, and violations of Sierra Leonean law during the armed conflict in Sierra Leone.
2. As a result, the Special Court for Sierra Leone ("Special Court") was established in 2002 by an agreement between the United Nations and the Government of Sierra Leone ("Special Court Agreement"). The Special Court's mandate is to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.
3. In particular, the Statute of the Special Court ("Statute") empowers the Special Court to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, other serious violations of international humanitarian law and specified crimes under Sierra Leonean law.

B. The Armed Conflict in Sierra Leone

4. The armed conflict in Sierra Leone started in March 1991 with an attack initiated in Kailahun District by an organised armed opposition group known as the Revolutionary United Front ("RUF") under the leadership of Foday Sankoh, a former soldier of the Sierra Leone Army ("SLA"). The RUF's aim was to overthrow the Government of Sierra Leone. By the end of 1991, the RUF held consolidated positions in a number of Districts within Sierra Leone and in the years that followed it took control of more Districts. By early 1995, the RUF was in control of large parts of Sierra Leone and had established a stronghold in the north of the Country. The RUF's success triggered the emergence of local pro-Government militias. These militias primarily consisted of traditional hunters and were known as the Civil Defence Forces ("CDF"). In the period following March 1995, the SLA was able to dislodge the RUF from most of its positions.
5. In March 1996, elections were held in Sierra Leone and Ahmad Tejan Kabbah, the head of the Sierra Leone People's Party, was pronounced the winner. About the same time, the Government's support of the CDF resulted in the development of tension between the SLA and the Government. As a consequence, in September 1996, a retired SLA officer, Johnny Paul Koroma, attempted to

seize power from the elected Government of President Ahmad Tejan Kabbah in a *coup d'état*. This attempt failed and Johnny Paul Koroma was imprisoned.

6. In the months that followed, negotiations between the Government and the RUF resulted in the Abidjan Peace Agreement, signed on 30 November 1996, which called for the cessation of hostilities on both sides. In return for peace with the RUF, the Government agreed to grant amnesty to RUF members for crimes committed before the signing of the Peace Agreement. The Parties further committed themselves to the disarmament, demobilisation and reintegration of RUF combatants. In early 1997, the peace process broke down when hostilities erupted between the SLA/CDF and the RUF.
7. On 25 May 1997, members of the SLA seized power from the elected Government of President Kabbah in a *coup d'état*, planned and executed by 17 junior rank soldiers. Johnny Paul Koroma was released from prison by the *coup* plotters and appointed Chairman of a new government, which was called the Armed Forces Revolutionary Council ("AFRC"). The AFRC suspended the 1991 Constitution of Sierra Leone, dissolved the elected Government and banned political parties. Koroma then invited the RUF to join the AFRC in government.
8. The AFRC was not immediately able to exercise control over the entire territory of Sierra Leone. As a result, the armed forces of the AFRC, comprising both AFRC soldiers and RUF fighters undertook military operations to gain control over Bo and Kenema Districts which were controlled by the CDF. This resulted in Bo Town being captured from the CDF in June 1997. From that date, the AFRC controlled most parts of Freetown and other parts of the Western Area, as well as the Districts of Bo, Kenema, Kono, Bombali and Kailahun. The AFRC however, remained under constant threat from the CDF and the forces of the Economic Community of West African States Monitoring Group ("ECOMOG") which were in control of the International Airport at Lungi in Port Loko District.
9. On 23 October 1997, political, military and economic pressure on the AFRC forced it to accept the Six-Month Peace Plan known as the Conakry Accord brokered by the Economic Community of West African States ("ECOWAS"). The Conakry Accord called for the immediate cessation of hostilities throughout Sierra Leone and the restoration of constitutional government by 22 May 1998. However, soon after the Accord was signed, hostilities resumed and AFRC forces were dislodged from their positions.
10. The Government of ousted President Kabbah was reinstated in March 1998.
11. After the fall of the AFRC, widespread atrocities continued to be committed throughout Sierra Leone. In January 1999, President Kabbah was under pressure to enter into a peace agreement with the warring factions.
12. On 7 July 1999, the Government of President Kabbah and the RUF signed a peace agreement known as the Lomé Accord, which resulted in a power sharing arrangement between them. Hostilities ceased in January 2002.

C. The Trial Proceedings

1. The Indictment

13. The original Indictments against Alex Tamba Brima (“Brima”), Brima Bazzy Kamara (“Kamara”) and Santigie Borbor Kanu (“Kanu”) were approved on 7 March, 2003, 28 May, 2003, and 16 September, 2003, respectively. These Indictments were later consolidated, amended and further amended.
14. The Further Amended Consolidated Indictment (“Indictment”) comprised a total of 14 Counts. These Counts charged Brima, Kamara and Kanu (the “Accused”) with:
 - (i) Seven Counts of crimes against humanity, namely: extermination, murder, rape, sexual slavery and any other form of sexual violence, “Other Inhumane Acts” and enslavement (Counts 3, 4, 6, 7, 8, 11, and 13, respectively);
 - (ii) Six Counts of violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, namely: acts of terrorism, collective punishments, violence to life, health and physical or mental well-being of persons (in particular murder and mutilation of civilians), outrages upon personal dignity and pillage (Counts 1, 2, 5, 9, 10 and 14, respectively); and
 - (iii) A single Count of “other serious violation of international humanitarian law” (Count 12) consisting of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities.
15. The Indictment stated that the Accused were individually criminally responsible, pursuant to Articles 6(1) and 6(3) of the Statute, for the crimes stated above and further alleged that the Accused participated in a joint criminal enterprise (“JCE”) with the RUF, the objective of which was to take any action necessary to gain and exercise political power and control over the territory of Sierra Leone and in particular the diamond mining areas.
16. It is pertinent to note, as observed by the Trial Chamber, that at various stages of the proceedings the Accused raised objections to the Indictment on the ground of vagueness. Brima submitted that the Indictment failed to plead with precision the crimes it was alleged he committed in person. Kamara submitted that there was a lack of specificity in pleading individual criminal responsibility pursuant to Article 6(1) of the Statute. Kamara further contended that the form of pleading joint criminal enterprise in the Indictment was defective in that the common purpose “to take any action to gain and exercise political control over the territory of Sierra Leone” did not amount to a crime within the Statute and was too broad. Finally, Brima and Kamara contended that the charging of sexual slavery and other forms of sexual violence as prohibited under Article 2.g of the Statute, offended the rule against duplicity.

2. The Accused

17. Consequent upon the May 1997 *coup d'état*, the Accused became members of the Supreme Council of the AFRC, the highest decision-making body of the military junta. In that capacity they attended co-ordination meetings between leaders of the AFRC and the RUF. In addition, Brima and Kamara were appointed as Public Liaison Officers ("PLO") 2 and 3, respectively. Under the AFRC regime, PLOs had supervisory responsibility over designated government ministries. The Decree establishing the office of PLO provided that they were responsible for "supervising, monitoring and coordinating the operations of any Department of State or such other business of Government, as may from time to time be assigned to [them]." As PLO 2, Brima supervised the Ministry of Works and Labour, the Department of Customs and Excise, as well as two Government parastatals, Sierratel and SALPOST. Similarly, as PLO 3, Kamara supervised the Ministries of Agriculture, Forestry, Fisheries, Energy and Power, the Income Tax Department, and Queen Elizabeth Quay.
18. In March 1998, shortly after the AFRC junta was dislodged by ECOMOG forces, Johnny Paul Koroma separated from his soldiers on the pretext that he was travelling abroad to organise logistics for the troops. The leadership of the AFRC then fell to a senior member of the SLA known as SAJ Musa. In December 1998 SAJ Musa was killed during an attack on an ECOMOG weapons depot in Benguema. After SAJ Musa's death, Brima took over as the overall commander of the AFRC force with Kamara as Deputy Commander and Kanu as Chief of Staff. From then on they remained the three most senior commanders of the AFRC until the cessation of hostilities in January 2002.

3. Judgment

19. The trial of the Accused opened before Trial Chamber II on 7 March 2005, closing arguments were heard on 7 and 8 December 2006, and on 20 June 2007, the Trial Chamber rendered its Judgment.
20. The Trial Chamber found that there was an armed conflict in Sierra Leone between March 1991 and January 2002, and that the crimes charged related to the armed conflict. It found that there was a systematic or widespread attack by the AFRC/RUF forces directed against the civilian population of Sierra Leone and that each incident described in the Indictment formed part of a widespread and systematic attack within the meaning of Article 2 of the Statute. According to its Judgment, "operations" conducted by AFRC/RUF forces targeted civilians and the Accused knew that their conduct formed part of a widespread and systematic attack.
21. The Trial Chamber evaluated the individual criminal responsibility of each of the Accused under Article 6(1) and 6(3) of the Statute. The Trial Chamber specifically held that "with respect to Joint Criminal Enterprise as a mode of criminal liability, the Indictment [had] been defectively pleaded" and that it would not consider JCE as a mode of criminal responsibility.

4. Verdict

22. The Accused were found guilty and convicted of six Counts of violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, four Counts of crimes against humanity pursuant to Articles 2.a, 2.b, 2.c and 2.g of the Statute, and one Count of other serious violations of international humanitarian law pursuant to Article 4.c of the Statute.
23. With respect to the crime of rape as a crime against humanity, charged under Count 6 of the Indictment, Brima, Kamara, and Kanu were convicted on the basis of superior responsibility under Article 6(3) of the Statute.
24. The Appellants Brima and Kamara were acquitted of the crime of “Other Inhumane Acts” as a crime against humanity, charged under Count 11 of the Indictment, and no conviction was entered against Kanu.
25. The Trial Chamber did not enter convictions under Counts 7 and 8 of the Indictment. Count 7 charged the offence of sexual slavery and any other form of sexual violence. A majority of the Trial Chamber held that the charge violated the rule against duplicity and dismissed it for that reason. Count 8 was dismissed on the ground of redundancy based on the Trial Chamber’s finding that the evidence led in support of that Count did not establish any offence distinct from sexual slavery.

5. Sentence

26. For all the Counts of which they were found guilty, Alex Tamba Brima and Santigie Borbor Kanu were each sentenced to a single term of imprisonment of fifty (50) years, and Brima Bazzy Kamara to a single term of imprisonment of forty-five (45) years. The Trial Chamber ordered that each be given credit for any period during which they were detained in custody pending trial.

[...]

D. Prosecution’s Seventh Ground of Appeal: Forced Marriage

1. The Trial Chamber’s Findings and Submissions of the Parties

175. Under its Seventh Ground of Appeal, the Prosecution challenges the Trial Chamber’s dismissal of Count 8 of the Indictment, which charged Brima, Kamara and Kanu with the crime of “Other Inhumane Acts” (forced marriage), punishable under Article 2.i of the Statute.
176. In dismissing Count 8 for redundancy, the Trial Chamber found that Article 2.i of the Statute (“Other Inhumane Acts”) must be restrictively interpreted to exclude crimes of a sexual nature, because Article 2.g of the Statute, which encompasses “[r]ape, sexual slavery, enforced prostitution, forced pregnancy and *any other form of sexual violence*,” exhaustively enumerates sexual

crimes. The Trial Chamber found that the Prosecution did not adduce any evidence that forced marriage was a non-sexual crime; that the Prosecution evidence with respect to forced marriages was completely subsumed in the crime of sexual slavery; and that there is no lacuna in the law which would necessitate a separate crime of forced marriage as an “Other Inhumane Act.” The Trial Chamber also found that use of the term “wife” by the perpetrator signified an intention to exercise ownership over the victim rather than to assume a marital or quasi-marital status with the victim.

177. The Prosecution argues that a majority of the Trial Chamber (Justice Doherty dissenting) made three distinct errors of law and fact by finding that:

- (i) the residual category of crimes against humanity “Other Inhumane Acts” under Article 2.i of the Statute should be confined to acts of a non-sexual nature;
- (ii) that the evidence adduced by the Prosecution was not capable of establishing the elements of a non-sexual crime of forced marriage independent of the crime of sexual slavery under Article 2.g of the Statute; and
- (iii) in dismissing Count 8 (forced marriage as “Other Inhumane Acts”) for redundancy on the ground that the evidence adduced by the Prosecution is completely subsumed in the crime of sexual slavery and that there is no lacuna in the law which would necessitate a separate crime of forced marriage as an “Other Inhumane Act.”

178. The Prosecution also asserts that forced marriage is distinct from the crime against humanity of sexual slavery as forced marriage “consists of words or other conduct intended to confer a status of marriage by force or threat of force . . . with the intention of conferring the status of marriage.” Further, the Prosecution contends that forced marriage essentially involves a “forced conjugal association by the perpetrator over the victim” and is not predominantly sexual as victims of forced marriage need not necessarily be subject to non-consensual sex. It further argues that the imposition of a forced conjugal association is as grave as the other crimes against humanity such as imprisonment, causing great suffering to its victims. Therefore, the Prosecution contends that forced marriage amounts to an “Other Inhumane Act” under Article 2.i of the Statute and requests that the Appeals Chamber enter convictions for all three Appellants under Count 8 for “Other Inhumane Acts.”

179. Brima and Kamara argue that the Trial Chamber was correct in dismissing Count 8 for redundancy as the “alleged crimes of forced marriage” are subsumed in the crime of sexual slavery. Furthermore, they assert that even if the Trial Chamber’s finding in this regard is incorrect, any alleged crime of forced marriage should have been charged under Article 2.g of the Statute as “any other form of sexual violence,” rather than as “Other Inhumane Acts” under Article 2.i of the Statute. In support of this argument, Brima and Kanu submit that the category of “Other Inhumane Acts” under Article 2.i of the Statute only applies to acts of a non-sexual nature. In addition to the specific crimes of a sexual nature listed in Article 2.g, that provision has an in-built

residual category, “any other form of sexual violence” which includes crimes such as forced marriage. Thus, Article 2.g of the Statute is broad and intended to cover not only crimes which are sexual in a physical sense (such as rape), but also gender-based crimes such as forced marriage. Accordingly, Brima and Kamara urge the Appeals Chamber to dismiss this Ground of the Prosecution’s Appeal.

180. Kanu agrees with the Prosecution’s submission that the Trial Chamber erred in finding that the offence of “Other Inhumane Acts” must be restrictively interpreted and limited to non-sexual crimes. However, Kanu adds that this legal error does not invalidate the Trial Chamber’s dismissal of Count 8 because the evidence led by the Prosecution to prove forced marriage failed to establish any conduct going beyond the elements of sexual slavery.

2. Discussion

181. A preliminary point worthy of note is that the Prosecution may have misled the Trial Chamber by the manner in which forced marriage appeared to have been classified in the Indictment. The Indictment classifies Count 8 “Other Inhumane Acts” along with Counts 6, 7 and 9 under the heading “Sexual Violence.” Under this heading in paragraphs 52 to 57, the Indictment alleges acts of forced marriages. This categorisation of forced marriages explain, but does not justify, the classification by the Trial Chamber of forced marriage as “sexual violence.” Notwithstanding the manner in which the Prosecution had classified “Forced Marriage” in the Indictment and the submissions made by the Prosecution on this appeal which is inconsistent with such classification, the Appeals Chamber will consider the submissions made as an issue of general importance that may enrich the jurisprudence of international criminal law.
182. The first issue for the Appeals Chamber’s determination relates to the scope of “Other Inhumane Acts” under Article 2.i of the Statute. The Trial Chamber concluded that in light of the exhaustive categorisation of sexual crimes under Article 2.g, the offence of “Other Inhumane Acts” must be restrictively interpreted so as to exclude offences of a sexual nature. The Appeals Chamber considers that it is implicit in the Trial Chamber’s finding that it considered forced marriage as a sexual crime.
183. In order to assess the correctness of the Trial Chamber’s finding, regard must be given to the objective of the prohibition of “Other Inhumane Acts” in international criminal law. First introduced under Article 6.c of the Nuremberg Charter, the crime of “Other Inhumane Acts” is intended to be a residual provision so as to punish criminal acts not specifically recognised as crimes against humanity, but which, in context, are of comparable gravity to the listed crimes against humanity. It is therefore inclusive in nature, intended to avoid unduly restricting the Statute’s application to crimes against humanity. The prohibition against “Other Inhumane Acts” is now included in a large

number of international legal instruments and forms part of customary international law.

184. The jurisprudence of the international tribunals shows that a wide range of criminal acts, including sexual crimes, have been recognised as “Other Inhumane Acts.” These include forcible transfer, sexual and physical violence perpetrated upon dead human bodies, other serious physical and mental injury, forced undressing of women and marching them in public, forcing women to perform exercises naked, and forced disappearance, beatings, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions. Case law at these tribunals further demonstrates that this category has been used to punish a series of violent acts that may vary depending upon the context. In effect, the determination of whether an alleged act qualifies as an “Other Inhumane Act” must be made on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, the personal circumstances of the victims including age, sex, health, and the physical, mental and moral effects of the perpetrator’s conduct upon the victims.
185. The Trial Chamber therefore erred in law by finding that “Other Inhumane Acts” under Article 2.i must be restrictively interpreted. A tribunal must take care not to adopt too restrictive an interpretation of the prohibition against “Other Inhumane Acts” which, as stated above, was intended to be a residual provision. At the same time, care must be taken not to make it too embracing as to make a surplusage of what has been expressly provided for, or to render the crime nebulous and incapable of concrete ascertainment. An over-broad interpretation will certainly infringe the rule requiring specificity of criminal prohibitions.
186. Furthermore, the Appeals Chamber sees no reason why the so-called “exhaustive” listing of sexual crimes under Article 2.g of the Statute should foreclose the possibility of charging as “Other Inhumane Acts” crimes which may among others have a sexual or gender component. As an ICTY Trial Chamber has recognised, “[h]owever much care [was] taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wish to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.” The Trial Chamber therefore erred in finding that Article 2.i of the Statute excludes sexual crimes.

(a) The Nature of “Forced Marriage” in the Sierra Leone Conflict and its Distinction from Sexual Slavery

187. The Appeals Chamber recalls the Trial Chamber’s findings that the evidence adduced by the Prosecution did not establish the elements of a non-sexual offence of forced marriage independent of the crime of sexual slavery under Article 2.g of the Statute; and that the evidence is completely of the crime of

sexual slavery, leaving no lacuna in the law that would necessitate a separate crime of forced marriage as an “Other Inhumane Act.”

188. The Trial Chamber defined sexual slavery as the perpetrator’s exercising any or all of the powers attaching to the right of ownership over one or more persons by imposing on them a deprivation of liberty, and causing them to engage in one or more acts of a sexual nature. In finding that the evidence of forced marriage was completely of the crime of sexual slavery, the Trial Chamber found that the relationship of the perpetrators to their “wives” was one of ownership, and that the use of the term “wife” was indicative of the perpetrator’s intent to exercise ownership rights over the victim. Implicitly, the Trial Chamber found that evidence of forced marriage was predominantly sexual in nature.
189. According to the Prosecution, the element that distinguishes forced marriage from other forms of sexual crimes is a “forced conjugal association by the perpetrator over the victim. It represents forcing a person into the appearance, the veneer of a conduct (i.e., marriage), by threat, physical assault or other coercion.” The Prosecution adds that while acts of forced marriage may in certain circumstances amount to sexual slavery, in practice they do not always involve the victim being subjected to non-consensual sex or even forced domestic labour. Therefore, the Prosecution contends that forced marriage is not a sexual crime.
190. The trial record contains ample evidence that the perpetrators of forced marriages intended to impose a forced conjugal association upon the victims rather than exercise an ownership interest and that forced marriage is not predominantly a sexual crime. There is substantial evidence in the Trial Judgment to establish that throughout the conflict in Sierra Leone, women and girls were systematically abducted from their homes and communities by troops belonging to the AFRC and compelled to serve as conjugal partners to AFRC soldiers. They were often abducted in circumstances of extreme violence, compelled to move along with the fighting forces from place to place, and coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labour such as cleaning and cooking for the “husband,” endure forced pregnancy, and to care for and bring up children of the “marriage.” In return, the rebel “husband” was expected to provide food, clothing and protection to his “wife,” including protection from rape by other men, acts he did not perform when he used a female for sexual purposes only. As the Trial Chamber found, the relative benefits that victims of forced marriage received from the perpetrators neither signifies consent to the forced conjugal association, nor does it vitiate the criminal nature of the perpetrator’s conduct given the environment of violence and coercion in which these events took place.
191. The Trial Chamber findings also demonstrate that these forced conjugal associations were often organised and supervised by members of the AFRC or civilians assigned by them to such tasks. A “wife” was exclusive to a rebel “husband,” and any transgression of this exclusivity such as unfaithfulness,

was severely punished. A “wife” who did not perform the conjugal duties demanded of her was deemed disloyal and could face serious punishment under the AFRC disciplinary system, including beating and possibly death.

192. In addition to the Trial Chamber’s findings, other evidence in the trial record shows that the perpetrators intended to impose a forced conjugal association rather than exercise mere ownership over civilian women and girls. In particular, the Appeals Chamber notes the evidence and report of the Prosecution expert Mrs. Zainab Bangura which demonstrates the physical and psychological suffering to which victims of forced marriage were subjected during the civil war in Sierra Leone. According to the Prosecution expert:

“the most devastating effect on women of the war was the phenomenon called ‘bush wife’, rebel wife or jungle wife. This was a phenomenon adopted by rebels whereby young girls or women were captured or abducted and forcibly taken as wives . . . The use of the term ‘wife’ by the perpetrator was deliberate and strategic. The word ‘wife’ demonstrated a rebel’s control over a woman. His psychological manipulations of her feelings rendered her unable to deny him his wishes . . . By calling a woman ‘wife’, the man or ‘husband’ openly staked his claim and she was not allowed to have sex with any other person. If she did, she would be deemed unfaithful and the penalty was severe beating or death.

‘Bush wives’ were expected to carry out all the functions of a wife and more . . . [S]he was expected to show undying loyalty to her husband for his protection and reward him with ‘love and affection . . . ‘Bush wives’ were constantly sexually abused, physically battered during and after pregnancies, and psychologically terrorised by their husbands, who thereby demonstrated their control over their wives. Physically, most of these girls experienced miscarriages, and received no medical attention at the time . . . Some now experience diverse medical problems such as severe stomach pains . . . some have had their uterus removed; menstrual cycles are irregular; some were infected with sexually transmitted diseases and others tested HIV positive.”

193. In light of all the evidence at trial, Judge Doherty, in her Partly Dissenting Opinion, expressed the view that forced marriage involves “the imposition, by threat or physical force arising from the perpetrator’s words or other conduct, of a forced conjugal association by the perpetrator over the victim.” She further considered that this crime satisfied the elements of “Other Inhumane Acts” because victims were subjected to mental trauma by being labelled as rebel “wives”; further, they were stigmatised and found it difficult to reintegrate into their communities. According to Judge Doherty, forced marriage qualifies as an “Other Inhumane Acts” causing mental and moral suffering, which in the context of the Sierra Leone conflict, is of comparable seriousness to the other crimes against humanity listed in the Statute.
194. Furthermore, the Appeals Chamber also notes that in their respective Concurring and Partly Dissenting Opinions, both Justice Sebutinde and Justice Doherty make a clear and convincing distinction between forced marriages in a war context and the peacetime practice of “arranged marriages” among certain traditional communities, noting that arranged marriages are not to be equated to or confused with forced marriage during armed conflict.

Justice Sebutinde goes further to add, correctly in our view, that while traditionally arranged marriages involving minors violate certain international human rights norms such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), forced marriages which involve the abduction and detention of women and girls and their use for sexual and other purposes is clearly criminal in nature.

195. Based on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the “husband” and “wife,” which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery.
196. In light of the distinctions between forced marriage and sexual slavery, the Appeals Chamber finds that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.

(b) Does Forced Marriage Satisfy the Elements of “Other Inhumane Acts”?

197. The Prosecution submits that the crime charged under Count 8 is “Other Inhumane Acts,” which forms part of customary international law, and therefore, does not violate the principle of *nullum crimen sine lege*. Therefore, the Prosecution submits that the only question on appeal is whether forced marriage satisfies the elements of “Other Inhumane Acts.” The Prosecution argues that forced marriage amounts to an “Other Inhumane Act” and that the imposition of a forced conjugal association is as grave as the other crimes against humanity such as imprisonment, causing great suffering to its victims. In particular, the Prosecution argues that the mere fact of forcibly requiring a member of the civilian population to remain in a conjugal association with one of the participants of a widespread or systematic attack directed against the civilian population is at least, of sufficient gravity to make this conduct an “Other Inhumane Act.”

198. The Appeals Chamber agrees with the Prosecution that the notion of “Other Inhumane Acts” contained in Article 2.i of the Statute forms part of customary international law. As noted above, it serves as a residual category designed to punish acts or omissions not specifically listed as crimes against humanity provided these acts or omissions meet the following requirements:
- (i) inflict great suffering, or serious injury to body or to mental or physical health;
 - (ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the Statute; and
 - (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act.

The acts must also satisfy the general *chapeau* requirements of crimes against humanity.

199. The Appeals Chamber finds that the evidence before the Trial Chamber established that victims of forced marriage endured physical injury by being subjected to repeated acts of rape and sexual violence, forced labour, corporal punishment, and deprivation of liberty. Many were psychologically traumatised by being forced to watch the killing or mutilation of close family members, before becoming “wives” to those who committed these atrocities and from being labelled rebel “wives” which resulted in them being ostracised from their communities. In cases where they became pregnant from the forced marriage, both they and their children suffered long-term social stigmatisation.
200. In assessing the gravity of forced marriage in the Sierra Leone conflict, the Appeals Chamber has taken into account the nature of the perpetrators’ conduct especially the atmosphere of violence in which victims were abducted and the vulnerability of the women and girls especially those of a very young age. Many of the victims of forced marriage were children themselves. Similarly, the Appeals Chamber has considered the effects of the perpetrators’ conduct on the physical, moral, and psychological health of the victims. The Appeals Chamber is firmly of the view that acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence.
201. The Appeals Chamber is also satisfied that in each case, the perpetrators intended to force a conjugal partnership upon the victims, and were aware that their conduct would cause serious suffering or physical, mental or psychological injury to the victims. Considering the systematic and forcible abduction of the victims of forced marriage, and the prevailing environment of coercion and intimidation, the Appeals Chamber finds that the perpetrators of these acts could not have been under any illusion that their conduct was not criminal. This conclusion is fortified by the fact that the acts described as forced marriage may have involved the commission of one or more

international crimes such as enslavement, imprisonment, rape, sexual slavery, abduction among others.

202. The Appeals Chamber has carefully given consideration to whether or not it would enter fresh convictions for “Other Inhumane Acts” (forced marriage). The Appeals Chamber is fully aware of the Prosecution’s submission that entering such convictions would reflect the full culpability of the Appellant. The Appeals Chamber is also aware that the Trial Chamber relied upon the evidence led in support of sexual slavery and forced marriage to enter convictions against the Appellants for “Outrages upon Personal Dignity” under Count 9 of the Indictment. Since “Outrages upon Personal Dignity” and “Other Inhumane Acts” have materially distinct elements (in the least, the former is a war crime, and the latter a crime against humanity) there is no bar to entering cumulative convictions for both offences on the basis of the same facts. However, in this case the Appeals Chamber is inclined against entering such cumulative convictions. The Appeals Chamber is convinced that society’s disapproval of the forceful abduction and use of women and girls as forced conjugal partners as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an “Other Inhumane Act” capable of incurring individual criminal responsibility in international law.
203. The Appeals Chamber therefore grants Ground Seven of the Prosecution’s Appeal.

[. . .]

E. Kanu’s Seventh Ground of Appeal: *Mens Rea* for Crimes Related to Child Soldiers

1. Introduction

293. In his Seventh Ground of Appeal, Kanu alleges that the Trial Chamber erred in law in dismissing his argument that “the absence of criminal knowledge on his part vitiated the requisite *mens rea* to the crimes relating to child soldiers.” He argues that the *mens rea* element required for the crime was in this instance negated by a mistake of law on his part. Due to various factors, detailed in his Appeal Brief, Kanu submits that “he believed that his conduct [of conscripting or enlisting children under the age of 15 years] was legitimate.” He contends that at all material times, he lacked the requisite criminal intent required for the crime of “conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities” punishable under Article 4.c of the Statute of the Special Court.

294. In the alternative, Kanu argues that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment.
295. The Prosecution observes that the Appeals Chamber has already ruled that conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities was a crime entailing individual criminal responsibility at the time of the acts alleged in the Indictment. The Appeals Chamber refers to its dictum that:
- “The rejection of the use of child soldiers by the international community was widespread by 1994 . . . Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above, the principle of legality and the principle of specificity are both upheld.”
296. Kanu’s submission that conscripting or enlisting children under the age of 15 was not a war crime at the time alleged in the Indictment is without merit. Furthermore it is frivolous and vexatious for Kanu to contend that the absence of criminal knowledge on his part vitiated the requisite *mens rea* in respect of the crimes relating to child soldiers.
297. Kanu’s Seventh Ground of Appeal therefore fails.

F. Kanu’s Ninth Ground of Appeal: Findings of Responsibility Pursuant to Article 6(1) of the Statute

1. The Parties’ Submissions and the Findings of the Trial Chamber

298. In his Ninth Ground of Appeal, Kanu submits that the Trial Chamber erred in convicting him under Article 6(1) for planning the commission of sexual slavery (Count 9), the conscription and use of children for military purposes (Count 12), and abductions and forced labour (Count 13). The Trial Chamber held that Kanu “planned, organised and implemented the system to abduct and enslave civilians which was committed by AFRC troops in Bombali and Western Area.” It further held that Kanu “had the direct intent to establish and implement the system of exploitation involving the three enslavement crimes, namely, sexual slavery, conscription and use of children under the age of 15 for military purposes, and abductions and forced labour.” The Trial Chamber was, therefore, satisfied beyond reasonable doubt that Kanu bore individual criminal responsibility under Article 6(1) for planning the commission of the above crimes in the Bombali District and the Western Area.
299. Kanu argues that while the evidence shows that it fell upon him, as Chief of Staff, to manage the system of slavery within the AFRC faction, he could not be convicted on that basis for planning the crimes of sexual slavery,

conscription and use of children for military purposes, and abductions and forced labour. He further argues that at best, the evidence implicates him at the execution stage in the military training of children and the exploitation of women for sexual purposes.

300. The Prosecution responds that Kanu's position of influence in the AFRC and his admission that he managed this system of slavery amply justify a reasonable inference that he was involved in planning the above crimes.

2. Discussion

301. The Appeals Chamber concurs with the Trial Chamber's definition of planning under Article 6(1). The Trial Chamber stated that "'planning' implies that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases." Circumstantial evidence may provide proof of the existence of a plan, and an individual may incur responsibility for planning when his level of participation is substantial even though the crime may have actually been committed by another person. According to the Trial Chamber, the *actus reus* for planning requires that "the accused, alone or together with others, designated [*sic*] the criminal conduct constituting the crimes charged." While "there must be a sufficient link between the planning of a crime both at the preparatory and the execution phases," it is "sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct." The Trial Chamber further stated that the *mens rea* "requires that the accused acted with direct intent in relation to his or her own planning or with the awareness of the substantial likelihood that a crime would be committed . . . in the execution of that plan."

302. With regard to sexual slavery, the Trial Chamber found that:

"In Bombali District the Accused Kanu designed and implemented a system to control abducted girls and women. All abducted women and girls were placed in the custody of the Accused. Any soldier who wanted an abducted girl or woman to be his "wife" had to 'sign for her'. The Accused informed his fighters that any problems with the women were to be immediately reported back to him, and that he would then monitor the situation. The Accused issued a disciplinary instruction ordering that any woman caught with another woman's husband should be beaten and locked in a box."

On the basis of this evidence, the Trial Chamber was satisfied beyond reasonable doubt that Kanu was responsible for planning the commission of the crime of sexual slavery in the Bombali District and the Western Area. The Appeals Chamber agrees.

303. The Appeals Chamber now turns to the Trial Chamber's findings regarding the conscription and use of children for military purposes, as well as abductions and forced labour in the Bombali District and the Western Area. In the case of Bombali District, the Trial Chamber found that Kanu was in charge of

forced military training of civilians at Camp Rosos and that children below the age of 15 years were among those forced to undergo training. On the basis of this evidence, the Trial Chamber was satisfied beyond reasonable doubt that in the Bombali District Kanu was not only responsible for planning the conscription of children under the age of 15 into an armed group, but also for using such children to participate actively in hostilities, as well as for the crime of enslavement.

304. Regarding the Western Area, the Trial Chamber also found that Kanu “continued in his positions as Chief of Staff and commander in charge of civilians in Freetown and the Western Area” and that he had “approximately ten child combatants in his charge in Benguema following the retreat from Freetown.” On the basis of this evidence, the Trial Chamber found that Kanu was responsible for planning the conscription of children under the age of 15 into an armed group, or the use of such children to participate actively in hostilities, and enslavement in the Western Area.
305. Finally, the Appeals Chamber finds that the evidence led before the Trial Chamber warrants an examination of Kanu’s responsibility for aiding and abetting the commission of sexual slavery and forced labour in Newton in the Western Area. The Appeals Chamber notes that witness TF1-334, whom the Trial Chamber found to be credible and reliable, stated that Kanu was responsible for the women and girls in the camp at Newton. AFRC soldiers reported to Kanu if they had any problems with the women and girls. The Trial Chamber found that while the women were helping with the cooking, “the ‘girls’ were sleeping with the ‘commanders.’” The Appeals Chamber is satisfied that in this position of responsibility regarding the women and girls at Newton, Kanu provided practical assistance to a system of sexual slavery and forced labour. The Appeals Chamber is further satisfied that Kanu was aware that his acts would assist in the implementation of this system of sexual slavery and forced labour. In light of the above evidence, the Appeals Chamber is satisfied that Kanu aided and abetted the commission of sexual slavery and forced labour in the Western Area. Thus, the Appeals Chamber finds that the Trial Chamber erred in failing to convict Kanu for aiding and abetting the commission of sexual slavery and forced labour in the Western Area.
306. The Appeals Chamber upholds the conviction of Kanu for planning the commission of sexual slavery in the Bombali District and upholds the conviction of Kanu for planning the commission of sexual slavery in the Western Area and further upholds the Trial Chamber’s convictions for planning the conscription and use of children for military purposes as well as abductions and forced labour in the Bombali District and the Western Area. The Appeals Chamber furthermore finds that there is sufficient evidence that Kanu aided and abetted the commission of the said crimes. However, as he has already been convicted of planning those crimes the question of convicting him on the basis of aiding and abetting does not arise.

II. Grounds of Appeal Relating to Sentence

A. Introduction

307. The Trial Chamber imposed a sentence of fifty (50) years imprisonment on Brima and Kanu respectively and forty-five (45) years imprisonment on Kamara. The Trial Chamber found that there were a number of aggravating but no mitigating factors. The Appellants have appealed against the sentence, while the Prosecution has not done so except to request that if some of its Grounds succeed, the Appeals Chamber should consider revising the sentence to reflect any additional criminal liability. The Appellants' Grounds of Appeal are closely related, therefore, dealing with them separately would lead to unnecessary repetition. It is convenient to address the Appellants' submissions together except for those which raise a different issue in Kanu's Eighth Ground of Appeal.

B. Standard of Review on Appeals Relating to Sentence

308. Article 19 of the Statute limits the penalty that a Trial Chamber can impose upon a convicted person (other than a juvenile) to "imprisonment for a specified term of years." It further provides that the Trial Chamber shall, in determining the "terms of imprisonment," as appropriate, have recourse to the sentencing practices of the International Criminal Tribunal for Rwanda ("ICTR") and the national courts of Sierra Leone. The Statute requires the Trial Chamber to take into account such factors as the gravity of the offence and the individual circumstances of the convicted person in imposing sentences.

309. The determination of an appropriate sentence being at the discretion of the Trial Chamber, the Appeals Chamber will only revise a sentence where the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law. To show that the Trial Chamber committed a discernible error in exercising its discretion:

"the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly."

C. Excessive Sentences: Ground Twelve of Brima's Appeal and Ground Ten of Kamara's Appeal

310. Brima alleges that the Trial Chamber erred by imposing a global sentence of fifty years, that it is "excessively harsh and disproportionate," and that it is inconsistent with the sentencing guidelines of the ICTY and the ICTR.

Kamara's Tenth Ground of Appeal argues that the Trial Chamber was required by Article 19(1) of the Statute to consider the sentencing practices in the ICTR and the national courts of Sierra Leone. Kamara further argues that a sentence of 45 years is inconsistent with the penalties that have been imposed by the ICTR.

311. Article 19(1) of the Statute provides that the "Trial Chamber, as appropriate, shall have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone." The phrase "where appropriate" shows that the Trial Chamber has a discretion in determining when to have recourse to sentencing practices in the two courts.

D. Mitigating Factors: Ground Nine of Kamara's Appeal and Grounds Eleven, Fifteen, Sixteen, Seventeen and Eighteen of Kanu's Appeal

312. The Appellants make two distinct submissions with regard to mitigating factors. First, that the Trial Chamber did not consider mitigating factors and second, that particular mitigating factors were not given adequate weight.
313. Rule 101(B) of the Rules provides that the "Trial Chamber shall take into account the factors mentioned in Article 19(2) of the Statute, as well as such factors as: . . . any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction." Brima and Kanu argue that the Trial Chamber failed to consider mitigating factors.
314. In the view of the Appeals Chamber an appellant challenging the weight given by a Trial Chamber to a particular mitigating circumstance has the duty of showing that the Trial Chamber abused its discretion.
315. The mere recital of mitigating factors, as the Appellants have done, without concrete arguments, does not suffice to discharge the burden of demonstrating that the Trial Chamber abused its discretion.

E. Double-Counting, Gravity of the Offence and Aggravating Factors: Ground Twelve of Brima's Appeal

316. Brima submits that the Trial Chamber erred by considering the following factors in determining the gravity of the offence as well as aggravating factors:

"The brutality and heinousness of the crimes such as the drugging of child soldiers, brutal gang rapes, lengthy periods of enslavement, the burning alive of civilians and amputations."

317. Although the issue of double-counting was only raised by Brima, it is in the interest of justice for the Appeals Chamber to consider the issue in relation to

Kanu and Kamara as well. As the Trial Chamber notes in the Sentencing Judgment, “where a factor has already been taken into account in determining the gravity of the offence, it cannot be considered additionally as an aggravating factor” This prohibition is well established in the case law of the international criminal tribunals.

318. In *Nikolić*, the ICTY Appeals Chamber determined that the Trial Chamber had double-counted by repeating facts concerning the accused’s general role in the offences. However, the Appeals Chamber determined that there was no double-counting where the Trial Chamber considered the impact of the crimes on the victim in one section and the vulnerability of the victims in the other section.
319. The Appeals Chamber notes that there were instances of double-counting in the Sentencing Judgment.
320. Although the Trial Chamber made an error by double-counting, the Appeals Chamber does not consider that this error had a significant impact upon the Appellants’ sentences.

F. Kanu’s Eighth Ground of Appeal: Cumulative Convictions and Sentence

1. Submissions of the Parties

321. In his Eighth Ground of Appeal, Kanu submits that the Trial Chamber erred in law in imposing a global sentence of fifty years. He argues that the term of imprisonment shows that the cumulative convictions entered against him were not discounted for sentencing purposes and that the sentence imposed on him reflects the number of convictions rather than the underlying criminal conduct. Kanu further submits that a more appropriate penalty that reflects his criminal conduct and not the number of convictions should replace the sentence imposed on him. In response, the Prosecution contends that the Trial Chamber was under no obligation to discount the cumulative convictions entered against Kanu for sentencing purposes.

2. Discussion

322. The Trial Chamber stated that the Special Court Statute permits it to impose a single sentence. It added that in exercising its discretion whether to impose a single sentence, “the governing criteria is that the final or aggregate sentence should reflect the totality of the culpable conduct, or generally, that it should reflect the gravity of the offences and the overall culpability of the offender, so that it is both just and appropriate.” The Trial Chamber then explained that “in the present case the Trial Chamber finds it is appropriate to impose a global sentence for the *multiple convictions* in respect of Brima, Kamara and Kanu.”

323. In the Sentencing Judgment, the Trial Chamber enumerated all criminal acts for which Kanu was found responsible under Article 6(1) of the Statute and also referred to the gravity of the criminal conduct of his subordinates throughout Bombali District, Freetown and other parts of the Western Area for which he was found liable under Article 6(3) of the Statute. The emphasis placed on Kanu's criminal acts demonstrates that the Trial Chamber ascertained the gravity of the offences in light of the individual criminal acts rather than in light of the multiple Counts for which Kanu was convicted. This approach ensured that the sentence encompasses Kanu's, overall, criminal conduct.
324. The Appeals Chamber finds that in imposing sentence, the Trial Chamber considered the overall criminal conduct of Kanu, rather than the number of convictions entered against him.
325. The Appeals Chamber thus finds no error in the Trial Chamber's approach that would warrant its interference with the sentence imposed. Ground Eight of Kanu's Appeal therefore fails.

G. Sentence: General Conclusion

326. Having considered all the Grounds of Appeal relating to the Sentencing Judgment of the Trial Chamber, the Appeals Chamber is satisfied that the Trial Chamber has overall properly exercised its discretion within the provisions of the Statute of the Court.
327. Article 19(2) of the Statute states as follows:

"In imposing the sentences, the Trial Chamber should take into account such factors as the **gravity** of the offence and the individual circumstances of the convicted person" (emphasis added).

328. The Trial Chamber, in applying this provision to the case, had this to say:

"Brima, Kamara and Kanu have been found responsible for some of the most heinous, brutal and atrocious crimes ever recorded in human history. Innocent civilians – babies, children, men and women of all ages – were murdered by being shot, hacked to death, burned alive, beaten to death. Women and young girls were gang raped to death. Some had their genitals mutilated by the insertion of foreign objects. Sons were forced to rape mothers, brothers were forced to rape sisters. Pregnant women were killed by having their stomachs slit open and the foetus removed merely to settle a bet amongst the troops as to the gender of the foetus. Men were disembowelled and their intestines stretched across a road to form a barrier. Human heads were placed on sticks on either side of the road to mark such barriers. Hacking off the limbs of innocent civilians was commonplace. The victims were babies, young children and men and women of all ages. Some had one arm amputated, others lost both arms. For those victims who survived an amputation, life was instantly and forever changed into one of dependence. Most were turned into beggars unable to earn any other living and even today cannot perform even the simplest of tasks without the help of others. Children were forcibly taken away from their families, often drugged and used as child soldiers who were trained to kill and

commit other brutal crimes against the civilian population. Those child soldiers who survived the war were robbed of a childhood and most of them lost the chance of an education.”

The Appeals Chamber is, therefore, satisfied that having regard to that finding, the Trial Chamber was justified in imposing a prison sentence of fifty (50) years on the Appellant Alex Tamba Brima, forty-five (45) years on the Appellant Brima Bazzy Kamara, and fifty (50) years on Santigie Borbor Kanu.

329. The Appeals Chamber finds no cause to interfere with the exercise by the Trial Chamber of its discretion in sentencing the Appellants.
330. In the result the Appellants Appeal against sentence fails.

III. Disposition

For the foregoing reasons, **THE APPEALS CHAMBER**

PURSUANT to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence;

NOTING the written submissions of the Parties and their oral arguments presented at the hearings on 12, 13 and 14 November 2007;

SITTING in open session;

UNANIMOUSLY;

WITH RESPECT TO THE PROSECUTION’S GROUNDS OF APPEAL;

HOLDS in regard to Grounds One and Three, that as the Appellants have been convicted and sentenced to terms of imprisonment of fifty (50) years and forty-five (45) years for crimes committed under Article 6(1) or Article 6(3) of the Statute, in Bombali District and in the Western Area, it becomes an academic exercise and also pointless to adjudicate further on Grounds One and Three of the Prosecution’s Appeal;

ALLOWS the Fourth Ground of Appeal relating to joint criminal enterprise but sees no need to make further factual findings or to remit the case to the Trial Chamber for that purpose, having regard to the interest of justice;

ALLOWS Ground Seven relating to forced marriage but declines to enter a further conviction on Count 8 of the Indictment;

ALLOWS Ground Nine relating to cumulative convictions, but declines to enter such convictions for responsibility found under Articles 6(1) and 6(3) of the Statute, having regard to the global sentences imposed which are adequate;

DISMISSES Grounds Two, Five, Six and Eight;

WITH RESPECT TO BRIMA’S GROUNDS OF APPEAL;

NOTES that Grounds Two, Three, Seven and Eight have been abandoned;

DISMISSES the rest of his Grounds, namely Grounds One, Four, Five, Six, Nine, Ten, Eleven and Twelve and **AFFIRMS** the sentence of fifty (50) years imprisonment imposed by the Trial Chamber;

WITH RESPECT TO KAMARA’S GROUNDS OF APPEAL;

DISMISSES all of Kamara’s Grounds of Appeal;

REVISES the Trial Chamber’s Disposition in respect of Counts 9, 12 and 13 by substituting Article 6(3) for Article 6(1) of the Statute and **AFFIRMS** the sentence of forty-five (45) years imprisonment imposed by the Trial Chamber;

WITH RESPECT TO KANU’S GROUNDS OF APPEAL;

DISMISSES all of Kanu’s Grounds of Appeal and **AFFIRMS** the sentence of fifty (50) years imprisonment imposed by the Trial Chamber;

ORDERS that this Judgment be enforced immediately pursuant to Rule 102 of the Rules of Procedure and Evidence.

Delivered on 22 February 2008 at Freetown, Sierra Leone.

[...]

11.2 Notes and Questions

11.2.1 *What Were the Charges and Who Were the Victims in The Prosecutor v. Brima, Kamara and Kanu?*

The accused (Brima, Kamara and Kanu) commanders who were members of the Supreme Council of the rebel Armed Forces Revolutionary Council (AFRC), the highest decision-making body in the militia group, were charged with a total of 14 counts relating to international crimes. These included (a) seven counts of crimes against humanity, namely: extermination, murder, rape, sexual slavery and any other form of sexual violence, “Other Inhumane Acts” and enslavement; (b) six counts of violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, namely: acts of terrorism, collective punishments, violence to life, health and physical or mental well-being of persons (in particular murder and mutilation of civilians), outrages upon personal dignity and pillage; and (c) one count of “other serious violation of international humanitarian law” consisting of conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities. The defendants were charged with being individually responsible for these crimes and as part of a joint criminal enterprise with the Revolutionary United Front (RUF) to take control of Sierra Leone and of its diamond mine areas especially by whatever means necessary. The international crimes were directed against the civilian population of Sierra Leone including the child population.

11.2.2 Did International Justice in The Prosecutor v. Brima, Kamara and Kanu Affirm Respect for the Fundamental Human Rights of the Child?

In what follows, let us consider this complex case on this issue with regard to the Prosecutor's charges of "other inhumane acts" (constituting "crimes against humanity" under Article 2 of the statute of the Special Court of Sierra Leone), where those "other inhumane acts" were held to be comprised of "forced marriage."

The Appeal Court judgment in the AFRC case represented the first time that "forced marriage" was recognized by an international criminal court as a distinct category of "crime against humanity." That category of international crime represented by "forced marriage" then was held by the Appeal Court in the instant case to be separate and apart from those other "crimes against humanity" listed under Article 2(g) of the Statute of the Special Court of Sierra Leone (the latter covering the international crimes of "sexual slavery, rape, enforced prostitution, forced pregnancy and any other form of sexual violence"). The Appeal Court in AFRC held that the crime of "forced marriage" meets the criteria for classification rather under 2(i) "other inhumane acts" a subcategory under the heading "Crimes Against Humanity" in the Statute of the Special Court of Sierra Leone:

Based on the evidence on record, the Appeals Chamber finds that no tribunal could reasonably have found that forced marriage was subsumed in the crime against humanity of sexual slavery. While forced marriage shares certain elements with sexual slavery such as non-consensual sex and deprivation of liberty, there are also distinguishing factors. First, forced marriage involves a perpetrator compelling a person by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association with another person resulting in great suffering, or serious physical or mental injury on the part of the victim. Second, unlike sexual slavery, forced marriage implies a relationship of exclusivity between the "husband" and "wife," which could lead to disciplinary consequences for breach of this exclusive arrangement. These distinctions imply that forced marriage is not predominantly a sexual crime. The Trial Chamber, therefore, erred in holding that the evidence of forced marriage is subsumed in the elements of sexual slavery. (AFRC Appeal Judgment, para. 195, emphasis added)

The Appeal Court in AFRC in finding that the defendants were guilty of an additional "crime against humanity" in regards to the AFRC use of forced marriage thus found specifically that the crime of forced marriage could *not* simply be grouped under "sexual slavery" or the subcategory of "any other form of sexual violence" (contrary to what the defense argued) (the crimes of sexual slavery and "any other form of sexual violence" both being enumerated, as previously mentioned, as part of 2(g) "Crimes Against Humanity" in the Statute of the Special Court of Sierra Leone). The Appeal Court found in this regard that while forced marriage may involve sexual elements such as rape and so has elements in common with sexual slavery, it is not wholly a sexual crime. Rather, forced marriage has distinctive elements (i.e., a forced exclusive conjugal relationship) that merit its

separate classification according to the Court's enabling statute (i.e., classification under Article 2(i) "other inhumane acts"). The implication of this Appeal Court ruling was that the accused were being held accountable for an additional crime against humanity; namely "forced marriage" (a reversal of the Trial Court holding on the matter).

Note that the Appeals Court in the instant case also affirmed and emphasized in its reasons that: (a) the crime of "forced marriage" was of such a gravity as to rise to a level of seriousness comparable to the crimes against humanity that are listed at 2(g) of the Statute of the Special Court of Sierra Leone, and (b) that the evidence showed that the perpetrators in the case were well aware that their conduct in imposing "forced marriage" on civilian girls and women was criminal:

The Appeals Chamber is also satisfied that in each case, the perpetrators intended to force a conjugal partnership upon the victims, and were aware that their conduct would cause serious suffering or physical, mental or psychological injury to the victims. Considering the systematic and forcible abduction of the victims of forced marriage, and the prevailing environment of coercion and intimidation, the Appeals Chamber finds that the perpetrators of these acts could not have been under any illusion that their conduct was not criminal. This conclusion is fortified by the fact that the acts described as forced marriage may have involved the commission of one or more international crimes such as enslavement, imprisonment, rape, sexual slavery, [and] abduction among others. (AFRC Appeal Judgment, para. 201)

In view of (a) the Appeal Court's holding that "forced marriage" is a separate crime against humanity, and a grave crime that causes great suffering to the victims, and (b) its finding that the AFRC had victimized not only adult females, but also children in this regard, did the Court then further children's fundamental human rights via this ruling?

11.2.3 Did the Appeal Court in the AFRC Case Consider the Vulnerability of Child Victims as an Aggravating Factor with Regard to Forced Marriage; a Crime Against Humanity?

The Appeal Court in the instant case acknowledged that children (girls specifically) were the victims also of the AFRC imposition of forced marriage as part of the rebel group's systemic attack on the civilian population:

In assessing the gravity of forced marriage in the Sierra Leone conflict, the Appeals Chamber has taken into account the nature of the perpetrators' conduct especially the atmosphere of violence in which victims were abducted and the vulnerability of the women and girls especially those of a very young age. Many of the victims of forced marriage were children themselves. Similarly, the Appeals Chamber has considered the effects of the perpetrators' conduct on the physical, moral, and psychological health of

the victims. *The Appeals Chamber is firmly of the view that acts of forced marriage were of similar gravity to several enumerated crimes against humanity including enslavement, imprisonment, torture, rape, sexual slavery and sexual violence.* (AFRC Appeal Judgment, para. 200, emphasis added)

[...] The Appeals Chamber is convinced that society's disapproval of the forceful abduction and use of *women and girls as forced conjugal partners* as part of a widespread or systematic attack against the civilian population, is adequately reflected by recognising that such conduct is criminal and that it constitutes an "Other Inhumane Act" capable of incurring individual criminal responsibility in international law. (AFRC Appeal Judgment, para. 202, emphasis added)

Having taken into consideration that highly vulnerable children (and women also very vulnerable) were the victims of the AFRC forced marriage practice, the Appeal Court in the instant case considered that this added to the gravity of the crimes and this was reflected in the substantial sentences of over 45 years incarceration meted out to the defendants. This is consistent with the requirement for special protection of children under international humanitarian law in times of armed conflict. Consider, however, what damage, if any, was done to the cause of protecting children's human rights internationally by the approach taken by the Trial Court in the AFRC case to the issue of forced marriage.

11.2.4 What Was the Position of the Appeal Court in the AFRC Case Regarding "Arranged Marriages" Vs. "Forced Marriages" and What Are the Implications for the Advancement of Children's Fundamental Human Rights (i.e., Such as Liberty Rights and the Right to Security of the Person)?

The issue arose in the AFRC case as to whether there is any distinction to be made: (a) between "forced marriage" and "arranged marriages" and (b) between "forced marriage" in times of armed conflict vs. in times of peace, or during a transitional post-conflict period:

Furthermore, the Appeals Chamber also notes that in their respective Concurring and Partly Dissenting Opinions, both Justice Sebutinde and Justice Doherty make a clear and convincing distinction between forced marriages in a war context and the peacetime practice of "arranged marriages" among certain traditional communities, noting that arranged marriages are not to be equated to or confused with forced marriage during armed conflict. *Justice Sebutinde goes further to add, correctly in our view, that while traditionally arranged marriages involving minors violate certain international human rights norms such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), forced marriages which involve the abduction and detention of women and girls and their use for sexual and other purposes is clearly criminal in nature.* (AFRC Appeal Judgment, para. 194, emphasis added)

Can it be argued, however, that there can, depending on the specifics of the case, be an overlap between an "arranged marriage" and a "forced marriage"? That is, if a

marriage, for instance, is “arranged” between minors or between a minor and an adult; the minor may not have the legal and/or cognitive and socio-emotional capacity to provide voluntary, informed consent, thus creating a de facto element of coercion (or, for instance, the child or children may have voiced their strong opposition to the marriage but have succumbed to community pressure). Did the Appeal Court in the AFRC case opt for a safe (“politically correct”) position on the issue of “arranged marriages” involving minors which failed to acknowledge that, depending on the particulars of the case, instances of arranged marriages may violate the international criminal law regarding enslavement? Consider also that “arranged marriages” between minors and adults are perpetrated internationally where the minor is usually a young girl, and most commonly a girl who is a member of a marginalized and poor population within that jurisdiction or another? Is it correct or incorrect to assume that the marriage between an adult and a minor is “arranged” rather than “forced” when the child has been “volunteered” for the marriage via the consent of the parents, and may have been transported to another region of the country or another country entirely to live with the marriage partner? Can it be argued that minors cannot be presumed to provide informed, voluntary consent to marriage where there is a significant power differential between the partners as exists between child and adult? Note that UNICEF has advocated a universal marriage consent age of 18.

Consider that Article 24(3) of the Convention on the Rights of the Child calls for States Parties “to take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.” Is a so-called arranged marriage of minors or a minor and an adult such a traditional practice that places the health, education and welfare of children at grave risk (especially where the child or children involved are very young)? Consider that early marriage has been linked by UNICEF to early pregnancy and the associated health risks, a prematurely aborted education and a higher risk of being the victim of domestic violence as well as an increased risk of HIV/AIDS (see early marriage at www.unicef.org/protection/index_earlymarriage.html).

Further, is it misleading to suggest that forced marriages always involve abduction and detention of women and girls as the Appeal Court in the AFRC case seems to suggest in its citation with approval of Justice Sebutinde at paragraph 193 of the Appeal judgment? Is it not possible that a child might stay in a forced marriage simply due to familial and/or community pressure and the lack of any other option though he or she is not being detained via any physical restraint or imprisonment? Can the Appeal Court’s endorsement of Justice Sebutinde’s view that “while traditionally arranged marriages involving minors violate certain international human rights norms such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), forced marriages ... is clearly criminal in nature” (AFRC Appeal Judgment, para. 193) thus be challenged?

11.2.5 Were the Principles of the Convention on the Rights of the Child Reflected in the Treatment of the Case and the Remedy Afforded the Victims?

Sierra Leone had ratified the Convention on the Rights of the Child (CRC) in September 1990 (about seven years before the events for which the defendants were charged in the case). Several of the articles of the CRC are relevant to the issue of “forced marriage”; namely the right to education (Article 28); the right to the highest attainable standard of health (Article 24) and the right to be protected from sexual violence and from sexual exploitation (Article 34) given the implications of forced marriage on these fundamental human rights.

11.2.6 What Was the Outcome Regarding the Charges in the AFRC Case Regarding Recruiting and Using Children Under Age 15 for Active Participation in Armed Hostilities and with Respect to Sexual Slavery?

The charges against Kanu regarding the recruitment of child soldiers concern the recruitment of children under age 15. As previously mentioned, Sierra Leone had ratified the Convention on the Rights of the Child (CRC) in September 1990 well before the events for which the defendants were charged. Article 38 of the CRC states that “States Parties shall take all feasible measures to ensure that persons who have not reached the age of fifteen years do not take direct part in hostilities.” The latter provision was modeled on Optional Protocol II to the Geneva Convention; Part II Humane Treatment: Article 4(3)(c) “Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities” (Protocol Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Adopted on 8 June, 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts entry into force 7 December, 1978, available at <http://www.unhchr.ch/html/menu3/b/94.htm>). The Appeals Court in the AFRC case did not accept Kanu’s contention of ignorance of the international humanitarian law in effect at the time regarding the prohibition on the recruitment and use of child soldiers.

It is noteworthy that the Court of Appeals in the AFRC case discussed forced labor, sexual slavery and the conscription of children under 15 into child soldiering together. However, the children who were used as sexual slaves to commanders and others in the armed AFRC group; forced to do domestic chores and to move in the bush with the group were *not* classed as “child soldiers” in the Appeal judgment. However, under current UNICEF definitions of child soldier, these girls recruited

by the armed forces for sexual purposes and exposed to all the dangers of living and moving with an armed group would also be classed as child soldiers. This view of the girls in forced marriages to the rebel commanders as being child soldiers is consistent with the Cape Town Principles definition of child soldier which does not restrict the definition to those who are carrying arms (though many of the girls in the forced marriages did in fact, at varying times, carry arms also and engage actively in the hostilities). (Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Re-integration of Child Soldiers in Africa, Cape Town, April 27–30, 1997; see Appendix G.2 for the full text of the Cape Town Principles.)

11.2.7 Were the Sentences Meted Out to the Defendants in the AFRC Case by the Appeal Court Adequate in Promoting Respect for the Rights of the Child in the International Community?

The Appeal Chamber held that though the Trial Court at times double counted (by considering the same factors both with regard to the gravity of the crime and as an aggravating factor), this did not substantially affect the ultimate sentences in the instant case. This finding no doubt was influenced by the Appeal Court's consideration of the heinousness of the atrocities committed with children often being amongst the victims or even being prime targets:

The Trial Chamber, in applying this provision to the case, had this to say:

“Brima, Kamara and Kanu have been found responsible for some of the most heinous, brutal and atrocious crimes ever recorded in human history. Innocent civilians – babies, children, men and women of all ages – were murdered by being shot, hacked to death, burned alive, beaten to death. Women and young girls were gang raped to death. Some had their genitals mutilated by the insertion of foreign objects. Sons were forced to rape mothers, brothers were forced to rape sisters. Pregnant women were killed by having their stomachs slit open and the foetus removed merely to settle a bet amongst the troops as to the gender of the foetus. Men were disembowelled and their intestines stretched across a road to form a barrier. Human heads were placed on sticks on either side of the road to mark such barriers. Hacking off the limbs of innocent civilians was commonplace. The victims were babies, young children and men and women of all ages. Some had one arm amputated, others lost both arms. For those victims who survived an amputation, life was instantly and forever changed into one of dependence. Most were turned into beggars unable to earn any other living and even today cannot perform even the simplest of tasks without the help of others. Children were forcibly taken away from their families, often drugged and used as child soldiers who were trained to kill and commit other brutal crimes against the civilian population. Those child soldiers who survived the war were robbed of a childhood and most of them lost the chance of an education.” (*Prosecutor v. Brima, Kamara and Kanu*, Appeal Judgment, para. 328)

The defendants Kamara and Kanu complained that mitigating factors were *not* considered in their case. Is it just or unjust that mitigation allegedly arising due to cooperation with the Prosecutor should be considered possible where: (a) there is

clear individual responsibility for the crimes committed and the perpetrator is an adult who acted without significant duress or diminished mental capacity or mental defect and (b) the crimes committed are of such a severity as occurred in the AFRC case?

To what extent, if any, was the fact that the AFRC commanders were anti-government forces a factor in the substantially greater sentences imposed as compared to the sentences imposed in the CDF case? (Note that in the CDF case also there were convictions for systematic murder and inhumane acts amongst other crimes against civilians.) Was the evidence in both cases fully and fairly considered? Does the discrepancy in the sentencing in the two cases reinforce the skeptical view of the international criminal justice system which holds that the system may be used as tools by States to quell opposition armed groups, but not to effectively prosecute State agents and leaders responsible for international crimes (i.e., see discussion in Noah Novogrodsky, Challenging impunity, *New Internationalist Magazine*, December, 2005, http://www.thirdworldtraveler.com/ICC/Challenging_Impunity_ICC.html).

Chapter 12

Case 9: *The Prosecutor v. Thomas Lubanga Dyilo* (Democratic Republic of the Congo)

The full documents are available at:

- “Submission of the Prosecution’s Updated Summary of Presentation of Evidence”: <http://www.icc-cpi.int/iccdocs/doc/doc499776.PDF>
- “Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict”: <http://www.icc-cpi.int/iccdocs/doc/doc457039.PDF>
- “Decision on the Prosecution’s Application to Lift the Stay of Proceedings”: <http://www.icc-cpi.int/iccdocs/doc/doc554218.pdf>
- Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June, 2008: <http://www.icc-cpi.int/iccdocs/doc/doc511249.PDF>

In the following excerpts from these documents internal footnotes have been omitted.

12.1 Submission of the Prosecution’s Updated Summary of Presentation of Evidence (ICC-01/04-01/06-1363)

[...]

No.: **ICC-01/04-01/06**

Date: **30 May 2008**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, President
Judge Elizabeth Odio Benito, Judge
Judge René Blattmann, Judge

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE
CONGO**

***IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO***

Public Document

Submission of the Prosecution's Updated Summary of Presentation of Evidence

Source: Office of the Prosecutor

[...]

I. Introduction

1. In or about 2000, Thomas LUBANGA assumed control of a Hema militia operating in the Ituri district of the Democratic Republic of the Congo (DRC). The group, which had no name at the time, pursued a policy of using child soldiers, among others, to further its principal objective of securing political domination over the Ituri region through armed force. Once he became leader, Thomas LUBANGA recast the militia in his own vision as a hybrid political-military structure, composed, over time, of the Union des Patriotes Congolais (UPC) and the Forces Patriotiques pour la Libération du Congo (FPLC), and commonly referred to jointly as the UPC. As leader of the UPC/FPLC political-military structure, Thomas LUBANGA used his political skills, and his contacts in the DRC, Rwanda and Uganda, to secure increased financing and heightened legitimacy for the UPC/FPLC; to obtain power over lucrative gold mines located in the town of Mongbwalu; and to continue the organizational policy of enlisting and conscripting children, including under the age of 15 years, and using them to take part in the armed conflict in Ituri.
2. As a result of his conduct, on 28 August, 2006, Thomas LUBANGA was charged with three war crimes: conscripting children into armed groups, enlisting children into armed groups, and using children to participate actively in hostilities, in the context of a conflict of a noninternational character, pursuant to Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute. On 29 January, 2007, the Pre-Trial Chamber confirmed the above charges against Thomas LUBANGA and also ordered him to stand trial on three additional war crimes, based on identical conduct, in the context of a conflict of an international character, pursuant to Articles 8(2)(b)(xxvi) and 25(3)(a) of the Rome Statute.
3. This document summarizes the main points of the Prosecution's case and the principal evidence the Prosecution presently intends to offer at trial in support of these charges. Section II addresses various issues relating to the armed conflict in Ituri during the relevant time periods determined by the Pre-Trial Chamber (hereafter "the relevant time periods"): the existence of the conflict, Thomas LUBANGA's awareness of the armed conflict, the nexus between the armed conflict and the charged crimes, and the character

(international or noninternational) of the conflict. Section III sets forth the Prosecution's theory of co-perpetration as the mode of liability applicable to Thomas LUBANGA's role in the crimes charged in the Document Containing the Charges. Section IV describes the common plan charged in the Document Containing the Charges, details how the plan was applied in practice, and places Thomas LUBANGA at the core of the common plan. Section V describes six individual cases of children, all under the age of 15 years, whom the UPC/FPLC recruited, enlisted, and/or used to participate actively in hostilities. Section VI concludes.

II. The Armed Conflict

A. The District of Ituri

4. Ituri is a district of the Province Orientale of the DRC, bordering Uganda to the East, and Sudan to the North. Its population has been estimated between 3.5 and 5.5 million people from about 18 ethnic groups. Among the bigger groups are, alongside the Alur and Bira communities, the Hema, the Lendu and the Ngiti. The district's capital is the city of Bunia, regularly inhabited by about 100,000 inhabitants. In 2002 and 2003, Bunia hosted tens of thousands of refugees.
5. Ituri is an area rich in valuable natural resources, including gold, diamonds, Colombo tantalite (coltan), timber and oil. Mongbwalu, a town located about 45 km northwest of Bunia, contains one of the most important gold mines in the world. Ituri's resources have always attracted great interest and, at times, great strife. The struggle to control these resources has been at the heart of the armed conflict and has deepened the mistrust between ethnic communities, subject to the manipulation by internal and external actors.

B. Existence of the Armed Conflict

6. Since early 1996, the district of Ituri, and the DRC Eastern Provinces in general, have been at the forefront of two successive regional wars, which involved armed forces from several African countries. What is commonly referred to as the "First Congo War", which took place between 1996 and 1997, led to the overthrow of long-time DRC President Mobutu Sésé Seko by the Alliance des forces démocratique pour la liberation du Congo (AFDL) of Laurent-Désiré Kabila. The "Second Congo War" lasted at least from 1998 to 2003, when the DRC Transitional Government was installed pursuant to the Accord Global et Inclusif. This period of sustained and widespread

violence – which fragmented the country, heightened ethnic divisions, caused enormous loss of life and physical dislocation, and weakened or destroyed many of the structures of governance in the Eastern Provinces – underlay and helped exacerbate long-standing political and social tensions in Ituri.

7. In 1998, the Ituri district was taken over by the rebel movement *Rassemblement Congolais pour la Démocratie* (RCD), at the time supported by the Ugandan army – the Ugandan People’s Defence Forces (UPDF) – and the Rwandan army – then called the Rwandan Patriotic Army (RPA). The RCD soon split into the RCD-Goma, a faction of the RCD based in Goma, North-Kivu and backed by Rwanda; and the RCD/ML, backed by Uganda.
8. Starting in mid-1999, disagreements in Ituri escalated and crystallized into a broader violent conflict among an array of armed militia aligned largely along ethnic lines. In early 2002, Ituri came under the control of the RCD/ML. Fighting between Hema and Lendu militia intensified. From, at the latest, mid-2002 onwards, a sustained and extensive armed conflict existed among the organizations purporting to represent these and other ethnic groups.
9. Amidst a web of constantly changing alliances and successive platforms, the following armed groups, among others, planned and/or carried out military operations in Ituri at different times in 2002 and/or 2003: the UPC/FPLC, the *Front des Nationalistes et Intégrationnistes* (FNI), the *Parti pour l’Unité et la Sauvegarde de l’Intégrité du Congo* (PUSIC), the *Forces Populaires pour la Démocratie au Congo* (FPDC), the *Forces Armées du Peuple Congolais* (FAPC), and the *Front de Résistance Patriotique de l’Ituri* (FRPI).
10. The fighting was aggravated by the involvement of both national and international actors, predominately from Uganda and Rwanda, who supported one or the other of the various Ituribased militia at different times.
11. Thus, Ugandan Government Officials from 2000 to the end of October 2002, and Rwanda Government Officials, from mid-2002 to about June 2003, aided the Hema militia and, once it existed, the FPLC. Among other assistance, these external governments provided, inter alia, military training, equipment such as weapons and ammunition, and military expertise.
12. Inter-governmental bodies have repeatedly and consistently concluded that an armed conflict existed in Ituri during the relevant time periods. In May 2003, in light of the unabated conflict, the United Nations Security Council determined “*that the situation in the Ituri region and in Bunia in particular constitutes a threat to the peace process in the Democratic Republic of the Congo and to the peace and security in the Great Lakes region*” and, acting pursuant to Chapter VII of the United Nations Charter, authorised “*the deployment ... of an Interim Emergency Multinational Force [IMEF] in Bunia in close coordination with MONUC ...*”, which was empowered “*... to take all necessary measures to fulfil its mandate.*” From 12 June, 2003 onwards, as part of Operation Artemis, several member states of the European Union (EU) and a number of other states contributed troops to an EU force that deployed in Bunia as part of the IMEF and in accordance with the Security Council mandate.

13. On 28 July, 2003, the Security Council pronounced itself “[d]eeply concerned by the continuation of hostilities in the eastern part of the Democratic Republic of the Congo, particularly . . . and in Ituri, and by the grave violations of human rights and of international humanitarian law that accompany them,” [author’s note: amongst the grave violations of international humanitarian law the Security Council explicitly listed at para. 13 of the UNSC Resolution 1493 (2003) of 28 July, 2003, DRC-OTP-0131-0167: “the continued recruitment and use of children in the hostilities in the Democratic Republic of the Congo, especially [. . .] in Ituri”] and reiterated “the request addressed to all parties [. . .] to provide the Special Representative of the Secretary-General with information on the measures that they have taken to put an end to the recruitment and use of children in their armed components [. . .]” and [author’s note: the Security Council] requested the Secretary-General “to deploy in the Ituri district, as soon as possible” a “tactical brigade-size force.” As a consequence, in September 2003, the UN deployed the MONUC Ituri Brigade, significantly adding to the limited number of previously-deployed UN troops in the region.
14. Notwithstanding these efforts, the combat persisted. [Author’s note: Fourteenth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, of 17 November, 2003, DRC-OTP-0074-0215, at para. 3: “The situation in Ituri has been particularly serious. Approximately 420 civilians have been killed in Bunia in fighting between Lendu and Hema militias [. . .] Widespread rape and looting also occurred. A significant number of the victims of the abuses have been minors [. . .]”.] In sum, from August 2002 up until December 2007, armed violence in Ituri has resulted in the killing of approximately 5,000 civilians and the internal displacement of hundreds of thousands.

C. Thomas Lubanga’s Awareness of the Armed Conflict

15. During the relevant time periods, Thomas LUBANGA was aware of the existence of an armed conflict in Ituri. [Author’s note: here follows references to various public statements made by Lubanga (in French) regarding the conflict in Ituria, the atrocities being committed and the plans to restore order.]
16. In a declaration of 13 August, 2002, Thomas LUBANGA stated that “[D]e grands forfaits ont été commis, notamment l’entretien et l’armement des combattants de guerres tribales, l’insémination de la haine et de la division dans les différentes communautés Ituriennes” and continues to say that “[L]es Ituriens, ne voulant pas demeurer dans le cycle infernal de violence, ont signé plusieurs accords de cessation des hostilités.” In the same document, Thomas LUBANGA recommended, *inter alia*, to the Iturian people the following: “Le FRP demande à tous les fils et filles de l’Ituri d’arrêter les massacres et tous les actes de destructions et chacun en ce qui le concerne doit oeuvrer pour la paix. De cesser de cultiver et de manifester tout

acte de violence et de haine. De soutenir les actions de pacification du gouvernement". [Author's note: in the foregoing Lubanga urges Ituri boys and girls to stop the massacres and all acts of violence and work for peace.]

17. On 15 November, 2002, Thomas LUBANGA signed, on behalf of the UPC, "The Kampala Understanding between RCD-ML and UPC", which contained the following statements: *"After a review of the security situation in Eastern-Congo and intensive discussions on the need for peace in Ituri in accordance with Lusaka and Luanda Agreements and, in order to put an end to the senseless killings and forestall a humanitarian crisis in Ituri, the Congolese leaders of RCD-ML and UPC agree as follows: "1. RCD-ML and UPC shall cease hostilities at all fronts in Ituri immediately"*.
18. On 4 January, 2003, as UPC President, Thomas LUBANGA, sent a message to the Congolese people in Ituri, in which he made numerous references to the armed conflict, including, inter alia, the following statement: *"L'année 2002 qui vient de s'achever, a connu des événements tels qu'ils auront marqué à jamais l'histoire et la vie socio-politique de l'Ituri, cette région du Nord-Est de la République Démocratique du Congo caractérisée depuis quatre ans par une rébellion doublée d'une guerre ethnique des plus atroces et de plus inhumaines."* Thomas LUBANGA also stated that *"[L]a détermination de nos éléments des Forces Patriotiques pour la Libération du Congo, FPLC en abrégé (auxquels nous rendons un vibrant hommage) a permis de maîtriser la situation sécuritaire à plus ou moins 80%."* [Author's note: in the aforementioned Lubanga acknowledged that acts of atrocity had taken place but claimed that his forces had achieved some considerable success in restoring security.]
19. On 14 August, 2003, in a draft "Déclaration politique des responsables politiques et militaires de l'Ituri, réunis en concertation du 16 au 17 Août à Kinshasa", amongst others, Thomas LUBANGA for the UPC/RP (Reconciliation et Paix) and NDJABU NGABU for the FNI declared the following: *"Vu les drames et atrocités indescriptibles vécus par la population congolaise de l'Ituri depuis bientôt cinq longues années;"* leading the signatories to undertake that *"... nous nous engageons fermement à mettre fin aux massacres, pillages, exactions et toute autre forme de violation des Droits de l'Homme dont nous sommes accusés"*. [Author's note: the aforementioned Lubanga and others pledged to put an end to the violence and atrocities occurring in the Ituri region.]
20. Finally, on 14 May, 2004, the parties to the armed conflict, amongst them again the FNI and the UPC, signed a treaty that indicated the following: *"Désireux de participer à la pacification et à la restauration de l'autorité de L'Etat sur l'ensemble du territoire national; considérant le caractère urgent et prioritaire de la mise en oeuvre du programme de désarmement et réinsertion communautaire pour L'Ituri élaboré par le Gouvernement de Transition; ... Exprimons en outre nos remerciements à l'endroit de la Communauté Internationale pour son soutien au processus de pacification de l'Ituri et formulons le souhait que cette implication demeure constante dans toutes les phases de l'exécution*

du programme de Désarmement et de Réinsertion Communautaire en Itur.”

[Author's note: the aforementioned refers to a treaty agreement between the FNI and the UPC to end the violence in the DRC.]

D. Nexus Between the Armed Conflict and the Alleged Crimes

21. The criminal conduct with which Thomas LUBANGA is charged took place in the context of and was associated with the armed conflict in Ituri: Children under the age of 15 years were enlisted and conscripted in order to undergo military training; the purpose of the training was to use them in hostilities [author's note: MONUC Special report, DRC-OTP-0074-0422 at 0463; see also further, Section V, Individual Cases].

E. Characterisation of the Armed Conflict

22. As the summary of evidence contained in Section II.B (“Existence of the Armed Conflict”), *supra*, indicates, the Prosecution maintains that, during the relevant time periods, there existed in Ituri, at a minimum, an armed conflict of a non-international character.
23. In the Decision on the confirmation of the charges, the Pre-Trial Chamber found that “*there is sufficient evidence to establish substantial grounds to believe that, as a result of the presence of the Republic of Uganda as an occupying power, the armed conflict which occurred in the Ituri region can be characterised as an armed conflict of an international character from July 2002 to 2 June, 2003.*” Consistent with this decision, and with the decision of the Trial Chamber of 13 December, 2007, the Prosecution is prepared to present all evidence in its possession pertaining to both the international and the national aspects of the armed conflict, so that the Trial Chamber can determine the appropriate legal characterization applicable to the present case.
24. From late 1998 to early June 2003, the UPDF was present in the Ituri region. During this time, UPDF military operations [sic] were had an important role in shaping local political dynamics. The UPDF's influence over the Congolese rebel groups during its presence in the Ituri region is sometimes characterized as that of a “king-maker.”
25. The UPDF helped the UPC to capture Bunia in August 2002. When the UPC/FPLC allied with the RCD-Goma backed by Rwanda in late 2002, Uganda then helped create the PUSIC as an opposing Congolese rebel group and also attempted to forge an alliance, the Front pour L'Intégration et Paix en Ituri (FIPI), among opposing Congolese militias in February 2003. Eventually, in March 2003, the UPDF and the FNI/FRPI drove the UPC/FPLC out of Bunia. The UPDF began to withdraw from the Ituri region in late April 2003. The UPDF withdrew completely from Bunia

around 6 May, 2003 and continued its withdrawal from other areas of the Ituri region until early June 2003.

26. Successive DRC governments repeatedly tried to reassert their authority in Ituri by securing the withdrawal of the UPDF. The Lusaka Ceasefire Agreement signed by, *inter alia*, the DRC and Uganda in July 1999 and the Luanda Agreement, signed by the DRC and Uganda in September 2002, called for the withdrawal of the UPDF from the territories of the DRC. The UN Security Council denounced Uganda for violating the sovereignty and territorial integrity of the DRC and repeatedly demanded withdrawal of the UPDF from the territories of the DRC.
27. During the period the UPDF was present, the DRC government was incapable of exercising its sovereign duties in Ituri, and the UPDF substituted its own authority. The UPDF widely intervened in local administration and shaped political developments: The UPDF's firm grasp of local administration further assisted it to exploit natural resources in Ituri. The international community viewed the level of authority the UPDF exercised as sufficient to make Uganda responsible for the security of the Ituri region.
28. Having taken over key areas of the Ituri region, UPDF General James KAZINI created the new province of "Kabili-Ituri" and appointed Adèle LOTSOVE as governor of the Ituri District in June 1999. Uganda remained a prominent party to the political and diplomatic framework designed to establish transitional administrative structures in Ituri. In the Luanda Agreement signed in September 2002, Uganda and the DRC agreed to jointly establish the Ituri Pacification Committee (IPC) in return for Uganda's promise to withdraw its troops.
29. In September 2002, the UN Secretary General recommended to the Security Council that, given the prevailing volatile environment, the UPDF should continue to discharge security responsibilities until a suitable Congolese alternative emerged. In March 2003, the Accord de cessation des hostilités en Ituri signed by Congolese rebel groups and witnessed by, *inter alia*, the DRC and Uganda explicitly gave Uganda the responsibility to secure the Ituri region.
30. The UPDF's withdrawal from Bunia and surrounding areas in May 2003 created a power vacuum. UPDF General Kale KAYIHURA warned of the dangers produced by a UPDF departure without an effective peacekeeping force and administration. After the rapid withdrawal of the UPDF, conflicts among Congolese militia erupted as they battled for control of Bunia. With the DRC Government still lacking the capacity to fill the gap, the UN Security Council authorized the deployment of the Interim Emergency Multinational Force in Bunia in May 2003 and further authorized MONUC forces to use all necessary means to protect civilians in Ituri region.
31. UPC/FPLC military operations, and, in particular, military attacks specifically cited under the "Individual cases" section of the Document Containing the Charges, took place within that context and were closely linked to the UPDF's presence in Ituri.

III. Co-perpetration Liability

32. One of the modes of liability established by the Rome Statute is co-perpetration. Pursuant to Article 25(3)(a), “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime . . . jointly with another. . . .”
33. The concept of co-perpetration incorporates two objective elements. First, there must exist a common plan or agreement between two or more persons, which amounts to or involves the commission of a crime. Second, the accused must have exercised functional control over the implementation of the common plan by reason of the central task or role assigned to him, and provided a substantial contribution to the implementation of the common plan. Functional control exists, not only where the accused has actually made an essential contribution to the commission of the crime, but also where (i) the role assigned to the accused *ex ante* was central to the implementation of the plan, and (ii) it appears in retrospect that his contribution was substantial, though not essential.
34. The concept of co-perpetration incorporates two subjective elements. First, the Prosecution must show that the objective elements of the crimes alleged were committed with both “intent and knowledge”. To this end, the Prosecution will prove that the accused was both aware of the existence of the facts relevant to the objective elements of the crimes and accepted the substantial likelihood that his acts or omissions would result in the realization of these objective elements. Second, the Prosecution must establish that the accused was aware of the factual circumstances establishing his liability as a co-perpetrator. To this end, the Prosecution will show that i) the accused was aware of the substantial likelihood that implementing the Common Plan would amount to or involve the commission of the crime(s); and ii) the accused was aware of the factual circumstances that enabled him to exercise functional control over the crime(s); namely, that he was aware of the centrality or importance of his role in the Common Plan.

IV. The Common Plan and the Role of the Accused

35. Thomas LUBANGA's criminal responsibility for the conscription, enlistment and use of children under the age of 15 years to participate in hostilities was manifested through a common plan (hereafter the “common plan”) among himself, Chief Kahwa Panga Mandro (UPC Deputy National Secretary for Defence), Rafiki Saba (UPC Chief of Security), Floribert Kisembo (FPLC Chief of Staff), Bosco Ntaganda (FPLC Deputy Chief of Staff for Military Operations), and other senior FPLC commanders, including Commander Tchalingonza (in charge of the South East sector). The goal of the common

plan, which existed from early September 2000 to 13 August, 2003, was to further the UPC/FPLC war effort by all means, including (i) recruiting and enlisting young people, including young people under the age of 15, into the UPC/FPLC, (ii) subjecting them to military training, and (iii) using them to participate actively in military operations and as bodyguards.

A. The Existence of the Common Plan

36. The existence of the common plan can be inferred from the following:

The Policy of Broad Recruitment

37. The military wing of the UPC, eventually named the FPLC, required the recruitment – through conscription and enlistment – of a constant supply of soldiers to fill the ranks of the UPC military apparatus. To meet this need, the UPC established an even more structured policy and implemented a widespread campaign of conscription and enlistment of soldiers in large number, including men, women and youth without regard to their age. The UPC enlisted whoever was available. In some instances, the UPC even re-recruited previously demobilised child soldiers.

Pattern of large scale enlistment and conscription of child soldiers

38. The UPC/FPLC recruitment campaign shows a consistent pattern of repeated and large scale enlistment and conscription of children, including those under the age of 15 years, into the UPC/FPLC. Forcible conscription of children by the UPC/FPLC included individual cases of abductions, large scale abductions and other forms of forced recruitment drives, which were directly or indirectly targeted at youths, including those under the age of 15. In some circumstances, the very children under 15 years who were themselves abducted were forced by their commanders to arrest and abduct children, including girls under the age of 15, into the UPC.
39. As part of its broad child recruitment policy, the UPC/FPLC leadership systematically pressured Hema families in UPC/FPLC-controlled territories to provide children for military service. Emissaries and propaganda were employed to encourage Hema youth to join the UPC/FPLC military.
40. In addition to forced conscription, the UPC/FPLC also increased its military capacity by enlisting youth voluntarily, including youth under the age of 15 years, into its ranks. The UPC/FPLC accepted for enlistment as children soldiers who joined following the loss of family members, some of whom were

pursuing a desire for revenge for such loss. The UPC/FPLC enlisted other youth who joined as a result of social pressure brought to bear on them by family, peers or the community as a whole. Other motivations for voluntary enlistment were the benefits proffered by the UPC/FPLC to child soldier recruits such as the promise of opportunity to protect family from a perceived threat, the allure of a military role, or the simple prospect of being fed.

41. The number of youths, including children under the age of 15 years, in ranks of the UPC/FPLC was significant. One witness states that during the time the UPC/FPLC controlled Bunia, he rarely saw adult military; rather, he mostly saw children of a young age, between 12–14 years old. A battalion commander within the UPC/FPLC states that the FPLC had up to seven hundred child soldiers. He also states that the battalion he commanded had up to 50 child soldiers from the ages of 14 to 16 years old.

Establishment of training camps

42. In order to prepare child recruits for combat, including those under 15 years of age, the UPC/FPLC established several military training camps, in Centrale, Rwampara, Mandro, Irumu, Bule, Bogoro, Sota, Mongbwalu and Bunia. The child soldiers spent, on average, two months at these locations where they learned basic military concepts and skills, such as discipline and morale, saluting, drill, and weaponry training and rudimentary combat tactics. At the conclusion of training, the child soldiers were usually issued with a uniform and weapon, signifying their readiness to participate in UPC/FPLC military operations.

Regular visits to training camps by Senior UPC/FPLC commanders

43. As discussed more fully in section 3(b), *infra*, high ranking UPC/FPLC commanders, including Thomas LUBANGA, inspected the training camps while child soldiers were visibly present.

Deployment of recruits without regard to age

44. Following the completion of training, child soldiers were deployed by the UPC/FPLC in military operations no differently from any other soldier, with complete disregard for their age. The UPC/FPLC used child soldiers in front line combat roles, where they inflicted and suffered casualties. Examples of combat operations in the time period September 2002 to September 2003 in which child soldiers were used by the UPC/FPLC are Libi and Mbau

(October 2002), Lenga and Fataki, Lipri (February/March 2003), Kobu (February/March 2003), Bogoro (February/March 2003), Bunia (August 2002 and May 2003), Songolo and Djugu and Mongbwalu (late 2002 and June 2003).

Use of child soldiers as bodyguards

45. Child soldiers were also regularly used as escorts/bodyguards for National Secretaries, Command Staff and UPC/FPLC members, informants and as guards for UPC/FPLC facilities.

B. The Role of the Accused

46. During the time he was in power, Thomas LUBANGA was the chief architect and enforcer of UPC/FPLC policies, including the common plan. The principal indicia of Thomas LUBANGA's central role in the articulation and execution of the common plan are highlighted below.

1. From September 2000 to September 2002, Thomas Lubanga Created the UPC/FPLC as a Means to Seize and Maintain Political and Military Domination of the Ituri Region

47. Thomas LUBANGA, a citizen of the Democratic Republic of the Congo (DRC), was born of Hema ethnicity in Djiba, in the then Republic of Congo, on 29 December, 1960. In late 1999/early 2000, following an advanced course of education which led to his professional appointment at the University of Cepromad, Thomas LUBANGA established himself on the political scene in the region, eventually as the Member of the Assembly of the Province of Ituri.
48. In 2000, Thomas LUBANGA decided to create his own organization, in order to secure and maintain political and military control over the Ituri region. On 15 September, 2000, together with others, he launched the UPC in Bunia and was unanimously acclaimed President. Thereafter, he remained the indispensable element of UPC policy and practice. Keenly aware of the centrality of armed force to political power in Ituri, Thomas LUBANGA and his supporters saw the UPC as the umbrella name for a political-military movement, to be composed predominantly of Hema people.
49. Even as he moulded the UPC into a powerful organisation in its own right, Thomas LUBANGA held senior positions in other groups that

struggled for dominance of Ituri politics in 2000 and 2001. In the summer of 2000, Thomas LUBANGA joined the *Rassemblement Congolais pour la Démocratie – Mouvement de Libération* (RCD-ML), which formed part of the *Front de Libération du Congo* (FLC). At the end of 2000, Thomas LUBANGA spent some months in Uganda, where he received military training. In 2001, he was briefly the FLC's Deputy National Secretary for Youth and Sports, before serving as Commissioner for Transport and Communication, then as Minister of Defence, of the alliance between the UPC and the *Rassemblement Congolais pour la Démocratie – Kisangani/Mouvement de Libération* (RCD-K-ML).

50. In April 2000, Thomas LUBANGA rallied mutinous Hema officers and soldiers from within the *Armée du Peuple Congolais* (APC, the military wing of the RCD-K-ML) and arranged to send them for training in Uganda.
51. On 17 April, 2002, the UPC issued a public declaration, breaking away from RCD-K-ML and launching itself as a distinct political-military movement. Both the political and military wings of the UPC were thereafter collectively known as the UPC with Thomas LUBANGA serving as both President and Commander-in-Chief.
52. Over the following months, Thomas LUBANGA and other UPC leaders planned and prepared the consolidation of UPC political and military control over Ituri. Even while he was in detention in Kinshasa from June to end-August 2002, Thomas LUBANGA appointed Richard LONEMA as interim UPC leader with instructions to continue to develop the military wing of the UPC and to recruit soldiers. During Thomas LUBANGA's detention in Kinshasa, Floribert KISEMBO was stationed in Bunia and oversaw UPC troops in the town, while KAHWA and NTAGANDA were leading UPC units as operational commanders. LONEMA coordinated all three of them. When Thomas LUBANGA returned on or about 25 August, 2002 he imposed a formal structure on this growing organization.
53. In September 2002, Thomas LUBANGA formally named the UPC's military wing the FPLC. He immediately became FPLC Commander-in-Chief and held this position throughout the relevant time periods. At Thomas LUBANGA's direction, the pre-existing Hema militias were incorporated into the FPLC as soldiers and officers in a hierarchically-organized army which included a Chief of General Staff and two deputies (in charge of, respectively, operations and administration/logistics). Staff officers for personnel, intelligence, logistics and civilian and military operations reported to the Chief of General Staff. Thomas LUBANGA and the UPC set up the military structure of the FPLC with a conventional military structure, and from its inception, the FPLC received financial support and arms from supporters of the UPC.
54. Thomas LUBANGA was instrumental in obtaining political, financial and social support for the UPC/FPLC, both within Ituri and beyond. He led the delegation that went to Kampala in June 2002 to secure Ugandan government

backing. He used his contacts and other assets to win and retain the allegiance of local Hema community leaders.

55. Under Thomas LUBANGA's direction, the UPC/FPLC sought, and for a time achieved, military control over the Kilo Moto gold mines in Mongbwalu, a significant source of financial revenue for the organization. Control of gold in Mongbwalu helped make the UPC/FPLC and Thomas LUBANGA particularly, an attractive interlocutor for outside supporters interested in exploiting Ituri's rich resources. Access to gold was sufficiently important for the UPC/FPLC to establish its Etat-Major in Mongbwalu from December 2002 to February 2003.

2. From September 2000 Until 13 August, 2003, Thomas Lubanga Assumed Leadership and Command of the UPC/FPLC

56. As President and Commander-in-Chief of the UPC/FPLC, Thomas LUBANGA established a system of government which conducted its affairs through the presidency and the Secretariat General. He appointed ministers, held regular meetings with them and developed an organised system of communication, record keeping, accounting, and revenue collection. Thomas LUBANGA's staff would regularly update him on the activities of their departments within the UPC.
57. Thus, Thomas LUBANGA convened regular meetings with UPC/FPLC commanders at his headquarters in Bunia to whom he gave instructions; regularly received reports from UPC Ministries, armed units of the FPLC and their respective commanders. In fact prior to military operations, Thomas LUBANGA would meet with his Chief of Staff of the FPLC in order to plan the operations. Thomas LUBANGA also established Presidential commissions; appointed and dismissed members of the UPC executive and officers in the FPLC; made policy decisions and gave orders to military commanders; and presided over military committees. The Statute of the UPC formally endowed the Secretariat General, the executive organ of the movement, with the power to execute the President's orders. There was nothing the FPLC could undertake that was not known to the UPC and Thomas LUBANGA, no matter how trivial.
58. Notwithstanding the extensive formal structures he established, in practice, Thomas LUBANGA enjoyed and often exercised the undisputed power to make decisions. Thomas LUBANGA only received technical advice from the UPC/FPLC movement's National Secretaries. Thomas LUBANGA *"used to take most of the decisions himself without consulting with the members of the movement's executive."*
59. Thomas LUBANGA dominated the UPC/FPLC to the extent that he was variously described by those who knew and worked with him as a *"dictator"*, and *"Supreme Commander"*. There was little space for debate in most UPC/FPLC executive meetings. Rather, Thomas LUBANGA often simply

gave orders to executive members and “yelled at them as if they were children”.

3. From Early September 2002 Until 13 August, 2003, Thomas Lubanga Oversaw and Ensured Effective Implementation of UPC/FPLC Policies, Including the Common Plan of Furthering the UPC/FPLC War Effort by Conscription, Enlisting and Using Children, Including Children Under the Age of 15 Years, to Participate Actively in Hostilities

60. Thomas LUBANGA had de facto and de jure ultimate authority to ensure effective implementation of UPC/FPLC policies, including the common plan of furthering UPC/FPLC war effort by conscripting, enlisting and using children including, children under the age of 15 years, to participate actively in hostilities.
61. Given the human resource needs of the UPC/FPLC's military objectives, Thomas LUBANGA and co-perpetrators set in place and enforced policies to conscript, enlist and use whoever could be deployed into combat, including children under the age of 15 years.
62. The most compelling evidence of Thomas LUBANGA's central role in the coordination and implementation of the common plan can be derived from his own statements. During an inspection to the Rwampara camp on 12 February 2003, Thomas LUBANGA gave following address to soldiers, including children visibly under age 15 years:
63. *“I am Thomas LUBANGA the president of our party, the UPC. . . . You are used to . . . talking with our commanders . . . who are . . . helping with this . . . work . . . of training . . . who are building the army . . . everyday. I am with them all the time but there is a lot of work. . . . And . . . sometimes my work requires me to go abroad or I have meetings all the time . . . So it is difficult for me to meet with you all the time. . . . The Chief of Staff, Commander Bosco, comes to see you. Does he come here? . . . Does he come here regularly? . . . If he does not come, you tell me Continue your training. We are keeping an eye on you all the time. So that we can know your problems . . . and solve them. You said a while ago that the Operations Commander . . . Commander Bosco comes to see you regularly. If you have difficulties, tell him. And they will get to a higher level . . . of our leadership. Because he is a senior leader of our army, the FPLC.”*
64. DRC-OTP-WWWW-0010, one of the individual former girl child soldiers, can be seen on this video and was present when Thomas LUBANGA addressed the recruits at Rwampara on 12 February, 2003.
65. Thomas LUBANGA's visit to Rwampara is evidence of his actions to further and implement the plan to recruit children under the age of 15. Equally compelling is the fact that in early February 2003, DRC-OTP-WWWW-0187, a UPC/FPLC battalion commander states that during a meeting where, amongst others, Floribert KISEMBO and Bosco NTAGANDA were present, Thomas LUBANGA gave orders for children to be recruited from Hema families in the

villages. Several days later, Thomas LUBANGA visits the Rwampara military training camp and addresses the recruits. Both these events demonstrate Thomas LUBANGA's direct actions to further and implement the plan to recruit and use children under the age of 15.

66. Thomas LUBANGA's key overall co-ordinating and supervisory role in the development, furtherance and implementation of the common plan was manifested in the following ways:

a. Thomas LUBANGA had direct and ongoing contacts with the other joint co-perpetrators in the common plan, including with those subordinate UPC/FPLC commanders known as being active in recruiting, training and using children in hostilities, such as NTAGANDA, TCHALIGONZA and Chief KAHWA.

These contacts included the following:

(i) Telephonic/Radio Communications

67. UPC/FPLC officers employed sophisticated communications devices to maintain close and frequent contact with each other and with Thomas LUBANGA. These facilities – which included satellite and mobile phones, and Motorola and other hand-held radios -enabled Thomas LUBANGA to exercise command and control over UPC/FPLC troops and to remain informed about military operations, the political situation in Ituri, and developments in UPC/FPLC training camps. By late 2002, nearly all of the officers had radios. Thus, for significant portions of time when he was not in Bunia, including in August 2002 and August 2003 when he was in Kinshasa, Thomas LUBANGA nonetheless maintained regular contact with NTAGANDA, KISEMBO and other senior UPC/FPLC members. Thomas LUBANGA expected to be informed of what was happening in UPC/FPLC-held territory and radio communication was established with high level commanders, including Thomas LUBANGA, each time the troops moved a few kilometres. The UPC/FPLC kept a logbook of radio communications which includes records of operational orders, operation situation reports and deployment instruction. By August 2002, the information-sharing system was sufficiently well-developed that the UPC/FPLC leadership, including Thomas LUBANGA, received information of military operations and other significant events all over Ituri, including in Mongwalu, Aru, Mahagi.

(ii) Correspondence

68. In practice, UPC/FPLC commanders regularly copied Thomas LUBANGA in name, and/or in his position as Commander-in-Chief, on correspondence and reporting concerning core topics that were essential to the fulfilment of the common plan, including, inter alia, military logistics and supplies, military command posts and areas of operation, and means of communication.

(iii) Meetings

69. Thomas LUBANGA, NTAGANA, KISEMBO, Aimable RAFIKI, NEMBE, Prince MUGABO, Ali MBUYI and Eric MBABAZI regularly convened security and related meetings at Thomas LUBANGA's home.
70. During the UPC/FPLC delegation's visit to Aru, in September/October 2002, two separate meetings were held, military and civilian. At the meetings' conclusion, the leading members of the UPC/FPLC delegation – Adele Lotsove MUGISA, KISEMBO, and Chief KAHWA – all reported to LUBANGA via INMARSAT and Thuraya satellite telephone.

b. Thomas LUBANGA inspected UPC/FPLC military training camps where young recruits including those under the age of 15 years, were being trained for armed combat. He spoke to them and encouraged them to fight.

71. The statements of DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0010, and DRC-OTPW-0297 describe Thomas LUBANGA's visits to the training camps at Centrale, Rwampara, Irumu and Langu, sometime between early September 2002 and 13 August, 2003, those under the age of 15 years, were beginning their military training.
72. The regularity and formality of Thomas LUBANGA's visits to the military training camps are demonstrated by the existence of a particular "protocol" at the camps, requiring the soldiers, including the children under the age of 15 to lift their rifles, rest them on their shoulders and march past Thomas LUBANGA with legs straight, when Thomas LUBANGA visited.

c. Thomas LUBANGA oversaw the conduct of military affairs and appointed the senior ranks within the UPC/FPLC, thus ensuring the existence and coherence of the military structure into which the children were incorporated.

73. From early September 2002 military matters were handled by Thomas LUBANGA and Chief KAHWA (UPC/FPLC Deputy National Secretary for Defence), until, after the departure of Chief KAHWA from the UPC, such matters came under the exclusive remit of Thomas LUBANGA. On 3 September 2002, Thomas LUBANGA officially appointed Bosco NTAGANDA UPC/FPLC Deputy Chief of the General Staff, in charge of military operations. Bosco NTAGANDA served in this capacity until December 2003, when Thomas LUBANGA promoted him to FPLC Chief of the General Staff.

d. Thomas LUBANGA secured financing for the UPC/FPLC and negotiated the provision of weapons and other military equipment, including such as would be used by children in hostilities.

74. Thomas LUBANGA secured financing for the UPC/FPLC227 including from businessmen. In a TV interview Thomas LUBANGA stated that the UPC/FPLC army was well-equipped "because there are people who have understood the value of our revindications, or our objectives, and they give us a hand so that we can improve the state of the army." As Thomas LUBANGA made clear, Uganda was a primary source of weapons purchases for the UPC/FPLC.

Thomas LUBANGA's involvement in the financing of the UPC/FPLC is evidenced by his frequently being copied on documents addressing financial matters.

4. From Early September 2002 Until 13 AUGUST, 2003, Thomas Lubanga Had Knowledge That, as Applied, UPC/FPLC Policies - And in Particular, the Common Plan of Furthering [author's note: the] UPC/FPLC War Effort by Conscription, Enlisting and Using Children, Including Children Under the Age of 15 – Systematically Resulted in the Conscription, Enlistment and Use of Children, Including Children Under the Age of 15, to Participate Actively in Hostilities

75. Thomas LUBANGA's knowledge that the application of the common plan systematically resulted in the conscription, enlistment and use of children, including children under the age of 15 years, to participate actively in hostilities, is shown in three principal ways:

a. Knowledge Shown by Attempts to Deflect Responsibility through Sham Demobilization and/or Sham Prohibition of Child Soldiers

76. Throughout his tenure as president and commander-in-chief, Thomas LUBANGA engaged repeatedly in sham efforts to prohibit the use of, and/or to demobilise, child soldiers. Never intended to be enforced, these purported bans and/or demobilisation orders had one aim – to deflect and ward off public criticism of the UPC/FPLC's child recruitment practices. Two of his military subordinates within the UPC/FPLC will testify that they never saw or implemented such demobilisation orders. They show that Thomas LUBANGA was well aware of the UPC/FPLC's systematic conscription, enlistment and use of child soldiers.
77. A letter dated 21 October, 2002, on UPC letterhead, signed by Thomas LUBANGA as President of the UPC and bearing the seal of the Presidency of the Commandant Chef d'Etat Major General of the FPLC, acknowledges the developing FPLC practice of recruiting children (both girls and boys) into the FPLC, and purports to prohibit any further child enrolment.
78. On 27 January, 2003, Thomas LUBANGA signed a *Letter Suivi Dossier Demobilisation enfants soldats de la FPLC* as President of the UPC and Commander in Chief of FPLC.
79. By decree dated 1 June, 2003, Thomas LUBANGA, in his capacity as President of the UPC/FPLC, ordered the demobilisation from the UPC/FPLC of any individual under the age of 18 years. The decree makes clear, not only that persons under 18 years were serving in the ranks of the UPC/FPLC in numbers large enough to warrant an order to demobilise them, but also that Thomas LUBANGA was aware of this fact. In practice, this order, like others, was never executed. It was never intended to be, particularly insofar as systematic

UPC/FPLC recruitment, enlistment and use of soldiers under the age of 15 years proceeded continuously during and after the period in which the decree was issued. Rather, the decree was an elaborate “masquerade” – a “public relations operation” – designed to give the appearance of ending the practice of unlawfully enlisting child soldiers while adamantly refusing to do so. The Chief of Intelligence of the FPLC and one of the battalion commanders with the UPC/FPLC did not see nor was [he] apprised of either the 21 October, 2002 demobilisation order or 27 January, 2003 order.

80. In a meeting with Save the Children in January 2003, Thomas LUBANGA acknowledged what he said were isolated cases of children in the UPC. In June 2003, Thomas LUBANGA said that the FPLC would demobilise 68 children as a gesture of cooperation with Save the Children. However, only ten children were finally demobilised.
81. In late 2002 the Mothers' Forum of Ituri complained to Thomas LUBANGA about the recruitment of children. Although the UPC/FPLC opened a small demobilization centre, recruitment of children continued.
82. Further, Irin, the UN humanitarian news and information service reported on the recruitment of child soldiers by Thomas LUBANGA's UPC.

b. Knowledge Attributable to Thomas LUBANGA's Role

83. By virtue of his unique role as leader of the UPC/FPLC, Thomas LUBANGA was apprised on numerous occasions of the extent to which the organisation's military force relied upon child soldiers, including those under 15 years of age.
84. In his position as UPC/FPLC commander in chief, Thomas LUBANGA was regularly briefed – including by other co-perpetrators – about the general situation in Ituri and, in particular, about UPC/FPLC military operations and the situation in the UPC/FPLC military training camps, where many children were sent. In fact Thomas LUBANGA was communicating every day with his Chief of Staff of the FPLC, Floribert KISEMBO.
85. Thomas LUBANGA knew about the pervasive use of child soldiers in the UPC/FPLC because:
 - a. He had given children their uniforms and seen them during parades. Thomas LUBANGA repeatedly visited UPC/FPLC military training camps where he addressed young recruits, including those under the age of 15 years. In the course of such visits, and more generally, Thomas LUBANGA saw children in military uniforms. Additionally, he presided over public meetings and rallies in Bunia at which child soldiers were present.
 - b. There were 20 to 30 children in the unit, comprised of about 400 soldiers, dedicated to his protection, the *Unite de Protection Presidentielle*. Amongst them were children of 12, 13 and 14 years.
 - c. Of his direct dealing with many UPC/FPLC commanders with whom he was in regular contact. In one encounter around 15 August, 2002, Richard

LONEMA – whom Thomas LUBANGA appointed to the role of coordinator and interim UPC/FPLC leader while he was in detention in Kinshasa – told DRCOTP-WWWW-0014 to [REDACTED], and added that the UPC had everything that was needed to train them. Many UPC leaders and FPLC commanders used children under the age of 15 years as personal bodyguards. Escorts, many 12 and 13 years of age, were provided to the UPC National-Secretaries, as well as to Adele Lotsove MUGISA, first appointed UPC Finance Minister in 2002 and several months later re-appointed UPC Social Affairs Minister, and Melanie LUMBULUMBA, the wife of KISEMBO.

- d. He had long experience with using children, including children under 15 years of age, in armed militias that supported his objectives. During a visit to Rwampara military training camp in mid-2002, Thomas LUBANGA, speaking to an audience which included many young recruits, including under 15 years of age, *“encouraged us to withstand the difficulties of the training until the end because it was to free our country from the Ugandans and the Lendu. . . . He added that it was not the responsibility of others to make the Congo free, but our own.”*

c. Knowledge Attributable to the Scale of Recruitment and Use of Children Under 15 Years Old

86. Children under the age of 15 years were voluntarily and forcibly recruited into the UPC/FPLC and actively participated in UPC/FPLC military operations and as bodyguards to protect military objectives, on such a scale, and to such an extent, that, in view of his central role in coordinating UPC/FPLC activities, Thomas LUBANGA was clearly aware of (and indeed actively endorsed and sought to encourage) these practices.
87. A number of observers and/or visitors to Bunia have noted that, during the relevant time period, children under the age of 15 years were visibly present among FPLC soldiers guarding UPC buildings in Bunia. [Author’s note: evidence of Kristine Peduto, ICC-04-01-01-06-T-37-EN, November 15, 2006, edited, at pp. 29–32; statement of DRC-OTP-WWWW-0111, DRC-OTP-0152-0072, para. 47 (during the time that the UPC controlled Bunia, he rarely saw adult military; rather, he saw mostly children between 12 and 14 years of age); statement of DRCOTP-WWWW-0024, DRC-OTP-0126-0189 at para. 41 (the recruitment of children in the UPC army was a systematic and widespread practice which was indicated by the large number of children, between 7 and 18 years of age, walking in the streets of Bunia in military uniforms and with arms, or having integrated UPC commander groups).] No one who came to UPC headquarters could have avoided seeing the young recruits [author’s note: statement of DRC-OTP-WWWW-0014, DRC-OTP-0165-0999 at paras. 164 and 168; transcript of DRC-OTPW-0055, DRC-OTP-0191-0598 at 0615–0618 where children were guarding roadblocks leading to the President’s house].

88. In December 2002 staff at the NGO, Save-the-Children, drafted a "texte d'alarme" decrying the widespread use of child soldiers. Although the document did not specify a particular armed group, it was drafted with the UPC in mind.
89. UPC/FPLC military training camps Centrale (12 km north of Bunia), Rwampara (15 km Southeast of Bunia), and Mandro (15 km east of Bunia), in all of which young recruits under 15 were receiving military training, were all located close to Thomas LUBANGA's residence in Bunia.
90. LUBANGA knew of the use of child soldiers because this was brought to the attention of UPC/FPC secretaries by *notables*. The UPC/FPLC secretaries did not dispute the existence of child soldiers; rather, they justified it by underscoring the UPC/FPLC's need for troops.
91. In sum, the inference is compelling that the failure to act for a period of approximately 13 months by the Thomas LUBANGA, who had substantial knowledge of crimes of enlistment, conscription and use of child soldiers, yet refused to act upon that knowledge given his material ability to do so as overall commander/leader of the UPC/FPLC, bespeaks a deliberate intent to recruit child soldiers in furtherance of the common plan.

5. From Early September 2002 Until 13 August, 2003, Thomas Lubanga Directly Took Part in the Conscription, Enlistment and Use of Children, Including Children Under the Age of 15 Years, to Participate Actively in Hostilities

a. Thomas LUBANGA Used Children under 15 Years as Bodyguards

92. Thomas LUBANGA, like other most senior UPC/FPLC commanders such as Floribert KISEMBO and Bosco NTAGANDA, personally used young recruits, including those under the age of 15 years, as bodyguards.
93. On 30 May 2003, when Thomas LUBANGA was present inside his residence in Mudzi-Pela, a neighbourhood of Bunia, he was guarded by children wearing uniforms and armed with Kalashnikovs, including at least one whose physical appearance clearly showed that he was under the age of 15 years. Further, generally in Thomas LUBANGA's compound there were at times 15 to 17 children, armed and in military uniform.
94. Video images played at the Aru residence of Jerome KAKWAVU depicted Thomas LUBANGA together with bodyguards who appeared to be under 15 years of age.
95. During a meeting in January 2003 between representatives of a non-governmental monitoring organization and Thomas LUBANGA at the UPC/FPLC Etat-Major, Thomas LUBANGA was wearing a military uniform, and the residence was guarded by a number of child soldiers between 12 and 14 years of age.

b. Thomas LUBANGA Actively Recruited Children under 15 years to Join the UPC/FPLC and to Participate in Armed Combat

96. Thomas LUBANGA and other UPC/FPLC co-founders organized recruitment campaigns and used emissaries in Bunia and surrounding areas to persuade or compel Hema families to send their children to join the UPC/FPLC. Orders were sent to UPC/FPLC officials to ensure that recruitments took place, including that the Hema community families give up one of their children. Thomas LUBANGA himself also decreed that each Hema family must contribute to the war efforts by providing a child.
97. Thomas LUBANGA also took part in forcibly recruiting individual child soldiers. In February 2003, on the road to the Mongbwalu market where he was visiting his family, a 14 year old boy was taken in a vehicle in which Thomas LUBANGA was traveling with six soldiers. Three other children were also caught. Thomas LUBANGA told the boys that they would go as far as Beni and that they would become rich. The boys were all taken to the UPC/FPLC camp at Mandro where there were a lot of soldiers and where they received one week of training in handling GPMG weapons, rocket launchers and “rapides”. Afterward, the young boy was sent to a small village to provide security with about 30 other persons.
98. During numerous visits to UPC/FPLC training camps, LUBANGA encouraged young recruits, including those under age 15, to participate in hostilities. Particularly telling was a visit by LUBANGA to the Rwampara camp on 12 February 2003, captured on videotape:

“What we are doing, and we are doing it together with you, is to build an army I wish you . . . good training, do it, persevere, and tomorrow you will stand with a weapon and a uniform. . . This army that we are protecting here is not a joke. It is an important army. . . . And already the work that our army is doing now is of value to us all. . . . When you finish, others will come behind you . . . we are forming this army and every body feels . . . ‘I am a useful soldier.’ . . . You stand facing the . . . history of the country and you know you are a useful soldier. We, as leaders, are doing everything so that you can get that benefit and meaning. . . . Therefore . . . continue to suffer for a few days . . . so that . . . you finish the training, and then . . . after the training . . . they will give you work. . . . It is for our benefit, it is for the benefit of . . . our country. . . it is for the benefit of our party”.

99. The video recording of this visit makes clear that:
 - (i) LUBANGA considers the children at the camp as soldiers in his speech when he says: “Soldiers . . . Even those who have weapons . . . Even those who have pieces of wood . . . even those with empty . . . hands. . .”
 - (ii) There is no difference between the conduct of the children and that of the uniformed soldiers. The children act and behave as soldiers and obey orders.
 - (iii) There is no difference as far as the weapons are concerned: uniformed soldiers also have sticks. These sticks are used as genuine weapons, even in the military parade.

- (iv) Thomas LUBANGA states that “[w]e are making that effort. . . For you to finish the training, for you to get a weapon”

V. Individual Cases of UPC/FPLC Conscription, Enlistment and/or Use of Children, Including Children under the Age of 15, to Participate Actively in Hostilities

100. Consistent with the common plan, DRC-OTP-WWWW-0011, DRC-OTP-WWWW-0007, DRC-OTP-WWWW-0008, DRC-OTP-WWWW-0010, DRC-OTP-WWWW-0297, DRCOTP-WWWW-0298, DRC-OTP-WWWW-0294 and DRC-OTP-WWWW-0213 (“the child witnesses”), together with many other children under 15 years of age, were conscripted, enlisted, and/or used to participate actively in hostilities by the UPC/FPLC between the beginning of September 2002 and 13 August, 2003. The individual cases of the child witnesses – including what they experienced, saw and/or were told by others – are characterised by a number of common features:

Forced Recruitment by UPC/FPLC

101. The recruitment of the children was typically undertaken through coercion by UPC/FPLC soldiers, on occasion through physical violence. UPC/FPLC soldiers would abduct children from schools and force them onto trucks, and in some circumstances threaten them with death and beatings should they refuse to board the trucks.

Training Camps

102. After recruitment by UPC/FPLC soldiers and commanders, each child was brought to UPC/FPLC military training camps together with other children, including children under 15 years of age. In the camps, they were divided into different groups and placed under the orders of a UPC/FPLC commander.
103. The training, usually over a two-month period, included exercises such as, inter alia, running, climbing and crawling, military drills, assembling and disassembling of weapons. The child witnesses were trained in the use of weapons: first by using a stick, afterwards by using firearms. In addition to this standard training, the girls were tasked to prepare food.

Strict Camp Discipline

104. The child witnesses were subjected to strict military discipline, which ranged from (in the case of others) corporal punishment and detention to execution. They were taught to sing military songs. They never received a salary or medical care.
105. Senior UPC/FPLC commanders, including Thomas LUBANGA, Bosco NTAGANDA and Floribert KISEMBO, saw the child witnesses during inspections of the training camps or during combat.
106. At the camps, the child witnesses were taught that Thomas LUBANGA was the head of the organisation and the Supreme Chief. The other commanders in the camp always referred to him as such. The child witnesses were told that, under Thomas LUBANGA, Bosco NTAGANDA and Floribert KISEMBO were the next two most important commanders.
107. At the conclusion of their training, each of the child witnesses was given a military uniform and a weapon.

Use as Bodyguards

108. They were then used as bodyguards together with other children, including children under the age of 15. It was widely known that UPC/FPLC commanders – including Thomas LUBANGA, Bosco NTAGANDA and Floribert KISEMBO – commonly used children, including those under 15 years of age, as bodyguards. The tasks of bodyguards included accompanying the commanders in their daily activities and carrying their weapons, Motorola radio and other military and/or communications equipment

Participation in Hostilities

109. The child witnesses were ordered to participate actively with the commanders in hostilities against the Lendu, and to kill all Lendu. Often, they were forced to fight at the frontlines under threat of death.
110. Typically before and after battle, the child witnesses would be counted by their commanders and their names would be called out.
111. As a result of the fighting, some of the child witnesses sustained injuries; and some saw other children die in battle. Following a victory, the battle dead would be buried in mass graves. Following a defeat, they were left behind.
112. After the battles, some of the commanders would address the soldiers, including the children, telling them to not be tired of fighting and defeating the enemy.

Drc-otp-www-0011

113. In 2002, DRC-OTP-WWWW-0011, born on [REDACTED] and was living with [REDACTED] following the death of his mother. While in

- [REDACTED], FPLC soldiers told DRC-OTP-WWWW-0011 that his mother had been killed by the Lendus.
114. By the end of 2002 DRC-OTP-WWWW-0011 met FPLC soldiers in [REDACTED] who offered to permit him to join their army in order to get military training and fight the Lendu enemies. Motivated by his fury against the Lendu, DRC-OTP-WWWW-0011 immediately accepted the offer thinking that this would be his chance to avenge the murder of his mother.
 115. The same day, without returning to [REDACTED] to inform DRC-OTP-WWWW-0011's grandmother, the UPC/FPLC soldiers drove DRC-OTP-WWWW-0011 somewhere close to the village of [REDACTED]. After arriving in the village, DRC-OTP-WWWW-0011 joined a group of new recruits, composed of some adults and around sixty children of DRC-OTPW-0011's age, who were brought to the UPC/FPLC military camp in [REDACTED].
 116. Upon their arrival, all new recruits were provided with a military uniform and a rifle. The next day, military training commenced. DRC-OTP-WWWW-0011 and other boys of his age were trained by Commander TSHITSHA. The training consisted of physical exercises and exercises on the use of weapons. They trained three days a week and stood guard the other days. There was discipline in the camp and DRC-OTP-WWWW-0011 himself was beaten in the beginning.
 117. During the training, which lasted approximately two months, the camp was visited by Bosco NTAGANDA and Floribert KISEMBO, who were permanently accompanied by bodyguards: both adults and children of the age of the DRC-OTP-WWWW-0011.
 118. After the training had concluded, DRC-OTP-WWWW-0011 and four other young recruits were made the bodyguards of Commander [REDACTED]. In this capacity DRC-OTPW-0011 accompanied the Commander during his daily activities and assured his close protection during battle. Commander [REDACTED] said that if he refused to fight he would be killed or put into prison.
 119. In February 2003, DRC-OTP-WWWW-0011 fought alongside Commander TSHITSHA at the frontlines in Lipri a place where he fought twice. He also fought in the village of BARIE. DRC-OTP-WWWW-0011 and other young recruits of his age were ordered to perform reconnaissance. During the battle, DRC-OTP-WWWW-0011 killed a person for the first time in his life, leaving him traumatized. Fearing the reaction of his Commander, who had threatened to kill recruits who hesitated to fight, DRC-OTP-WWWW-0011 continued shooting his weapon. That day DRC-OTP-WWWW-0011 saw many of his friends killed. Commander TSHITSHA was also killed.
 120. After the attack, DRC-OTP-WWWW-0011 and the other recruits retreated to Mongwalu, where they met with Floribert KISEMBO and Bosco NTAGANDA. The next day, DRCOTPW-0011, who was now placed under the command of Bosco NTAGANDA, was ordered by the latter to re-attack Lipri. In complying with the order, DRC-OTP-WWWW-0011 emptied five magazines of ammunition during the fighting.

121. Upon his return to the UPC/FPLC military camp of [REDACTED], DRC-OTP-WWWW-0011 was asked by Bosco NTAGANDA to fight again in another village. As DRC-OTP-WWWW-0011 was profoundly affected by what had happened, and as he disapproved of what he had done, he asked for permission to stay in the camp, which was granted.
122. Approximately one month later, DRC-OTP-WWWW-0011 fled from the UPC/FPLC and was admitted into a demobilisation program. As a result of his experience fighting for the UPC/FPLC, DRC-OTP-WWWW-0011 has severe psychological deficits and suffers from Nightmares.

DRC-OTP-WWWW-0007 and DRC-OTP-WWWW-0008

123. In early 2003, witness DRC-OTP-WWWW-0007, who was born on [REDACTED], was at his parents' house in the village of [REDACTED], when UPC/FPLC soldiers entered and, without explanation, ordered him to follow them to obtain military training. A few hours later, the UPC/FPLC soldiers returned to the same house to abduct [REDACTED], DRC-OTPW-0008, born on [REDACTED].
124. The practice of UPC/FPLC soldiers of abducting children by force was well known by the civilian population. Knowing that they would be killed if they objected to the abductions, family members of these two witnesses did nothing.
125. After his abduction, DRC-OTP-WWWW-0007 was ordered to enter into a truck in which there were other abducted children, including school-mates. He was brought to the UPC/FPLC military camp of [REDACTED]. On the way, the truck repeatedly stopped to allow UPC/FPLC soldiers to capture additional children from the road. During the transport, UPC/FPLC soldiers made sure the children could not flee. On that day children aged between 10 and 17 were abducted and driven to [REDACTED] camp.
126. DRC-OTP-WWWW-0008 was brought to the centre of [REDACTED] where the UPC/FPLC soldiers had grouped many other children of his age as well as adolescents and adults. The group was forced to walk to the FPLC military camp of [REDACTED]. Along the way, the UPC/FPLC soldiers beat them at the slightest hint of fear or despair, telling them that they should not cry because during the war it would be worse.
127. At [REDACTED] camp, the new recruits were divided into groups and the cousins were separated. The groups were composed of around fifty recruits, and included both adult soldiers and children of the age of the witnesses, including boys and girls.
128. The next day, military training started. DRC-OTP-WWWW-0007 was instructed by Commander KARWAKARWA and DRC-OTP-WWWW-0008 by Commander PITCHEN. The training was mainly of a practical nature, and included, inter alia, saluting, marching and climbing. In addition, the recruits were taught how to shoot firearms.

129. During the training DRC-OTP-WWWW-0008 was told that the UPC/FPLC was going to fight all the way to Kinshasa to chase out the President and replace him with Thomas LUBANGA.
130. DRC-OTP-WWWW-0007 received special training in the Protocol to be used during the regular visit of Thomas LUBANGA to the camp. This Protocol differed from the one used for other visitors.
131. After about two months, once the military training was completed, the children were supplied with military uniforms and a rifle. DRC-OTP-WWWW-0007 was made the bodyguard of Commander [REDACTED] together with another three children of his age. DRC-OTP-WWWW-0008 was made the bodyguard of Commander [REDACTED].
132. In their capacity as bodyguards, the witnesses accompanied the commanders during their daily activities and provided them with close protection during combat.
133. DRC-OTP-WWWW-0007 together with other children and adult soldiers participated in the UPC/FPLC attacks on Lipri in February 2003.
134. Before the attack, DRC-OTP-WWWW-0007 and the other recruits were visited by Bosco NTAGANDA who addressed the troops to bolster their morale. During battle Commander [REDACTED] instructed DRC-OTP-WWWW-0007 to form a single front with the other recruits, and said that the recruits that stayed behind the front should be killed, as they were probably trying to escape.
135. During the fight, DRC-OTP-WWWW-0007 was wounded in his foot. Fearing being killed by his Commander, DRC-OTP-WWWW-0007 for the first time in his life shot a person. He emptied two magazines.
136. After his wound had healed, DRC-OTP-WWWW-0007 was ordered by Commander KASANGAKI to participate in the FPLC attack on Bogoro in February 2003. Following this order, the witness again fought on the frontline in Bogoro. DRC-OTP-WWWW-0007 was taken to Mandro camp where he saw Thomas LUBANGA speaking to the young recruits.
137. In February 2003 DRC-OTP-WWWW-0008 was ordered to accompany Commander PITCHEN to participate in the attack on Lipri, during which he was wounded in his left foot. Following the orders of his Commander, DRC-OTP-WWWW-0008 emptied four magazines of ammunition and killed a number of persons. While shooting, the witness was terrified and regretted his actions since he felt that they were not right, but his Commander urged him to continue.
138. After the military campaign in Lipri, DRC-OTP-WWWW-0008 was [REDACTED] at the UPC/FPLC military camp in [REDACTED]. [REDACTED], the witness was also tasked to recruit new children of his age, which he did. He falsely told the family members of children he took that the children would receive military training and return afterwards. This was a lie since, as he knew, the children were sent to the battlefield immediately after being trained.

139. At the end of 2003, following the order of KAKWAVU, the Commander of the then UPC/FPLC Sector North, both DRC-OTP-WWWW-0007 and DRC-OTP-WWWW-0008 were admitted into a demobilisation program.
140. As a result of their recruitment, both children lost all contact with their parents. In addition, as a result of fighting for the UPC/FPLC, DRC-OTP-WWWW-0007 suffers severe psychological deficits, manifested in his fear of loud noise or people crying.

DRC-OTP-WWWW-0010

141. DRC-OTP-WWWW-0010, was born on [REDACTED] and was on the road from [REDACTED] in August 2002, when she was abducted by UPC/FPLC soldiers.
142. That day, people fled the UPC attacks on [REDACTED] en masse, including DRC-OTPW-0010 and her family. In the general confusion, the witness lost sight of her family. She then saw armed soldiers advancing in the opposite direction, towards [REDACTED]. DRC-OTP-WWWW-0010 didn't pay much attention until she realised that the armed soldiers were stopping young girls and boys. By then it was too late. A group of armed UPC/FPLC soldiers blocked her path and forced her and another girl of the same age, to come with them. The soldiers pointed their rifles at the two children. DRC-OTP-WWWW-0010, fearing being killed, did not dare to disobey.
143. Before leaving the area, DRC-OTP-WWWW-0010 was assembled with many boys and girls between 10 and 18 years of age who had also been captured under the same circumstances. They numbered up to 150. The prisoners were forced to walk to the UPC/FPLC military camp in [REDACTED], led by Commander PEPE. Upon arrival, DRC-OTP-WWWW-0010 saw that other groups of prisoners had been brought to the camp as well.
144. The next day, DRC-OTP-WWWW-0010 and the other recruits were divided into three groups of approximately 45 persons each. DRC-OTP-WWWW-0010's group was composed of boys and girls, all more or less her age and all abducted in a similar way.
145. That same day, the heads of the children were shaved, and military training commenced. First the training was mainly of practical nature, and included a wide variety of physical exercises. Later on, the training was expanded to also cover the use of firearms.
146. During the training, the camp was visited once by Thomas LUBANGA, and twice by Bosco NTAGANDA. Both addressed the recruits to encourage them. In addition BOSCO threatened to kill the recruits if they would escape from the camp. While she was at the camp she saw new recruits arriving in four trucks, some of the boys aged 11 and some of the girls from 12 to 15 years old.

147. The military training lasted almost two months. In about October 2002, after the completion of training, Bosco NTAGANDA returned to the camp with three trucks and distributed a uniform and a rifle to each of the recruits. NTAGANDA then ordered the recruits to get into the lorries. The recruits were driven to the village of Libi, where they would participate in their first attack.
148. Prior to the attack, the recruits were ordered by Bosco NTAGANDA to kill all Lendu. Following this order, DRC-OTP-WWWW-0010 killed at least one person, and emptied two magazines of ammunition. During the attack, ten young FPLC recruits were killed: four girls and six boys.
149. After the attack on Libi, DRC-OTP-WWWW-0010 was ordered by Bosco NTAGANDA to participate in the FPLC attack on Mbau in about October 2002. Prior to this attack, Bosco NTAGANDA repeated the same order to kill all Lendu. In the course of the attack many UPC/FPLC soldiers of the age of DRC-OTP-WWWW-0010 were killed. DRC-OTP-WWWW-0010 herself sustained an injury in her leg.
150. Once she recovered, DRC-OTP-WWWW-0010, together with two other girls of her age and six adult soldiers, was made the bodyguard of [REDACTED]. In this capacity, DRC-OTP-WWWW-0010 accompanied [REDACTED] during his daily activities. In addition, DRC-OTP-WWWW-0010 was ordered by [REDACTED] to participate in several attacks including attacks in which other commanders also participated.
151. As such, DRC-OTP-WWWW-0010 was ordered to participate in the UPC/FPLC attacks on Bunia in May 2003 together with Commander CLAUDE, as well as in the UPC/FPLC attacks on Djugu and Mongwalu in June 2003 together with Floribert KISEMBO and SALUMU MULENDA.
152. After the Artemis force had pushed the FPLC out of Bunia, [REDACTED] allowed DRC-OTP-WWWW-0010 to leave the FPLC. Since her abduction, DRC-OTP-WWWW-0010 has not seen her mother or other family again. After DRC-OTP-WWWW-0010 for the first time killed a person, she had nightmares for several months.

DRC-OTP-WWWW-0297

153. This former child soldier was not older than twelve years at the time of his recruitment into the UPC/FPLC. He was abducted by soldiers who came to the quarters where he was living, and threatened with death unless he boarded the truck with the others. He was told by the soldiers that he and the others were being taken on the trucks so that they could fight against the Lendu.
154. DRC-OTP-WWWW-0297 was forcibly taken to [REDACTED], to a training camp in [REDACTED] and immediately as the witness describes, put into military service. Upon arrival he was surrounded by soldiers, along with their leader Bosco NTAGANDA. DRC-OTP-WWWW-0297 was put

into training for three weeks before his first battle and forced to take part in military drills, assembling and disassembling weapons. New recruits were coming to the camp daily and there was no system of registration or verification of age of the new recruits. Co-perpetrator Floribert KISEMBO oversaw the training of the recruits. There was no possibility for escape from [REDACTED] as people who attempted were caught and beaten, upon the instructions of KISEMBO.

155. Upon completion of his training, DRC-OTP-WWWW-0297 was given a weapon and uniform – green and a dark, mixed camouflage by KISEMBO. He was subsequently taken to participate in battle at Mandro to fight against the Lendu. The weapons the Lendu were using included G2, SMG's and RPG. He was in a group that was advancing and following KISEMBO. DRC-OTP-WWWW-0297 shot at four people during the battle. During the battle some eleven persons were wounded on the UPC side; some of the soldiers were younger than fifteen years of age. DRC-OTP-WWWW-0297 participated in another battle at Lonio. KISEMBO was commanding the fighters at Lonio and DRC-OTP-WWWW-0297 was in his group. In this battle DRC-OTP-WWWW-0297 shot at Lendu soldiers and civilians. KISEMBO lead DRC-OTP-WWWW-0297 and others into another battle at Lopa where they surprised the Lendu killing civilians and soldiers that started to fight them. During all this time DRC-OTP-WWWW-0297 was used as the personal bodyguard to coperpetrator Floribert KISEMBO.
156. On one particular occasion DRC-OTP-WWWW-0297 saw Thomas LUBANGA at Langu when he and his fellow soldiers went to guard his house. Outside Thomas LUBANGA's house there were soldiers and bodyguards, some were younger than DRC-OTP-WWWW-0297 and some were older or the same age. At his house Thomas LUBANGA was convening a meeting where KISEMBO was present along with other high commanders.
157. DRC-OTP-WWWW-0297 participated in further combat at MARABU where he shot at the Lendus and Ngitis after reinforcement arrived for the battle. These reinforcements were brought by the Operations Commander Bosco NTAGANDA and they included child soldiers. His last main battle was in CHAI, where again he was with KISEMBO.
158. While a soldier with the UPC/FPLC, DRC-OTP-WWWW-0297 saw or knew of UPC/FPLC soldiers who abducted "young people". Some of the children were ten years old, younger than him. DRC-OTP-WWWW-0297 himself arrested child soldiers; most of the soldiers he arrested were ten years old and some were girls. These arrests were also carried out by his fellow soldiers and took place daily.
159. Eventually, DRC-OTP-WWWW-0297 had to make up a story to the commander [REDACTED] to be able to escape the camp and UPC/FPLC. He wanted to leave in particular because he learned that his mother had been killed.

DRC-OTP-WWWW-0298

160. DRC-OTP-WWWW-0298 was born on [REDACTED]. Just before Christmas of 2002, as he was walking home from school with his friends, UPC/FPLC soldiers with a commander called [REDACTED] who was the head of training at [REDACTED], physically beat him and abducted DRC-OTP-WWWW-0298 into the army.
161. He was taken to the training camp at [REDACTED] where he was placed into one of the six groups that contained some 47 people, including many young boys and three girls. He was placed into military training where he had to learned, [sic] inter alia, how to salute, march, carry and assemble weapons, military tactics and how to instantaneously kill people. He recalls that Bosco NTAGANDA visited the camp with bodyguards, some of them children.
162. Discipline was tight at the camp and soldiers were regularly beaten by the commanders. DRCOTP-WWWW-0298 was himself beaten. He thought about escaping but was afraid as he witnessed the beating of those who tried to escape, including the beating to death of some children.
163. After DRC-OTP-WWWW-0298 completed the training, he was given a uniform and weapons and put on security detail at the perimeter of the camp. From December 2002 through to September 2003, DRC-OTP-WWWW-0298 participated in hostilities, fighting against the Lendu in several places. He fought battles at Lenga, Fataki and Bule. In all places he shot and fired his weapons at the Lendu upon the orders of UPC commanders, notably Commander Alpha and Christian.
164. DRC-OTP-WWWW-0298 was initially rescued from [REDACTED] military camp, where he had been moved to, [REDACTED], who was also a member of the UPC, however he was again abducted by the UPC and as punishment placed in [REDACTED] for two days after being beaten. He was eventually demobilised some three months after his arrival in Bunia by Save the Children.

DRC-OTP-WWWW-0294

165. DRC-OTP-WWWW-0294 was born on [REDACTED]. He joined the military in June 2000, when he was about 10 years old. During the war between the APC and the Ugandan soldiers in Nyakunde, DRC-OTP-WWWW-0294 went to the military camp of the [REDACTED] to look for protection. The military camp was then placed under the authority of second-in-command, [REDACTED] with whom DRC-OTP-WWWW-0294 was already in contact. DRC-OTP-WWWW-0294 fled with the [REDACTED] soldiers to Sota where [REDACTED] provided him with a weapon.
166. He decided to leave Sota for Bunia to join [REDACTED]. He stayed in Bunia with two soldiers placed under the authority of Commandant [REDACTED]. He followed them to [REDACTED], where Commandant [REDACTED] requested families to give one of their children to the army. Children under

the age of 15 were recruited and DRC-OTPWWW-0294 was responsible for teaching the children how to utilise the weapons as he was already considered a soldier. He was still forced to undergo training at the [REDACTED] military camp where he was forced to sing aggressive military songs against the Lendus. He was forced by the trainers to smoke hemp in order not to fear war. He was also beaten when he was tired.

167. DRC-OTP-WWWW-0294 took part in the Sangolo and Zumbe battles and in the Battle of Bunia. During this combat, he fled to Kasenyi and joined the PUSIC. He fought in the Kasenyi battle and got injured. Once again, DRC-OTP-WWWW-0294 escaped during the war and went to Bunia where he was re-mobilised in Floribert KISEMBO's militia. He took part in the fight against the Artemis forces and the Congolese police officers of the Police d'Intervention Rapide near the village of Centrale. During this war, DRC-OTP-WWWW-0294 escaped and returned to Bunia.
168. DRC-OTP-WWWW-0294 went directly to the MONUC and was sent to a Caritas Center. He went to [REDACTED] to start his secondary studies. He returned to live with his mother in [REDACTED] in July 2007 after passing his exams.

DRC-OTP-WWWW-0213

169. DRC-OTP-WWWW-0213 was born in [REDACTED]. He was [sic] abducted by UPC/FPLC soldiers in [REDACTED] who had come to take people to carry weapons and ammunition. Their chief was KASANGAKI. He was forcibly abducted by UPC/FPLC soldiers. He was taken to a training camp near [REDACTED]. When he arrived at the camp he saw numerous children training. There he stayed a week, unable to leave until he was able to eventually escape when the opportunity arose and returned to his family.
170. This respite did not last long, as soon thereafter he was abducted a second time into the UPC/FPLC while he was [REDACTED]. The UPC/FPLC soldier arrived in a truck and forcibly took them to the training camp in [REDACTED]. He could not resist as the UPC soldiers were all armed. Upon arrival at [REDACTED], DRC-OTP-WWWW-0213 received military training for two weeks. There were three groups of recruits all of which included children. At the end of the training, the chief of the camp, Maki, gave the recruits weapons and cartridges and a uniform.
171. DRC-OTP-WWWW-0213 became the bodyguard of commander [REDACTED]. He was one of 15 who protected the commander, most of them children. [REDACTED]'s superior was Bosco NTAGANDA. Both Bosco NTAGANDA and Thomas LUBANGA came to Bule training centre; the day Thomas LUBANGA came he was wearing military uniform.
172. DRC-OTP-WWWW-0213 actively participated in hostilities. He was in battle at Bunia, where he was wounded in the leg, and at Katoto, where he fought against the Lendus. He also was used as a bodyguard at the house of Thomas

LUBANGA. After his wound he convalesced at home; during this time the UPC/FPLC attempted to abduct him again but he was able to avoid them.

VI. Conclusion

173. This summary of evidence that the Prosecution intends to present at trial reveals that Thomas LUBANGA is individually responsible as a co-perpetrator for the conscription, enlistment and use of children under age 15 to participate in hostilities, as manifested through his participation in a common plan – among himself, Chief Kahwa PANGA MANDRO (UPC Deputy National Secretary for Defence), Rafiki SABA (UPC Chief of Security), Floribert KISEMBO (FPLC Chief of Staff), Bosco NTAGANDA (FPLC Deputy Chief of Staff for Military Operations), and other senior FPLC commanders - to further the UPC/RP and FPLC war effort.

Luis Moreno-Ocampo, Prosecutor
Dated this 30th Day of May 2008
At The Hague, The Netherlands

12.2 Amicus Brief: “Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict” (ICC-01/04-01/06-1229-AnxA)

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO IN THE CASE OF

THE PROSECUTOR v. THOMAS LUBANGA DYILO

Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict

Submitted in application of Rule 103 of the Rules of Procedure and Evidence

I. Introduction

1. Radhika Coomaraswamy, United Nations Special Representative of the Secretary-General on Children and Armed Conflict (hereinafter “the Special Representative”) respectfully submits this amicus curiae brief pursuant to Decision Inviting Observations from the Special Representative of the Secretary-General of the United Nations for Children and Armed Conflict, of Trial Chamber I of the

International Criminal Court (hereinafter “the ICC” or “the Court”) dated 18 February, 2008, which granted her leave to submit written observations on “a) the definition of ‘conscripting or enlisting’ children, and, bearing in mind a child’s potential vulnerability, the manner in which any distinction between the two formulations (i.e. conscription or enlistment) should be approached; and b) the interpretation, focusing specifically on the role of girls in armed forces, of the term ‘using them to participate actively in hostilities.’” That decision was made in response to the Special Representative’s application for leave to submit written observations in the form of an *amicus curiae* brief, contained in Submission by the Registrar of correspondence received within the context of Rule 103 of the Rules of Procedure and Evidence and submitted to the Court on 4 January, 2008.

2. The mandate of the Special Representative originates in General Assembly resolution 51/77 of 12 December 1996. According to this mandate, the role of the Special Representative encompasses advocacy to raise awareness about the plight of children in armed conflict. The mandate also specifies that the Special Representative will work closely with competent international bodies to ensure protection of children in situations of armed conflict. This original mandate has been extended by the General Assembly in several subsequent resolutions. In three of these, resolutions 54/149, 57/190 and 60/231, the General Assembly recognizes the role of the International Criminal Court in ending impunity for perpetrators of crimes against children. The mandate of the Special Representative therefore authorizes and compels her to assist the Court as *amicus curiae* in cases such as the one brought against Thomas Lubanga, given the nature of the charges against him, both as an independent representative of the children banned in armed conflict, and through the presentation of relevant expertise gained through the performance of her mandate.
3. In relation to the charges laid against Thomas Lubanga, the Special Representative offers observations on the following issues in this *amicus curiae* brief: a) the definition of “conscripting or enlisting” children, and, bearing in mind a child’s potential vulnerability, the manner in which any distinction between the two formulations (i.e. conscription or enlistment) should be approached; and b) the interpretation, focusing specifically on the role of girls in armed forces, of the term “using them to participate actively in hostilities.”

II. Definition of “Conscripting” or “Enlisting”

4. The war crimes established by the Rome Statute are limited to the conscription and enlistment of children under the age of fifteen years. The conscription and enlistment acts are two forms of recruitment. According to written commentary following the Rome Conference, the terms may be defined by their “ordinary signification]”: “Conscription refers to the compulsory entry into the armed forces. Enlistment ... refers to the generally voluntary act of joining armed

forces by enrolment, typically on the ‘list’ of a military body or by engagement indicating membership and incorporation in the forces.”

A. There Is a High Likelihood That Children Under the Age Of 15 Will Be Conscripted Or Enlisted When Minors Are Recruited In Modern Conflict

5. In the interest of ensuring the greatest protection to conflict-affected children, the Court should recognize that enlistment, recruitment and use of children under the age of 15 is a highly predictable consequence of a purpose or plan to recruit minors, but not necessarily children under 15 years of age.
6. The Special Representative is of the view that the risk or likelihood of the realization of the crimes of conscripting or enlisting children under the age of 15 years into the national armed forces, is inevitably high due to the nature of some contemporary armed conflicts. In this permissible environment, children are extremely vulnerable to military recruitment and being manipulated or enticed into joining armed groups.
7. The risk of conscripting or enlisting children under the age of 15 is never low. In armed conflict zones, the impunity of the perpetrators, the need for more numbers in the ranks, and the vulnerability of children who are often orphaned, displaced, without family and community protection and fighting for survival, are amongst the aggravating factors that increase this risk.

B. Conscription and Enlistment are Forms of Recruitment

8. In the Confirmation of Charges Decision, the Pre-Trial Chamber distinguished the terms simply as forced recruitment (conscriptio) versus voluntary recruitment (enlistment). The Special Court for Sierra Leone (“SCSL”) Trial Chamber II offered additional guidance in its June 2007 judgment of guilt against the AFRC Accused for child soldiering crimes: “The Trial Chamber adopts an interpretation of ‘conscriptio’ which encompasses acts of coercion, such as abductions and forced recruitment, by an armed group against children, committed for the purpose of using them to participate actively in hostilities. ‘Enlistment’ entails accepting and enrolling individuals when they volunteer to join an armed force or group.”
9. The SCSL Trial Chamber’s definition of conscription reflects its recognition of the changed nature of modern warfare. “While previously wars were primarily between well-established States, contemporaneous armed conflicts typically involve armed factions which may not be associated with, or acting on behalf of, a State. To give the protection against crimes relating to child soldiers its intended effect, it is justified not to restrict ‘conscriptio’ to the prerogative of States and their legitimate Governments, as international humanitarian law is not grounded on formalistic postulations.” Similarly, the Trial Chamber’s

definition of enlistment reaches beyond the traditional implication that enlistment involves an actual list of new recruits but also encompasses children enrolled by more informal means.

10. *Consent of the child is not a valid defense to any of the three child soldiering war crimes. The line between lawful recruitment and unlawful recruitment is drawn based solely on age, under the Rome Statute as elaborated upon by the Elements of the Crimes, not on any act of the child. All 'Voluntary' acts or statements or other indications or interpretations of consent by children under the legal age for recruitment are legally irrelevant* [author's note: emphasis added]. The fieldwork of our office makes apparent the invalidity of a child's consent to any of the three crimes of child soldiering. Abou was a child soldier demobilized in Sierra Leone. When he returned home, he had difficulty with his parents and was ostracized by the community. He then disappeared only to reappear as a child soldier in Côte d'Ivoire. Soldiering is all he knew. Though he "voluntarily" joined the rebels in Côte d'Ivoire, to accept consent as a defense would be to negate the whole policy behind such prohibitions.
11. *There is no best interest of the child defense. Recruitment is per se against the best interest of the child. The Rome Statute codifies this understanding in its prohibition without exception of conscripting, enlisting, and using child soldiers* [author's note: emphasis added].

C. The Court Should Approach the Distinction Between Conscripting And Enlistment On a Case-By-Case Basis

12. Children recruited into armed forces are broadly covered by the conscription and enlistment crimes. The determination of which crime applies will require a case-by-case inquiry into the way the child was made a soldier.
13. The recruitment of individual child soldiers by armed groups may often be characterized by elements of compulsion and voluntariness, rendering the task of categorizing child soldiers under one or the other recruiting crime difficult. Based on a recent visit to the DRC, the Special Representative has stated: "The recruitment and enlisting of children in DRC is not always based on abduction and the brute use of force. It also takes place in the context of poverty, ethnic rivalry and ideological motivation. Many children, especially orphans, join armed groups for survival to put food in their stomach. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role models they know. They are sometimes encouraged by parents and elders and are seen as defenders of their family and community."
14. In most conditions of child recruitment even the most "voluntary" of acts are taken in a desperate attempt to survive by children with a limited number of options. Children who "Voluntarily" join armed groups mostly come from families who were victims of killing and have lost some or all of their family

or community protection during the armed conflict. Many “volunteer” recruits soon become disillusioned, but are not able to leave due to fear of being killed. Many children who try to escape are executed in order to serve as an example to the other children. The line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict. In the DRC, coercion of children by varying elements are so pervasive and children become associated with armed forces in so many informal ways that evidence of voluntariness will commonly be outweighed by evidence of compulsion. The Special Representative met Laurent from a Tutsi tribe. His parents felt it was a matter of duty for him to join a Tutsi militia leader, even though he was still a child. They convinced him that he was doing the right thing. He was going to protect the tribe.

15. *Notably, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, ratified by the DRC on 14 February 2004, does not make this distinction in its proscription of recruitment [author’s note: emphasis added]. Article 4 states: “Armed groups . . . should not, under any circumstances, recruit . . . persons under the age of 18 years (emphasis added).” The phrase “under any circumstances” signals the common understanding that whether recruitment was a matter of (forced) conscription or of (voluntary) enlistment is irrelevant to the prohibition. The Special Representative urges the Court to keep this in mind as it parses facts into one category of recruitment or the other and ultimately determines sentences proportionate to these crimes [author’s note: emphasis added].*
16. The case-by-case determination of which kind of recruitment will be relevant in a particular case will require evidence that focuses on the acts children are required to perform, the circumstances on how the child was enrolled and the circumstances surrounding the child’s separation from family and community. In the DRC, the Special Representative met Mary, who had been on her way to school when she was waylaid by an armed group and forced to return with them to the camp. In the beginning she was a domestic aide and sexually abused, but she soon became familiar with how a gun works and soon thereafter she was joining the others in their attacks on villages. Whatever may have been her initial activities – in the end it is clear that she had been conscripted.

III. Interpretation of “Using Them to Participate in Hostilities”

17. The “using” crime creates a broad category for criminal liability. It proscribes the acceptance of a child’s participation to support conflict. Children’s participation takes numerous and varied forms and includes tasks and roles that are typically fulfilled by girls.

A. The “Participate Actively” Standard Covers Combatant And Non-combatant Children And the Court Should Interpret the Standard Broadly

18. Participation by combatant and non-combatant children are covered equally. The “participate actively” language of the Rome Statute is broader than the “take a direct part in hostilities” language used in international humanitarian law (“IHL”) [author’s note: emphasis added]. This interpretation is supported in the Pre-Trial Chamber’s Confirmation of Charges Decision. It is also consistent with United Nations policy for disarmament, demobilization, and reintegration (“DDR”): “No distinction should be made between combatants and non-combatants when [DDR] eligibility criteria are determined, as these roles are blurred in armed forces and groups, where children, and girls in particular, perform numerous combat support and non-combat roles that are essential to the functioning of the armed force or group.”
19. In the Confirmation of Charges Decision, the Pre-Trial Chamber placed an outer limit on the “participate actively” standard, stating that it does not apply when the contribution in question is “manifestly without connection to the hostilities.” The Chamber provided the examples of food delivery and domestic help in an officer’s married accommodation as activities without connection, in contrast to related activities such as guarding military objects or acting as a bodyguard. The Pre-Trial Chamber’s examples are reminiscent of the oft-cited footnote in the Zutphen draft of the Rome Statute (“Zutphen text”): “The words ‘using’ and ‘participate’ have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as porters to take supplies to the front line, or activities at the front line itself would be included within the terminology.”
20. The Zutphen text and the Confirmation of Charges Decision purport to establish a bright-line rule to determine which activities qualify under the “participate actively” standard. The Special Representative submits that this effort is ill-conceived and threatens to exclude a great number of child soldiers - particularly girl soldiers - from coverage under the using crime [author’s note: emphasis added].
21. The “participate actively” inquiry requires a case-by-case approach. The relevant question for the Court in each case is whether the child’s participation served an essential support function to the armed force or armed group during the period of conflict. This standard is developed from the UN Integrated Disarmament, Demobilization, and Reintegration Standards (“IDDRS”) regarding women’s and girls’ eligibility for reintegration assistance. Much like the Rome Statute and Zutphen text, this standard deliberately moves

away from a rigid definition of child soldiers as exclusively armed combatants and recognizes all children “participating in and associated with armed groups and forces” as victims of these crimes. It also comports with the definition used by the SCSL Trial Chamber in its June 2007 decision in the AFRC case: “‘Using’ children to ‘participate actively in the hostilities’ encompasses putting their lives directly at risk in combat . . . any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation.”

22. A case-by-case approach is particularly apt and critical in the context of modern conflicts in which the nature of warfare differs from group to group and the children used in hostilities play multiple and changing roles. When the Special Representative spoke to girl combatants in the eastern DRC, they spoke of being fighters one minute, a “wife” or “sex slave” the next, and domestic aides and food providers at another time. Children are forced to play multiple roles, asked to kill and defend, carry heavy burdens, spy on villages and transmit messages. They are asked to perform many other functions and their use differs from group to group. Eva was a young girl whom the Special Representative met in the DRC. She was only twelve when she was abducted on her way to school. Initially, Eva was kept in a situation of forced nudity and subject to sexual abuse. She worked in the camp cooking, cleaning and being a sexual slave, and was often taken along for armed attacks on the villages to be a “porter” to carry the looted goods.
23. As a matter of guidance, children who serve essential support functions for armed forces and armed groups during the period of hostilities may function in any of the following roles over the course of their use, including but not limited to: cooks, porters, nurses, spies, messengers, administrators, translators, radio operators, medical assistants, public information workers, youth camp leaders, and girls or boys used for sexual exploitation.

B. The Court Must Reject Any Interpretation Of the “Participate Actively” Standard That Excludes Girls

24. The exclusion of girls from the definition of child soldiers would represent an insupportable break from well-established international consensus. The definition of child soldier auxiliary to the Cape Town Principles recognized that “child soldier” includes “girls recruited for sexual purposes and for forced marriage.” The Special Representative notes that African regional human rights instruments also recognize and interpret, consistent with the Cape Town Principles, that girls are included within the meaning of child soldiers. Notably, the African Union’s Protocol to the Charter on Human and Peoples’ Rights on the Rights of Women in Africa pronounces that “State Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age . . . is recruited as a soldier.” The recent Paris Principles, reviewing the Cape Town Principles memorialized nearly ten years prior, renewed the status of child soldier for all children used for sexual purposes.

25. The Court should deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the “using” crime. The Special Representative underscores that during war, the use of girl children in particular includes sexual violence. In this regard the Special Representative refers to the African Union’s Solemn Declaration on Gender Equality, wherein it was “hereby agree[d] to: (3) [l]aunch, within the next one year, a campaign for systematic prohibition of the recruitment of child soldiers and abuse of girl children as wives and sex slaves.” The AU thus reiterated its disdain of the illicit sexual abuse conduct inflicted upon girl children when they are child soldiers.
26. The Special Representative explains that girl combatants are often invisible: “Because they are also wives and domestic aides, they either slip away or are not brought forward for DDR programs. Commanders prefer to ‘keep their women,’ who often father their children, and even if the girls are combatants, they are not released with the rest. Their complicated status makes them particularly vulnerable. They are recruited as child soldiers and sex slaves but are invisible when it comes to the counting.” As the above case illustrates, the actual experience of children in the DRC conflicts requires a more inclusive interpretation.

Dated this 17th day of March, 2008

Radhika Coomaraswamy

United Nations Special Representative of the Secretary-General for Children and Armed Conflict

12.3 Redacted Version of “Decision on the Prosecution’s Application to Lift the Stay of Proceedings” (ICC-01/04-01/06-1467)

[...]

No.: **ICC-01/04-01/06**

Date: **3 September 2008**

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge

Judge Elizabeth Odio Benito

Judge René Blattmann

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO
Public**

Redacted Version of “Decision on the Prosecution’s Application to Lift the Stay of Proceedings”

[...]

Trial Chamber I ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC") in the case of *The Prosecutor v. Thomas Lubanga Dyilo*, issues the following decision on the application of the Office of the Prosecutor ("prosecution") to lift the stay of the proceedings:

I. Procedural History

1. On 13 June, 2008, the Chamber rendered its "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008" ("Decision"). In its Decision the Chamber indefinitely stayed the proceedings against Mr Thomas Lubanga Dyilo as a result of the prosecution's failure to disclose to the defence or make available to the Chamber certain potentially exculpatory materials which had been obtained pursuant to confidentiality agreements made under Article 54(3)(e) of the Rome Statute ("Statute") ("Documents"). In its Decision, the Trial Chamber specified that the stay had the effect of halting the proceedings unless and until such time as the stay is lifted by a decision either of the Appeals Chamber or the Trial Chamber itself.
2. On 23 June, 2008, the Prosecution sought leave to appeal the Decision. The Legal Representatives for Victims a/0001/06 to a/0003/06 filed their response to the prosecution's application for leave to appeal on 24 June 2008, stating that they supported the application. On 27 June, 2008, the defence filed its response to the prosecution's application for leave to appeal, which it did not oppose. On 2 July, 2008, the Trial Chamber granted the prosecution's application for leave to appeal. The decision with regard to this appeal is currently pending before the Appeals Chamber.
3. The prosecution filed on a confidential *ex parte* basis a "Prosecution's application to lift the stay of proceedings" on 10 July, 2008, and a public redacted version of the application, which was notified to the defence and the legal representatives of the victims the next day ("Application"). The prosecution provided supplementary information to the Application on 30 July, 2008, August 8, 2008, and 22 August, 2008 by way, respectively, of the "Prosecution's provision of information supplementing the 'Prosecution's application to lift the stay of proceedings'" the "Prosecution's provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings'" and the "Prosecution's additional provision of further information supplementing the 'Prosecution's application to lift the stay of proceedings'" (collectively "Supplementary Information"). The legal representatives of the victims did not respond to the Application or Supplementary Information. On 26 August, 2008, the Chamber ordered the defence to file a consolidated response, which was received on 1 September, 2008.

4. Without prejudice to the position on any future applications (for which hearings may be necessary), the issues were sufficiently clear on this application to obviate the need for a Status Conference.

II. Submissions of the Parties

A. *Prosecution*

5. The prosecution indicated in its Application and Supplementary Information that there are currently 204 items that appear to be potentially exculpatory and are subject to Article 54(3)(e) agreements. Of these, 152 Documents were obtained by the prosecution from the United Nations, and the remainder were provided by six Non-Governmental Organisations (“NGOs”).

Documents obtained from the United Nations

6. According to the prosecution’s Application and Supplementary Information, to date the United Nations has agreed to the following:
 - a. A total of 53 Documents may be disclosed in full to the defence without any conditions;
 - b. A total of 83 Documents may be disclosed to the defence with redactions;
 - c. One Document may be disclosed to the defence with redactions, subject to a defence undertaking not to disclose the information to any third party;
 - d. 16 Documents are still under review by the United Nations and may not be disclosed to the defence (“Outstanding Documents”).
7. As regards the 16 Outstanding Documents (paragraph 6(d) above), the Application sets out a proposal whereby the United Nations would make available to the Chamber the Documents provided by it to the prosecution, subject to the Chamber undertaking not to disclose them to the defence without its consent. The Chamber notes that while it expressly gave this undertaking in court on 6 May, 2008, the United Nations has requested that the undertaking is repeated in writing by the Chamber. The Chamber notes additionally that it is a necessary inference that these conditions apply equally to the parts of the 83 Documents (paragraph 6(b) above) which are the subject of proposed redactions, along with the single Document (paragraph 6(c) above) (unless and until the defence accepts the proposed condition suggested for that latter item).
8. It would appear that the United Nations’ proposal would allow the Chamber to review the 16 United Nations’ Outstanding Documents which, in their entirety, cannot currently be disclosed and the portions of the 83 Documents which are the subject of proposed redactions, along with the single Document, and to make notes thereupon. Upon completion of the review, the Chamber would be

required to return the Documents or the redacted sections to the United Nations and the judges would be required to redact any portion of their individual notes insofar as they quote from or paraphrase the 16 United Nations' Outstanding Documents, the redacted parts of the 83 Documents or the single Document, until such time as the Appeals Chamber agrees to be bound in its review of the Documents by an undertaking similar to that provided by the Chamber. If the Trial Chamber rules that any of the 16 United Nations' Outstanding Documents, the redacted sections of the 83 Documents or the single Document (absent defence consent to the conditions) should be disclosed to the defence in order to secure a fair trial, the United Nations would consent only to the disclosure of summaries of the relevant Document in the first instance, although the prosecution submitted that "the United Nations envisages the possibility of making such items or information contained therein available to the accused and his defence by other means, including subject to such protective measures that may be permissible under the Rome Statute ...".

9. [sic] In light of this proposed procedure from the United Nations, the prosecution submitted that the Trial Chamber can be immediately provided with the 152 items of undisclosed evidence that originate from the United Nations. The prosecution confirmed that all Documents provided by the United Nations can be submitted to the Chamber in non-redacted form. It further submitted that the procedure proposed by the United Nations accommodates the concerns of the Chamber and will enable it to explain, by reference to the detail of the evidence it has seen, the reasons for any relevant decisions.

Documents obtained from non-governmental organisations

10. The Chamber notes that there appears to be some inconsistencies in the figures provided by the prosecution. In relation to the Documents obtained by NGOs, disclosure (albeit redacted) is currently contemplated in respect of only 3 Documents, with no undertaking in respect of disclosure of the remainder having been provided.
11. The first information provider is the NGO [REDACTED]. The 22 Documents provided by [REDACTED] were provided in non-redacted form to the Trial Chamber as annexes to the Application. However, [REDACTED] has declined to consent to the disclosure of its identity to the defence and the accused. The Application indicates that the prosecution will recommend to [REDACTED] the provision of summaries to the defence, including redactions of [REDACTED]. No indication has been given as to whether [REDACTED] will agree to this recommendation and, if not, whether other potential disclosure alternatives are available.
12. The second information provider is the NGO [REDACTED]. The one Document that originates from [REDACTED] was provided in non-redacted form to the Chamber as an annex to the Application. The prosecution submitted that [REDACTED] and indicated that [REDACTED] has declined to consent to the

disclosure of its identity to the defence, the accused and the public. The Application does not indicate whether [REDACTED] will agree to any of the suggested disclosure “alternatives” and, if not, whether further disclosure possibilities are available.

13. The third information provider is the NGO [REDACTED]. The prosecution, on 3 June 2008, provided the Chamber with redacted versions of 3 Documents which, it informed the Chamber, had originated from [REDACTED]. These Documents were re-submitted as annexes to the Application, without redactions. It was submitted by the prosecution that [REDACTED] is prepared to agree to the disclosure of summaries or redacted versions of the Documents to the defence and the accused, if necessary. The NGO has declined to consent to the disclosure of its identity to the defence, the accused, and the public.
14. The fourth information provider is the NGO [REDACTED]. The prosecution submitted that [REDACTED] has agreed to the disclosure of its identity and the 22 Documents (in non-redacted form) which originated from this NGO, to the Trial Chamber. However [REDACTED], it was submitted that [REDACTED] is not currently in a position to agree to the disclosure of summaries or redacted versions of the Documents to the defence and to the accused. Potential methods for alternative disclosure are, however, apparently being explored by [REDACTED] but these are not detailed in the Application. The NGO has declined to consent to the disclosure of its identity to the defence, the accused, and the public.
15. The fifth information provider is the NGO [REDACTED]. The prosecution re-submitted the 6 Documents originating from this NGO in non-redacted form to the Trial Chamber. It was submitted that, if necessary, [REDACTED] will explore means of alternative disclosure through summaries or redacted versions of the Documents to the defence and the accused. The Application does not clarify either the form or likely duration of this exercise. This NGO has declined to consent to the disclosure of its identity to the defence, the accused, and the public.
16. The sixth and last information provider is the NGO [REDACTED]. The prosecution re-submitted the one Document originating from this NGO in non-redacted form to the Trial Chamber. It was further submitted that [REDACTED] is currently [REDACTED] in order to seek [REDACTED] view on potential disclosure through alternative arrangements to the defence and the accused but the Application is silent as to which disclosure alternatives, if any, are available. This NGO has declined to consent to the disclosure of its identity to the defence, the accused, and the public.
17. Therefore, of the non-United Nations information providers, only one of the six ([REDACTED], with 3 items) has indicated that, if the Trial Chamber deems it necessary, it will provide summaries or redacted versions of its Documents to the defence and the accused. Three others have submitted that they are not currently in a position to facilitate disclosure. More specifically, one is “[REDACTED] to what extent, if at all, the Document concerned can be disclosed to the defence and the accused” ([REDACTED], with 1 item);

another will “explore alternative arrangements” for partial disclosure to the defence ([REDACTED], with 6 items); and the other “continues [REDACTED] to provide for summaries or redacted versions of the Documents concerned to the Defence and the accused” ([REDACTED], with 22 items). For a fifth non-United Nations information provider ([REDACTED], with 22 items), the Application is ambiguous as to whether the NGO [REDACTED] will agree to the provision of (potentially redacted) summaries to the defence: the prosecution states that if the Chamber deems disclosure of those Documents to be necessary, it “will recommend the provision of summaries, where applicable in redacted form” without revealing what the position of the NGO will be in these circumstances. Finally, for a sixth non-United Nations information provider ([REDACTED], with 1 item), the Application does not address the question of eventual disclosure to the defence at all.

B. Defence

18. In its observations, the defence contended that the Application did not meet the conditions established by the Trial Chamber in its 13 June, 2008 Decision. The defence observed that, contrary to the Chamber's orders, the prosecution has filed four separate documents, each portraying a developing situation, and each subject to future, hypothetical situations. The defence further highlighted the prosecution's suggestion that summaries could be provided to the defence, and that alternatively the United Nations is ready to explore “other means” (which would entail further negotiations with the United Nations), submitting that they may both prove to be unacceptable to the Chamber. The defence submitted that like objections apply to the other information providers. Additionally, it observed that the latter, seemingly, refuse to disclose their identities to the defence. Therefore, the defence contended that far from providing the Chamber with a precise and effective solution, the prosecution has demonstrated its inability to guarantee the implementation of an acceptable outcome following, in part, from its dependence on the principal information providers. The defence emphasised that such uncertainty regarding possible solutions and the intentions of the information providers fails to provide any kind of acceptable remedy, and that it remains currently impossible for the defendant to receive a fair trial.
19. The defence also submitted that the nature of the Documents and the identity of the information providers are imprecise, since the prosecution has not provided the defence with the annexes to its Application (wherein the evidence is set out). The defence contended that this is a manifestly unjustified use of *ex parte* proceedings, which, furthermore, is not required by any of the agreements concluded with the information providers. In the submission of the defence, a reference to the nature of a document does not materially affect the confidentiality of the title of the document or its contents. The defence highlighted that the prosecution has refused to identify the NGO providers, and that no

justification has been offered for the proposed redactions; the defence highlighted, however, that the approach appears to afford general protection to the information providers. Whatever the reasons, this has had the effect of limiting the scope and the utility of the defence response.

20. The defence further argued that the options advanced by the prosecution do not fulfil the requirements of a fair trial, since confidentiality should never prevail over the rights of the accused in this regard, and non-disclosure should only be authorised by the Chamber in exceptional circumstances. The defence argued that the options proposed by the prosecution run counter to the principle of public, adversarial justice since disclosure of potentially exculpatory material is a pre-condition of a fair trial. The defence submitted that although the Chamber may examine potentially exculpatory evidence when its nature is uncertain, this evaluation should be undertaken as part of a public, adversarial debate. Moreover, the defence submitted that it is only the defence – as opposed to the Trial Chamber – who can properly determine what material is likely to assist the accused. In the circumstances, the defence argued that all the potentially exculpatory documents in the prosecution's possession, without exception, should be disclosed to the defence before the proceedings resume.
21. The defence submitted that the prosecution's proposals do not guarantee full disclosure of exculpatory material, in accordance with the Statute, since most of the information providers refuse to lift the confidentiality restrictions, and the alternative solutions they propose do not guarantee the rights of the accused. The defence noted that only 3 of the 52 Documents provided by the NGOs can be disclosed to the defence and, as set out above, they each refuse to disclose their identities to the defence.
22. As regards the alternative solutions advanced by the prosecution, the defence suggested that the provision of summaries or redacted Documents fail to satisfy the requirements for a fair trial. The defence resisted the suggestion that the defence could review certain Documents in camera and ex parte: it was argued that this would not assist the defence since it would not be able to keep copies of the Documents or to use them in preparation of the accused's defence.
23. The defence submitted that:
 - a) the prosecution has failed to provide the Chamber with reasons, and including any suggested exceptional circumstances, justifying the non-disclosure of potentially exculpatory material to the defence, or its abusive use of Article 54(3)(e);
 - b) the prosecution has not advanced any remedy for the nondisclosure of exculpatory evidence to the defence; and
 - c) under these circumstances, the obstacles to the continuation of the proceedings (as described by the Chamber in its 13 June, 2008 Decision) remain in place.
24. The defence also observed that the prosecution's proposals impose conditions on the Chamber that are unacceptable and contravene the independence of the

judiciary. The defence argued that it is unacceptable for an information provider such as the United Nations to dictate to a Chamber how it should proceed, or to attempt to supplant the judges in the exercise of their judicial role.

25. Finally, the defence argued that the violations to the integrity of the trial that currently exist are of such gravity that the judicial process is compromised, and the trial should not be resumed, because:

- a) the Prosecutor has compromised his own independence on a permanent basis;
- b) the Prosecutor, by his abuse of Article 54(3)(e), has prevented the investigation and production of exculpatory materials, and their use during the proceedings, in accordance with Article 64(6)(d) of the Statute; and
- c) the conduct of the Prosecutor has led to a serious violation of the right of the accused to be prosecuted without undue delay.

26. In conclusion, the defence requested the Chamber to order the permanent cessation of the proceedings against the accused, and to confirm his immediate release.

III. Relevant Provisions

27. The following provisions from the Statute and Rules of Procedure and Evidence ("Rules") are relevant to a consideration of the Application:

Article 40 of the Statute:

Independence of the judges

- 1. The judges shall be independent in the performance of their functions.

[...]

Article 54 of the Statute:

Duties and powers of the Prosecutor with respect to investigations

- 3. The Prosecutor may:

[...]

(e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

[...]

Article 64 of the Statute:

Functions and powers of the Trial Chamber

- 2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

[...]

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

Article 67 of the Statute:

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

[...]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide

Rule 82 of the Rules:

Restrictions on disclosure of material and information protected under article 54, paragraph 3(e)

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3(e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.

2. If the Prosecutor introduces material or information protected under article 54, paragraph 3(e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.

Rule 83 of the Rules:

Ruling on exculpatory evidence under article 67, paragraph 2

The Prosecutor may request as soon as practicable a hearing on an ex parte basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.

IV. Analysis

28. At the outset, the Chamber stresses its keen awareness of the importance of this Decision to the peoples of the Democratic Republic of Congo, the victims and the accused, and in the result it has scrutinised the proposals

and the various submissions with particular care. Furthermore, the Chamber underlines that on the information available, responsibility for the continuing problems, as analysed below, does not rest with the information-providers, who have sought to discharge their respective mandates. As the Trial Chamber has previously observed, the United Nations and the NGOs entered into the relevant agreements in good faith, and thereafter have sought to assist the court to the extent that is consistent with their individual responsibilities. The Chamber is grateful for the attempts they have made to resolve these difficulties. The Trial Chamber also notes that there have been some real developments in the position of the United Nations as a result of discussion between itself and the prosecution.

29. During the Status Conference of 24 June 2008, the Trial Chamber gave the following guidance should the prosecution apply for an order to lift the stay of proceedings. First, "the matter should be addressed comprehensively as part of a single application once the Prosecution's overall submissions regarding the relevant material have been formulated to the extent that that is possible." Second, "the Chamber is unlikely to approve a system that depends on its ability to memorise large quantities of information which it is unable to retain and study and which, furthermore, it is unable to compare with the other evidence in the case so as to assess its relevance for Article 67(2) and Rule 77." Third, as this issue potentially is an appealable decision, "any proposal that the Trial Chamber should view the 54(3)(e) material will need to include conditions which enable it to explain in a written decision by reference to the detail of the evidence it has seen, an analysis of why it has reached any relevant conclusions. Furthermore, any material shown to the Trial Chamber must be available, if necessary, for review by the Appeals Chamber." The Trial Chamber will not read any documentation which is to be withheld from the Appeals Chamber or which will be provided to the Appeals Chamber only on the basis of proposed conditions which have not yet been agreed by that Chamber. Fourth, "it should not be assumed that the Chamber will approve summaries. It all depends on the nature of the information and a detailed analysis of each piece of evidence against the background of the requirements of Article 67(2) and Rule 77".
30. Therefore, before lifting the stay in the proceedings, the Trial Chamber must be satisfied, first, that it can adequately review – on a continuing basis – the Documents in question, in a way which is susceptible to a meaningful appeal, and, second, that there is some real prospect that the accused will be given sufficient access to any Documents which the Chamber considers to be exculpatory.

The United Nations Documents

31. The prosecution submitted that the Trial Chamber will be immediately provided with copies of the Documents from the United Nations which cannot

be disclosed in order to review them, either in chambers or in an *ex parte* session. Additionally, the Trial Chamber may make notes as necessary during its review. These conditions meet the requirements of the Trial Chamber in respect of its own initial access to the Documents. However, the Chamber has an obligation to keep all potentially exculpatory, undisclosed Documents under review as the evidence and the issues in the case unfold, and it will, therefore, be necessary for the documentation to remain with the Chamber for the entirety of the trial (emphasis added). The prosecution's proposals do not appear to facilitate this requirement.

32. Furthermore, as rehearsed above, the Trial Chamber set out the following in relation to the Appeals Chamber's access to the Documents and to the Trial Chamber's notes:

[...] any material shown to the Trial Chamber must be available, if necessary, for review by the Appeals Chamber. And it follows, therefore, that the Trial Chamber is likely to refuse to read any documentation which is to be withheld from the Appeals Chamber or which will only be provided to the Appeals Chamber on the basis of proposed conditions which have not yet been agreed by that Chamber.

33. Despite the Chamber's explicit directions in this regard, on the prosecution's proposal the Trial Chamber will be required to return all copies of the Documents, as well as to redact any notes which it may have taken with regard to the review of Documents insofar as such notes quote from or paraphrase the United Nations' Documents. By clear implication this stipulation will apply to any review of the Documents that may be set out in the decisions of the Chamber on this issue, with the consequence that the Trial Chamber will only be able to retain a redacted copy of its own decisions. The Trial Chamber will be obliged to comply with these conditions until such time as the Appeals Chamber consents to the same conditions of confidentiality imposed upon the Trial Chamber. Thus there remains the real possibility that decisions of the Trial Chamber on the Documents and their non-disclosure or partial disclosure may not be fully reviewable by the Appeals Chamber (who may be allowed to consider only a redacted version of decisions on this issue by the Trial Chamber). The prosecution's proposal, therefore, continues to infringe the fundamental principle that first instance decisions of this kind should be susceptible to appellate review.
34. As regards the Documents to be disclosed to the defence with redactions, the Application and Supplementary Information neither set out the nature and the extent of, and the suggested bases for, the proposed redactions, nor do they explain how the redactions may be authorised and kept under review by the Chamber. As set out above (paragraph 7), it seems likely that the redacted sections of Documents that will otherwise be disclosed are to be subject to the same conditions as the 16 Outstanding Documents that are currently to be withheld in their entirety. However, the Chamber stresses that if the core proposals had been acceptable, it would have investigated the circumstances of the suggested redactions.

35. With respect to the possible disclosure to the defence of currently undisclosed, potentially exculpatory materials provided by the United Nations, the Application proposes providing the defence with summaries of the Documents as its principal solution. In the alternative, the United Nations envisages 'other means' as provided for under the Statute and Rules. However, a clear indication as to what 'means' the United Nations would agree to has not been provided. This ambiguity wholly precludes the Trial Chamber from ascertaining the precise meaning and scope of the prosecution's suggestions, although if the core proposals were acceptable, the Chamber would have investigated the detail of the options.

NGO Documents

36. In relation to the other information providers, the prosecution's Application does not reveal any real prospect that some of them, such as [REDACTED] and [REDACTED], will agree to any form of disclosure of their Documents to the defence. This affects 21 Documents. [REDACTED] and [REDACTED] are currently exploring certain alternative measures of disclosure internally, according to the prosecution's Application, leaving disclosure uncertain for a further 23 Documents. The prosecution submits that [REDACTED] and [REDACTED] have indicated a willingness to explore alternative measures of disclosure to the defence; however, the measures that may be acceptable are not specified in the Application, leaving uncertainty with respect to an additional 9 documents. However, as with the United Nations' Documents, if the core proposals were acceptable, the Chamber would have investigated the detail of the options.
37. Furthermore, as regards the Documents to be disclosed to the defence with redactions, the prosecution's Application neither sets out the nature and the extent of the proposed redactions nor do they explain how the redactions may be authorised and kept under review by the Chamber. However, as with the United Nations' Documents, the Chamber stresses that if the core proposals had been acceptable, it would have investigated the circumstances of the suggested redactions.
38. Under these conditions, there is no assurance that the prosecution will be able to afford adequate disclosure of all the exculpatory materials in the event that the Chamber concludes that Documents should be provided to the defence.

V. Conclusions

39. The proposals outlined in the Application demonstrably fail to meet the pre-requisites set out hitherto by the Chamber to enable it to lift the stay of proceedings, and they infringe fundamental aspects of the accused's right to

a fair trial. Indeed, unless and until the guidance outlined by the Chamber on 24 June, 2008 is sufficiently addressed, it is necessary for the stay of proceedings to remain in place.

40. Addressing each of the four issues by way of summary, the Trial Chamber finds that:

- i) The Application fails to address comprehensively and sufficiently all of the Documents held by the various information-providers, and particularly the NGOs. There is inadequate clarity as to a significant proportion of the Documents along with the position, overall, of the information-providers, as regards disclosure and the opportunity for appellate review;
- ii) For the United Nations Documents (i.e. those which are currently to be withheld in their entirety, along with the redacted sections of other Documents), the proposals unacceptably appear to require the Chamber to return the Documents, or the redacted sections, after its initial review and to remove quotations or paraphrases from the judges' notes, unless and until the Appeals Chamber agrees to the same conditions as the Trial Chamber. These requirements will have the effect of preventing the Chamber from keeping the Documents sufficiently under review during the trial;
- iii) The proposals neither allow the Chamber to refer to the detail of the Documents in a written decision nor do they guarantee that any decision by the Chamber will be susceptible to full appellate review. Until the opportunity for the Chamber to issue a full and detailed written decision in respect of which a proper appeal is guaranteed (during which the Appeals Chamber is able to review all of the relevant documentation, along with a non-redacted version of any relevant decision of the Trial Chamber), one of the principal elements of a fair trial will be missing from the proceedings;
- iv) The proposals do not provide sufficiently comprehensive information on the redactions required by the providers, nor is a procedure for review of such redactions by both the Trial and – potentially – the Appeals Chambers set out;
- v) On the basis of the Application and Supplementary Information, there is a real prospect that the prosecution will not be in a position to effect adequate disclosure to the accused of a significant number of Documents (if the Chamber so orders) because, even at this late stage in the proceedings, there is currently no indication that some of the NGOs will be able to assist with the disclosure orders, whether by way of full disclosure, summaries or otherwise and for the United Nations, it is unclear whether sufficient disclosure, in an adequate form, will be possible. However, the Chamber stresses that if all of the Documents from all the information providers are submitted to the Chamber in a non-redacted form for the entirety of the trial and if the Appeals Chamber is able to consider in a similar, non-redacted form all of the relevant materials and any decision of the Trial Chamber on the issue, the Bench would be prepared to review all the Documents

(prior to lifting the stay) to assess which Documents need to be disclosed and whether the proposed methods of disclosure accord with the accused's right to a fair trial.

[...]

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Dated this 3 September 2008

At The Hague, The Netherlands

12.4 Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June, 2008

[...]

No.: ICC-01704-01/06 Date: 13 June 2008

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge

Judge Elizabeth Odio Benito

Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO

IN THE CASE OF THE PROSECUTOR v. THOMAS LUBANGA DYILO

Public Document

URGENT

Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008

[...]

1. Trial Chamber 1 ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC") in the case of The Prosecutor v. Thomas Lubanga Dyilo, following the Status Conference on 10 June, 2008 and the Chamber's oral announcement on 11 June, 2008 that the trial date of 23 June, 2008 was vacated, delivers its decision on the following issues:
 - (a) The consequences of the inability on the part of the Office of the Prosecutor ("prosecution") to disclose to the accused potentially exculpatory materials covered by agreements entered into pursuant to Article 54(3)(e) of the Rome Statute ("Statute");

- (b) The applications by the defence on 2 June, 2008, contained within its “Requête de la Défense aux fins de cessation des poursuites” seeking orders from the Chamber:
1. For the discontinuance of the prosecution and the release of the accused;
 2. For the immediate disclosure of potentially incriminatory material;
 3. That the defence is not obliged to notify the Court of its lines of defence; and
 4. That any potential charges currently being investigated in the context of the situation in the Democratic Republic of the Congo (“DRC”) will not be brought against the accused.
2. Certain other matters were addressed during the Status Conference which, given the Chamber’s conclusions on the first issue, have not been resolved in this Decision.

I. Background and Submissions

A. Procedural History

3. The disclosure of potentially exculpatory evidence received by the prosecution under the provisions of Article 54(3)(e) of the Statute has been the subject of consideration – including by way of oral and written submissions – since the earliest hearings before the Trial Chamber in this case. It was first raised by the prosecution in its 11 September 2007 filing to which the defence responded on 24 September, 2007; these were followed by oral submissions during the Status Conference of 1 October, 2007 and 2 October, 2007. The main elements of those submissions, in so far as they relate to the subject matter of the present decision, are rehearsed below.
4. Furthermore, during the course of this pre-trial phase, the Chamber has rendered various decisions which have touched upon this issue, and these also, where relevant, are set out below.
5. On 9 November, 2007 this Chamber rendered its “Decision regarding the timing and manner of disclosure and the date of trial” wherein it held as regards the agreements entered into by the prosecution for the provision of information on a confidential basis, that “from the moment the prosecution entered into the agreements and was thereafter presented with exculpatory materials, it has been under an obligation to act in a timely manner to lift the agreements in order to ensure a fair trial without undue delay.” In light of the proposed commencement of trial (at that time being 31 March, 2008) the Chamber ordered the disclosure of the prosecution evidence to the defence by 14 December, 2007. Any redactions sought by the prosecution were to be explained and justified. The Chamber stated that the obligation to disclose potentially exculpatory evidence as soon as is practicable would continue throughout the trial period.

6. *The Chamber further indicated that the prosecution would be under an obligation to withdraw any charges where non-disclosed exculpatory material has a material impact on the Chamber's determination of the guilt or innocence of the accused. If the prosecution were in doubt as to whether or not any material falls into this category, the Chamber directed that it should be put before the Trial Chamber for its determination [author's note: emphasis added].*

B. Submissions of the Parties and the Participants

1. Interpretation of the Statutory Provisions

a. The extent of the prosecution's disclosure obligations

7. The prosecution underlined that whilst Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence ("Rules") require disclosure of materials, Rule 77 refers to Rule 81 which "subjects disclosure to the requirements of confidentiality contained *inter alia* in Article 54, as well as to Rule 82 which similarly operates as a restriction on disclosure".
8. The prosecution submitted that it had taken a very liberal approach to the definition of "exculpatory" under Article 67(2) so as to include *tu quoque* material. However, the prosecution submitted that material in this category did not afford the accused with a valid defence since in its view the undisclosed evidence does "not materially impact on the Court's determination of the guilt or innocence of the accused".
9. During the Status Conference on 10 June, 2008, the Bench requested the prosecution to define its usage of the term "exculpatory". In particular it queried how potentially exculpatory evidence would not, *ipso facto*, potentially impact on the guilt or innocence of the accused. To this the prosecution submitted that such evidence could be merely mitigating, or Rule 77 evidence (the latter only being material to the preparation of the defence). The prosecution clarified, therefore, that its use of the term "exculpatory material" included, but was not limited to, mitigating evidence.
10. On the question of whether mitigating material should also be disclosed to the defence, prior to any sentencing procedure, the prosecution submitted there should be no difference in the approach to the disclosure of such material.
11. The defence argued that Article 54(1)(a) of the Statute imposed a responsibility on the prosecution to investigate exonerating materials. One reason for this, in the submission of the defence, was that it did not have the resources, authority or institutional aids which are available to the prosecution. This responsibility, according to the defence, created an obligation for the prosecution to disclose exculpatory and mitigating evidence to the defence.
12. The defence submitted that the prosecution had adopted an unjustifiably narrow interpretation of Article 67(2) of the Statute. In particular, it emphasised that the prosecution must disclose not only exculpatory evidence but also mitigating

evidence or evidence that affects the credibility of prosecution evidence. The defence argued that exculpatory evidence must be understood in light of Rule 145 of the Rules which provides that any mitigating or aggravating factors must be taken into account when sentencing. This included, in the submission of the defence, evidence relating to: the nature of the unlawful behaviour, the means used to employ it, the accused's degree of participation and intent and the manner, time and location of the crime. The defence argued that all mitigating material within Rule 145 must be disclosed by the prosecution.

13. The defence submitted and relied on jurisprudence of the International Tribunal for the Former Yugoslavia ("ICTY"), in support of the proposition that restrictions on disclosure of materials do not relieve the prosecution of its obligation to disclose to the defence material which tends to show the innocence of the accused. The prosecution contended that the jurisprudence of the ICTY which upheld the principle of the disclosure of exculpatory material could be distinguished from the present circumstances as the prosecution has already disclosed evidence similar to the protected exculpatory material to the defence.

b. Status and exculpatory value of non-disclosed materials

14. On 11 September, 2007 the prosecution informed the Chamber that it anticipated completing disclosure, or applying for the removal of restrictions, by the end of October 2007. However, it suggested that the outcome of the process was beyond its control.
15. During the Status conference on 1 October, 2007 the prosecution informed the Chamber of the disclosure status of evidence obtained pursuant to Article 54(3)(e). The prosecution noted that information providers had refused to lift the restrictions in respect of 46 documents comprised of about 220 pages. The prosecution informed the Chamber that, at that time, requests to lift redactions were pending as regards over 500 documents which amounted to about 3080 pages.
16. Following a request by the Chamber on 13 March 2008, the prosecution provided a summary of the status of exculpatory materials in its written submissions on 28 March, 2008.
17. In its 28 March filing the prosecution provided an update on the status of potentially exculpatory materials collected pursuant to Article 54(3)(e). In particular it informed the Chamber that as of 25 March, 2008 it had disclosed or provided for pre-inspection 76 documents containing potentially exculpatory information or falling within the scope of Rule 77. Of these 76 documents, the prosecution noted that 44 were disclosed or provided in full, whilst 32 were disclosed with redactions requested by the information providers. Finally, in reporting on the status of potentially exculpatory material, the prosecution informed the Chamber that a total of 216 items containing potentially exculpatory material or information falling within the scope of Rule 77 had not been disclosed to the defence. For 35 of these items, the prosecution noted that it was

awaiting responses to requests to disclose from information providers. However, it noted that information providers had refused to lift Article 54(3)(e) restrictions as regards the remaining 181 items.

18. On 7 April the prosecution informed the Chamber that the undisclosed evidence comprised 212 rather than 216 items.
19. During the Status Conference of 10 June 2008 the prosecution provided up-to-date information to the Chamber on the situation as regards undisclosed material and its sources. In particular the prosecution informed the Chamber that there currently are 156 documents provided by the UN under Article 54(3) (e) for which authorisation to disclose to the defence had been refused. Of those 156 documents, the prosecution informed the Chamber that 112 fell under the heading of Rule 77 of the Rules whilst the remaining 95 were considered potentially exculpatory or mitigating in nature. As to the documents for which a response was pending, the prosecution submitted that negotiations were ongoing, although it was unable to predict the outcome thereof.
20. *In addressing the undisclosed materials, the prosecution divided the evidence into two categories: evidence which would not materially impact on the Chamber's determination of the guilt or innocence of the accused and evidence which had that potential. However, having clearly indicated that the evidence fell into these two categories, in a seemingly contradictory submission the prosecution thereafter maintained that none of the undisclosed evidence "in fact" materially impacted on the Chamber's determination of the guilt or innocence of the accused [author's note: emphasis added].*
21. In elaboration of this latter submission, the prosecution submitted that evidence which could not, in the prosecution's contention, impact upon the Chamber's decision as to the guilt or innocence of the accused consisted of the following: evidence which purported to establish that children voluntarily joined the UPC/FPLC or were sent by their parents; *tu quoque* evidence which purported to establish the use of child soldiers by the Lendu or other armed groups in Ituri; reported benevolent acts by Thomas Lubanga Dyilo; material relating to the political nature of the UPC/FPLC and its aim of pacifying Ituri or references to it as an "all-inclusive" organisation; and information falling within the scope of Rule 77 (which, in the prosecution's submission, did not go to the guilt or innocence of the accused but was material to the preparation of his defence).
22. The categories of evidence which the prosecution submitted could materially impact on the Court's determination of the guilt or innocence of the accused included: evidence indicating that Thomas Lubanga Dyilo suffered from a mental condition; that he was intoxicated thus impairing his capacity to control, or understand the unlawfulness of, his conduct; that he was under duress or compulsion; that he acted in self-defence; that he made efforts to demobilise child soldiers; that he had insufficient command over people who committed the crimes with which he is charged; that the UPC/FPLC was under the control of Uganda, Rwanda and other countries. *However, it submitted that none of this*

evidence revealed control as regards the recruitment of children [author's note: emphasis added], and that there was "no doubt" that these categories of evidence would only impact in *principle* on the Chamber's decision, and that it would not *in fact* materially impact on the determination of the guilt or innocence of the accused.

23. The defence averred that the documents outlined in the prosecution's description of the categories of undisclosed potentially exculpatory materials were in fact exculpatory and should be disclosed.

2. Interpretation of Agreements Under Article 54(3)(e) of the Statute

a. Purpose of Article 54(3)(e) and agreements concluded pursuant to Article 54(3)(e)

24. The prosecution argued that Article 54(3)(e) guaranteed confidentiality, unless the information-providers authorised otherwise, because many of them did not wish for their co-operation to be revealed in juridical proceedings. This interpretation, it was averred, accorded with the terms of the agreements as well as the approach of the prosecution and the information-providers.
25. Despite the requirements of Article 54(3)(e) that confidentiality agreements are to be used solely for the purpose of generating new evidence, the prosecution contended that evidence which it is anticipated may be used during the trial can also be obtained pursuant to Article 54(3)(e). This argument was founded on Rule 82, which anticipates that materials obtained under Article 54(3)(e) may later be introduced as evidence.
26. *In defending the confidentiality agreements, the prosecution submitted that it depends upon the co-operation of information-providers who were working under very difficult conditions on the ground and who had made a deliberate decision that, in order to protect staff, their information must be confidential.* In the prosecution's submission, the Court "has to accept" that the mandate of the information-providers was "very different to [that of] the Office of the Prosecutor" and that the materials were not collected for the purpose of trial. *The prosecution submitted that if the Court was not to accept the "realities" for the UN and NGOs on the ground, then they would not provide evidence and "there was no other option available". Similarly, in a later submission, the prosecution argued that it was not possible to approach the UN with specific issues in which it was interested before being provided with materials, and that such an approach would only be viable at later stages of the investigation* [author's note: emphasis added]. The prosecution contended that it would not have been able to initiate an investigation in the DRC without the information provided by the UN under the confidentiality agreements.
27. The prosecution has interpreted Article 54(3)(e) as not limiting confidentiality agreements to evidence obtained solely for the purpose of generating new

evidence. Rather, it submitted that the UN had provided general materials to the prosecution pursuant to the confidentiality agreement, and thereafter the prosecution had selected the evidence to be used in the trial and the items that were to be treated as lead evidence. The prosecution accepted that at the material time, there had been a clear understanding that these materials were likely to be used as evidence.

28. *By contrast, the defence noted that Article 54(3)(e) of the Statute only permits the prosecution to enter into a confidential agreement of this kind when it will generate new evidence and it argued that once obtained under this provision, the material should not be tendered as evidence in the trial* [author's note: emphasis added].
29. The defence submitted that Article 54(3)e was not intended to make the prosecution's task easier or to allow it to obtain the information more quickly but rather it had a specific purpose that had not been adhered to in the these proceedings.
30. The defence argued that Article 54(3)(e) of the Statute permits confidentiality agreements to cover only documents which will generate new evidence. Accordingly, in the defence's submission, these agreements cannot be used loosely to cover all documents from a particular source.

b. Incorporation of agreements under article 54(3)(e) of the Statute in the Court's legal framework

31. Addressing the Relationship Agreement with the UN and those reached with other information providers, the prosecution argued that their interpretation and use of the agreements were justified. In particular, during the *ex parte* Status Conference held on 2 October, 2007, the prosecution argued that Article 18(3) of the Relationship Agreement between this Court and the United Nations ("Relationship Agreement") which prohibited it from disclosing confidential materials to any organ of the Court without consent of the information providers, had been endorsed by the Assembly of States Parties. It was argued that the approval by this entity, being the Court's legislative body, gave authority to the prosecution's interpretation of Article 54(3)(e).
32. Despite this, the prosecution acknowledged that an excessive use of Article 54(3)(e) would be problematic and that its use in the present case may be viewed as excessive. The prosecution acknowledged that the language used in the agreements did not necessarily reflect what Article 54(3)(e) was meant to cover.
33. At the Status Conference of 10 June, 2008 the defence submitted that the prosecution's use of the confidentiality agreements, which could affect the discovery of the truth and the fairness of the trial, was untenable because no instance-specific reasons had been provided by the UN justifying the suggested need for confidentiality. The defence cited as an example of the misuse of the agreements that one of the documents provided to it recently by the prosecu-

tion, which had been covered by one of the confidentiality agreements, was in fact a public document.

34. The prosecution submitted that the obligation to provide exculpatory material under Article 67(2) of the Statute must be read in conjunction with the Relationship Agreement with the UN, and that, in the result, the obligation is limited to material that has not been provided to the prosecution confidentially or whenever the information provider, under a confidentiality agreement, has granted consent. It submitted that the Relationship Agreement, which prevented the Chamber from viewing the undisclosed material, became binding law pursuant to Article 21(l)(b) of the Statute.
35. *The defence submitted, in the context of the Relationship Agreement, that agreements made between the Court and other bodies cannot take precedence over the Statute or the fundamental right of the accused to obtain exculpatory material* [author's note: emphasis added]. Accordingly, the defence argued that the prosecutor had manifestly exceeded his mandate.

c. Authorisation from information providers under Article 54(3)(e) of the Statute

36. The prosecution made extensive submissions regarding its attempts to obtain the consent of information providers to disclose exculpatory materials. It first informed the Chamber of these attempts during the Status Conference of 1 October, 2007. In order to facilitate disclosure, the prosecution informed the Chamber that it had emphasised the urgency of the matter and it was trying to speed up the process of obtaining authorisation. Whilst the prosecution noted that the United Nations in particular was “very well-prepared to lift the restrictions” it submitted that the negotiation process would take time and that the outcome was beyond the prosecution’s control. The prosecution, nonetheless maintained that it “anticipated having disclosed or provided for inspection or having sought to lift any restrictions on disclosure on the materials concerned by the end of October [2007].”
37. The prosecution confirmed its attempts at obtaining this consent from the information-providers in its 10 December, 2007 filing and submitted that it maintained its aim of effecting full disclosure before 14 December, 2007.
38. However, in its written submissions of 24 January, 2008, the prosecution submitted that it had not received responses to its requests to lift the Article 54(3)(e) restrictions prior to 14 December, 2007.
39. The prosecution indicated that it was engaged in continuing negotiations with the information-providers at the Status Conference of 13 March, 2008.
40. On 7 April, 2008 the prosecution informed the Chamber that whilst it was seeking consent from the information providers other than the UN, the deadline imposed by the Chamber had not afforded it sufficient time. However, the prosecution indicated that some responses were expected within a short period.

41. During the Status Conference on 10 June, 2008 the prosecution submitted that negotiations were ongoing, although it was unable to predict the eventual outcome.

d. Disclosure of similar materials as an alternative to disclosure under Article 67(2) of the Statute

42. In the event that consent to disclose materials was not forthcoming, the prosecution submitted that its approach was to provide the defence with similar alternative materials [author's note: emphasis added]. On 10 and 15 April, 2008, pursuant to an order of the Chamber, the prosecution filed its submissions on similar alternative material to the undisclosed evidence. The prosecution submitted that it had provided the defence with sufficient similar alternative evidence to allow it to prepare for trial.
43. The defence contested the prosecution's argument that sufficient similar evidence had been provided; it argued that the fundamental right of the accused is to receive the totality of exculpatory materials and no confidentiality agreement, in the submission of the defence, could justifiably form an obstacle to this fundamental right.

e. The provision of non-disclosed material to the Bench

44. In order to address the matter fully, on 3 April, 2008 the Chamber ordered the prosecution to provide it with the undisclosed exculpatory material. The prosecution indicated it was unable to comply with this order, citing the provisions of the agreements under which the material had been obtained. Thereon, the Chamber directed the prosecution to furnish it with descriptions of the undisclosed potentially exculpatory material, together with explanations as to why each document was not in the prosecution's view exculpatory; however, the prosecution indicated that it was also unable to comply with this order of the Chamber.
45. *As an alternative, the prosecution agreed that if the Chamber were to undertake not to disclose the material without the consent of the information providers, the latter may provide the documents to the Chamber for its review (the Chamber having indicated its willingness to give such an undertaking). However it emerged thereafter that at least two information providers (including the UN) declined to allow the Chamber to view the material, notwithstanding the Chamber's undertaking, and other information-providers required redactions to the information which removed information which may identify individuals or bodies* [author's note: emphasis added].
46. The defence submitted that the Chamber was able to review the relevant materials, accepting that this process may reveal some incriminatory material.
47. In the contention of the defence, exculpatory evidence and the confidentiality agreements should be provided to the Chamber so that it can establish whether the agreements are justified. Accordingly, the Chamber can override

confidentiality agreements which affect the rights of the defence under Article 67(2) of the Statute and Rule 77 of the Rules.

48. *The prosecution submitted that disclosure of exculpatory material should not be ordered by the Chamber pursuant to its powers under Article 72(7) of the Statute but, rather, the appropriate remedy for non-disclosure “where the evidence is so critical as to materially impact on the guilt or innocence of the accused is for the Chamber to make such inferences in the trial as to the existence or non-existence of facts as may be appropriate in the circumstances, and where the Chamber considers this remedy to be insufficient, the appropriate remedy is the dropping of the relevant charges” [author’s note: emphasis added].*
49. On 9 June, 2008, the prosecution filed an update on information obtained from the United Nations containing potentially exculpatory materials. Therein the prosecution informed the Chamber that, pursuant to recent negotiations, the United Nations had authorised disclosure of two documents to the defence. In respect of 33 documents, the prosecution noted that the UN was willing to explore ways in which “elements of information” could be provided to the Chamber. On 11 June, 2008, the prosecution filed a further confidential update on information obtained from the UN.
50. *The Presiding Judge observed during the Status Conference on 10 June, 2008 that Article 67(2) establishes that the Chamber is the arbiter of whether or not material falls to be disclosed and that the confidential agreements tended to undermine its role in this regard. In response, the prosecution argued that the materials it had disclosed to the defence were similar to the material covered by the confidentiality agreements and thus the Chamber was able to evaluate the latter by process of analogy [author’s note: emphasis added].*

3. Suitability of 23 June, 2008 trial date

51. In arguing for the retention of the 23 June, 2008 trial date, the prosecution averred on 10 June, 2008 that the defence had been provided with alternative evidence, not covered by confidentiality agreements, which was similar in nature. Furthermore, the prosecution argued that Article 67(2), by directing the prosecution to disclose materials that it believed to be potentially exculpatory, implied that it was trusted to deal with evidence in this area appropriately” and that disclosure, as an ongoing obligation, necessitated the defence accepting that disclosure of exculpatory materials would continue throughout the trial [author’s note: emphasis added]. In support of this, the prosecution repeated its contention that none of the undisclosed potentially exculpatory material would impact on the guilt or innocence of the accused. Similarly, in the prosecution’s submission, the defence would have adequate

time to prepare given the trial date is in late June and the limited volume of the material in question.

52. On the proposed 23 June commencement of the trial, the defence argued, during the Status Conference on 10 June, 2008, that it had “never requested the postponement of the trial in writing and will not do so.”

4. The power of the Chamber to stay the proceedings

53. Whilst the prosecution acknowledged the inherent power of the Chamber to discontinue the proceedings, it submitted that such a drastic remedy is strictly limited to the most serious cases involving an abuse of power by the prosecution. It submitted that the abuse would have to call into question the integrity of the system, resulting in a contravention of the rights of the accused of constitutional magnitude. In the prosecution’s submissions no such abuse had occurred, nor had the defence alleged as such.
54. The defence argued that the proceedings should be terminated. The power to do so, in the submission of the defence, originated in the inherent power of the Bench to prevent an abuse of the process and ensure the fairness of proceedings.
55. *The legal representative of victims a/0001/06 to a/0003/06 submitted that issues relating to the possible discontinuance of the trial go to the crux of victims’ interests* [author’s note: emphasis added]. Responding to the defence’s filing requesting the discontinuance of the proceedings, *the legal representative of victims a/0001/06 to a/0003/06 argued that there are legally only two justifications for such discontinuance: inadmissibility or lack of jurisdiction. He further submitted that in such a situation certain participants must be heard, including the referring state and victims* [author’s note: emphasis added]. Discontinuance of the present proceedings, in the submission of the legal representative of victims a/0001/06 to a/0003/06, was not possible and in any event was not within the Trial Chamber’s powers but rather those of the Pre-Trial Chamber.

5. Ongoing investigations

56. In relation to the issue of ongoing investigations the prosecution submitted that it was continuing to investigate other possible crimes committed by Thomas Lubanga Dyilo. However, it averred that it would not seek to amend the charges and that it had the right and obligation to conduct such investigations.
57. In this regard, the defence submitted that the prosecution was concealing further potential charges against the accused. This, the defence argued, was in violation of the accused’s right to be informed of the charges against him and prosecutorial fairness.

II. Relevant Provisions

Article 21 of the Statute

Applicable Law

1. The Court shall apply:

[...]

(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

[...]

3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights [...]

Article 54 of the Statute

Duties and powers of the Prosecutor with respect to investigations

[...]

3. The Prosecutor may:

[...]

(e) Agree not to disclose, at any stage of the proceedings, documents or Information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and

Article 64 of the Statute

Functions and powers of the Trial Chamber

[...]

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

[...]

(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

Article 67 of the Statute

Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

[...]

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

[...]

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control

which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Rule 77 of the Rules of Procedure and Evidence (“Rules”)

Inspection of material in possession or control of the Prosecutor

The Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.

Rule 82 of the Rules

Restrictions on disclosure of material and information protected under article 54, paragraph 3(e)

1. Where material or information is in the possession or control of the Prosecutor which is protected under article 54, paragraph 3(e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.
2. If the Prosecutor introduces material or information protected under article 54, paragraph 3(e), into evidence, a Chamber may not order the production of additional evidence received from the provider of the initial material or information, nor may a Chamber for the purpose of obtaining such additional evidence itself summon the provider or a representative of the provider as a witness or order their attendance.

[. . .]

Rule 83 of the Rules

Ruling on exculpatory evidence under article 67, paragraph 2

The Prosecutor may request as soon as practicable a hearing on an ex parte basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2.

58. In addition, in light of Article 21(3) of the Statute, the Chamber has also considered the following international provisions:

Article 14(1) of the International Covenant on Civil and Political Rights

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [. . .]

Article 11(1) of the Universal Declaration of Human Rights

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Article 6 of the European Convention on Human Rights

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and the facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

III. Analysis and Conclusions

The inability on the part of the prosecution to disclose to the accused exculpatory materials covered by Article 54(3)(e) agreements

Preliminary matters

59. The expression “exculpatory material” has been used during the submissions on this issue to cover a variety of circumstances, all of which are to be found in Article 67(2) of the Statute. *Exculpatory material therefore includes material, first, that shows or tends to show the innocence of the accused; second, which mitigates the guilt of the accused; and, third, which may affect the credibility of prosecution evidence* [author’s note: emphasis added]. The prosecution accepts that the exculpatory material which it is unable to disclose to the defence or to put before the judges in non-redacted form comes, in each instance, from one of these categories. Furthermore, the prosecution has included under the general umbrella of materials that it has been unable to disclose those that are covered by Rule 77 of the Rules.
60. Although the prosecution has sought to suggest, in a general sense, that the exculpatory value of the non-disclosed material has been covered in other

documents or information that have already been served, the Court has been unable to assess for itself whether this proposition is accurate, and whether, notwithstanding the existence of other disclosed material, fairness dictates that the accused should be provided with part or all of the undisclosed evidence. *On this latter issue, the Chamber has grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence: the right of the accused is to both items* [author's note: emphasis added]. In the Chamber's "Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters" of 8 May, 2008 the majority observed in the context of the accused's "absolute entitlement" to potentially exculpatory evidence:

The fact that it may be undermined by other evidence, or the witness may also provide incriminating evidence, or there are other sources providing similar evidence are all irrelevant for these purposes. If the real possibility exists that this evidence may contribute to a resolution of material factual issues in the case in favour of the accused, he is to be provided with it [...]

(See also the decision of the Appeals Chamber of the ICTY in the case of *Blaskic*, which is considered in paragraph 81 below.)

61. As set out above, under the heading 'Rights of the accused', Article 67(2) obliges the prosecution to disclose to the defence exculpatory material in "the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence". It is left to the Chamber to decide whenever there is a doubt as to the application of this provision: "In case of doubt as to the application of this paragraph, the Court shall decide".
62. Despite the unequivocal terms of this section, the prosecution has been given the opportunity, pursuant to Article 54(3)(e), to enter into agreements not to disclose material provided on a confidential basis, when the sole purpose of obtaining the material is to generate new evidence.
63. In this case over 200 documents, which the prosecution accepts have potential exculpatory effect or which are material to defence preparation, are the subject of agreements of this kind. On 10 June 2008, the Chamber was told that there are "approximately" 95 items of potentially exculpatory material and 112 items which are "material to defence preparation", pursuant to Rule 77, making a total of 207 items of evidence. *Of these 207 items, 156 were provided by the UN* [author's note: emphasis added].
64. The prosecution is unable to disclose any of these items of evidence to the accused, in full or in a redacted form. Furthermore, save for a limited number of documents (32) that have been supplied to the Chamber by six unidentified information-providers in redacted form, the prosecution (given the terms of the agreements) is unable to show them to the Chamber. This is

because the information-providers do not consent to the judges viewing copies of the original materials (in the majority of instances the Chamber cannot be shown the documents at all), notwithstanding an undertaking which has been given by the judges to uphold the confidential status of the documents or information, unless consent is given by the information-providers for their wider distribution. It needs to be stressed, however, that the Chamber fully appreciates that the UN, and possibly other information-providers, were invited by the Court to enter into these agreements, and it unreservedly accepts that they will have approached this issue in good faith, bearing in mind their own particular responsibilities and their respective mandates.

65. The Chamber has only seen two of the agreements that have been reached under Article 54(3)(e) of the Statute; the Relationship Agreement with the UN, stipulates in Article 18(3) that:

The United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents or information shall not be disclosed to other organs of the Court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.

66. The Chamber has not seen the agreements with the other unidentified information-providers; it does not know who they are; and the Chamber has not been provided with the terms of these further agreements.
67. Having been informed earlier that the Prosecutor was to raise these issues with the UN, in a document filed at 20.48 on 9 June, 2008, the judges were informed that the Prosecutor and the UN Legal Counsel had met on 3 June 2008 to discuss them. Following that meeting, two documents have been disclosed to the defence, and in relation to a further 33 documents “the UN is ready and willing to explore with the OTP ways in which elements of information that are contained in the documents and that the OTP believes to be of a potentially exculpatory nature may be made available to the Trial Chamber without at the same time disclosing the documents themselves, either in whole or in part.”
68. It is to be observed that if this proposal is adopted, in the result the Chamber will not be allowed to view and evaluate any of this evidence in its original form and instead it will be dependent on the prosecution’s evaluation of its “exculpatory nature” and the adequacy of any “elements of information” – whatever this latter expression means – as may be provided to the judges.
69. The other documents supplied by the UN are not covered by this proposal and the Chamber has simply been informed that “the OTP continues its discussions and efforts to find solutions with the UN in respect of the remaining documents that form part of the list of documents that due to their status cannot be disclosed.”

The Agreements

70. It is necessary, first, to analyse whether the prosecution has correctly applied the provisions of Article 54(3)(e) in the agreements it reached with the information-providers, because it is self-evident that the situation confronting the Court has only arisen because of the agreements which the prosecution has entered into in this case, and the way which they have been implemented. Importantly, therefore, if the exculpatory material was not covered by the agreements, it would have been provided to the defence: non-disclosure is the direct result of the prosecution's use of the Article 54(3)(e) agreements.
71. Addressing whether the agreements conform to the provisions of Article 54(3)(e), in the view of the Chamber the wording of the subsection is clear, and its purpose is readily apparent. In highly restricted circumstances, the prosecution is given the opportunity to agree not to disclose material provided to it at any stage in the proceedings. The restrictions are that the prosecution should receive documents or information on a confidential basis *solely for the purpose of generating new evidence* – in other words, the only purpose of receiving this material should be that it is to lead to other evidence (which, by implication, can be utilised), unless Rule 82(1) applies [author's note: emphasis added].
72. The prosecution has given Article 54(3)(e) a broad and incorrect interpretation: it has utilised the provision routinely, in inappropriate circumstances, instead of resorting to it exceptionally, when particular, restrictive circumstances apply. Indeed, the prosecution conceded in open court that agreements reached under Article 54(3)(e) have been used generally to gather information, unconnected with its springboard or lead potential. During the Status Conference on 6 May 2008, the prosecution made this unequivocally clear, during the following exchange:

Presiding Judge:

You have used the expression [...] "lead evidence" on various occasions today. Is it the Prosecution's intention that these agreements in fact were all limited to lead evidence, what I think on earlier occasions I have referred to as springboard material?

Prosecution:

Mr President, your Honours, not at all [...] and this is just an example, but the most important example, in relation to the United Nations. On top of the UN relationship agreement and the Memorandum of Understanding there's a letter of 8 November 2005 to the United Nations where interpretation is given to the relevant provisions in the agreement and, in particular, in respect of the Memorandum of Understanding, and here it says in relation to Article 10(6) [...] "It is understood as a general rule the United Nations will endeavour to the extent possible to accede to all requests to consent to view such documents and information in trial. This understanding shall also apply with respect to the information of records referred to in Article 11(7)." [...] And this [...] refers to the question you put to me. **Of course, there was never any intention on the side of the Prosecutor, and it was also understood as such by the United Nations, that these materials were received only for lead purposes. The point was to obtain these**

materials as quickly as possible for the sake of the ongoing investigation and then to allow the Office of the Prosecutor to identify the materials it wishes to use as evidence and then seek permission [added emphasis].

73. *Therefore, although the Chamber does not have the information necessary to analyse the circumstances in which each of the individual documents was supplied to the prosecution, the overall picture is clear: the prosecution's general approach has been to use Article 54(3)(e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence **to be used at trial** (having obtained the information provider's consent). This is the exact opposite of the proper use of the provision, which is, exceptionally, to allow the prosecution to receive information or documents **which are not for use at trial** but which are instead intended to "lead" to new evidence. The prosecution's approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances. The logic of the prosecution's position is that all of the evidence that it obtains from information-providers can be the subject of Article 54(3)(e) agreements* [author's note: emphasis added except for bolded portion which is in the original].
74. Judge Steiner on 2 June, 2008 in her "Decision Requesting Observations concerning Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material for the Defence's Preparation for the Confirmation Hearing" observed:

9. At the outset, the Single Judge notes the considerable number of documents (1632 according to the last indication given by the Prosecution on 25 April 2008) that the Prosecution has collected pursuant to article 54(3)(e) of the Statute, and that, according to the Prosecution, "were considered to be relevant" for the present case. In the view of the Single Judge, this is particularly notable because the present case is confined to the crimes allegedly committed during one attack against one village on a single day.

10. The Single Judge finds this considerable number of documents to indicate that the Prosecution is not resorting to article 54(3)(e) of the Statute only in exceptional or limited circumstances, but rather is extensively gathering documents under such provision.

11. This practice, in the view of the Single Judge, is at the root of the problems that have arisen in the present case, as well as in the case of the Prosecutor v. Thomas Lubanga Dyilo, with regard to the disclosure to the Defence of those materials identified as potentially exculpatory (article 67(2) of the Statute) or otherwise material for the Defence's preparation for the confirmation hearing (rule 77 of the Rules) and that have been collected under the conditions of confidentiality set forth in article 54(3)(e) of the Statute.

12. Furthermore, the series of reports filed by the Prosecution in the last six and a half months (i.e. from 14 November, 2007 to 23 May, 2008) show that the problems posed by the practice of extensively gathering materials pursuant to article 54(3)(e) of the Statute are significantly aggravated by the Prosecution's difficulties in securing the consent of the providers.

With respect, this Bench echoes those sentiments.

75. In light of the prosecution's inappropriate use of these confidentiality agreements, and the resulting inability to effect proper disclosure to the defence, it is manifest that the agreements should not be allowed to operate in a way that subverts the Statute. The choices for the prosecution are clear and stark. Either it must disclose all the potentially exculpatory material in its possession (in accordance with the Statute) to the accused or it will choose not to do so because of the improper agreements it has reached with information providers. If it follows the latter course, the consequences of that decision are analysed in detail hereafter.
76. Finally on this subject, if Article 54(3)(e) is used appropriately, the apparent tension which exists between this provision and Article 67(2) is likely to be negligible: although exculpatory material may be included in the springboard or lead evidence, in the limited circumstances in which this provision should be used, it is likely that a mechanism can be established which facilitates all necessary disclosure; for instance, the prosecution may need to make arrangements with the information-provider for disclosure of such parts of the Article 54(3)(e) material as will enable it to provide any potentially exculpatory evidence to the accused. In any event, if the prosecution is unable to disclose evidence of this kind which is covered by these agreements, the issue should always be raised with the Chamber in accordance with Rule 83.

Does the right to a fair trial include the right to disclosure of potentially exculpatory material?

77. The Chamber has unhesitatingly concluded that the right to a fair trial – which is without doubt a fundamental right – includes an entitlement to disclosure of exculpatory material. This is established not only by the provisions of Article 67(2) of the Statute, but also by a review of the relevant international jurisprudence, and particularly that of the European Court of Human Rights and the ICTY. In *Krstić* the Appeals Chamber of that latter court stated:

The disclosure of exculpatory material is fundamental to the fairness of proceedings before the Tribunal and considerations of fairness are the overriding factor in any determination of whether the governing Rule has been breached.

78. In *Oric* the Trial Chamber of the ICTY observed:

The jurisprudence of the Tribunal is clear that, in pursuit of justice, the disclosure of Rule 68 [exculpatory] Material to the Defence is of paramount importance to ensure the fairness of proceedings before this Tribunal.

79. In *Jespers v. Belgium*, the European Commission of Human Rights held that the principle of equality of arms imposes on prosecuting and investigating authorities an obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating

himself or in obtaining a reduction in sentence. This principle covers a wide variety of evidential possibilities, and it includes evidence which may undermine the credibility of a prosecution witness.

80. Critically, although international human rights jurisprudence and that of the *ad hoc* tribunals indicate that “only such measures restricting the rights of the accused, which are strictly necessary, ought to be adopted”, these cannot extend to denying him or her a fair trial. For instance, the ICTY in *Talic* emphasised that although it may be “necessary in some cases to withhold certain material from the defence, so as to safeguard an important public interest” nonetheless “*the public interest [...] is excluded where its application would deny to the accused the opportunity to establish his or her innocence*” [author’s note: emphasis added].
81. On a linked issue, the Appeals Chamber of the ICTY has disapproved attempts by the prosecution to avoid disclosure when other, similar evidence has been served. In its judgment on the appeal in the *Blaskic* case, the Appeal Chamber observed:

... the Appeals Chamber reiterates that it cannot endorse the view that the Prosecution is not obliged to disclose material which meets the disclosure requirements provided for in Rule 68 if there exists other information of a generally similar nature.

The role of the judges

82. In *Rowe and Davis v. U.K.*, the European Court of Human Rights held that although Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) generally requires the prosecution to disclose to the defence all relevant evidence for or against the accused, considerations of national security or the protection of vulnerable witnesses may, in certain circumstances, justify an exception to this rule. The court decided that any departure from the principles of open adversarial justice must, however, be strictly necessary, and the consequent handicap imposed on the defence must be adequately counterbalanced by procedural safeguards, to protect the rights of the accused.
83. In *Rowe and Davis* it was decided that where the prosecution has withheld relevant evidence on public interest immunity grounds, without first submitting the material to the trial judge, the fair-trial requirements of Article 6 were not met. This principle was described by the European Court of Human Rights in *Rowe* as follows:

[T]he prosecution’s failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial [author’s note: emphasis added].

84. It follows that under international jurisprudence it is clear that it is the judges and not the prosecution who are solely competent to decide upon this issue

[author's note: emphasis added]. As Judge Pettiti (albeit in a dissenting opinion) has noted, in relation to the non-disclosure of exonerating information:

Cases where evidence has been hidden from the trial court have left bitter memories in the history of justice.

85. Likewise, in *Jasper v. United Kingdom* in finding that there had been no miscarriage of justice by non-disclosure of potentially exculpatory material, the European Court of Human Rights stated:

The fact that the need for disclosure was at all times under assessment by the trial judge provided a further, important, safeguard in that it was his duty to monitor throughout the trial the fairness or otherwise of the evidence being withheld.

86. In deciding whether non-disclosure is justified, human rights law suggests that it is the evidence and not summaries which should be provided to the court. The European Court of Human Rights held in *V. v. Finland* that as the courts (at first instance and on appeal) had been denied access to crucial detailed telephone metering information,

they were not therefore in a position to monitor the relevance to the defence of the withheld information.

87. Accordingly, under international jurisprudence the judges are empowered to determine relevant issues concerning the disclosure of potentially exculpatory materials. Particularly given that with trials before the ICC the judges are also the ultimate fact-finders, they are in a position to know what effect the exculpatory evidence may have on their ultimate decision in the case. *It follows that the Chamber rejects the suggestion, advanced by the prosecution, that it is entitled to decide whether or not potentially exculpatory evidence will only impact in principle on the Chamber's decision, rather than having a material impact in fact on the Chamber's determination of the guilt or innocence of the accused. This is not a decision for the prosecution but for the judges: once the prosecution believes that the evidence "shows or tends to show the innocence of the accused" (Article 67(2) of the Statute), it is to be disclosed to the defence, or in case of doubt put before the Court* [author's note: emphasis added].
88. Although the prosecution, as a first stage in this procedure, must make the initial decision as to the exculpatory value or effect of any piece of evidence under Article 67(2) ("evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence"), once this threshold is passed and it is accepted that the material **has**, potentially, an exculpatory effect, only the Chamber can make a decision on non-disclosure if exceptional circumstances so require. If it is proposed that evidence of this kind should be withheld, it is to be put before the judges in its original form and in its entirety. *The ultimate responsibility for securing justice and ensuring fairness has been given to the Chamber (Article*

64(2) of the Statute) and these responsibilities cannot be delegated by, or removed from, the judges [author's note: emphasis added]. In this case, the Bench has been prevented from assessing for itself the impact on the fairness of these proceedings should the evidence remain undisclosed, and the approach of the prosecution means, *inter alia*, that for the purposes of Article 67(2), the Chamber could never, "in case of doubt", make a decision (because it will be unable to view the underlying material).

89. It has been stressed by the Appeals Chamber in relation to other issues, that any factor implicating the rights of the accused must be assessed on a case by case basis. On the non-disclosure of potentially exculpatory information pursuant to Rule 81(2), the Appeals Chamber held "a thorough assessment will need to be made by the Pre-Trial Chamber of the potential relevance of the information to the Defence on a case by case basis. If the information is relevant or potentially exculpatory, the balancing exercise performed by the Pre-Trial Chamber between the interests at stake will require particular care." In the view of the Chamber, each individual document purporting to contain potentially exculpatory material must be individually examined by the Chamber in order to enable it to assess whether the trial will be "conducted with full respect for the rights of the accused" in accordance with Article 64(2) of the Statute.

Consequences of non-disclosure

90. If particular circumstances exist, the Court has the duty to halt or "stay" the proceedings. The Appeals Chamber of the ICC has addressed the issue of imposing a stay on criminal proceedings in the following way (in the context of an appeal from the Pre-Trial Chamber in this case):

36. The doctrine of abuse of process had *ab initio* a human rights dimension in that the causes for which the power of the Court to stay or discontinue proceedings were largely associated with breaches of the rights of the litigant, the accused in the criminal process, such as delay, illegal or deceitful conduct on the part of the prosecution and violations of the rights of the accused in the process of bringing him/her to justice.³⁹ *Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed* [author's note: emphasis added]. To borrow an expression from the decision of the English Court of Appeal in *Huang v. Secretary of State*, it is the duty of a court: "to see to the protection of individual fundamental rights which is the particular territory of the courts [...]" *Unfairness in the treatment of the suspect or the accused may rupture the process to an extent making it impossible to piece together the constituent elements of a fair trial. In those circumstances, the interest of the world community to put persons accused of the most heinous crimes against humanity on trial, great as it is, is outweighed by the need to sustain the efficacy of the judicial process as the potent agent of justice* [author's note: emphasis added].

It is not a necessary precondition, therefore, for the exercise of this jurisdiction that the prosecution is found to have acted *mala fides*. It is sufficient that this has resulted in a violation of the rights of the accused in bringing him to justice.

91. This is an international criminal court, with the sole purpose of trying those charged with the “most serious crimes of concern to the international community as a whole” and the judges are enjoined, in discharging this important role, to ensure that the accused receives a fair trial. If, at the outset, it is clear that the essential preconditions of a fair trial are missing and there is no sufficient indication that this will be resolved during the trial process, it is necessary – indeed, inevitable – that the proceedings should be stayed. It would be wholly wrong for a criminal court to begin, or to continue, a trial once it has become clear that the inevitable conclusion in the final judgment will be that the proceedings are vitiated because of unfairness which will not be rectified. In this instance, in its filing of 9 June 2008, the prosecution went no further than raising the possibility that the Chamber may be provided at some stage in the future with no more than incomplete and insufficient materials. There is, therefore, no prospect, on the information before the Chamber, that the present deficiencies will be corrected.

Conclusions

92. The Chamber’s overall conclusions can be shortly described:
- i) The disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused’s right to a fair trial;
 - ii) The prosecution has incorrectly used Article 54(3)(e) when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defence; and
 - iii) The Chamber has been prevented from exercising its jurisdiction under Articles 64(2), Article 64(3)(c) and Article 67(2), in that it is unable to determine whether or not the non-disclosure of this potentially exculpatory material constitutes a breach of the accused’s right to a fair trial.
93. Adapting the language of the Appeals Chamber, the consequence of the three factors set out in the preceding paragraph has been that the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.
94. In consequence a stay is imposed on these proceedings. Although the Chamber is not rendered without further authority or legal competence by this decision, it means that unless this stay is lifted (either by this Chamber or the Appeals Chamber), the trial process in all respects is halted. In the circumstances,

a hearing will take place on Tuesday 24 June, 2008 at 14.00 in order to consider the release of the accused.

95. Although the Chamber has no doubt that this stay of proceedings is necessary, it has nonetheless imposed it with great reluctance, not least because it means the Court will not make a decision on issues which are of significance to the international community, the peoples of the Democratic Republic of the Congo, the victims and the accused himself. *When crimes, particularly of a grave nature, are alleged it is necessary for justice that, whenever possible, a final determination is made as to the guilt or innocence of the accused.* The judicial process is seriously undermined if a court is *prevented from reaching a verdict on the charges brought against an individual. One consequence is that the victims will be denied an opportunity to participate in a public forum, in which their views and concerns were to have been presented and their right to receive reparations will be affected. The judges are acutely aware that by staying these proceedings the victims have, in this sense, been excluded from justice* [author's note: emphasis added].

Other issues

96. During the Status Conference on 10 June, 2008 other matters were discussed, as follows. The defence sought **orders** from the Chamber: for the discontinuance of the prosecution and the release of the accused; for the immediate disclosure of potentially incriminatory material; that the defence is not obliged to notify the Court of its lines of defence; and that any potential charges currently being investigated in the context of the Situation in the Democratic Republic of the Congo will not be brought against the accused. The Bench was addressed on the reliance by the prosecution on materials that have been communicated to the accused under Rule 77. Finally, the parties and the participants (principally in writing) addressed the consequences of the Appeal Chamber's "Decision on the requests of the Prosecutor and the Defence for suspensive effect of the appeals against Trial Chamber I's Decision on Victims Participation of 18 January" and the further participation of victims pending a decision from the Appeals Chamber.
97. The decision set out above staying the proceedings renders it redundant for the Chamber to reach any further decision on any of these issues. However, if the stay on the proceedings is lifted hereafter, at that stage these matters will be resolved.

[...]

Judge Adrian Fulford

Judge Elizabeth Odio Benito

Judge René Blattmann

Dated this 13 June 2008

At The Hague, The Netherlands

12.5 Notes and Questions

12.5.1 Notes and Questions Regarding the Prosecutor's Updated Submission of Evidence of 30 May, 2008 (ICC-01/04-01/06-1363)

12.5.1.1 What Is the Background to the Lubanga Case? Why Was Lubanga's Force Considered by the Pre-Trial Chamber to Be a National Armed Force?

On 19 April, 2004, the DRC President referred the situation in the DRC to the ICC and on 23 June, 2004 the ICC Prosecutor announced his decision to open a preliminary investigation into the situation. Lubanga had been charged initially only under Article 8(2)(e)(vii) of the Rome Statute which sets out the crime of recruitment or use in hostilities of child soldiers under age 15 in an *internal* armed conflict:

Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

The events which constituted the basis for the original crimes charged against defendant Lubanga took place, according to the Prosecution, when Thomas Lubanga was in control of a Hema militia operating in the Ituri district of the Democratic Republic of the Congo (DRC). Lubanga created the *Union des Patriotes Congolais* (UPC) and the *Forces Patriotiques pour la Libération du Congo* (FPLC); the military wing of the UPC (commonly referred to jointly as the UPC) and became leader of the UPC/FPLC. He was charged with recruiting children under aged 15 years into the FPLC and using them for active participation in armed hostilities as child soldiers. The Pre-Trial Chamber (PTC), however, ruled that the conflict in Ituri was international from July, 2002 to 2 June, 2003. The Ugandan Government Officials from 2000 to the end of October 2002, and Rwanda Government Officials, from mid-2002 to about June 2003, aided the Hema militia and, once it existed, the FPLC. The original period in which the crimes charged against Lubanga were held to have occurred, according to the Prosecutor, was between July 1, 2002 and 31 December, 2003. However, the PTC in its ruling on confirmation of charges included a shorter period; namely early September 2002 to 13 August, 2003. Due to Uganda's involvement as an occupying power, the Pre-Trial Chamber changed the charge for the initial period (now September 2002 to 2 June, 2003) to one of enlisting, and conscripting children under age 15 years and using them to participate actively in armed hostilities in the context of an *international conflict*; a charged under Article 8(2)(b)(xxvi) of the Rome Statute. The charges relating to enlisting, and conscripting children under age 15 years and using them to participate actively in armed hostilities in the context of an *internal conflict* pursuant to Articles 8(2)(e)(vii) and 25(3)(a) of the Rome Statute were also upheld

by the PTC and held by the Pre-Trial Court to cover the period 2 June, 2003 to 13 August, 2003. The latter charges cover the internal conflict in the Ituri Eastern region of the DRC, for instance, between the Lubanga-led Hema group and the Lendu militia; each representing their respective warring ethnic groups. Lubanga is charged as a co-perpetrator in the aforementioned crimes who, according to the Pre-Trial Chamber confirmation of charges judgment, appears, based on substantial evidence: (a) to have participated in a common plan with other high military Officials of the FPLC (the common plan being to recruit children as soldiers with no concern whether they were over or under age 15 years); (b) to have made significant contributions toward the implementation of the plan; (c) to have had intent to contribute to the common plan and knowledge that the planned actions constituted international crimes and knowledge as to what the consequences of the common plan would be (i.e., recruitment and use also of children under age 15 years old to actively participate in armed hostilities); (d) to have known and accepted as a shared understanding with the other co-perpetrators that implementing the common plan would result in executing all the elements of the crimes charged; and (e) to have known how to go about exercising joint control over the common plan to commit the international crimes charged.

The Pre-Trial Chamber held – based on the Geneva Conventions (Additional Protocol I), and the case law of the ICTY – that though Article 8(2)(b)(xxvi) of the Rome Statute refers to recruitment of children under age 15 into “national armed forces”, this did not necessarily mean “government” forces. Hence, the Pre-Trial Chamber held that Lubanga’s armed group with its central role as a party to the international conflict fell under the meaning of ‘national armed forces’ under Article 8(2)(b)(xxvi).

12.5.1.2 The Prohibition Against Recruitment and Use of Children Under Age 15 in Soldiering

The DRC had ratified the Convention on the Rights of the Child 27 October, 1990 and the Optional Protocol to the CRC on the involvement of children in armed conflict (OP-CRC-AC) 12 February, 2002. Thus, these international treaties had been ratified by the DRC during the time that Lubanga committed his alleged offences regarding the recruitment and use of child soldiers under age 15 for active participation in armed conflict. The CRC at Article 38 prohibits the recruitment of child soldiers under age 15 as well as prohibiting their direct participation in hostilities. The OP-CRC-AC prohibits the direct participation of children 18 and under in hostilities (Article 1), the compulsory recruitment of under 18s into the State armed forces (Article 2) and restricts voluntary recruitment into the State armed forces to those over 15 with certain safeguards in place to ensure the age of at least 15 years as well as voluntariness (Article 3). Furthermore, the OP-CRC-AC prohibits under any circumstances the recruitment, or use in hostilities of children (persons under age 18), by armed forces distinct from State armed forces (Article 4) such as were the Lubanga UPC forces. The CRC and the OP-CRC-AC place

obligations on the State to ensure that these protections for children regarding child soldiering are implemented. Thus, the CRC and the CRC-OP-AC could form part of the basis for holding that defendant Lubanga did, or should have known that his recruitment and use of child soldiers under age 15 in hostilities was an international crime.

12.5.1.3 Was the Prohibition Against the Recruitment and Use of Child Soldiers Under Age 15 for Active Participation in Hostilities Established Customary International Law?

Note that The CRC provision regarding the recruitment and use of child soldiers under age 15 parallels Article 77 of “Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June, 1977” (available at <http://www.icrc.org/ihl.nsf/WebART/470-750099?OpenDocument>, accessed 13 February, 2009); ratified by the DRC in 1982:

Article 77 – Protection of children

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

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

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

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

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

Hence, there appears to be ample basis for the Pre-Trial Court’s holding in the Lubanga case that the prohibition against the recruitment and use of child soldiers for active participation in hostilities was well-established customary (humanitarian) international law. Indeed, the PTC (in its confirmation of charges decision 29 January, 2007 in the Lubanga case) made reference to the prohibition against the recruitment and use of child soldiers under age 15 for direct participation in hostilities which is set out in the Geneva Convention of 1949 and its additional Protocols, and in the Convention on the Rights of the Child. In addition, the PTC

referenced the 31 May, 2004 decision of the Special Court of Sierra Leone in the Norman case in which the Appeals Chamber held that prior to November 1996, “the prohibition against child recruitment had already crystallized as a customary law norm” (para. 311, p. 106). Hence, Lubanga’s alleged ignorance of the law regarding the prohibition against recruitment and use of children under 15 for active participation in hostilities appeared, in the PTC view, unlikely. This was furthermore especially the case since Lubanga was a prominent political-military leader in the DRC who would likely have known the customary lawful practice in this regard, and had in any case a duty to know it.

12.5.1.4 What Was the Pre-Trial Chamber’s Assessment of the Lubanga’s “Mistake of Law” Defence? Is Ignorance of the Law Ever a Viable Defence to the Charge of Having Committed an International Crime According to the Provisions of the Rome Statute and How Was This Defence Assessed in the Lubanga Case?

Lubanga had argued more specifically in regards to a “mistake of law” that he could not be held criminally responsible for the recruitment or use of child soldiers under age 15 years for active participation in hostilities. This, as he was allegedly unaware that the DRC had ratified the Rome Statute which includes specific provisions against the recruitment or use of child soldiers under age 15 years to actively participate in hostilities; whether in an internal or international conflict. However, the Pre-Trial Chamber held in opposition that the ICC statute was in force and ratified by the DRC at the time Lubanga was alleged to have committed the war crimes of recruiting and using child soldiers under age 15 in international and internal hostilities (date of the DRC ratification was 11 April, 2002 and the statute entered into force 1 July, 2002). The Defence argued that the Ituri territory was occupied by Uganda at the time and that for Uganda the Rome Statute did not enter into force until 1 September, 2002. The PTC pointed out that the DRC had also ratified the Geneva Convention of 1949 in 1961 and Protocol I to the Geneva Convention in 1982, while Uganda had ratified the Geneva Convention of 1949 in 1964 and Protocols I and II to the Geneva Convention in 1991; all of which contained prohibitions against the recruitment and use of children under 15 in armed conflict. Further, the PTC held that that the population of the DRC was aware of the ratification of the ICC statute. In addition, the PTC rejected the “mistake of law” defence holding that the problem of the recruitment and use of child soldiers in hostilities had been raised with Lubanga by NGOs during the time periods in question (see the Pre-Trial Chamber decision on confirmation of charges in the Lubanga case, PTC I, 29 January, 2007 (ICC 01/04-01/06); see also Thomas Weigend 2008, Intent, mistake of law and co-perpetration in the Lubanga decision on confirmation of charges, *Journal of International Criminal Justice* 6:471–487). Thus, the PTC did not accept that (1) Lubanga was ignorant of the fact that his actions in respect of the recruitment and use of children under 15 years to actively participate in armed conflict constituted international crimes, and (2) held that, in

any case, he should have known that the prohibitions against such activities was well established in customary international law (i.e., rejected his “mistake of law” defence).

Article 32 of the Rome Statute, furthermore, makes it clear that ignorance of the law is *not* a defence *unless* it negates the mental element required for commission of the offence:

Article 32: Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility *only if it negates the mental element required by the crime.*
2. *A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime* [...] [author’s note: emphasis added].

On the issue of the mental element required for commission of the war crimes of conscripting, enlisting or using child soldiers under age 15 years for active participation in hostilities, the PTC held that Lubanga did know or *should have known* that children under age 15 were being recruited and used in hostilities by his armed group and that he did meet the standard of Article 30(1) of the Rome Statute for commission of an international crime; namely: (a) having had the *intent* to commit the international crimes of conscripting, enlisting and using children under 15 in armed hostilities in the context of an international conflict for a period and in the context of an internal conflict during another period, and (b) having the *knowledge* that his actions contributed to implementing the elements of the crimes as described at Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the ICC “Elements of the Crime” (which elements constitute the war crimes of conscripting or enlisting children under age 15 years as soldiers and using them to actively participate in hostilities); those elements being as follows:

“Elements of Crimes” as set out by the ICC (included at Appendix F.2)

Article 8(2)(b)(xxvi) War crimes of using, conscripting or enlisting children

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. *The perpetrator knew or should have known that such person or persons were under the age of 15 years* [author’s note: emphasis added].
4. The conduct took place in the context of and was associated with an *international armed conflict* [author’s note: emphasis added].
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8(2)(e)(vii) War crime of using, conscripting and enlisting children

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.

3. *The perpetrator knew or should have known that such person or persons were under the age of 15 years* [author's note: emphasis added].

4. The conduct took place in the context of and was associated with an armed conflict *not of an international character* [author's note: emphasis added].

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

12.5.1.5 What Was the Pre-Trial Chamber's Holding Regarding Whether a "Mistake of Fact" or a "Mistake of Law" Existed Which Effectively Negated the Mental Element of the Crimes Charged Against Lubanga Regarding the Recruitment and Use of Child Soldiers Under Age 15? Is the Alleged Consent of the Child, or the Parents' Consent on Behalf of the Child, a Legally Valid Defence to the Recruitment ("Enlistment" or "Conscription") and Use of Child Soldiers Under Age 15 for Active Involvement in Armed Hostilities?

The PTC thus, on the basis of the substantial evidence presented by the Prosecutor at the Pre-Trial hearing, rejected any notion that Lubanga had made a "mistake of fact" (i.e., regarding the age of the children recruited), or a "mistake of law" (i.e., believing that it was lawful for a national armed force to "recruit" children under age 15 years – whether allegedly voluntarily and/or forcibly - in the context of an international or non-international conflict). Thus, the PTC held that there was nothing in the Lubanga case which negated the existence of the mental element required for commission of the ICC crimes regarding the recruitment and use of child soldiers under age 15 to actively participate in hostilities (as specified under Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the Elements of Crimes). For instance, the PTC held that Lubanga should have known and can be assumed to have known that the prohibition in the ICC statute against the recruitment of child soldiers barred both so-called voluntary and forcible recruitment.

The PTC held that *alleged* consent of the children, (which would include also their parents' alleged voluntary consent on the children's behalf where such parental consent purportedly existed), is *not* a defence to the crimes regarding the "enlistment" or "conscription" and use of child soldiers under age 15 years for active participation in hostilities as set out in the Rome Statute. That is, consent is *not* a valid defence to either "conscription" or "enlistment" under the Rome statute ("It follows then that enlisting is a 'voluntary' act, whilst conscripting is forcible recruitment. In other words, the child's consent is not a valid defence" PTC I Confirmation of Charges Judgment, 29 January, 2007, No. ICC-01/04-01/06, para. 247, p. 85, see also para. 252, p. 87). Consider, in this regard (as will be discussed in further detail in the notes regarding the amicus curiae brief in the Lubanga case), that while "enlistment" implies voluntariness; in the context of war-torn countries where the population has been subjected to a terror campaign such as in the DRC; the purported voluntariness of children caught up in such a situation

becoming child soldiers is debatable at best. The PTC appears to acknowledge this, as the word “voluntary” in the aforementioned quote from the PTC Lubanga confirmation of charges decision is placed in quotes when referring to the alleged voluntariness of the enlistment of children under 15 as child soldiers in this case. Further, even if the “enlistment” was allegedly voluntary, it would not undermine the longstanding international law principle that children under 15 years old ought not to be recruited for child soldiering; particularly where there is a high likelihood that it is for the purpose of active engagement in hostilities.

12.5.1.6 What Is the Implication of the Rome Statute’s Requirement that a Perpetrator, in Order to Be Found Criminally Responsible, Must Have Not Only Intent to Commit the Crime(s), but Also Knowledge that His or Her Conduct Will Engage All of the Elements of the Crime(s) Charged?

Article 30 of the Rome Statute requires that the perpetrator has not only intent, but also knowledge that his or her conduct engages all the elements of the crime for which he or she is held liable. However, the crime of recruitment and use of child soldiers under age 15 does not allow an interpretation of the knowledge requirement under Article 30 of the Rome Statute to be used as an excuse. Thus, for instance, the ICC stipulation regarding elements of crimes places the burden on those who would use children as soldiers to reasonably ensure that the children are not under age 15 years. Hence, where children under 15 years old are recruited as child soldiers and/or used in armed hostilities, the perpetrator is held responsible for *either* knowing the child was under 15, or not making reasonably sufficient efforts to ascertain the child’s true age. The fact that perpetrators are also held responsible where they *should have known* the child’s age was under 15 (see Article 8(2)(b)(xxvi) under Elements of the crime: “The perpetrator knew or should have known that such person or persons were under the age of 15 years”) reflects the reasonable presumption that, in most every instance, efforts at age ascertainment would have revealed that the child was under 15. (Where such reasonable efforts were undertaken, but the perpetrator still did not know the child’s correct age; then one could argue that in such instances one cannot assume that the perpetrator should have known the child’s real age.) Thus, the perpetrator is considered to have met the mental element set out at Article 30(1) of the Rome Statute regarding the intent and knowledge criterion for commission of the crime (i.e., knowledge of the element of recruiting and/or using children under age 15 as child soldiers) whether the perpetrator knew the age of the children, or alternatively should have known the children’s age:

Article 30 of the Rome Statute

Mental element

1. *Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge [author’s note: emphasis added].*

2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

In this respect then the Articles of the Rome Statute concerning the recruitment and use of child soldiers under age 15 are formulated so as to preclude most, if not all, perpetrator excuses relating to alleged mistakes of fact or law.

12.5.1.7 Does the Evidence Presented by the Prosecutor in the Lubanga Case Reveal that Lubanga Knew, or Should Have Known that His Conduct in Regards to the Recruitment and Use of Child Soldiers Under Age 15 Constituted a War Crime?

Recall some of the specifics of the alleged evidence against Lubanga presented by the Prosecutor to the Pre-Trial Chamber. Consider whether that evidence, if ultimately accepted as factual by the Trial Court, points to knowledge that (a) the children recruited as child soldiers were often as not under age 15 and/or (b) the defendant should have known that the children were under 15 but made no, or at least inadequate attempts to discern their actual age. Recall also that the CRC, Geneva Convention of 1949 and its additional Protocols I and II, the OP-CRC-AC and Rome Statute prohibiting the recruitment and use of children under age 15 for active participation in armed conflict had all been ratified by the DRC and were in force at the relevant time period in which the alleged offences by Lubanga regarding the recruitment and use of child soldiers under 15 were committed.

12.5.1.8 What Was Some of the Key Evidence Presented by the Prosecutor Regarding Lubanga’s Alleged Meeting of the Intent and Knowledge Criteria for Criminal Culpability with Respect to the War Crimes Charged Against Him?

With respect to evidence relevant to the issue of Lubanga’s alleged knowledge and intent with respect to the international crimes charged consider the following: There was evidence presented by the Prosecutor which the PTC held established substantial grounds to believe, that (a) there had been widespread use of child soldiers by the Lubanga forces and often re-recruitment by the FPLC of child soldiers who had been previously demobilized by Lubanga’s forces; (b) once recruited, by whatever means (including drugging and abduction), the children

were forced to fight even if they did not wish to due to the threat of beatings or even execution; (c) there did not appear to be any effort to ascertain the age of the children and children as young as 10 were recruited and used directly in hostilities and even used as bodyguards for various commanders including Lubanga (note that the PTC held that the use of children under 15 as bodyguards in the context of an armed conflict constitutes the use of the children to “actively participate” in hostilities as per the Rome Statute provisions prohibiting the recruitment and use of children under 15 years old as child soldiers. Thus, “active participation” as set out in Articles 8(2)(b)xxvi and 8(2)(e)vii is not limited only to combat operations as long as the activity is *directly* connected to the hostilities *in some way*); (d) Lubanga had regularly visited military training camps with large numbers of child soldiers present and had addressed the children and encouraged them in their combat role; (e) Lubanga encouraged Hema families to surrender one child per family to “the cause” as a child soldier with Lubanga setting no age specification for this recruitment; (f) Lubanga engaged in a PR campaign in which he claimed he disavowed the recruitment or use of soldiers under age 18 for active participation in hostilities. However, Lubanga did not, it appears, in actuality disavow the recruitment and use of child soldiers under age 15. Hence, Lubanga did *not* follow through in demobilizing significant numbers of the hundreds of children under age 15 recruited into his armed forces contrary to his promise to do so. For instance, the Prosecutor in this regard presented witness and other evidence such as the following:

37. The military wing of the UPC, eventually named the FPLC, required the recruitment through conscription and enlistment – of a constant supply of soldiers to fill the ranks of the UPC military apparatus. To meet this need, the UPC established an even more structured policy and implemented a widespread campaign of conscription and enlistment of soldiers in large number, including men, women and youth without regard to their age. The UPC enlisted whoever was available. In some instances, the UPC even re-recruited previously demobilised child soldiers.

[...]

38. The UPC/FPLC recruitment campaign shows a consistent pattern of repeated and large scale enlistment and conscription of children, including those under the age of 15 years, into the UPC/FPLC. Forcible conscription of children by the UPC/FPLC included individual cases of abductions, large scale abductions and other forms of forced recruitment drives, which were directly or indirectly targeted at youths, including those under the age of 15. In some circumstances, the very children under 15 years who were themselves abducted were forced by their commanders to arrest and abduct children, including girls under the age of 15, into the UPC.

39. As part of its broad child recruitment policy, the UPC/FPLC leadership systematically pressured Hema families in UPC/FPLC-controlled territories to provide children for military service. Emissaries and propaganda were employed to encourage Hema youth to join the UPC/FPLC military. (“Submission of the prosecution’s updated summary of presentation of evidence”, ICC-01/04-01/06-1363, 30 May, 2008, paras. 37–39)

[...] A battalion commander within the UPC/FPLC states that the FPLC had up to seven hundred child soldiers. He also states that the battalion he commanded had up to 50 child soldiers from the ages of 14 to 16 years old. (“Submission of the prosecution’s

updated summary of presentation of evidence”, ICC-01/04-01/06-1363, 30 May, 2008, para. 41)

[...] high ranking UPC/FPLC commanders, including Thomas LUBANGA, inspected the training camps while child soldiers were visibly present. (“Submission of the prosecution’s updated summary of presentation of evidence”, ICC-01/04-01/06-1363, 30 May, 2008, para. 43)

12.5.1.9 According to the Prosecutor in the Lubanga Case, Was There a Common Plan with Respect to the Recruitment and Use of Child Soldiers for Active Participation in Hostilities?

The Prosecutor set out a case for the charge that Lubanga was in fact one of the masters of a common plan that involved the recruitment (often by force) and use of children under age 15 in direct armed hostilities (co-perpetration). The Prosecution evidence also reveals (if not successfully refuted at trial) that as head commander of the UPC/FPLC, Lubanga could have intervened, but instead failed to do anything to stop this recruitment and use of child soldiers under 15 years old as active participants in the conflict. Further, the evidence, unless ultimately controverted, reveals that Lubanga was directly involved in the recruitment and use of child soldiers under age 15 exposing them to mortal danger as his bodyguards and as combat soldiers on the frontlines.

12.5.1.10 Why Have Numerous NGOs and Human Rights Activists Maintained that the Prosecutor Has Too Narrowly Restricted the Charges in the Lubanga Case? What Have Critics Charged Regarding the Prosecutor’s Decision to Charge Lubanga Only with Respect to the War Crime of Recruiting and Using Child Soldiers Under Age 15 for Active Participation in Hostilities?

It should be noted that NGOs and many human rights groups have criticized the Prosecutor for restricting the charges against Lubanga to those concerning recruitment and use of children under 15 as soldiers activity participating in hostilities. These critics hold that there is ample evidence of Lubanga’s responsibility as a co-perpetrator of the common plan also for (a) crimes including, but not limited to, murder, torture, mutilations and rape of civilians including children; (b) crimes, including but not limited to, sexual violence, physical violence including executions of child soldiers including those in his own FPLC forces; (c) international crimes targeted at female child soldiers, including those under age 15, such as sexual slavery, forced marriage and forced pregnancy. There is no bar against the Prosecutor bringing further charges against Lubanga in regards to the latter alleged crimes. However, this means that the victims of these crimes - often women

and girls – must survive an even more prolonged period without having one of the alleged perpetrators of these crimes (if convicted) being held accountable. The practical difficulties of pursuing these charges at a later date may reduce the victims' chance for validation by the international community of their suffering in regards to these sexual and other crimes of violence. Can it be argued that the suffering of girl soldiers in the FPLC and the gendered nature of a significant portion of the violence allegedly committed by the Lubanga FPLC forces against children has not been acknowledged? This, given the restrictive charges that have been brought against Lubanga.

Critics have suggested that the OTP wanted to have cases before the ICC as soon as possible and secure quick convictions, and hence focused on selected crimes (rather than a representative range of the alleged crimes committed by the Lubanga forces). This in order to reduce the time and resources required for the investigations (see International Centre for Transitional Justice, Kathy Glassborow (17 October, 2008) DRC: investigative strategy under fire, available at <http://www.ictj.org/en/news/coverage/article/2075.html>). The OTP counters, however, that the selected charges are simply a reflection of the limited resources that the OTP has to work with despite the complexity of the cases and circumstances to be investigated.

12.5.2 Notes and Questions on the “Decision on the Prosecution’s Application to Lift the Stay of Proceedings” (ICC-01/04-01/06-1467)

12.5.2.1 What Rationale Did the Trial Chamber Give for Issuing Its June 13, 2008 Conditional Stay on the Trial Proceedings? What Was the Trial Chamber’s Rationale in the Lubanga Case for Holding that in Order for the Trial to Proceed, Material Collected by the Prosecutor Under Non-disclosure Agreements Was in Fact Potentially Subject to Disclosure If the Court Deemed It Necessary?

Trial Chamber I had initially issued a *conditional* stay of proceedings in the Lubanga case on 13 June, 2008 (the stay was “conditional” according to the majority view of the Appeal Court as expressed in its 21 October, 2008 judgment on the release of Lubanga at para. 31, p. 12, No.: ICC-01/04-01/06 OA 12; though not according to the dissenting Judge Pikis). This stay of trial proceedings was issued on the ground that there was, at the time, according to Trial Chamber I, an impossibility of holding a fair trial. That alleged impossibility (under the circumstances that existed at the time in June and July 2008) was, according to Trial Chamber I, due to the OTP’s non-disclosure of exculpatory evidence for full review by the Chamber in-camera: (a) without redactions or omissions of any sort, and,

(b) thereafter, possible release of any or all of this material to the defence; redacted, if at all, to the extent authorized by the Chamber. The purpose of this in-camera review by the Trial Court of the documents collected under the umbrella of non-disclosure agreements would be for the Trial Chamber to determine, on a document-by-document basis, just what sensitive information/documents must be turned over to the defence in whole or in part.

The Trial Chamber held that (1) the documents collected by the OTP from the United Nations and NGOs in confidence constituted “evidence” in itself; and (2) hence the material was potentially subject to disclosure if the trial was to proceed. This unless the Trial Chamber itself determined with respect to some or all of the material that non-disclosure was warranted in consideration of various factors (i.e., victim safety, etc.). The OTP had indicated that some of the material obtained under the non-disclosure arrangements was potentially exculpatory. For this reason also, the Trial Chamber held it imperative that the material be reviewed by the Trial Chamber to decide what documentary “evidence” needed to be provided to the defence and in what form. The Trial Chamber took the position that since the Prosecutor had *not* developed further information on the basis of the undisclosed documents, the material upon which the Prosecutor wished to rely was *not* covered under the Article 54(3)(e) provision of the Rome Statute. Article 54(3)(e) of the Rome Statute allows for non-disclosure of “lead material” that is documents *used only to generate new evidence* (see 21 October, 2008 Appeal Court opinion on the appeal of the Prosecutor against the decision of Trial Chamber I entitled: “Decision on the consequences of non-disclosure of exculpatory materials covered under Article 54(3)(e) and the application to stay the prosecution of the accused ...” at Judge Pikis dissenting opinion, para. 14, pp. 45–46, ICC-01/04-01/06 OA 13, on the Prosecutor’s failure to develop new information [“evidence”] based on the undisclosed materials). The Appeal Court held that material that may be kept confidential by the OTP under a non-disclosure agreement is either: (a) evidence that leads to entirely new evidence that is not similar to the original, or (b) evidence that leads to the OTP to acquiring new material parallel to the content of that in the original spring-board material (see 21 October, 2008 Appeal Court opinion on the appeal of the Prosecutor against the decision of Trial Chamber I entitled: “Decision on the consequences of non-disclosure of exculpatory materials covered under Article 54 (3)(e) and the application to stay the prosecution of the accused ...” Judge Pikis Dissenting Opinion at para. 39, p. 55, ICC-01/04-01/06 OA 13). The victims argued that the material collected in confidence was *not* itself *evidence* under Article 54(3)(e) of the Rome Statute and therefore need not be disclosed to the defence (21 October, 2008 Dissenting Appeal Court opinion on the appeal of the Prosecutor against the decision of Trial Chamber I entitled: “Decision on the consequences of non-disclosure of exculpatory materials covered under Article 54 (3)(e) and the application to stay the prosecution of the accused ...”, at Judge Pikis Dissenting Opinion, para. 25, p. 49, ICC-01/04-01/06 OA 13, outlining the victim’s position on the issue of non-disclosure of the documents and its consequences).

12.5.2.2 What Was the Prosecutor’s Position Regarding the Proper Interpretation of Article 54(3)(e) of the Rome Statute? What Difficulties Does the ICC Prosecutor Potentially Face when Entering into Non-disclosure Agreements Regarding Documentary Evidence?

The Prosecutor contended that (1) according to the wording of Article 54(3)(e) of the Rome Statute, all evidence is potentially covered under that Article (i.e., springboard evidence or not), and (2) the aforementioned Article does *not* confine the OTP to receiving in confidence under non-disclosure agreements only material that provides evidentiary leads to the exclusion of source material that did not generate leads to new evidence (see 21 October, 2008 Appeal Court opinion on the appeal of the Prosecutor against the decision of Trial Chamber I entitled: “Decision on the consequences of non-disclosure of exculpatory materials covered under Article 54(3)(e) and the application to stay the prosecution of the accused . . .” regarding the Prosecutor’s position on the non-disclosure issue, Dissenting Opinion of Judge Pikis, para. 23, p. 48, ICC-01/04-01/06 OA 13).

Consider that the Prosecutor most frequently has no way of knowing in advance when entering into non-disclosure agreements regarding particular information or “evidentiary” documents relating to a complex “situation” he wishes to investigate (as he did with the United Nations and certain NGO’s in the Lubanga case) whether: (1) that material will ultimately generate leads to *new* evidence such that the Prosecutor will *not* need to request consent for disclosure of the “springboard evidence”, or (2) the OTP will be able to obtain new but parallel evidence to that in the original material which the OTP had hoped would serve as springboard material providing investigative leads. Yet, the Appeal Court noted, apparently with approval, that “The Trial Chamber [author’s note: in Lubanga] admonished the Prosecutor for collecting evidential material under non-disclosure agreements *without any certainty that he would be able to use it and make disclosure of it*” (emphasis added) (21 October, 2008, Appeal Court opinion on the appeal of the Prosecutor against the decision of Trial Chamber I entitled: “Decision on the consequences of non-disclosure of exculpatory materials covered under Article 54(3)(e) and the application to stay the prosecution of the accused . . .”, Dissenting Opinion of Judge Pikis, para. 34, p. 53, ICC-01/04-01/06 OA 13).

12.5.2.3 What Was the Position of the Lubanga ICC Trial Chamber and Appeals Court Regarding the Proper Interpretation of Article 54(3)(e) of the Rome Statute?

According to Trial Chamber I and the Appeals Court in the Lubanga case then material obtained in confidence that generates leads to entirely new evidence and/or parallel new evidence is *by definition* under Article 54(3)(e) *not* considered evidence requiring disclosure. However, if material obtained in confidence under a non-disclosure agreement turns out *not* to serve as a springboard to new evidentiary material, then the *original information or documentary material* obtained under the

non-disclosure agreement is itself evidence requiring disclosure *by definition* under Article 54(3)(e) of the Rome Statute:

If the material constitutes evidence in itself *and the Prosecutor fails to generate new evidence corresponding to it or reproducing it, he will be stranded with evidential material that he will be unable to disclose to the accused unless the providers agree to this course. The duty of the Prosecutor to disclose to the accused exculpatory material is not mitigated in such circumstances.* Article 67(2) of the Statute is specific on the subject. (emphasis added) (21 October, 2008, Appeal Court opinion on the appeal of the Prosecutor against the decision of Trial Chamber I entitled: “Decision on the consequences of non-disclosure of exculpatory materials covered under Article 54(3)(e) and the application to stay the prosecution of the accused . . .”, dissenting opinion of Judge Pikis, para. 40, p. 55, ICC-01/04-01/06 OA 13)

12.5.2.4 Did the Trial Chamber in *Lubanga* Link Article 54(3)(e) and Article 67(2) of the Rome Statute to Reach Its Position Regarding the Potential Need to Disclose Some or All of the Documents and Information Collected by the Prosecutor Under the Nondisclosure Agreements?

That the evidence that was not “springboard” or “lead evidence” needed to be released to the defence, according to the Trial Chamber in *Lubanga*, was especially the case since (a) some of the material was characterized as potentially exculpatory, and (b) the OTP thus had an obligation under Article 67(2) to provide the defence with the potentially exculpatory material in the possession of the Prosecution. However, in this regard, reconsider the *exact* wording of Article 54(3)(e) of the Rome Statute which states that:

The Prosecutor may [...] (e) agree not to disclose, *at any stage of the proceedings*, documents or information that the Prosecutor obtains on the condition of confidentiality and *solely for the purpose* of generating *new evidence*, unless the provider of the information consents [...]

12.5.2.5 Does the Exact Wording of Article 54(3)(e) of the Rome Statute Support the Position of the ICC Prosecutor or Trial Chamber Regarding What Constitutes Evidence or Information Subject to Disclosure?

Consider whether the following interpretation of Article 54(3)(e) is viable and supports the Prosecution’s position on non-disclosure of material collected with the intention of it being “lead material”: (a) Article 54(3)(e) does *not* specify that the material received in confidence must be disclosed if no leads are developed from it (something which the Prosecutor does not have full control over). Rather, Article 54(3)(e) only stipulates that the material can be held in confidence if the *purpose* of its collection was to use it to try and generate new information (“evidence”); (b) Article 54(3)(e) maintains that the Prosecutor may agree to

confidentiality *at any stage of the proceedings*, hence perhaps suggesting indirectly that should the material result in no leads – something which may become evident only very late in the proceedings – the Prosecutor could still keep the material confidential; and (c) the information which might be generated from the lead material is referred to as “new evidence” in Article 54(3)(e); thus suggesting that the original material obtained in confidence is itself “evidence” from the outset though subject to certain non-disclosure agreements resulting in redactions or withholding of the material altogether unless consent is provided by the source for disclosure of some or all of the material.

12.5.2.6 Was the ICC Appeal Court in *Lubanga* Correct in Affirming the ICC Trial Chamber’s Conditional Stay on Proceedings (the Latter Issued Based on the Prosecutor’s Failure to Obtain Consent from the United Nations and NGOs and Other Sources for Potential Disclosure of Any or All of the Documents and Information that Had Been Gathered Under Non-disclosure Agreements)?

The Appeal Court in an 21 October, 2008 decision unanimously affirmed the decision of the Trial Chamber regarding the conditional stay of the trial proceedings. This it did, it is respectfully submitted, based on what may be (if the above interpretation is correct) a misinterpretation of Article 54(3)(e). More specifically, the Appeal Court relied heavily on the fact that the Prosecutor did *not* generate new evidence from the undisclosed material. The Appeal Court in its 21 October, 2008 judgment on the non-disclosure of potentially exculpatory material held that, therefore, not disclosing the information under this circumstance amounted to what in the English common law would be considered an “abuse of process”. This being the case, according to the Appeal Court, since Article 54(3)(e) did not apply (the undisclosed material was *not* lead or springboard material which generated new evidence, and hence must be turned over to the defence subject to any restrictions imposed by the Trial Chamber for the protection of witnesses and consent of the source). Note that though “abuse of process” is not a concept specifically defined under the Rome Statute; the principle is implicitly recognized given the right of due process for the accused articulated in the Rome Statute.

12.5.2.7 Did the Appeal Court in *Lubanga* Emphasize the Prosecutor’s Alleged Failure to Explore the Implications of the Failure to Develop New Evidence from the Material Gathered in Confidence?

The Appeal Court commented on the OTP failure to appreciate and explore the weighty implications of not having been able to generate new evidence from the material obtained under the non-disclosure agreements:

What must be noticed is that neither the parties nor the victims touch upon or address the implications of the Prosecutor failing to generate new evidence from the mass of material that came into his possession long ago. (21 October, 2008, Appeal Court opinion on the

appeal of the Prosecutor against the decision of Trial Chamber I entitled: “Decision on the consequences of non-disclosure of exculpatory materials covered under Article 54(3)(e) and the application to stay the prosecution of the accused . . .”, dissenting opinion of Judge Pikis, para. 26, p. 50, ICC-01/04-01/06 OA 13)

12.5.2.8 What Are the Implications of the Exact Wording Used in Article 67 (2) of the Rome Statute on Disclosure of Exculpatory Material by the Prosecutor?

Now let us turn to a consideration of the Prosecutor’s obligation to turn over to the Defence exculpatory information and documents in his or her possession as per Article 67(2) of the Rome Statute which states:

In addition to any other disclosure *provided for in this Statute*, the Prosecutor shall, as soon as practicable, disclose to the defence evidence *in the Prosecutor’s possession or control* which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. *In case of doubt as to the application of this paragraph, the Court shall decide* [author’s note: emphasis added].

Article 67(2) of the Rome Statute thus: (a) admits of the fact that there may be instances in which it is not clear if certain evidence needs to be turned over to the defence; (b) refers to evidence in the “possession or control” of the Prosecutor as well as to (c) disclosure as “provided for in this Statute” (the Rome Statute). Recall that the Rome Statute under Article 54(3)(e) allows for non-disclosure of documents or information obtained by the OTP in confidence under a non-disclosure agreement and that these are *not* in the complete control of the Prosecutor’s Office in that they can be released in whole or in part only with the consent of the source. Can it be argued then that the disclosure of evidence or information as “provided for in this Statute” which information is in the “possession or control” of the Prosecutor (as per Article 67(2) of the Rome Statute), whether exculpatory or incriminating, *excludes* material acquired via non-disclosure agreements if that excluded material was collected for the *purpose* of generating leads to new evidence (whether or not the anticipated leads actually materialized and generated new evidence)? Recall also in considering the impact on the OTP of Articles 54(3)(e) and 67(2) *taken together* that (a) the Court is not empowered to order the OTP to release to the Defence information gathered under a non-disclosure agreement, and (b) the OTP is an independent organ of the Court.

12.5.2.9 What Was the Position of the ICC Trial Chamber in *Lubanga* on Whether the Stay on Trial Proceedings Which It Issued 13 June, 2008 Was Reversible?

In its 13 June, 2008 judgment issuing the stay, the Lubanga Trial Chamber I held that the stay was *potentially reversible* as reflected in the following statement by the Trial Chamber:

[. . .] Although the Chamber is *not* rendered without further authority or legal competence by this decision, it means that unless this stay is lifted (either by the Chamber or the Appeals

Chamber), the trial process in all respects is halted. [...] (13 June, 2008, Trial Chamber I “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, ICC-01/04-01/06-1401, para. 94, obiter dicta, emphasis added)

12.5.2.10 What Was the Trial Chamber’s Rationale for Its 2 July, 2008 Order for the Unconditional Release of Lubanga?

Due to the Trial Chamber’s conclusion in the 13 June, 2008 stay decision that under the circumstances (non-disclosure of “evidence” collected under confidentiality agreements as per Article 54(3)(e) of the Rome Statute), there could be no due process for the accused, Trial Chamber I ordered the unconditional release of Lubanga in a judgment of 2 July, 2008 judgment. This since the trial at that point was not proceeding. Lubanga, however, was kept in custody in The Hague ICC detention facilities pending the outcome of appeals by the Prosecutor on both the conditional stay and the unconditional release decisions rendered by Trial Chamber I.

12.5.2.11 What Was the Reasoning of the ICC Appeal Court’s 21 October, 2008 Reversal of the Trial Chamber I Order of 2 July, 2008 for the Unconditional Release of Lubanga?

In a decision of 21 October, 2008 (ICC-01/04-01/06 OA 12), the Appeals Chamber *reversed* the Trial Chamber I decision on the *unconditional release* of Lubanga; concluding that the release of the defendant was *not* the “inevitable” consequence of the stay of proceedings (contrary to the 2 July, 2008 conclusion of Trial Chamber I). The Appeal Court reached this conclusion given that the stay imposed by the Trial Chamber was conditional and hence potentially reversible (i.e., if circumstances changed, the Trial Chamber could, if it so decided, order the trial to proceed in which case the defendant should be available at the proceedings). Also on 21 October, 2008 the Appeals Chamber ruled that the stay imposed by the Trial Chamber in June 2008 was imposed for justifiable reasons at that point in time (the alleged impossibility of a fair trial at that juncture) and hence it affirmed that *conditional stay* decision. The Appeal Court, however, remanded the case back to the Trial Court to reconsider the accused’s unconditional release in light of any new circumstances in the case (i.e., the willingness of the United Nations and NGOs and other confidential sources to allow the OTP to release for in-camera review by the Trial Chamber in unredacted form all of the previously undisclosed documents [over 200 documents]; some of which purportedly might have exculpatory value). Note that the Appeal Court made it clear in its 21 October, 2008 decision affirming the Trial Court’s imposition of a conditional stay that:

If the obstacles that led to the stay of the proceedings fall away, the Chamber that imposed the stay of proceedings may decide to lift the stay of the proceedings in appropriate circumstances and if this would not occasion unfairness to the accused person for other reasons, in particular in light of his or her right to be tried without undue delay [...] (21

October, 2008, Appeal Court decision on the appeal of the Prosecutor against a decision of the Trial Chamber I entitled: “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused”, para. 5, p. 4, ICC-01/04-01/06 OA 13)

The conditional stay on the trial proceedings in *Lubanga* was ultimately lifted by Trial Chamber I on 18 November, 2008 and the trial began on 26 January, 2009.

12.5.2.12 What Was the Trial Chamber’s Position Regarding Which Organ of the ICC Had the Authority to Decide Which Documents and What Information, If Any, Gathered Under Non-disclosure Agreements Should or Should Not Be Disclosed to the Defence (Such Disclosure Occurring Only with Consent of the Source)?

Trial Chamber I held that it was the Trial Chamber and not the Prosecutor that should decide which undisclosed materials, if any, should be released to the defence in whole or in part to ensure due process vs. which should be held confidential and for what reason. This after Trial Chamber I had had an opportunity to review the full documents in-camera without redactions and hear the submissions on the matter of the potential disclosure of particular documents in whole or in part (that is submissions on the issue from the Parties and any interveners who might be granted standing).

12.5.2.13 Is Lubanga Claiming Actual Innocence or Mounting Various Affirmative Defences to the War Crimes Charged?

It should be recalled that the evidence presented by the Prosecutor was accepted by the Pre-Trial Chamber as sufficient for proceeding with the trial (i.e., setting out substantial grounds to believe Lubanga had committed the offences charged). Also note that Lubanga has *not* made a plea of “actual innocence”, but rather is preparing to mount various affirmative legal defences to otherwise criminally culpable actions and inactions. These defences will have to be established by the Defence as applicable on the evidence if Lubanga is to be excused for certain behaviors and found not criminally culpable and/or there are to be found certain mitigating factors.

12.5.2.14 What Was the Nature of the Dispute Between the Office of the Prosecutor and Trial Chamber I in *Lubanga* Which Persisted Even After the OTP Obtained Permission from His Sources for the Potential Disclosure of Materials and Information the OTP Had Collected in Confidence?

The Prosecutor (subsequent to the conditional stay on trial proceedings imposed by Trial Chamber I) negotiated with the United Nations and the NGOs involved on the release of the previously undisclosed documents in question. In a 9 September,

2008 application for leave to appeal the 3 September, 2008 refusal by the ICC Trial Court I to lift the stay on the Lubanga proceedings (which leave to appeal was accepted), the Prosecutor made the point that he had arranged to provide the Trial Court with *unredacted* versions of all the undisclosed “discovery” documents at issue. The Trial Chamber refused, however, to review the documents regarding whether any or all of these documents are potentially exculpatory unless there was an assurance from the Prosecutor that the Defence would have access to *any* potentially exculpatory material. The Prosecutor states (Prosecution’s Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings, ICC-01/04-01/06, 9 September, 2008, pp. 3–4):

The Prosecution respectfully submits that it has addressed the concerns that led to the original stay and complied with the substance of the conditions imposed by the Chamber, and that it was an error of the Chamber to conclude otherwise. The Chamber can now review all undisclosed documents in an unredacted form. It is in a position to make a decision on which documents need to be disclosed. In its initial decision of 13 June 2008, the Chamber decided to stay the proceeding because there was no prospect for the Chamber to receive the necessary material in order to assess the impact, if any, of the undisclosed information on the rights of the defence. The Prosecution submits (1) that the principle of fair trial requires that the judges are the final arbiter of what has to be disclosed to the defence and (2) that, fair trial does not necessarily require that all information collected has to be provided to the Defence. In this Court, as well as in other national and international jurisdictions, there are grounds – inter alia, protection of witnesses, national security – providing for non disclosure in specific circumstances. The Prosecution submits that the role of the Chamber as a custodian of the fairness of the proceedings and the rights of the accused has not been affected in the present proceedings, and the Chamber is in a position to make informed determinations on these matters. At this time, the Chamber can be provided with all the relevant material from the information providers for its examination. The Prosecution has provided to the Trial Chamber all undisclosed evidence from NGOs in unredacted form and on 10 July informed the Trial Chamber that “the Prosecution is in a position to immediately provide [author’s note: to the Trial Chamber] all UN documents that form part of the Undisclosed Evidence to the Trial Chamber”.

12.5.2.15 Did the Trial Chamber in Lubanga Decline Its Jurisdiction in Its 3 September, 2008 Refusal to Review Unredacted Documents In-camera that Had Been Collected by the OTP Under Nondisclosure Agreements?

Can it be argued that the Trial Chamber in its initial 3 September, 2008 refusal to lift the stay (i.e., refusing to review the now *unredacted* United Nation’s and NGO documents in-camera and decide which, if any, should be disclosed and in what form), improperly declined its jurisdiction to (a) assess how to best balance the accused’s right to a fair trial against the rights of victims and other informants to security of the person; and (b) assess whether that balancing can occur and still ensure that the defendant Lubanga’s right to a fair trial is adequately protected? By declining to review the now unredacted materials in camera (to determine what documents, if any, should be provided to the defence in whole or in part, for

instance, as potentially exculpatory evidence relevant to the defence case), did the Trial Court in fact place Mr. Lubanga in the enviable position of having the Trial Court create the perception (arguably incorrect) that a fair trial was not possible in the case. This refusal to review the unredacted material in-camera thus leading inexorably to the Trial Court's conclusion that the case must not proceed and that Lubanga must be unconditionally released. If the foregoing is the case, was the Prosecutor (Prosecution's Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings, ICC-01/04-01/06, 9 September, 2008, p. 5) then correct in his assertion that:

The Chamber's current approach, chiefly its refusal to modify the terms of the stay of proceedings and to even consider examining the documents in question, adversely affects the fairness of the proceedings *vis-à-vis* the Prosecution and the victim participants, as well as the expeditious conduct of the proceedings and the outcome of trial.

12.5.2.16 What Was the Trial Chamber's Position in *Lubanga* Regarding the Need for the Appeal Court to Receive Unredacted Materials for Review?

The Trial Chamber also reasoned that the stay could not be lifted as the United Nations and the NGOs required that certain confidentiality requirements would need to be agreed upon before the documents could be disclosed to the Trial Chamber for in-camera review. Specifically, the United Nations and NGOs expected that the Trial Chamber would *not* include those portions of documents that these sources wished redacted if those documents were referred to in the Trial Chamber's judgment. Hence the Appeal Court, if there were an appeal, would not have had access to unredacted versions of certain documents referred to and quoted (with redactions) in the lower Court's judgment. The Prosecutor (Prosecution's Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings, ICC-01/04-01/06, 9 September, 2008, pp. 5–6) made the following arguments in that regard:

The Prosecution submits this is a hypothetical argument – the **possibility** that the decision **might** not be able to be subject of full appellate review – and this hypothetical argument was a basis for a decision to maintain the stay of the proceedings. It is hypothetical as (1) there could be no appeal, (2) the Appeal Chamber could decide that it does not require reading the documents in order to review the Decision and (3) finally, the Appeal Chamber, as the master of its own proceedings, will determine the conditions it can and cannot accept from the information providers. The Decision further infringes on the prerogatives of the Appeal Chamber. The Prosecution submits that the proper scope of appellate review is a matter within the sole jurisdiction of the Appeals Chamber, and it is for that Chamber to authoritatively pronounce upon the requirements and conditions for such review. Finally, the Trial Chamber has imposed a condition which may be impossible to fulfill for the Prosecutor, as there appears to be no procedural basis on which the Appeals Chamber could consider and agree to the assurances required by the provider in advance or in the abstract, outside of the context of any appeal. Thus, the

Chamber is affecting the rights of the Prosecutor and the victims to an actual trial in order to preserve a hypothetical unfair appeal.

Was it the case that in its reasons for initially refusing to lift the stay on the trial proceedings, the Trial Chamber was, as the OTP suggested, interfering with the Appeal Court's jurisdiction? Alternatively, was the Trial Chamber instead attempting to ensure a fair judicial process? The latter by declining to accept the conditions for disclosure demanded by the information providers (i.e., the Trial Chamber demanding, absent any agreement by the Appeal Court to the contrary, that the Appeal Court be able to conduct a review of the trial judgment – should there be an appeal – knowing fully what was the basis for the trial judgment and what evidence was relied upon such that no redactions of material evidence would appear in the judgment for fear those redactions might adversely impact the fairness and efficacy of the appellate review).

12.5.2.17 What Is the Proper Balance of Rights of the Parties and the Victim Participants in a Case Involving Non-disclosure Agreements?

Trial Chamber I in the Lubanga case thus demanded that (a) the Defence be assured of access to *any* potentially exculpatory material (previously undisclosed) regardless the circumstances if the Trial Court deemed it necessary and appropriate, and (b) the Appeal Court agree in advance to any non-disclosure conditions imposed by the information providers. By setting these conditions for lifting the stay, did the Trial Court effectively deny the possibility; *at that point at least*, of obtaining justice for the victims should the United Nations, NGOs and other sources not make it possible for the OTP to meet these requirements? Given that the stay has now been lifted, all of the Trial Chamber's concerns appear to have been addressed. Many of these concerns would have vanished with the disclosure of the material to the Trial Chamber for its in-camera review (the OTP having received consent from the United Nations and NGO sources for full disclosure of the material to the Trial Chamber).

12.5.2.18 What Is the Current Situation in the Democratic Republic of the Congo?

Note that the fighting in the Democratic Republic of the Congo has in fact not stopped and that informants and witnesses come forward at considerable personal risk. On 22 December, 2008, the United Nations Security Council renewed the mandate for UN forces in the DRC for another year given an escalation of violence there in the late summer months. That violence has been directed also at

humanitarian staff and facilities, in various parts of the country according to United Nations reports.

12.5.2.19 What Are the Potential Security Implications for (1) Victim Witnesses and Participants, and (2) Confidential Sources of the Prosecutor Due to the Lubanga Trial Chamber Succeeding in Gaining Access to All Previously Undisclosed Information and Documentary Evidence?

The original stay of proceedings had specific requirements for lifting of the stay, i.e., potential release to the defence of *any* exculpatory evidence, (including previously undisclosed documents that were not lead evidence), possibly in unredacted form – in whole or in part – depending on the decision of the Trial Chamber regarding any redactions. Yet, where defendants have instigated or co-perpetrated a reign of terror, it is understandably exceedingly difficult, or often impossible for victims, humanitarian agency personnel and other confidential sources to provide the OTP with consent for release of *all* unredacted material to the Trial Chamber and/or Defence. The Lubanga Trial Chamber has, however, gained access to all previously undisclosed information or evidentiary material for its in-camera review. The information providers relinquished this control given their understanding, in light of the Trial Chamber conditional stay decisions, that a failure to do so would result in the Lubanga trial not proceeding. However, persons who might be at high personal risk have *not* completely relinquished their personal control over their ability to protect themselves through certain non-disclosure of information or documents. This is the case since they may still decline to consent to the release *to the Defence* of some or all of the material in question which could potentially jeopardize their well-being. Alternatively, where such voluntary consent from information providers is given to release to the Defence the previously undisclosed material or information (where the Court deems it necessary), these information providers must leave the matter of their personal security largely up to the Court. How much risk they are ultimately exposed to, if any, will depend, in those instances, on the Trial Chamber's decisions regarding disclosure and the Trial Chamber's calculus in weighing the rights of the accused to due process against the rights to safety of the victims and other information providers. The difficulty is, however, that the Trial Court has no litmus test to ensure absolute accuracy in assessing whether disclosure of a document to the Defence ensures the rights of the accused while not posing an intolerable security risk to the information provider. This is, after all, in the final analysis, a judgment call. Any protection provided by the ICC, furthermore, may not be comprehensive enough, or failsafe enough to adequately protect all those information providers involved in every instance. This may even be the case where documents are released with selective redactions.

12.5.2.20 What Evidence Is There that There Is a Great Deal of Fear for the Safety of Victim Witnesses and Victim Participants in the Lubanga Case As Well As for the United Nations and NGO Staff Who Have Provided Documents and Information Vital to the Prosecution?

In the Lubanga case, it was experienced United Nations personnel and NGOs who feared for their safety and/or their ability to carry on their work in the DRC and wanted certain documents or parts of documents undisclosed and held in confidence by the OTP. It has been reported that over 50% of the evidentiary documents in the Lubanga case were submitted by the OTP sources on the condition of confidentiality. Further, 80% of the potential witnesses required ICC protection for their security. This includes maintenance of witness anonymity from the public and, until three months before trial, also anonymity from the accused (see Sabine Swoboda 2008, *The ICC disclosure regime – a defence perspective*, *Criminal Law Forum* 19:449–472 at p. 463). We can assume that the United Nations and NGO information providers' fears for their personal safety were in all likelihood well-founded. These OTP sources were thus, based on those very real fears, reluctant to hand over unredacted previously undisclosed documents to the Trial Chamber even for an in-camera review. However, the sources, as discussed, finally relented allowing the lifting of the Trial Chamber's conditional stay on the proceedings in the Lubanga case. One can only hope that all precautions that the Trial Chamber takes to safeguard the victims and other information sources are adequate and that for their courage none of these sources pay the ultimate price at the hands of any of the militia that may be disgruntled by the information these sources have provided in the case.

12.5.2.21 What Was the Trial Chamber's *Initial Position* on the Disclosure of Any and All Potentially Exculpatory Material?

Recall that when it was arranged that the previously undisclosed documents provide by NGOs and the United Nations to the OTP were, or would be soon provided for the Trial Chamber's in-camera review with no material kept secret, the Trial Chamber held that *any exculpatory document* must potentially be made available to the Defence. *The Trial Chamber declined to conduct such an in-camera review of the material if that condition could not also be met.* Now, as mentioned previously, the stay has been lifted on remand of the case by the Appeal Court back to the Trial Chamber and the trial proceedings began 26 January, 2009. In an oral decision, Trial Chamber I communicated publicly that the reasons for the stay "have fallen away" (see Coalition for the International Court Media Advisory 18 November, 2008 available at <http://www.iccnw.org>).

What Were the Written Reasons Provided by the Trial Chamber in Its 23 January, 2009 Judgment (ICC-01/04-01/06) for Lifting of the Stay of Trial Proceedings in the Lubanga Case?

The Trial Chamber held that without the consent of the information providers, the Trial Chamber could not order disclosure of documents obtained by the Prosecutor under non-disclosure agreements. Where that consent was not forthcoming, and the material would normally have been disclosed to the Defence (i.e., were there no non-disclosure agreement), the Trial Chamber held it would have to determine if counter-balancing measures were available to ensure that the right of the accused to due process were protected.

The Trial Chamber next made a determination that under certain circumstances, as set out by the Lubanga Appeal Chamber in its 13 May, 2008 decision (ICC-01/04-01/07-475, paras. 71–72), redactions (nondisclosure to the Defence and/or public) were permissible to evidentiary documentary materials covered under Article 67(2) (material in the possession or under the control of the Prosecutor relevant to the issue of the potential innocence of the accused, mitigation of the guilt of the accused, and/or which might affect the credibility of the Prosecution case) and/or material covered under Article 77 of the Rome Statute (concerning the need for providing discovery materials to the defence subject to any disclosure restrictions provided for in the Rome Statute). The Trial Chamber thus implemented non-disclosure of certain information, including, where necessary, non-disclosure of identities and of identifying information. The Trial Chamber held that, after considering what, if any, counter-balancing measures should be taken, that the rights of the accused (Lubanga) were not compromised. Such counter-balancing measures might include, for instance, alternate material of evidentiary value provided by the Prosecutor to substitute for the non-disclosed material, admissions of fact by the Prosecutor upon which the defence can rely and need not call the unnamed witness, etc. (Lubanga Trial Chamber, Reasons for oral decision lifting the stay of proceedings, ICC-01/04-01/06, 23 January, 2009, para. 46).

The Trial Chamber held that Article 54(3)(f) of the Rome Statute had general applicability throughout the statute despite the fact that the heading of Article 54 of the Rome Statute refers to the investigative stage (“Duties and powers of the Prosecutor with respect to investigations”). Article 54(3)(f) provides that the Prosecutor may:

(f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

The Trial Chamber (Reasons for oral decision lifting the stay of proceedings, 23 January, 2009, para. 38) commented as follows on this issue:

There would be real difficulty in the prosecution’s proper discharge of its function if it is limited in its ability to implement, or to request, protective measures to the investigative stage only. It is clearly necessary for the prosecution to have the ability to take or to initiate these steps at any stage during the trial and the Chamber, adopting a purposive

interpretation, is persuaded that this provision, notwithstanding where it is included in the Statute, has general applicability throughout all stages of the pre-trial and trial stage.

The Trial Chamber held that the combined effect of Article 54(f) and 64(2)64(6)(c) (e)(f) is that: “[...] the Trial Chamber, once constituted, has a statutory responsibility for the protection of victims and witnesses throughout the entirety of the period it is seized of the case” (Reasons for oral decision lifting the stay of proceedings, 23 January, 2009, para. 41). Clearly, Trial Chamber I in these written reasons for lifting the stay accorded the right to safety of the victims and various NGO and United Nations personnel and other information sources no less weight than the right of the accused to a fair trial. It is, in this author’s respectful view, a great victory for the victim participants, witnesses and for NGOs and United Nations personnel and others cooperating with the ICC Prosecutor to have their right to security of the person affirmed in *Lubanga* as a guaranteed statutory right (in effect both a procedural and substantive right) under the Rome Statute; one which cannot be legitimately intentionally compromised in any significant way. The Trial Chamber reasons in *Lubanga* are consistent in this regard with the ICC Appeal Court judgment in *Katanga* of 13 May, 2008 in Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled, “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May, 2008, ICC-01/04-01/07-475, para. 44) which was referenced by the Trial Court in *Lubanga* in its 23 January, 2009 ruling. These rulings (*Katanga* case, “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May, 2008, ICC-01/04-01/07-475, para. 54) establish that:

[...] the specific provisions of the Statute and the Rules for the protection not only of witnesses and victims and members of their families, but also of others at risk on account of the activities of the Court are indicative of an overarching concern to ensure that persons are not unjustifiably exposed to risk through the activities of the Court.

12.5.2.22 What Are the Implications for Due Process in ICC Proceedings Given that Victims May Participate and Make Independent Submissions at Every Stage Rather than Just Being Witnesses?

The Prosecutor in the *Lubanga* case made the following pointed statement (Prosecution’s Application for Leave to Appeal against Decision on Application to Lift the Stay of Proceedings, ICC-01/04-01/06, 9 September, 2008, para. 20, p. 12):

[...] fairness is not a concept confined to the rights of the accused. Rather, fairness requires that the procedural and substantive rights and obligations of all participants, including the Prosecution, be respected. The Chamber’s refusal to lift the stay of proceedings adversely impacts on the fairness of the proceedings vis-à-vis the Prosecution and the victims. The Decision, loses sight of the rights of these procedural actors who also enjoy a legitimate expectation of fair proceedings.

The Prosecutor is undoubtedly correct in his statement that “fairness is not a concept confined to the rights of the accused” but rather “fairness requires that the

procedural and substantive rights and obligations of all participants [...] be respected” in ICC proceedings. Recall in that regard, for instance, that victims have participation rights at all stages of ICC proceedings unlike the situation in most other criminal proceedings where victims are only potential witnesses who have a voice only if called by the prosecution, and then only in response to the questions put to them. Consider then how: (a) the disputes in the Lubanga case about the disclosure of materials gathered by the OTP under non-disclosure agreements, and (b) the nature of the ultimate resolution of these disputes will impact on respect for the ICC process, and on confidence that the ICC process can provide a measure of justice to the victims of the most grievous international crimes.

12.5.3 Notes and Questions Regarding the Amicus Brief “Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict” of 17 March, 2008 (ICC-01/04-01/06-1229-AnxA)

12.5.3.1 What Was the Position of the Special Representative of the Secretary-General on Children and Armed Conflict in *Lubanga* on the Issue of Recruitment of Children into Soldiering and the Child’s Alleged Voluntary Consent as a Defence to the War Crimes Charge?

The Special Representative of the UN Secretary General on Children and Armed Conflict (hereafter in these notes referred to as “the Special Representative”) makes the point that:

Consent of the child is not a valid defense to any of the three child soldiering war crimes. The line between lawful recruitment and unlawful recruitment is drawn based solely on age, under the Rome Statute as elaborated upon by the Elements of the Crimes, not on any act of the child. All “Voluntary” acts or statements or other indications or interpretations of consent by children under the legal age for recruitment are legally irrelevant. [...] (Amicus brief, para. 10)

This foregoing is a critical point given that (a) the erroneous defences may be proffered by ICC defendants based on the alleged voluntariness of the child participants in soldiering in arguing either innocence and/or mitigation and (b) the ill-considered rationales that have been proffered by some cultural relativists regarding the use of child soldiers in the developing world combined with the notion that international law prohibiting such a practice is de-contextualized and has a Western bias and that child soldiering can thus allegedly not be assessed according to international criminal legal norms (see Grover SC 2007, A response to KA Bentley’s “Can There Be Any Universal Children’s Rights”, *International Journal of Human Rights* 11(4):429–443; section concerning child soldiers).

12.5.3.2 What Was the Position of the Special Representative of the Secretary-General on Children and Armed Conflict in *Lubanga* on the Issue of “Best Interests of the Child” and Recruitment of Children into Soldiering?

Consider that the Special representative in her amicus brief (Amicus Brief: Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict, ICC-01/04-01/06-1229-AnxA, para. 11) in the *Lubanga* case makes the critical point *without* reference to any purported exception based on the cultural, socio-political, economic or other context for child soldiering that:

There is no best interest of the child defense. Recruitment is per se against the best interest of the child. The Rome Statute codifies this understanding in its prohibition without exception of conscripting, enlisting, and using child soldiers.

12.5.3.3 What Evidence in the *Lubanga* Case Appears Inconsistent with the Notion of Voluntary Recruitment of Children into Soldiering?

Note that the concept of so-called “voluntary” recruitment into the *Lubanga* forces is difficult to reconcile with the following facts among others:

- Children in the DRC have endured years of civil war. There has been various forms of manipulation of the children and the parents by warring armed forces with the objective of recruitment. The Prosecutor’s evidence in the *Lubanga* case (to date accepted as credible evidence by the Pre-Trial Court) is that *Lubanga* demanded that every Hema family offer up at least one child to serve as a child soldier for the cause regardless whether the child was under 15 and that abducted children themselves were among those deployed to recruit such children by any means necessary including force; promises of the opportunity to have their families protected if the child joined, opportunities for revenge, etc., (see Prosecutor’s 30 May, 2008 submission above).
- Children and families suffered and continue to suffer extreme poverty (in the DRC, for instance, in 2005 families of an average of six persons earned less than \$1 per day; (see The Redress Trust 2006, *Victims, Perpetrators or Heroes? Child soldiers before the International Criminal Court*, <http://www.redress.org>. Children often with no means of survival having lost their parents were “recruited” by the *Lubanga* and other forces).

12.5.3.4 What Is the Status of Child Soldiers Under International Humanitarian Law?

For a discussion of child soldiers as “protected civilians” under international law see Grover SC (2008, “Child soldiers” as “non-combatants”: the inapplicability of

the refugee convention exclusion clause, *International Journal of Human Rights* 12 (1):53–65).

12.5.3.5 What Is the Implication of Wide Spread Recruitment of Child Soldiers and the War Crimes Set Out in the Rome Statute Regarding the Recruitment and Use of Child Soldiers Under Age 15 for Active Participation in Hostilities?

The Special Representative makes the point that when there is widespread recruiting of child soldiers (by various means) the probability is high that children under 15 will be recruited even where they may not have been specifically targeted. Hence, the Prosecutor's evidence in the Lubanga case (yet to be proved at trial) of such widespread recruitment of children as part of the "common plan" speaks to the point that Lubanga *should have been aware* that children under 15 were being recruited into his armed forces. The OTP alleges that at various points child soldiers under age 18 were ordered to be demobilized by Lubanga from his forces in what the Prosecutor contends were sham PR stunts (see "Submission of the Prosecution's Updated Summary of Presentation of Evidence", ICC-01/04-01/06-1363, 30 May, 2008, paras. 76–82, and hence Lubanga according to the Prosecutor was one of the problem of such recruitment and use of children within in his own forces).

12.5.3.6 What Is the Potential Implication of the Difference in Wording Between Additional Protocol I to the Geneva Conventions and the Rome Statute in Regards to the War Crimes Concerning the Recruitment and Use of Child Soldiers?

The Additional Protocol I to the 1949 Geneva Convention at Article 77 prohibits the recruitment or *direct use in hostilities* of children under age 15. The Rome Statute uses significantly different wording as to use referring instead to a prohibition against using child soldiers under 15 to *participate actively*. This leaves open the possibility for an interpretation which includes criminalization under the Rome Statute of a broader range of underage child soldier involvement in hostilities such as spying, sabotage and scouting operations. Yet, the term "actively participate" is also vague. It is unclear whether the ICC will, in the Lubanga case, or in any pending case consider that (a) the use of girl soldiers under age 15 as "bush wives", sexual slaves, domestics and support persons in every conceivable way for militia commanders meets the criterion for "active participation" in hostilities and (b) the use of girl children for these forms of active participation in hostilities is an international crime under the ICC articles dealing with child soldiering. This in addition to meeting the elements of any specific additional charges for related sexual crimes such as rape such that the conduct charged in each count is non-duplicative. At present, the Pre-Trial Chamber's interpretation of "participate actively" in hostilities appears to exclude recognition of girl soldiers as soldiers if they served

support roles as forced wives to armed force commanders and subordinates, etc., even though these female children under age 15 moved with the forces and were exposed to all the risks of being a member of such a group such as were the boys:

[...] the Confirmation of Charges Decision purports to establish a bright-line rule to determine which activities qualify under the “participate actively” standard. The Special Representative submits that this effort is ill-conceived and threatens to exclude a great number of child soldiers – particularly girl soldiers – from coverage under the using crime. (Amicus Brief, 17 March, 2008, para. 20)

12.5.3.7 What Was the Position of the Special Representative of the Secretary-General on Children and Armed Conflict in Lubanga on the Issue of Who Meets the Criteria for Being Considered a Child Soldier?

In her amicus brief in the Lubanga case, the Special Representative endorsed the approach of the Special Court of Sierra Leone in the AFRC case with respect to who is designated as a child soldier and who is considered to have been used to actively participate in hostilities: “Using children to “participate actively in the hostilities” encompasses putting their lives directly at risk in combat . . . any labour or support that gives effect to, or helps maintain, operations in a conflict constitutes active participation” (cited at Amicus Brief, 17 March, 2008, para. 21). The special representative also made mention of the Cape Town Principles definition of “child soldier”:

The exclusion of girls from the definition of child soldiers would represent an insupportable break from well-established international consensus. The definition of child soldier auxiliary to the Cape Town Principles recognized that “child soldier” includes “girls recruited for sexual purposes and for forced marriage.” (Amicus Brief, 17 March, 2008, para. 24)

12.5.3.8 According to the Special Representative of the Secretary-General on Children and Armed Conflict in *Lubanga*, What Evidence Is There that Girl and Boy Child Soldiers Constantly Shift Between Combatant and Non-combatant Roles?

The Special Representative noted that girl children shifted from combatant to non-combatant role and vice versa as did the boy children recruited and should be considered as child soldiers:

A case-by-case approach is particularly apt and critical in the context of modern conflicts in which the nature of warfare differs from group to group and the children used in hostilities play multiple and changing roles. When the Special Representative spoke to girl combatants in the eastern DRC, they spoke of being fighters one minute, a “wife” or “sex slave” the next, and domestic aides and food providers at another time. Children are forced to play multiple roles, asked to kill and defend, carry heavy burdens, spy on villages and

transmit messages. They are asked to perform many other functions and their use differs from group to group. Eva was a young girl whom the Special Representative met in the DRC. She was only twelve when she was abducted on her way to school. Initially, Eva was kept in a situation of forced nudity and subject to sexual abuse. She worked in the camp cooking, cleaning and being a sexual slave, and was often taken along for armed attacks on the villages to be a “porter” to carry the looted goods. (Amicus Brief, 17 March, 2008, para. 22)

Hence, the Special Representative has argued in her amicus brief in the Lubanga case that children recruited into the armed ranks can be considered as “actively participating” in hostilities whether directly fulfilling combatant roles or any type of significant and on-going non-combatant roles by the armed forces in question including girls who are being sexually abused:

The Court should deliberately include any sexual acts perpetrated, in particular against girls, within its understanding of the “using” crime [author’s note: using to participate actively in hostilities]. [...]” (Amicus Brief, 17 March, 2008, para. 25)

12.5.3.9 What Is the Implication of the ICC’s Refusal to Regard as Child Soldiers Those Girl Children Who Are Forced Child Brides and Child Sex Slaves Attached to Militia Groups?

To the extent that the ICC does not acknowledge girl children who are used as forced wives and sex slaves as child soldiers, does the international criminal justice system further serve to re-victimize these girls. This by (a) making them invisible as soldiers, and denying them redress in respect of the child soldiering offences codified in the Rome Statute and (b) making it more difficult for the girls thus to re-integrate into the community (due to the missed opportunity to publicly place the blame for their participation with the armed units on the perpetrators):

The Special Representative explains that girl combatants are often invisible: “Because they are also wives and domestic aides, they either slip away or are not brought forward for DDR programs. Commanders prefer to ‘keep their women,’ who often father their children, and even if the girls are combatants, they are not released with the rest. Their complicated status makes them particularly vulnerable. *They are recruited as child soldiers and sex slaves but are invisible when it comes to the counting.*” (Amicus brief, 17 March, 2008, para. 26, emphasis added)

12.5.3.10 What Is the Mandate of the ICC Special Gender and Children’s Unit?

Recall that the ICC system includes a Special Gender and Children’s Unit which is designated in part with assisting child witnesses who have been the victims of

sexual violence often in the context of armed conflict which form of violence in contemporary times has become an increasingly prevalent international crime.

12.5.3.11 What Is the Nature of Child Involvement in the International Criminal Court Process?

What Role Have Children Played in the Lubanga ICC Court Proceedings?

According to the United Nations Mission in Congo (MONUC), there were an estimated 30,000 children in armed forces or groups in 2004 in the region (*The Redress Trust 2006, Victims, perpetrators or heroes? Child soldiers before the International Criminal Court*, available at <http://www.redress.org>, p. 18). In the International Criminal Court (ICC), child witnesses have played a pivotal role in providing eye witness testimony to the Office of the Prosecutor on the charged offence against Lubanga Dyilo of recruitment, and use of children under age 15 years for active participation in armed hostilities. The child witnesses, for instance, have provided testimony on the use of coercion and torture of children by the UPC/FPLC in furtherance of its goal of recruitment, and forced retention of child soldiers, and the forced recruitment and use of girl child soldiers. Certain of these witnesses presented testimony *or* made independent submissions via their legal representative as victim participants at the Pre-Trial Court proceedings, and at the Trial level, for instance, in respect of the Prosecutor's appeal of the Trial Chamber's stay of proceedings decision (that stay now lifted). However, due to the restriction in charges against Lubanga Dyilo (to those pertaining only to the recruitment and use for active participation in hostilities of children under age 15), the children are unable to testify as witnesses, *or* to make submissions (via their legal representative as "victim participants") with respect to other atrocities (i.e., a pattern of sexual violence against children as international crimes separable from the recruitment and use of child soldiers under 15) allegedly committed by the defendant and his forces. Child victims, as is the case with adult victims, may participate then at the ICC either: (a) as witnesses called to testify in response to the questions posed by the Defence or the Prosecution, etc., *or* (b) as "victim participants" making independent submissions regarding their position on a legal issue (submissions are normally made via their legal representative and are independent, for instance, in terms of the Prosecutor). As victim participants the children may also make submissions pertaining to the issue of any reparations to which they may be entitled. Many international criminal law experts and human rights advocates believe that the children's participation increases the chances for a just outcome; especially with regard to the reparations matter (i.e., when the children may make submissions in their own interests as victim participants in the proceedings regarding reparations). It would appear, though this remains to be seen in future cases, that the practice of the ICC will be to consider that children (persons under age 18) are under a legal disability and hence should always make their submissions as victim participants via a legal

representative. As the ICC does not have jurisdiction over persons *under* age 18, children who have committed atrocities, for instance as child soldiers, do *not* appear before the ICC as defendants.

What Are the ICC Rules Regarding Child Victim Participants in the ICC Process or Child Witnesses Giving Testimony Before the ICC?

- The ICC under Article 68(3) provides for victim participation *including when the victims are children* (consistent also with the accused's right to a fair trial). Where the victim participants are children, the ICC, as mentioned, will normally require that a legal representative or other adult participate on their behalf. Article 68 of the ICC statute provides, in addition, for certain procedural and other measures to better ensure the protection of the physical and psychological well being of child witnesses (or potential child witnesses) and of child "victim participants" or (potential participants):

Article 68 of the Rome Statute

Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. *In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes.* These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial [author's note: emphasis added].
2. *As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness* [author's note: emphasis added].
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. *Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence* [author's note: emphasis added].
4. *The Victims and Witnesses Unit [of the ICC] may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6* [author's note: emphasis added].
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted *prior to the commencement of the trial*, withhold such evidence or information and instead

submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial [author's note: emphasis added].

6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.
- Victims may file complaints regarding international crimes and/or provide information on already filed complaints to the Office of the Prosecutor of the ICC. The OTP, after a preliminary examination of the information received and any additional information obtained, will bring the situation before the Pre-Trial Chamber where he or she determines that international crimes falling under the ICC jurisdiction may have occurred. Thus victims may *not* directly bring a case before the ICC. The charges in the indictment must be confirmed by the Pre-Trial Chamber (PTC) of the ICC. There may also be instances in which the PTC ultimately orders the Prosecutor to investigate where the Office of the Prosecutor initially may have declined to investigate but the victims have requested that the PTC review this refusal. The PTC oversees and reviews the decisions of the Office of the Prosecutor. The case is not admissible until the PTC confirms the charges and rules the case admissible. Thus, the victims, in accord with the procedures, may in a variety of case scenarios have an opportunity to make submissions as “victim participants” at the PTC hearing and at subsequent proceedings (either directly in person or through written submission, or through a legal representative) where the interests of the victims are at stake and the information is relevant to the issues to be decided. For instance, in the Lubanga Democratic Republic of Congo case, the Appeal Court which in its 6 August, 2008 decision (para. 7) granted the victims the opportunity to participate at the Appeal level, did so in consideration of the following criteria:
 - (i) whether the individuals seeking participation are victims in the case;
 - (ii) whether they have personal interests which are affected by the issues on appeal;
 - (iii) whether their participation is appropriate [i.e. their testimony is relevant to the issues to be tried, whether they are capable of giving informed, reasoned testimony etc] and lastly;
 - (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
 - Victims must apply to the Court’s Registrar to be heard as “victim participants” and this opportunity to be heard may or may not be granted. Victims who have been given the opportunity to be heard may, through their legal representative, cross-examine the accused, experts, or other witnesses on the charges as well in respect of any hearing on reparations.
 - Under Article 75 of the Rome Statute, victims are entitled to such restitution, compensation and rehabilitation as the Court deems appropriate. (Such forms of reparation were not available under the statutes of the ICTR or the ICTY

which provided only for the return of property to its rightful owner in terms of reparation for pecuniary damages.) The ICC statute also provides that the availability of reparations of various sorts be publicized so that the probability of victims accessing those funds and other types of reparations should be optimized. The ICC may also provide for reparations on its own motion (not all victims may be in a position, for whatever reason, to be able to request reparations), and the ICC may also order reparations for a designated group of victims (i.e., “collective reparations”). These reparations may, in some instances, come from the ICC Victim Trust Fund to which the parties to the ICC contribute funds for diverse forms of victim support at various stages of the proceedings and for reparations or it may come from other sources.

- Supporting the victims in their role as witnesses *or* as victim participants is the “Victims’ Participation and Compensation Unit” of the ICC Office of the Registrar which is an independent body within the Registry’s “Victims and Witnesses Unit”. The Victims’ Participation and Compensation Unit provides, for instance, assistance in organizing legal counsel for victims and provides support for that legal counsel. The Victims and Witnesses Unit provides various types of support to the victims before, during and after their participation in the ICC investigation and/or proceedings as needed including, but not limited to, providing protection for the victim and his or her family, and counselling by mental health and other experts for the victims of trauma as well as other services including urgent medical services and relocation services for those at high personal risk. (Note that under the ICTR and ICTY Court systems, no such assistance was available to victim witnesses who had suffered atrocities though the incarcerated defendants, in contrast, had access to medical services.) In those cases where there are gender-specific matters relating to sexual violence, or in some other respect, the ICC Victims and Witnesses Unit works to assist the Court in implementing the measures necessary to ensure the well-being of victim witnesses or victim participants including child victims. ICC child victim witnesses, with the approval of the Court, and having regard to the fact that testifying itself as to atrocities suffered may be very traumatizing, may testify in-camera, via closed circuit television, or in the presence of a support person who may be a family member, legal representative, mental health professional or other. The ICC is empowered, if it so decides, to use anonymous testimony (i.e., from child victim witnesses where the child’s security is at high risk) to the degree, and in the form deemed required, and which is still compatible with the due process rights of the accused (i.e., using a pseudonym instead of the child’s name; disguising the child’s voice, and blocking pictures of a child testifying via videoconference, etc.). The child victim witnesses are, however, always subject to rigorous cross-examination (see Without Borders 2003, Victims guide to the International Criminal Court, available at <http://www.rsrf.org>, for detailed information on the work of the ICC Victims’ Participation and Compensation Unit).

12.5.3.12 Are There Any Potential Barriers to Child Participation at the ICC?

What Are the Implications of Article 69 of the Rome Statute for Child Participation Before the ICC?

It has been suggested that Article 69 of the Rome Statute (requiring a solemn declaration by the witness that he or she will give truthful testimony) may potentially serve improperly as a barrier to child participation at the ICC. The ICC is empowered to allow children to testify if they have knowledge of relevant facts and can relate them and appear to understand the difference between truth and lies and understand the need to tell the truth. Beresford (2005) makes the point (consistent with empirical psychological findings on children's developmental process), that a child being able to explain the difference between the truth and a lie does not mean that the child will necessarily tell the truth, while conversely, their not being able to tell the difference between the truth and a lie does not automatically mean the child will not tell the truth. Hence, Beresford (2005, Child witnesses and the international criminal court system: does the International Criminal Court protect the most vulnerable? *Journal of International Criminal Justice* 3:740) concludes that:

The exclusion of children's testimony under this limb of the competence requirement seems to run counter to the goal of bringing all relevant evidence before the Chambers. It also ignores the ability of judges to make decisions about weight and credibility which they will do with regard to those persons who are presumed to be competent. In this author's view, the judges should base their decision about credibility on the totality of the child's evidence and not their response to questions couched in legalistic language [...] children should always be allowed to testify unless it can be reasonably demonstrated that they are incapable of giving an intelligible account of the events that are the subject of the proceedings.

This author is in accord with Beresford in that various significant parts of the child's account will be open for independent corroboration or lack of corroboration in most if not all instances (through other eyewitness accounts, forensic, medical, documentary and other evidence, etc.), and hence, there will be a check on the veracity or likely veracity of the child victim's testimony. Furthermore, as Beresford points out, allowing child victim testimony, even if the child cannot make a solemn declaration, or adequately demonstrate knowledge of the difference between lies and the truth when confronted with out of context examples, "would not affect the rights of the accused, as they will still be able to challenge the reliability and credibility of the child's evidence through cross-examination" (Beresford 2005, Child witnesses and the international criminal court system: does the International Criminal Court protect the most vulnerable? *Journal of International Criminal Justice* 3:740). Beresford also notes that often humanitarian organizations do not coordinate with the ICC investigators and other personnel and organs of the court. This can result in the child being unnecessarily re-interviewed multiple times by different agencies and personnel leading to stress and confusion and even trauma for the child. Beresford, therefore, recommends videotaping the child's interview in

most every case and especially when the child is young. This in order that repeated interviewing can be avoided to the extent possible. He maintains, further, that videotaped interviews may lead to more accurate, fuller testimony than does non-videotaped testimony. What is clear is that it is as necessary to make special accommodation for children in providing testimony as it is for any other person with special needs (i.e., psychological research has found that having a support person present in the courtroom enhances children's ability to testify fully and completely (i.e., see Goodman et al. (eds.) 1992, *Testifying in criminal court: emotional effects on child sexual assault victims*, University of Chicago Press, 121). As Beresford also explains, interpreters, in addition, must be sensitive to "the characteristics of particular child witnesses" otherwise there is a risk of communication breakdowns as the child may not understand the question or be intimidated, etc. He points out that "it is unlikely that many children will give testimony in either of the Court's two working languages" (Beresford 2005, *Child witnesses and the international criminal court system: does the International Criminal Court protect the most vulnerable?* *Journal of International Criminal Justice* 3:745). Beresford also recommends that where the accused is unrepresented he or she should normally not do the cross-examination of the child directly but should have legal representation (either arranged privately or by the court) to carry out such cross-examination. This in order to ensure that the child's testimony is not unnecessarily "diminished" [...] for in the end:

If the ICC treats child witnesses insensitively, the quality of their participation suffers, thereby reducing the likelihood that justice will be done. While the reduction of stress or trauma is important in itself, it may also result in more reliable evidence being given. In fact it may make available vital evidence, without which the case could not proceed. (Beresford 2005, *Child witnesses and the international criminal court system: does the International Criminal Court protect the most vulnerable?* *Journal of International Criminal Justice* 3:747)

What Is the Status and Efficacy of ICC Outreach Activity?

There is a need for better outreach activity, for instance: (a) informing the population, including children, that recruitment and use of children in soldiering is an international crime; (b) informing child victims of their rights under the ICC statute; and (c) informing children, families and supporters of the potential therapeutic benefits of the children's ICC participation as well as (d) informing the child victims and their families of the possibility of reparation should the case be won. All of this may lead to better re-integration of the ex child soldiers into the community and better acceptance of the children by their community as victims of international crimes. In this regard, note the following statement by the NGO The Redress Trust (The Redress Trust 2006, *Victims, perpetrators or heroes? Child soldiers before the International Criminal Court*, available at <http://www.redress.org>, p. 47):

Even in Eastern DRC, where the International Criminal Court has received positive publicity due to the Lubanga arrest, and where victims are familiar with the notion of participating in criminal proceedings, there is still widespread incomprehension by civil society as to what this ‘foreign’ court will provide, and how that will help meet their needs in the context of conflict and poverty. It is suggested that outreach initiatives focus on these ‘preliminary issues’.

12.5.3.13 What Has Been the General Reaction of the Populace in the DRC to the Crimes Charged Against Lubanga?

Lubanga and the other DRC defendants with superior responsibility and/or other high level alleged involvement in the commission of the international crimes charged to date have been indicted only under the child soldiering war crime provisions of the ICC statute. Yet, there is abundant evidence that other crimes *involving child victims* among others occurred in the DRC after the coming into force of the ICC statute in July 2002. These international crimes include, among others, forcible transfer of children from their communities to the armed groups (who at times were even members of opposing ethnic groups), sexual slavery, systematic rape of girl children, massacres and torture. There is a need therefore for prosecution of the relevant accused also for these additional grave international crimes:

[...] as concerns Thomas Lubanga’s case, the charges concerning child soldiers have been met with surprise [...] *Furthermore, this surprise is coupled with incomprehension and some frustration as the crimes which are perceived as “more grave”, such as rape, large scale massacres or torture have not been included in the initial list of charges.* It is feared by many that these latter acts will not receive the required attention. This has caused significant disappointment given that hopes were high when the arrest was first announced. It is hoped that at least further arrests will follow quickly to make up for the lacunae of the present charges, to maintain momentum and to cover numerous other areas and atrocities committed [...]. (The Redress Trust 2006, Victims, perpetrators or heroes? Child soldiers before the International Criminal Court, available at <http://www.redress.org>, p. 47, emphasis added)

12.5.3.14 What Barriers May Child Victims Face in Their Search for Justice via the ICC?

It has been noted that large numbers of children have been the victims of war crimes in recent years and that therefore they are essential sources of information regarding such international crimes (i.e., see Beresford 2005, Child witnesses and the international criminal court system: does the International Criminal Court protect the most vulnerable? *Journal of International Criminal Justice* 3: 721–748). It would be the hope that child victims, as persons in their own right with an inherent entitlement to justice under international criminal law, would receive just satisfaction via the ICC process and outcome in any particular case. This, however, continues to be a struggle. Perpetrators may escape, or at least significantly delay

a modicum of justice for the child victims based on various legal manoeuvres despite the videotaped, audiotaped, and/or print documentary evidence that may be available and/or eyewitness evidence of their involvement in international crimes (i.e., the recruitment of children under age 15 into armed forces and their use for active participation in hostilities). Does the release of *alleged* perpetrators in the face of such evidence, based on procedural matters beyond the control of the Prosecutor (as arguably almost occurred in the Lubanga case), serve to undermine both the dignity and the psychological and physical well-being of the surviving child victims and their families? One must ask whether complete impunity is justified for such offences due to the abandonment of a case based on alleged technical errors by the Prosecutor (i.e., incomplete disclosure to the Trial Chamber due to inability to obtain agreement to full disclosure from NGOs, the United Nations and other sources *for certain* documentary evidence). Most importantly, what is the standard for determining if such non-disclosure has substantially affected the due process rights of the accused, and has the ICC always applied that standard in a non-arbitrary way? Was the standard appropriately applied by the ICC Trial Chamber in the Lubanga case when it issued an unconditional release order for Lubanga at a point in the case which was prior to the Prosecutor being able to obtain agreements for the full disclosure to the Trial Chamber of previously confidential documentary evidence? Might other more limited remedies have been appropriate at that point also?

12.5.3.15 How Adequately Has the ICC Protected Child Witnesses at Every Stage of the ICC Process?

To the extent that child witnesses/complainants are not protected at every stage of the investigation and proceedings *including after the trial* (which would be contrary to the requirements of Article 68 of the Rome Statute), it may be concluded that the ICC system, in those instances, is in fact not acting in the best interests of the children. Examples of the failure of ICC staff to adequately protect child witnesses in every situation have been provided by Save the Children. For instance, Save the Children, based on research and field investigations, suggested that the ICC process in Northern Uganda had put children (and adults) at risk:

[...] Save the Children is deeply worried over the way ICC has so far approached formerly abducted children for interviews in the pre-investigation period. The fact that ICC is interviewing children and young persons in the centers where children live could put these centers at risk of reprisals and attacks from the LRA. Mechanisms to protect children had neither been guaranteed nor put in place as part of the pre-investigation procedures. This is a breach of internationally recognised principles and standards of child protection. [...] The confidentiality of witnesses and information is an important policy of the Chief Prosecutor which was discussed in a meeting between Save the Children ad representatives from the ICC. Nevertheless information from Northern Uganda shows that it has been fairly easy for research teams to identify who the ICC have interviewed and to do follow up interviews with these children and young people. This raises serious concerns about the ICC's capacity to maintain strict confidentiality in the process to come. Just interviewing

children to obtain general information can, in the current situation of ongoing conflict, put them at increased risk of being targeted, re-abducted and killed. (“Child protection concerns related to the ICC investigations and possible prosecution of the LRA Leadership”, Save the Children in Uganda Report, Kampala, Uganda, 30 March, 2005, p. 2)

In that same report, Save the Children Uganda pointed out that the ICC at the time did not appear to have a suitable protocol for interviewing children and follow up with those children (i.e., the children did not always understand why they were being interviewed, what protections they would or would not receive from the ICC, their right not to consent to the interview, who would use the information gathered, how that information would be handled, the potential risks to them of consenting to be interviewed, etc; Child Protection Concerns related to the ICC Investigations and Possible Prosecution of the LRA Leadership, Save the Children in Uganda report, Kampala, Uganda, 30 March, 2005, p. 5)

12.5.3.16 Have Child Witnesses and Participants Always Been Treated with an Adequate Level of Respect by All Judges and Staff of the International Criminal Courts?

It is essential that child victim witnesses, as any other, are treated with respect by the international criminal courts but this has not always occurred. It is necessary that any staff or judges who consistently cannot show child witnesses this respect be held accountable and, in this author’s view, be asked to recuse themselves from the case. Human Rights Watch reported such insensitivity occurred on occasion at the Special Court of Sierra Leone (a hybrid international criminal court):

It is absolutely necessary that when witnesses come forward to testify, often at great risk to themselves and their families, that they are treated with dignity and respect. This is a matter of principle and also pragmatic, as ill-treatment of witnesses will have a chilling effect on witness cooperation with the court and undermines the very principles on which the court is founded. [...] Human Rights Watch was told that judges have reportedly referred to the “degree of intelligence of a witness” in reference to a witness’ lack of education, laughed concerning the illiteracy of a witness, requested that a witness whose arms were obviously amputated raise hands to demonstrate this, and, in at least one instance, stated the name of a child witness in open court. At the same time, Human Rights Watch was told that judges have demonstrated sensitivity in other instances to witnesses, particularly with rape victims [...] The judges have also worked with the Witnesses and Victims Support Unit to ensure proper treatment of witnesses. (Treatment of witnesses and courtroom management, Human Rights Watch report, available online at <http://www.hrw.org/reports/2004/sierraleone0904/3.htm>)

12.5.3.17 Does the ICC Code of Ethics for Judges Speak to the Issue of Respect for Witnesses and Victim Participants?

The ICC Code of Ethics at Article 8 (Code of Judicial Ethics International Criminal Court, ICC-BD/02-01-05, http://www2.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf) speaks to the issue

of the need to treat witnesses with respect. These principles are relevant to any international criminal court proceeding though each court has its own code:

Article 8 Conduct during proceedings

[...]

3. Judges shall avoid conduct or comments which are racist, sexist or otherwise degrading and, to the extent possible, ensure that any person participating in the proceedings refrains from such comments or conduct.

12.5.3.18 What Are the Weaknesses of a Code of Judicial Ethics As the Only Vehicle for Ensuring that Judges Conduct Themselves in a Manner Befitting Their Position As Judges?

Codes of Judicial Ethics are but advisory as to proper professional and ethical conduct for judges. The question can be raised then as to whether there is a need for an *independent oversight body* with respect to the judicial panels of any level of the ICC and all other international criminal court systems such that (a) judges who undermine the dignity of witnesses, and contribute to the further violation of victim human rights in any way (i.e., through biased rulings, etc.) can be held accountable and (b) victims can receive the appropriate remedy for any such judicial misconduct. (Note that the ICC, does, under Chapter 8 of its rules of court, have a mechanism for dealing with complaints against judges, but how accessible and effective this mechanism will be remains to be seen). This issue of judicial accountability was raised at an international workshop on judicial ethics held in 2003. The report issued as a result of this workshop (“Toward the development of ethics guidelines for international courts”, Report on the Workshop on Judicial Ethics held in conjunction with the Brandeis Institute for International Judges, 24 July, 2003, Salzburg, Austria, p. 11, available online at <http://www.brandeis.edu/ethics/pdfs/internationaljustice/ethics/EthicsGuidelines.pdf>) states the following:

The issue of accountability plays into the discussion of disciplinary procedures since it was generally expressed that international judges should be answerable not only to their courts, but also perhaps to external entities. What these entities should be and how a judge’s accountability to them should be evaluated are, the group agreed, complex questions to answer. Yet it was also widely felt that the development of recognizable mechanisms to ensure accountability, and disciplinary measures for cases where standards of conduct are not met, would go far in allaying the fears of critics who believe that international courts answer to no one.

The international judges group attending the aforementioned 2003 workshop on judicial ethics and the international courts suggested that several key questions regarding the accountability of, for instance, international criminal court judges remain to be adequately answered, for instance: (a) are the judges of the international courts sufficiently accountable and to whom (i.e., are they accountable to peer judges, to member States, to NGOs, to victims, to the media, to the interested public, and/or to their own consciences)? and (b) are there disciplinary measures in place and are these appropriate for serious and less serious violations of judicial ethics?

12.5.3.19 What Potential Legal Standing Do Children Have Before the ICC?

The question arises as to how accountable the international criminal courts are likely to be to child victims and how that relates to the child's legal standing. The ICC does, it appears, recognize children's legal capacity in their own right to bring information forward to the Office of the Prosecutor for the prosecutor's consideration. Further, the ICC provides for the participation of child victims as victim participants who may make independent submissions generally through their representatives. The question arises whether the test for the right to children's participation is clear enough so as to eliminate arbitrary exercise of judicial discretion in the matter. Hence, the possibility for wide variation exists in whether minor children will be given the opportunity to participate in the ICC judicial process in any particular case either directly or through their representative. In the Lubanga case, as per a 11 July, 2008 ICC Appeal Court decision, children will be permitted to testify at trial regarding the evidence pertaining to the charge; recruitment (i.e., enlistment and/or conscription) and use of children under age 15 to participate actively in hostilities, but not other international crimes they are alleged to have suffered as the result of victimization by Lubanga directly or indirectly through his forces. The child victims who may participate in the ICC Lubanga case include: (a) child victims who suffered direct harm as a result of the war crime allegedly committed by the defendant and his militia (i.e., relating to the matter of the recruitment and use of child soldiers under 15 for active participation in hostilities) and (b) those who suffered indirect but personal harm as a result (i.e., siblings and other family members who suffered psychological harm as a result of the child family member in question being "recruited" and/or used as a child soldier, other child community members who lived in fear that they, too, would be taken, etc.). The Appeal Court affirmed that the "victim participants" in Lubanga may lead evidence as to the guilt or innocence of the accused and may also challenge the relevance and admissibility of evidence.

12.5.3.20 What Statement Did the NGO "No Peace Without Justice" Make in Regard to the Importance of Child Victim Participation in the Lubanga ICC Proceedings?

"No Peace Without Justice" issued the following statement regarding the implications for the ICC of child witness testimony in the Lubanga case; the first case to proceed before the ICC, and strikingly one focused on a child-specific international crime:

The opportunity to testify and the recognition of the relevance and importance of their suffering by the Court and the world, is in itself an important part of addressing the crimes committed. . . NPWJ calls for the immediate development of a *child specific ICC Code of Conduct* setting out the required treatment of child witnesses, from the moment of first contact with the Court, through the pre-trial, trial and post-trial process, and that appropriate mechanisms be put in place to provide protection and support in their longer-term

integration within society. (Rome, Brussels, 29 January, 2007, available at http://www.iccnw.org/documents/NPWJ_PR_ICC_DRC_ConfCharges_29jan07.pdf)

Judge Fulford has said the ICC is a “brave new court [...] We have no internal precedents. We are constructing our jurisprudence from scratch” (Lisa Clifford and Katy Glassborow, Institute for War and Peace Reporting, ICC Africa-Update, The Hague, AR No. 158, 29 Feb, 2008), Lubanga Trial Delay Concerns, ‘available online at http://www.iwpr.net/index.php?apc_state=hen&s=o&o=l=EN&p=acr&s=f&o=343028). It remains to be seen, however, just how brave the ICC and the other international criminal courts will ultimately be, and what legacy of justice they actually create for the child victims of grave international crimes.

Part VI

Documents

Appendix A.1

American Convention on Human Rights

(Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 22, 1969, Effective July 18, 1978)

[Author's note: available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm>, accessed February 24, 2009]

Preamble

The American states signatory to the present Convention,

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states;

Considering that these principles have been set forth in the Charter of the Organization of American States, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights, and that they have been reaffirmed and refined in other international instruments, worldwide as well as regional in scope;

Reiterating that, in accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights; and

Considering that the Third Special Inter-American Conference (Buenos Aires, 1967) approved the incorporation into the Charter of the Organization itself of broader standards with respect to economic, social, and educational rights and resolved that an inter-American convention on human rights should determine the structure, competence, and procedure of the organs responsible for these matters,

Have agreed upon the following:

Part I – State Obligations and Rights Protected

Chapter I – General Obligations

Article 1. Obligation to Respect Rights

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, “person” means every human being.

Article 2. Domestic Legal Effects

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Chapter II – Civil and Political Rights

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 6. Freedom from Slavery

1. No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women.
2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.
3. For the purposes of this article, the following do not constitute forced or compulsory labor:
 - a. work or service normally required of a person imprisoned in execution of a sentence or formal decision passed by the competent judicial authority. Such work or service shall be carried out under the supervision and control of public authorities, and any persons performing such work or service shall not be placed at the disposal of any private party, company, or juridical person;

- b. military service and, in countries in which conscientious objectors are recognized, national service that the law may provide for in lieu of military service;
- c. service exacted in time of danger or calamity that threatens the existence or the well-being of the community; or
- d. work or service that forms part of normal civic obligations.

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

- a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
 - b. prior notification in detail to the accused of the charges against him;
 - c. adequate time and means for the preparation of his defense;
 - d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
 - e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
 - f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
 - g. the right not to be compelled to be a witness against himself or to plead guilty; and
 - h. the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
 4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause.
 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

Article 9. Freedom from Ex Post Facto Laws

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Article 10. Right to Compensation

Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.

Article 11. Right to Privacy

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

3. Everyone has the right to the protection of the law against such interference or attacks.

Article 12. Freedom of Conscience and Religion

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one's religion or beliefs, and freedom to profess or disseminate one's religion or beliefs, either individually or together with others, in public or in private.
2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Article 13. Freedom of Thought and Expression

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
 - a. respect for the rights or reputations of others; or
 - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race,

color, religion, language, or national origin shall be considered as offenses punishable by law.

Article 14. Right of Reply

1. Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish.
2. The correction or reply shall not in any case remit other legal liabilities that may have been incurred.
3. For the effective protection of honor and reputation, every publisher, and every newspaper, motion picture, radio, and television company, shall have a person responsible who is not protected by immunities or special privileges.

Article 15. Right of Assembly

The right of peaceful assembly, without arms, is recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and necessary in a democratic society in the interest of national security, public safety or public order, or to protect public health or morals or the rights or freedom of others.

Article 16. Freedom of Association

1. Everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes.
2. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.
3. The provisions of this article do not bar the imposition of legal restrictions, including even deprivation of the exercise of the right of association, on members of the armed forces and the police.

Article 17. Rights of the Family

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws,

insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.

3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.

Article 18. Right to a Name

Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

Article 19. Rights of the Child

Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

Article 20. Right to Nationality

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

Article 22. Freedom of Movement and Residence

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
5. No one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it.
6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.
9. The collective expulsion of aliens is prohibited.

Article 23. Right to Participate in Government

1. Every citizen shall enjoy the following rights and opportunities:
 - a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
 - c. to have access, under general conditions of equality, to the public service of his country.
2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Article 24. Right to Equal Protection

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
 - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - b. to develop the possibilities of judicial remedy; and
 - c. to ensure that the competent authorities shall enforce such remedies when granted.

Chapter III – Economic, Social, and Cultural Rights**Article 26. Progressive Development**

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Chapter IV – Suspension of Guarantees, Interpretation, and Application**Article 27. Suspension of Guarantees**

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to

a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of such rights.

3. Any State Party availing itself of the right of suspension shall immediately inform the other States Parties, through the Secretary General of the Organization of American States, of the provisions the application of which it has suspended, the reasons that gave rise to the suspension, and the date set for the termination of such suspension.

Article 28. Federal Clause

1. Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction.
2. With respect to the provisions over whose subject matter the constituent units of the federal state have jurisdiction, the national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention.
3. Whenever two or more States Parties agree to form a federation or other type of association, they shall take care that the resulting federal or other compact contains the provisions necessary for continuing and rendering effective the standards of this Convention in the new state that is organized.

Article 29. Restrictions Regarding Interpretation

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Article 30. Scope of Restrictions

The restrictions that, pursuant to this Convention, may be placed on the enjoyment or exercise of the rights or freedoms recognized herein may not be applied except in

accordance with laws enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established.

Article 31. Recognition of Other Rights

Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention.

Chapter V – Personal Responsibilities

Article 32. Relationship between Duties and Rights

1. Every person has responsibilities to his family, his community, and mankind.
2. The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

Part II – Means of Protection

Chapter VI – Competent Organs

Article 33

The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:

- a. the Inter-American Commission on Human Rights, referred to as “The Commission;” and
- b. the Inter-American Court of Human Rights, referred to as “The Court.”

Chapter VII – Inter-American Commission on Human Rights

Section 1. Organization

Article 34

The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.

Article 35

The Commission shall represent all the member countries of the Organization of American States.

Article 36

1. The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states.
2. Each of those governments may propose up to three candidates, who may be nationals of the states proposing them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

Article 37

1. The members of the Commission shall be elected for a term of four years and may be reelected only once, but the terms of three of the members chosen in the first election shall expire at the end of two years. Immediately following that election the General Assembly shall determine the names of those three members by lot.
2. No two nationals of the same state may be members of the Commission.

Article 38

Vacancies that may occur on the Commission for reasons other than the normal expiration of a term shall be filled by the Permanent Council of the Organization in accordance with the provisions of the Statute of the Commission.

Article 39

The Commission shall prepare its Statute, which it shall submit to the General Assembly for approval. It shall establish its own Regulations.

Article 40

Secretariat services for the Commission shall be furnished by the appropriate specialized unit of the General Secretariat of the Organization. This unit shall be provided with the resources required to accomplish the tasks assigned to it by the Commission.

Section 2. Functions

Article 41

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

- a. to develop an awareness of human rights among the peoples of America;
- b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
- c. to prepare such studies or reports as it considers advisable in the performance of its duties;
- d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;
- e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
- f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and
- g. to submit an annual report to the General Assembly of the Organization of American States.

Article 42

The States Parties shall transmit to the Commission a copy of each of the reports and studies that they submit annually to the Executive Committees of the Inter-American Economic and Social Council and the Inter-American Council for Education, Science, and Culture, in their respective fields, so that the Commission may watch over the promotion of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

Article 43

The States Parties undertake to provide the Commission with such information as it may request of them as to the manner in which their domestic law ensures the effective application of any provisions of this Convention.

Section 3. Competence

Article 44

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.

Article 45

1. Any State Party may, when it deposits its instrument of ratification of or adherence to this Convention, or at any later time, declare that it recognizes the competence of the Commission to receive and examine communications in which a State Party alleges that another State Party has committed a violation of a human right set forth in this Convention.
2. Communications presented by virtue of this article may be admitted and examined only if they are presented by a State Party that has made a declaration recognizing the aforementioned competence of the Commission. The Commission shall not admit any communication against a State Party that has not made such a declaration.
3. A declaration concerning recognition of competence may be made to be valid for an indefinite time, for a specified period, or for a specific case.
4. Declarations shall be deposited with the General Secretariat of the Organization of American States, which shall transmit copies thereof to the member states of that Organization.

Article 46

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
 - a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;
 - b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;
 - c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and
 - d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.

2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:
 - a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;
 - b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
 - c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

Article 47

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

- a. any of the requirements indicated in Article 46 has not been met;
- b. the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention;
- c. the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or
- d. the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.

Section 4. Procedure

Article 48

1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:
 - a. If it considers the petition or communication admissible, it shall request information from the government of the state indicated as being responsible for the alleged violations and shall furnish that government a transcript of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.
 - b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.
 - c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.
 - d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall

- carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.
- e. The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.
 - f. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.
2. However, in serious and urgent cases, only the presentation of a petition or communication that fulfills all the formal requirements of admissibility shall be necessary in order for the Commission to conduct an investigation with the prior consent of the state in whose territory a violation has allegedly been committed.

Article 49

If a friendly settlement has been reached in accordance with paragraph 1.f of Article 48, the Commission shall draw up a report, which shall be transmitted to the petitioner and to the States Parties to this Convention, and shall then be communicated to the Secretary General of the Organization of American States for publication. This report shall contain a brief statement of the facts and of the solution reached. If any party in the case so requests, the fullest possible information shall be provided to it.

Article 50

1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.
2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.
3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.

Article 51

1. If, within a period of three months from the date of the transmittal of the report of the Commission to the states concerned, the matter has not either been settled or submitted by the Commission or by the state concerned to the Court and its jurisdiction accepted, the Commission may, by the vote of an absolute majority

of its members, set forth its opinion and conclusions concerning the question submitted for its consideration.

2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.
3. When the prescribed period has expired, the Commission shall decide by the vote of an absolute majority of its members whether the state has taken adequate measures and whether to publish its report.

Chapter VIII – Inter-American Court of Human Rights

Section 1. Organization

Article 52

1. The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.
2. No two judges may be nationals of the same state.

Article 53

1. The judges of the Court shall be elected by secret ballot by an absolute majority vote of the States Parties to the Convention, in the General Assembly of the Organization, from a panel of candidates proposed by those states.
2. Each of the States Parties may propose up to three candidates, nationals of the state that proposes them or of any other member state of the Organization of American States. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate.

Article 54

1. The judges of the Court shall be elected for a term of six years and may be reelected only once. The term of three of the judges chosen in the first election shall expire at the end of three years. Immediately after the election, the names of the three judges shall be determined by lot in the General Assembly.
2. A judge elected to replace a judge whose term has not expired shall complete the term of the latter.
3. The judges shall continue in office until the expiration of their term. However, they shall continue to serve with regard to cases that they have begun to hear and

that are still pending, for which purposes they shall not be replaced by the newly elected judges.

Article 55

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.
2. If one of the judges called upon to hear a case should be a national of one of the States Parties to the case, any other State Party in the case may appoint a person of its choice to serve on the Court as an ad hoc judge.
3. If among the judges called upon to hear a case none is a national of any of the States Parties to the case, each of the latter may appoint an ad hoc judge.
4. An ad hoc judge shall possess the qualifications indicated in Article 52.
5. If several States Parties to the Convention should have the same interest in a case, they shall be considered as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.

Article 56

Five judges shall constitute a quorum for the transaction of business by the Court.

Article 57

The Commission shall appear in all cases before the Court.

Article 58

1. The Court shall have its seat at the place determined by the States Parties to the Convention in the General Assembly of the Organization; however, it may convene in the territory of any member state of the Organization of American States when a majority of the Court considers it desirable, and with the prior consent of the state concerned. The seat of the Court may be changed by the States Parties to the Convention in the General Assembly by a two-thirds vote.
2. The Court shall appoint its own Secretary.
3. The Secretary shall have his office at the place where the Court has its seat and shall attend the meetings that the Court may hold away from its seat.

Article 59

The Court shall establish its Secretariat, which shall function under the direction of the Secretary of the Court, in accordance with the administrative standards of the

General Secretariat of the Organization in all respects not incompatible with the independence of the Court. The staff of the Court's Secretariat shall be appointed by the Secretary General of the Organization, in consultation with the Secretary of the Court.

Article 60

The Court shall draw up its Statute which it shall submit to the General Assembly for approval. It shall adopt its own Rules of Procedure.

Section 2. Jurisdiction and Functions

Article 61

1. Only the States Parties and the Commission shall have the right to submit a case to the Court.
2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.

Article 62

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

Article 63

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if

appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

Article 64

1. The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.
2. The Court, at the request of a member state of the Organization, may provide that state with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Article 65

To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

Section 3. Procedure

Article 66

1. Reasons shall be given for the judgment of the Court.
2. If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment.

Article 67

The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

Article 68

1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

Article 69

The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Parties to the Convention.

Chapter IX – Common Provisions**Article 70**

1. The judges of the Court and the members of the Commission shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents in accordance with international law. During the exercise of their official function they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties.
2. At no time shall the judges of the Court or the members of the Commission be held liable for any decisions or opinions issued in the exercise of their functions.

Article 71

The position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes.

Article 72

The judges of the Court and the members of the Commission shall receive emoluments and travel allowances in the form and under the conditions set forth in their statutes, with due regard for the importance and independence of their office. Such emoluments and travel allowances shall be determined in the budget of the Organization of American States, which shall also include the expenses of the Court and its Secretariat. To this end, the Court shall draw up its own budget and submit it for

approval to the General Assembly through the General Secretariat. The latter may not introduce any changes in it.

Article 73

The General Assembly may, only at the request of the Commission or the Court, as the case may be, determine sanctions to be applied against members of the Commission or judges of the Court when there are justifiable grounds for such action as set forth in the respective statutes. A vote of a two-thirds majority of the member states of the Organization shall be required for a decision in the case of members of the Commission and, in the case of judges of the Court, a two-thirds majority vote of the States Parties to the Convention shall also be required.

Part III – General and Transitory Provisions

Chapter X – Signature, Ratification, Reservations, Amendments, Protocols, and Denunciation

Article 74

1. This Convention shall be open for signature and ratification by or adherence of any member state of the Organization of American States.
2. Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the General Secretariat of the Organization of American States. As soon as eleven states have deposited their instruments of ratification or adherence, the Convention shall enter into force. With respect to any state that ratifies or adheres thereafter, the Convention shall enter into force on the date of the deposit of its instrument of ratification or adherence.
3. The Secretary General shall inform all member states of the Organization of the entry into force of the Convention.

Article 75

This Convention shall be subject to reservations only in conformity with the provisions of the Vienna Convention on the Law of Treaties signed on 23 May 1969.

Article 76

1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.
2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

Article 77

1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.
2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it.

Article 78

1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties.
2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

Chapter XI – Transitory Provisions**Section 1. Inter-American Commission on Human Rights****Article 79**

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each member state of the Organization to present, within ninety days, its candidates for membership on the Inter-American Commission on Human Rights.

The Secretary General shall prepare a list in alphabetical order of the candidates presented, and transmit it to the member states of the Organization at least thirty days prior to the next session of the General Assembly.

Article 80

The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 79. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the member states shall be declared elected. Should it become necessary to have several ballots in order to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly.

Section 2. Inter-American Court of Human Rights

Article 81

Upon the entry into force of this Convention, the Secretary General shall, in writing, request each State Party to present, within ninety days, its candidates for membership on the Inter-American Court of Human Rights. The Secretary General shall prepare a list in alphabetical order of the candidates presented and transmit it to the States Parties at least thirty days prior to the next session of the General Assembly.

Article 82

The judges of the Court shall be elected from the list of candidates referred to in Article 81, by secret ballot of the States Parties to the Convention in the General Assembly. The candidates who obtain the largest number of votes and an absolute majority of the votes of the representatives of the States Parties shall be declared elected. Should it become necessary to have several ballots in order to elect all the judges of the Court, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the States Parties.

Appendix A.2

American Declaration of the Rights and Duties of Man

(O.A.S. Res. XXX, Adopted by the Ninth International Conference of American States Bogotá, Colombia, 1948)

[Author's note: available at <http://www.unhcr.org/refworld/type,RESOLUTION,OAS,,3ae6b3710,0.html>, accessed February 24, 2009]

Whereas:

The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness;

The American States have on repeated occasions recognized that the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality;

The international protection of the rights of man should be the principal guide of an evolving American law;

The affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable,

The Ninth International Conference of American States

Agrees:

To adopt the following

American Declaration of the Rights and Duties of Man

Preamble

All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another.

The fulfillment of duty by each individual is a prerequisite to the rights of all. Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty.

Duties of a juridical nature presuppose others of a moral nature which support them in principle and constitute their basis.

Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources.

Since culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.

And, since moral conduct constitutes the noblest flowering of culture, it is the duty of every man always to hold it in high respect.

Chapter One. Rights

Article I. Right to Life, Liberty and Personal Security

Every human being has the right to life, liberty and the security of his person.

Article II. Right to Equality before Law

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

Article III. Right to Religious Freedom and Worship

Every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.

Article IV. Right to Freedom of Investigation, Opinion, Expression and Dissemination

Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.

Article V. Right to Protection of Honor, Personal Reputation, and Private and Family Life

Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.

Article VI. Right to a Family and to Protection Thereof

Every person has the right to establish a family, the basic element of society, and to receive protection therefor.

Article VII. Right to Protection for Mothers and Children

All women, during pregnancy and the nursing period, and all children have the right to special protection, care and aid.

Article VIII. Right to Residence and Movement

Every person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will.

Article IX. Right to Inviolability of the Home

Every person has the right to the inviolability of his home.

Article X. Right to the Inviolability and Transmission of Correspondence

Every person has the right to the inviolability and transmission of his correspondence.

Article XI. Right to the Preservation of Health and to Well-being

Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

Article XII. Right to Education

Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity.

Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society.

The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide.

Every person has the right to receive, free, at least a primary education.

Article XIII. Right to the Benefits of Culture

Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries.

He likewise has the right to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author.

Article XIV. Right to Work and to Fair Remuneration

Every person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit.

Every person who works has the right to receive such remuneration as will, in proportion to his capacity and skill, assure him a standard of living suitable for himself and for his family.

Article XV. Right to Leisure Time and to the Use Thereof

Every person has the right to leisure time, to wholesome recreation, and to the opportunity for advantageous use of his free time to his spiritual, cultural and physical benefit.

Article XVI. Right to Social Security

Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.

Article XVII. Right to Recognition of Juridical Personality and Civil Rights

Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.

Article XVIII. Right to a Fair Trial

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XIX. Right to Nationality

Every person has the right to the nationality to which he is entitled by law and to change it, if he so wishes, for the nationality of any other country that is willing to grant it to him.

Article XX. Right to Vote and to Participate in Government

Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Article XXI. Right of Assembly

Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any nature.

Article XXII. Right of Association

Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.

Article XXIII. Right to Property

Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

Article XXIV. Right of Petition

Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.

Article XXV. Right of Protection from Arbitrary Arrest

No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law.

No person may be deprived of liberty for nonfulfillment of obligations of a purely civil character.

Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

Article XXVI. Right to Due Process of Law

Every accused person is presumed to be innocent until proved guilty.

Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment.

Article XXVII. Right of Asylum

Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements.

Article XXVIII. Scope of the Rights of Man

The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

Chapter Two. Duties

Article XXIX. Duties to Society

It is the duty of the individual so to conduct himself in relation to others that each and every one may fully form and develop his personality.

Article XXX. Duties toward Children and Parents

It is the duty of every person to aid, support, educate and protect his minor children, and it is the duty of children to honor their parents always and to aid, support and protect them when they need it.

Article XXXI. Duty to Receive Instruction

It is the duty of every person to acquire at least an elementary education.

Article XXXII. Duty to Vote

It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.

Article XXXIII. Duty to Obey the Law

It is the duty of every person to obey the law and other legitimate commands of the authorities of his country and those of the country in which he may be.

Article XXXIV. Duty to Serve the Community and the Nation

It is the duty of every able-bodied person to render whatever civil and military service his country may require for its defense and preservation, and, in case of public disaster, to render such services as may be in his power.

It is likewise his duty to hold any public office to which he may be elected by popular vote in the state of which he is a national.

Article XXXV. Duties with Respect to Social Security and Welfare

It is the duty of every person to cooperate with the state and the community with respect to social security and welfare, in accordance with his ability and with existing circumstances.

Article XXXVI. Duty to Pay Taxes

It is the duty of every person to pay the taxes established by law for the support of public services.

Article XXXVII. Duty to Work

It is the duty of every person to work, as far as his capacity and possibilities permit, in order to obtain the means of livelihood or to benefit his community.

Article XXXVIII. Duty to Refrain from Political Activities in a Foreign Country

It is the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien.

Appendix A.3

Statute of the Inter-American Commission on Human Rights

(Approved by Resolution No. 447 Taken by the General Assembly of the OAS at Its Ninth Regular Session, Held in La Paz, Bolivia, October 1979)

[Author's note: available at <http://www.unhcr.org/refworld/publisher,OAS,3ae6b38e2b,0.html>, accessed February 24, 2009]

I. Nature and Purposes

Article 1

1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
2. For the purposes of the present Statute, human rights are understood to be:
 - a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
 - b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

II. Membership and Structure

Article 2

1. The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.
2. The Commission shall represent all the member states of the Organization.

Article 3

1. The members of the Commission shall be elected in a personal capacity by the General Assembly of the Organization from a list of candidates proposed by the governments of the member states.
2. Each government may propose up to three candidates, who may be nationals of the state proposing them or of any other member state of the Organization. When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the proposing state.

Article 4

1. At least six months prior to completion of the terms of office for which the members of the Commission were elected, 1[1] the Secretary General shall request, in writing, each member state of the Organization to present its candidates within 90 days.
2. The Secretary General shall prepare a list in alphabetical order of the candidates nominated, and shall transmit it to the member states of the Organization at least thirty days prior to the next General Assembly.

Article 5

The members of the Commission shall be elected by secret ballot of the General Assembly from the list of candidates referred to in Article 4(2). The candidates who obtain the largest number of votes and an absolute majority of the votes of the member states shall be declared elected. Should it become necessary to hold several ballots to elect all the members of the Commission, the candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the General Assembly.

Article 6

The members of the Commission shall be elected for a term of four years and may be reelected only once. Their terms of office shall begin on January 1 of the year following the year in which they are elected.

Article 7

No two nationals of the same state may be members of the Commission.

Article 8

1. Membership on the Inter-American Commission on Human Rights is incompatible with engaging in other functions that might affect the independence or impartiality of the member or the dignity or prestige of his post on the Commission.
2. The Commission shall consider any case that may arise regarding incompatibility in accordance with the provisions of the first paragraph of this Article, and in accordance with the procedures provided by its Regulations.

If the Commission decides, by an affirmative vote of a least five of its members, that a case of incompatibility exists, it will submit the case, with its background, to the General Assembly for decision.

3. A declaration of incompatibility by the General Assembly shall be adopted by a majority of two thirds of the member states of the Organization and shall occasion the immediate removal of the member of the Commission from his post, but it shall not invalidate any action in which he may have participated.

Article 9

The duties of the members of the Commission are:

1. Except when justifiably prevented, to attend the regular and special meetings the Commission holds at its permanent headquarters or in any other place to which it may have decided to move temporarily.
2. To serve, except when justifiably prevented, on the special committees which the Commission may form to conduct on-site observations, or to perform any other duties within their ambit.
3. To maintain absolute secrecy about all matters which the Commission deems confidential.
4. To conduct themselves in their public and private life as befits the high moral authority of the office and the importance of the mission entrusted to the Commission.

Article 10

1. If a member commits a serious violation of any of the duties referred to in Article 9, the Commission, on the affirmative vote of five of its members, shall submit the case to the General Assembly of the Organization, which shall decide whether he should be removed from office.
2. The Commission shall hear the member in question before taking its decision.

Article 11

1. When a vacancy occurs for reasons other than the normal completion of a member's term of office, the Chairman of the Commission shall immediately notify the Secretary General of the Organization, who shall in turn inform the member states of the Organization.
2. In order to fill vacancies, each government may propose a candidate within a period of 30 days from the date of receipt of the Secretary General's communication that a vacancy has occurred.
3. The Secretary General shall prepare an alphabetical list of the candidates and shall transmit it to the Permanent Council of the Organization, which shall fill the vacancy.
4. When the term of office is due to expire within six months following the date on which a vacancy occurs, the vacancy shall not be filled.

Article 12

1. In those member states of the Organization that are Parties to the American Convention on Human Rights, the members of the Commission shall enjoy, from the time of their election and throughout their term of office, such immunities as are granted to diplomatic agents under international law. While in office, they shall also enjoy the diplomatic privileges required for the performance of their duties.
2. In those member states of the Organization that are not Parties to the American Convention on Human Rights, the members of the Commission shall enjoy the privileges and immunities pertaining to their posts that are required for them to perform their duties with independence.
3. The system of privileges and immunities of the members of the Commission may be regulated or supplemented by multilateral or bilateral agreements between the Organization and the member states.

Article 13

The members of the Commission shall receive travel allowances and per diem and fees, as appropriate, for their participation in the meetings of the Commission or in other functions which the Commission, in accordance with its Regulations, entrusts to them, individually or collectively. Such travel and per diem allowances and fees shall be included in the budget of the Organization, and their amounts and conditions shall be determined by the General Assembly.

Article 14

1. The Commission shall have a Chairman, a First Vice-Chairman and a Second Vice-Chairman, who shall be elected by an absolute majority of its members for a period of one year; they may be re-elected only once in each four-year period.
2. The Chairman and the two Vice-Chairmen shall be the officers of the Commission, and their functions shall be set forth in the Regulations.

Article 15

The Chairman of the Commission may go to the Commission's headquarters and remain there for such time as may be necessary for the performance of his duties.

III. Headquarters and Meetings***Article 16***

1. The headquarters of the Commission shall be in Washington, D.C.
2. The Commission may move to and meet in the territory of any American State when it so decides by an absolute majority of votes, and with the consent, or at the invitation of the government concerned.
3. The Commission shall meet in regular and special sessions, in conformity with the provisions of the Regulations.

Article 17

1. An absolute majority of the members of the Commission shall constitute a quorum.
2. In regard to those States that are Parties to the Convention, decisions shall be taken by an absolute majority vote of the members of the Commission in those cases established by the American Convention on Human Rights and the present Statute. In other cases, an absolute majority of the members present shall be required.
3. In regard to those States that are not Parties to the Convention, decisions shall be taken by an absolute majority vote of the members of the Commission, except in matters of procedure, in which case, the decisions shall be taken by simple majority.

IV. Functions and Powers

Article 18

The Commission shall have the following powers with respect to the member states of the Organization of American States:

- a. to develop an awareness of human rights among the peoples of the Americas;
- b. to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights;
- c. to prepare such studies or reports as it considers advisable for the performance of its duties;
- d. to request that the governments of the states provide it with reports on measures they adopt in matters of human rights;
- e. to respond to inquiries made by any member state through the General Secretariat of the Organization on matters related to human rights in the state and, within its possibilities, to provide those states with the advisory services they request;
- f. to submit an annual report to the General Assembly of the Organization, in which due account shall be taken of the legal regime applicable to those States Parties to the American Convention on Human Rights and of that system applicable to those that are not Parties;
- g. to conduct on-site observations in a state, with the consent or at the invitation of the government in question; and
- h. to submit the program-budget of the Commission to the Secretary General, so that he may present it to the General Assembly.

Article 19

With respect to the States Parties to the American Convention on Human Rights, the Commission shall discharge its duties in conformity with the powers granted under the Convention and in the present Statute, and shall have the following powers in addition to those designated in Article 18:

- a. to act on petitions and other communications, pursuant to the provisions of Articles 44 to 51 of the Convention;
- b. to appear before the Inter-American Court of Human Rights in cases provided for in the Convention;
- c. to request the Inter-American Court of Human Rights to take such provisional measures as it considers appropriate in serious and urgent cases which have not

- yet been submitted to it for consideration, whenever this becomes necessary to prevent irreparable injury to persons;
- d. to consult the Court on the interpretation of the American Convention on Human Rights or of other treaties concerning the protection of human rights in the American states;
 - e. to submit additional draft protocols to the American Convention on Human Rights to the General Assembly, in order to progressively include other rights and freedoms under the system of protection of the Convention; and
 - f. to submit to the General Assembly, through the Secretary General, proposed amendments to the American Convention on Human Rights, for such action as the General Assembly deems appropriate.

Article 20

In relation to those member states of the Organization that are not parties to the American Convention on Human Rights, the Commission shall have the following powers, in addition to those designated in Article 18:

- a. to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man;
- b. to examine communications submitted to it and any other available information, to address the government of any member state not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and
- c. to verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each member state not a Party to the Convention have been duly applied and exhausted.

V. Secretariat

Article 21

- 1. The Secretariat services of the Commission shall be provided by a specialized administrative unit under the direction of an Executive Secretary. This unit shall be provided with the resources and staff required to accomplish the tasks the Commission may assign to it.
- 2. The Executive Secretary, who shall be a person of high moral character and recognized competence in the field of human rights, shall be responsible for the

work of the Secretariat and shall assist the Commission in the performance of its duties in accordance with the Regulations.

3. The Executive Secretary shall be appointed by the Secretary General of the Organization, in consultation with the Commission. Furthermore, for the Secretary General to be able to remove the Executive Secretary, he shall consult with the Commission and inform its members of the reasons for his decision.

VI. Statute and Regulations

Article 22

1. The present Statute may be amended by the General Assembly.
2. The Commission shall prepare and adopt its own Regulations, in accordance with the present Statute.

Article 23

1. In accordance with the provisions of Articles 44 to 51 of the American Convention on Human Rights, the Regulations of the Commission shall determine the procedure to be followed in cases of petitions or communications alleging violation of any of the rights guaranteed by the Convention, and imputing such violation to any State Party to the Convention.
2. If the friendly settlement referred to in Articles 44–51 of the Convention is not reached, the Commission shall draft, within 180 days, the report required by Article 50 of the Convention.

Article 24

1. The Regulations shall establish the procedure to be followed in cases of communications containing accusations or complaints of violations of human rights imputable to States that are not Parties to the American Convention on Human Rights.
2. The Regulations shall contain, for this purpose, the pertinent rules established in the Statute of the Commission approved by the Council of the Organization in resolutions adopted on 25 May and 8 June, 1960, with the modifications and amendments introduced by Resolution XXII of the Second Special Inter-American Conference, and by the Council of the Organization at its meeting held on 24 April, 1968, taking into account resolutions CP/RES. 253 (343/78), “Transition from

the present Inter-American Commission on Human Rights to the Commission provided for in the American Convention on Human Rights,” adopted by the Permanent Council of the Organization on 20 September, 1979.

VII. Transitory Provisions

Article 25

Until the Commission adopts its new Regulations, the current Regulations (OEA/Ser.L/VII. 17, doc. 26) shall apply to all the member states of the Organization.

Article 26

1. The present Statute shall enter into effect 30 days after its approval by the General Assembly.
2. The Secretary General shall order immediate publication of the Statute, and shall give it the widest possible distribution.

Appendix A.4

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, “Protocol of San Salvador”

(O.A.S. Treaty Series No. 69 [1988], Entered into Force November 16, 1999)

[Author’s note: available at <http://www.oas.org/juridico/english/treaties/a-52.html>, accessed February 24, 2009]

Preamble

The States Parties to the American Convention on Human Rights “Pact San José, Costa Rica,”

Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man;

Recognizing that the essential rights of man are not derived from one’s being a national of a certain State, but are based upon attributes of the human person, for which reason they merit international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American States;

Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified;

Recognizing the benefits that stem from the promotion and development of cooperation among States and international relations;

Recalling that, in accordance with the Universal Declaration of Human Rights and the American Convention on Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights;

Bearing in mind that, although fundamental economic, social and cultural rights have been recognized in earlier international instruments of both world and regional

scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the democratic representative form of government as well as the right of its peoples to development, self-determination, and the free disposal of their wealth and natural resources; and

Considering that the American Convention on Human Rights provides that draft additional protocols to that Convention may be submitted for consideration to the States Parties, meeting together on the occasion of the General Assembly of the Organization of American States, for the purpose of gradually incorporating other rights and freedoms into the protective system thereof,

Have agreed upon the following Additional Protocol to the American Convention on Human Rights "Protocol of San Salvador:"

Article 1 Obligation to Adopt Measures

The States Parties to this Additional Protocol to the American Convention on Human Rights undertake to adopt the necessary measures, both domestically and through international cooperation, especially economic and technical, to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.

Article 2 Obligation to Enact Domestic Legislation

If the exercise of the rights set forth in this Protocol is not already guaranteed by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Protocol, such legislative or other measures as may be necessary for making those rights a reality.

Article 3 Obligation of Non-Discrimination

The State Parties to this Protocol undertake to guarantee the exercise of the rights set forth herein without discrimination of any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.

Article 4 Inadmissibility of Restrictions

A right which is recognized or in effect in a State by virtue of its internal legislation or international conventions may not be restricted or curtailed on the pretext that this Protocol does not recognize the right or recognizes it to a lesser degree.

Article 5 Scope of Restrictions and Limitations

The State Parties may establish restrictions and limitations on the enjoyment and exercise of the rights established herein by means of laws promulgated for the purpose of preserving the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights.

Article 6 Right to Work

1. Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity.
2. The State Parties undertake to adopt measures that will make the right to work fully effective, especially with regard to the achievement of full employment, vocational guidance, and the development of technical and vocational training projects, in particular those directed to the disabled. The States Parties also undertake to implement and strengthen programs that help to ensure suitable family care, so that women may enjoy a real opportunity to exercise the right to work.

Article 7 Just, Equitable, and Satisfactory Conditions of Work

The States Parties to this Protocol recognize that the right to work to which the foregoing article refers presupposes that everyone shall enjoy that right under just, equitable, and satisfactory conditions, which the States Parties undertake to guarantee in their internal legislation, particularly with respect to:

- a. Remuneration which guarantees, as a minimum, to all workers dignified and decent living conditions for them and their families and fair and equal wages for equal work, without distinction;
- b. The right of every worker to follow his vocation and to devote himself to the activity that best fulfills his expectations and to change employment in accordance with the pertinent national regulations;
- c. The right of every worker to promotion or upward mobility in his employment, for which purpose account shall be taken of his qualifications, competence, integrity and seniority; d. Stability of employment, subject to the nature of each industry and occupation and the causes for just separation. In cases of unjustified dismissal, the worker shall have the right to indemnity or to reinstatement on the job or any other benefits provided by domestic legislation;
- d. Safety and hygiene at work;

- e. The prohibition of night work or unhealthy or dangerous working conditions and, in general, of all work which jeopardizes health, safety, or morals, for persons under 18 years of age. As regards minors under the age of 16, the work day shall be subordinated to the provisions regarding compulsory education and in no case shall work constitute an impediment to school attendance or a limitation on benefiting from education received;
- f. A reasonable limitation of working hours, both daily and weekly. The days shall be shorter in the case of dangerous or unhealthy work or of night work;
- g. Rest, leisure and paid vacations as well as remuneration for national holidays.

Article 8 Trade Union Rights

1. The States Parties shall ensure:
 - a. The right of workers to organize trade unions and to join the union of their choice for the purpose of protecting and promoting their interests. As an extension of that right, the States Parties shall permit trade unions to establish national federations or confederations, or to affiliate with those that already exist, as well as to form international trade union organizations and to affiliate with that of their choice. The States Parties shall also permit trade unions, federations and confederations to function freely;
 - b. The right to strike.
2. The exercise of the rights set forth above may be subject only to restrictions established by law, provided that such restrictions are characteristic of a democratic society and necessary for safeguarding public order or for protecting public health or morals or the rights and freedoms of others. Members of the armed forces and the police and of other essential public services shall be subject to limitations and restrictions established by law.
3. No one may be compelled to belong to a trade union.

Article 9 Right to Social Security

1. Everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents.
2. In the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.

Article 10 Right to Health

1. Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.
2. In order to ensure the exercise of the right to health, the States Parties agree to recognize health as a public good and, particularly, to adopt the following measures to ensure that right:
 - a. Primary health care, that is, essential health care made available to all individuals and families in the community;
 - b. Extension of the benefits of health services to all individuals subject to the State's jurisdiction;
 - c. Universal immunization against the principal infectious diseases;
 - d. Prevention and treatment of endemic, occupational and other diseases;
 - e. Education of the population on the prevention and treatment of health problems, and
 - f. Satisfaction of the health needs of the highest risk groups and of those whose poverty makes them the most vulnerable.

Article 11 Right to a Healthy Environment

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.

Article 12 Right to Food

1. Everyone has the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development.
2. In order to promote the exercise of this right and eradicate malnutrition, the States Parties undertake to improve methods of production, supply and distribution of food, and to this end, agree to promote greater international cooperation in support of the relevant national policies.

Article 13 Right to Education

1. Everyone has the right to education.
2. The States Parties to this Protocol agree that education should be directed towards the full development of the human personality and human dignity and

should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. They further agree that education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace.

3. The States Parties to this Protocol recognize that in order to achieve the full exercise of the right to education:
 - a. Primary education should be compulsory and accessible to all without cost;
 - b. Secondary education in its different forms, including technical and vocational secondary education, should be made generally available and accessible to all by every appropriate means, and in particular, by the progressive introduction of free education;
 - c. Higher education should be made equally accessible to all, on the basis of individual capacity, by every appropriate means, and in particular, by the progressive introduction of free education;
 - d. Basic education should be encouraged or intensified as far as possible for those persons who have not received or completed the whole cycle of primary instruction;
 - e. Programs of special education should be established for the handicapped, so as to provide special instruction and training to persons with physical disabilities or mental deficiencies.
4. In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above.
5. Nothing in this Protocol shall be interpreted as a restriction of the freedom of individuals and entities to establish and direct educational institutions in accordance with the domestic legislation of the States Parties.

Article 14 Right to the Benefits of Culture

1. The States Parties to this Protocol recognize the right of everyone:
 - a. To take part in the cultural and artistic life of the community;
 - b. To enjoy the benefits of scientific and technological progress;
 - c. To benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to this Protocol to ensure the full exercise of this right shall include those necessary for the conservation, development and dissemination of science, culture and art.
3. The States Parties to this Protocol undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to this Protocol recognize the benefits to be derived from the encouragement and development of international cooperation and relations in the fields of science, arts and culture, and accordingly agree to foster greater international cooperation in these fields.

Article 15 Right to the Formation and the Protection of Families

1. The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions.
2. Everyone has the right to form a family, which shall be exercised in accordance with the provisions of the pertinent domestic legislation.
3. The States Parties hereby undertake to accord adequate protection to the family unit and in particular:
 - a. To provide special care and assistance to mothers during a reasonable period before and after childbirth;
 - b. To guarantee adequate nutrition for children at the nursing stage and during school attendance years;
 - c. To adopt special measures for the protection of adolescents in order to ensure the full development of their physical, intellectual and moral capacities;
 - d. To undertake special programs of family training so as to help create a stable and positive environment in which children will receive and develop the values of understanding, solidarity, respect and responsibility.

Article 16 Rights of Children

Every child, whatever his parentage, has the right to the protection that his status as a minor requires from his family, society and the State. Every child has the right to grow under the protection and responsibility of his parents; save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother. Every child has the right to free and compulsory education, at least in the elementary phase, and to continue his training at higher levels of the educational system.

Article 17 Protection of the Elderly

Everyone has the right to special protection in old age. With this in view the States Parties agree to take progressively the necessary steps to make this right a reality and, particularly, to:

- a. Provide suitable facilities, as well as food and specialized medical care, for elderly individuals who lack them and are unable to provide them for themselves;
- b. Undertake work programs specifically designed to give the elderly the opportunity to engage in a productive activity suited to their abilities and consistent with their vocations or desires;
- c. Foster the establishment of social organizations aimed at improving the quality of life for the elderly.

Article 18 Protection of the Handicapped

Everyone affected by a diminution of his physical or mental capacities is entitled to receive special attention designed to help him achieve the greatest possible development of his personality. The States Parties agree to adopt such measures as may be necessary for this purpose and, especially, to:

- a. Undertake programs specifically aimed at providing the handicapped with the resources and environment needed for attaining this goal, including work programs consistent with their possibilities and freely accepted by them or their legal representatives, as the case may be;
- b. Provide special training to the families of the handicapped in order to help them solve the problems of coexistence and convert them into active agents in the physical, mental and emotional development of the latter;
- c. Include the consideration of solutions to specific requirements arising from needs of this group as a priority component of their urban development plans;
- d. Encourage the establishment of social groups in which the handicapped can be helped to enjoy a fuller life.

Article 19 Means of Protection

1. Pursuant to the provisions of this article and the corresponding rules to be formulated for this purpose by the General Assembly of the Organization of American States, the States Parties to this Protocol undertake to submit periodic reports on the progressive measures they have taken to ensure due respect for the rights set forth in this Protocol. 2. All reports shall be submitted to the Secretary General of the OAS, who shall transmit them to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture so that they may examine them in accordance with the provisions of this article. The Secretary General shall send a copy of such reports to the Inter-American Commission on Human Rights.
2. The Secretary General of the Organization of American States shall also transmit to the specialized organizations of the inter-American system of which the

States Parties to the present Protocol are members, copies or pertinent portions of the reports submitted, insofar as they relate to matters within the purview of those organizations, as established by their constituent instruments.

3. The specialized organizations of the inter-American system may submit reports to the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture relative to compliance with the provisions of the present Protocol in their fields of activity.
4. The annual reports submitted to the General Assembly by the Inter-American Economic and Social Council and the Inter-American Council for Education, Science and Culture shall contain a summary of the information received from the States Parties to the present Protocol and the specialized organizations concerning the progressive measures adopted in order to ensure respect for the rights acknowledged in the Protocol itself and the general recommendations they consider to be appropriate in this respect.
5. Any instance in which the rights established in paragraph a) of Article 8 and in Article 13 are violated by action directly attributable to a State Party to this Protocol may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights.
6. Without prejudice to the provisions of the preceding paragraph, the Inter-American Commission on Human Rights may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States Parties, which it may include in its Annual Report to the General Assembly or in a special report, whichever it considers more appropriate.
7. The Councils and the Inter-American Commission on Human Rights, in discharging the functions conferred upon them in this article, shall take into account the progressive nature of the observance of the rights subject to protection by this Protocol. Article 20 Reservations

Article 20 Reservations

The States Parties may, at the time of approval, signature, ratification or accession, make reservations to one or more specific provisions of this Protocol, provided that such reservations are not incompatible with the object and purpose of the Protocol.

Article 21 Signature, Ratification or Accession. Entry into Effect

1. This Protocol shall remain open to signature and ratification or accession by any State Party to the American Convention on Human Rights.

2. Ratification of or accession to this Protocol shall be effected by depositing an instrument of ratification or accession with the General Secretariat of the Organization of American States.
3. The Protocol shall enter into effect when eleven States have deposited their respective instruments of ratification or accession.
4. The Secretary General shall notify all the member states of the Organization of American States of the entry of the Protocol into effect.

Article 22 Inclusion of other Rights and Expansion of those Recognized

1. Any State Party and the Inter-American Commission on Human Rights may submit for the consideration of the States Parties meeting on the occasion of the General Assembly proposed amendments to include the recognition of other rights or freedoms or to extend or expand rights or freedoms recognized in this Protocol.
2. Such amendments shall enter into effect for the States that ratify them on the date of deposit of the instrument of ratification corresponding to the number representing two thirds of the States Parties to this Protocol. For all other States Parties they shall enter into effect on the date on which they deposit their respective instrument of ratification.

Appendix A.5

Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty

(Entered into Force August 28, 1991)

[Author's note: available at <http://www.oas.org/juridico/English/treaties/a-53.html>, accessed February 24, 2009]

Preamble

The States Parties to this Protocol,

Considering:

That Article 4 of the American Convention on Human Rights recognizes the right to life and restricts the application of the death penalty;

That everyone has the inalienable right to respect for his life, a right that cannot be suspended for any reason;

That the tendency among the American States is to be in favor of abolition of the death penalty;

That application of the death penalty has irrevocable consequences, forecloses the correction of judicial error, and precludes any possibility of changing or rehabilitating those convicted;

That the abolition of the death penalty helps to ensure more effective protection of the right to life;

That an international agreement must be arrived at that will entail a progressive development of the American Convention on Human Rights, and

That States Parties to the American Convention on Human Rights have expressed their intention to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas,

Have agreed to sign the following Protocol to the American Convention on Human Rights to abolish the death penalty

Article 1

The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

Article 2

1. No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.
2. The State Party making this reservation shall, upon ratification or accession, inform the Secretary General of the Organization of American States of the pertinent provisions of its national legislation applicable in wartime, as referred to in the preceding paragraph.
3. Said State Party shall notify the Secretary General of the Organization of American States of the beginning or end of any state of war in effect in its territory.

Article 3

1. This Protocol shall be open for signature and ratification or accession by any State Party to the American Convention on Human Rights.
2. Ratification of this Protocol or accession thereto shall be made through the deposit of an instrument of ratification or accession with the General Secretariat of the Organization of American States.

Article 4

This Protocol shall enter into force among the States that ratify or accede to it when they deposit their respective instruments of ratification or accession with the General Secretariat of the Organization of American States.

Appendix A.6

Inter-American Convention to Prevent and Punish Torture

(Entered into Force February 28, 1987)

[Author's note: available at <http://www.oas.org/juridico/English/Treaties/a-51.html>, accessed February 24, 2009]

The American States signatory to the present Convention,

Aware of the provision of the American Convention on Human Rights that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment;

Reaffirming that all acts of torture or any other cruel, inhuman, or degrading treatment or punishment constitute an offense against human dignity and a denial of the principles set forth in the Charter of the Organization of American States and in the Charter of the United Nations and are violations of the fundamental human rights and freedoms proclaimed in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights;

Noting that, in order for the pertinent rules contained in the aforementioned global and regional instruments to take effect, it is necessary to draft an Inter-American Convention that prevents and punishes torture;

Reaffirming their purpose of consolidating in this hemisphere the conditions that make for recognition of and respect for the inherent dignity of man, and ensure the full exercise of his fundamental rights and freedoms,

Have agreed upon the following:

Article 1

The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention.

Article 2

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

Article 3

The following shall be held guilty of the crime of torture:

- a. A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
- b. A person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

Article 4

The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability.

Article 5

The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

Neither the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture.

Article 6

In accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction.

The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature.

The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction.

Article 7

The States Parties shall take measures so that, in the training of police officers and other public officials responsible for the custody of persons temporarily or definitively deprived of their freedom, special emphasis shall be put on the prohibition of the use of torture in interrogation, detention, or arrest.

The States Parties likewise shall take similar measures to prevent other cruel, inhuman, or degrading treatment or punishment.

Article 8

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

After all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State.

Article 9

The States Parties undertake to incorporate into their national laws regulations guaranteeing suitable compensation for victims of torture.

None of the provisions of this article shall affect the right to receive compensation that the victim or other persons may have by virtue of existing national legislation.

Article 10

No statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statement by such means.

Article 11

The States Parties shall take the necessary steps to extradite anyone accused of having committed the crime of torture or sentenced for commission of that crime, in accordance with their respective national laws on extradition and their international commitments on this matter.

Article 12

Every State Party shall take the necessary measures to establish its jurisdiction over the crime described in this Convention in the following cases:

- a. When torture has been committed within its jurisdiction;
- b. When the alleged criminal is a national of that State; or
- c. When the victim is a national of that State and it so deems appropriate.

Every State Party shall also take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within the area under its jurisdiction and it is not appropriate to extradite him in accordance with Article 11.

This Convention does not exclude criminal jurisdiction exercised in accordance with domestic law.

Article 13

The crime referred to in Article 2 shall be deemed to be included among the extraditable crimes in every extradition treaty entered into between States Parties. The States Parties undertake to include the crime of torture as an extraditable offence in every extradition treaty to be concluded between them.

Every State Party that makes extradition conditional on the existence of a treaty may, if it receives a request for extradition from another State Party with which it has no extradition treaty, consider this Convention as the legal basis for extradition in respect of the crime of torture. Extradition shall be subject to the other conditions that may be required by the law of the requested State.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such crimes as extraditable offences between themselves, subject to the conditions required by the law of the requested State.

Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

Article 14

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the crime had been committed within its jurisdiction, for the purposes of investigation, and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State that has requested the extradition.

Article 15

No provision of this Convention may be interpreted as limiting the right of asylum, when appropriate, nor as altering the obligations of the States Parties in the matter of extradition.

Article 16

This Convention shall not limit the provisions of the American Convention on Human Rights, other conventions on the subject, or the Statutes of the Inter-American Commission on Human Rights, with respect to the crime of torture.

Article 17

The States Parties undertake to inform the Inter-American Commission on Human Rights of any legislative, judicial, administrative, or other measures they adopt in application of this Convention.

In keeping with its duties and responsibilities, the Inter-American Commission on Human Rights will endeavor in its annual report to analyze the existing situation in the member states of the Organization of American States in regard to the prevention and elimination of torture.

Article 18

This Convention is open to signature by the member states of the Organization of American States.

Article 19

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 20

This Convention is open to accession by any other American state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 21

The States Parties may, at the time of approval, signature, ratification, or accession, make reservations to this Convention, provided that such reservations are not incompatible with the object and purpose of the Convention and concern one or more specific provisions.

Article 22

This Convention shall enter into force on the thirtieth day following the date on which the second instrument of ratification is deposited. For each State ratifying or acceding to the Convention after the second instrument of ratification has been deposited, the Convention shall enter into force on the thirtieth day following the date on which that State deposits its instrument of ratification or accession.

Article 23

This Convention shall remain in force indefinitely, but may be denounced by any State Party. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, this Convention shall cease to be in effect for the denouncing State but shall remain in force for the remaining States Parties.

Article 24

The original instrument of this Convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified copy to the Secretariat of the United Nations for registration and publication, in accordance with the provisions of Article 102 of the United Nations Charter. The General Secretariat of the Organization of American States shall notify the member states of the Organization and the States that have acceded to the Convention of signatures and of deposits of instruments of ratification, accession, and denunciation, as well as reservations, if any.

Appendix A.7

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem do Para”

(Entered into Force March 5, 1995)

[Author’s note: available at <http://www.oas.org/cim/english/convention%20violence%20against%20women.htm>, accessed February 24, 2009]

Preamble

The States Parties to this Convention,

Recognizing that full respect for human rights has been enshrined in the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights, and reaffirmed in other international and regional instruments;

Affirming that violence against women constitutes a violation of their human rights and fundamental freedoms, and impairs or nullifies the observance, enjoyment and exercise of such rights and freedoms;

Concerned that violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men;

Recalling the Declaration on the Elimination of Violence against Women, adopted by the Twenty-fifth Assembly of Delegates of the Inter-American Commission of Women, and affirming that violence against women pervades every sector of society regardless of class, race or ethnic group, income, culture, level of education, age or religion and strikes at its very foundations;

Convinced that the elimination of violence against women is essential for their individual and social development and their full and equal participation in all walks of life; and

Convinced that the adoption of a convention on the prevention, punishment and eradication of all forms of violence against women within the framework of the Organization of American States is a positive contribution to protecting the rights of women and eliminating violence against them,

Have agreed to the following:

Chapter I: Definition and Scope of Application

Article 1

For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

Article 2

Violence against women shall be understood to include physical, sexual and psychological violence:

- a. that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse;
- b. that occurs in the community and is perpetrated by any person, including, among others, rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment in the workplace, as well as in educational institutions, health facilities or any other place; and
- c. that is perpetrated or condoned by the state or its agents regardless of where it occurs.

Chapter II: Rights Protected

Article 3

Every woman has the right to be free from violence in both the public and private spheres.

Article 4

Every woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others:

- a. The right to have her life respected;
- b. The right to have her physical, mental and moral integrity respected;

- c. The right to personal liberty and security;
- d. The right not to be subjected to torture;
- e. The rights to have the inherent dignity of her person respected and her family protected;
- f. The right to equal protection before the law and of the law;
- g. The right to simple and prompt recourse to a competent court for protection against acts that violate her rights;
- h. The right to associate freely;
- i. The right of freedom to profess her religion and beliefs within the law; and
- j. The right to have equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making.

Article 5

Every woman is entitled to the free and full exercise of her civil, political, economic, social and cultural rights, and may rely on the full protection of those rights as embodied in regional and international instruments on human rights. The States Parties recognize that violence against women prevents and nullifies the exercise of these rights.

Article 6

The right of every woman to be free from violence includes, among others:

- a. The right of women to be free from all forms of discrimination; and
- b. The right of women to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.

Chapter III: Duties of the States

Article 7

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

- a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
- b. apply due diligence to prevent, investigate and impose penalties for violence against women;

- c. include in their domestic legislation penal, civil, administrative and any other type of provisions that may be needed to prevent, punish and eradicate violence against women and to adopt appropriate administrative measures where necessary;
- d. adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman or using any method that harms or endangers her life or integrity, or damages her property;
- e. take all appropriate measures, including legislative measures, to amend or repeal existing laws and regulations or to modify legal or customary practices which sustain the persistence and tolerance of violence against women;
- f. establish fair and effective legal procedures for women who have been subjected to violence which include, among others, protective measures, a timely hearing and effective access to such procedures;
- g. establish the necessary legal and administrative mechanisms to ensure that women subjected to violence have effective access to restitution, reparations or other just and effective remedies; and
- h. adopt such legislative or other measures as may be necessary to give effect to this Convention.

Article 8

The States Parties agree to undertake progressively specific measures, including programs:

- a. to promote awareness and observance of the right of women to be free from violence, and the right of women to have their human rights respected and protected;
- b. to modify social and cultural patterns of conduct of men and women, including the development of formal and informal educational programs appropriate to every level of the educational process, to counteract prejudices, customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and women which legitimize or exacerbate violence against women;
- c. to promote the education and training of all those involved in the administration of justice, police and other law enforcement officers as well as other personnel responsible for implementing policies for the prevention, punishment and eradication of violence against women;
- d. to provide appropriate specialized services for women who have been subjected to violence, through public and private sector agencies, including shelters, counselling services for all family members where appropriate, and care and custody of the affected children;
- e. to promote and support governmental and private sector education designed to raise the awareness of the public with respect to the problems of and remedies for violence against women;

- f. to provide women who are subjected to violence access to effective readjustment and training programs to enable them to fully participate in public, private and social life;
- g. to encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women;
- h. to ensure research and the gathering of statistics and other relevant information relating to the causes, consequences and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eradicate violence against women and to formulate and implement the necessary changes; and
- i. to foster international cooperation for the exchange of ideas and experiences and the execution of programs aimed at protecting women who are subjected to violence.

Article 9

With respect to the adoption of the measures in this Chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.

Chapter IV: Inter-American Mechanisms of Protection

Article 10

In order to protect the rights of every woman to be free from violence, the States Parties shall include in their national reports to the Inter-American Commission of Women information on measures adopted to prevent and prohibit violence against women, and to assist women affected by violence, as well as on any difficulties they observe in applying those measures, and the factors that contribute to violence against women.

Article 11

The States Parties to this Convention and the Inter-American Commission of Women may request of the Inter-American Court of Human Rights advisory opinions on the interpretation of this Convention.

Article 12

Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention by a State Party, and the Commission shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.

Chapter V: General Provisions

Article 13

No part of this Convention shall be understood to restrict or limit the domestic law of any State Party that affords equal or greater protection and guarantees of the rights of women and appropriate safeguards to prevent and eradicate violence against women.

Article 14

No part of this Convention shall be understood to restrict or limit the American Convention on Human Rights or any other international convention on the subject that provides for equal or greater protection in this area.

Article 15

This Convention is open to signature by all the member states of the Organization of American States.

Article 16

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 17

This Convention is open to accession by any other state. Instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 18

Any State may, at the time of approval, signature, ratification, or accession, make reservations to this Convention provided that such reservations are:

- a. not incompatible with the object and purpose of the Convention, and
- b. not of a general nature and relate to one or more specific provisions.

Article 19

Any State Party may submit to the General Assembly, through the Inter-American Commission of Women, proposals for the amendment of this Convention. Amendments shall enter into force for the states ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

Article 20

If a State Party has two or more territorial units in which the matters dealt with in this Convention are governed by different systems of law, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or to only one or more of them. Such a declaration may be amended at any time by subsequent declarations, which shall expressly specify the territorial unit or units to which this Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall enter into force thirty days after the date of their receipt.

Article 21

This Convention shall enter into force on the thirtieth day after the date of deposit of the second instrument of ratification. For each State that ratifies or accedes to the Convention after the second instrument of ratification is deposited, it shall enter into

force thirty days after the date on which that State deposited its instrument of ratification or accession.

Article 22

The Secretary General shall inform all member states of the Organization of American States of the entry into force of this Convention.

Article 23

The Secretary General of the Organization of American States shall present an annual report to the member states of the Organization on the status of this Convention, including the signatures, deposits of instruments of ratification and accession, and declarations, and any reservations that may have been presented by the States Parties, accompanied by a report thereon if needed.

Article 24

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it by depositing an instrument to that effect with the General Secretariat of the Organization of American States. One year after the date of deposit of the instrument of denunciation, this Convention shall cease to be in effect for the denouncing State but shall remain in force for the remaining States Parties.

Article 25

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified copy to the Secretariat of the United Nations for registration and publication in accordance with the provisions of Article 102 of the United Nations Charter.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective governments, have signed this Convention, which shall be called the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women "Convention of Belém do Pará."

DONE IN THE CITY OF BELEM DO PARA, BRAZIL, the ninth of June in the year one thousand nine hundred ninety-four.

Appendix A.8

Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities

(Entered into Force September 14, 2001)

[Author's note: available at <http://www.oas.org/juridico/English/treaties/a-65.html>, accessed February 24, 2009]

The States Parties to this Convention,

Reaffirming that persons with disabilities have the same human rights and fundamental freedoms as other persons; and that these rights, which include freedom from discrimination based on disability, flow from the inherent dignity and equality of each person;

Considering that the Charter of the Organization of American States, in Article 3.j, establishes the principle that “social justice and social security are bases of lasting peace”;

Concerned by the discrimination to which people are subject based on their disability;

Bearing in mind the agreement of the International Labour Organization on the vocational rehabilitation and employment of disabled persons (Convention 159); the Declaration of the Rights of Mentally Retarded Persons (UN General Assembly resolution 2856 (XXVI) of 20 December, 1971); the Declaration on the Rights of Disabled Persons (UN General Assembly resolution 3447 (XXX) of 9 December, 1975); the World Programme of Action concerning Disabled Persons (UN General Assembly resolution 37/52 of 3 December, 1982); the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights, “Protocol of San Salvador” (1988); the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (UN General Assembly resolution 46/119 of 17 December, 1991); the Declaration of Caracas of the Pan American Health Organization; resolution AG/RES. 1249 (XXIII-O/93), “Situation of Persons with Disabilities in the American Hemisphere”; the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (UN General Assembly resolution 48/96 of 20 December, 1993); the Declaration of Managua (December 1993); the Vienna Declaration and Programme of Action,

adopted by the UN World Conference on Human Rights (157/93); resolution AG/RES. 1356 (XXV-O/95), “Situation of Persons with Disabilities in the American Hemisphere” and AG/RES. 1369 (XXVI-O/96), “Panama Commitment to Persons with Disabilities in the American Hemisphere”; and

Committed to eliminating discrimination, in all its forms and manifestations, against persons with disabilities,

Have agreed as follows:

Article I

For the purposes of this Convention, the following terms are defined:

1. Disability

The term “disability” means a physical, mental, or sensory impairment, whether permanent or temporary, that limits the capacity to perform one or more essential activities of daily life, and which can be caused or aggravated by the economic and social environment.

2. Discrimination against persons with disabilities

- a) The term “discrimination against persons with disabilities” means any distinction, exclusion, or restriction based on a disability, record of disability, condition resulting from a previous disability, or perception of disability, whether present or past, which has the effect or objective of impairing or nullifying the recognition, enjoyment, or exercise by a person with a disability of his or her human rights and fundamental freedoms.
- b) A distinction or preference adopted by a state party to promote the social integration or personal development of persons with disabilities does not constitute discrimination provided that the distinction or preference does not in itself limit the right of persons with disabilities to equality and that individuals with disabilities are not forced to accept such distinction or preference. If, under a state’s internal law, a person can be declared legally incompetent, when necessary and appropriate for his or her well-being, such declaration does not constitute discrimination.

Article II

The objectives of this Convention are to prevent and eliminate all forms of discrimination against persons with disabilities and to promote their full integration into society.

Article III

To achieve the objectives of this Convention, the states parties undertake:

1. To adopt the legislative, social, educational, labor-related, or any other measures needed to eliminate discrimination against persons with disabilities and to promote their full integration into society, including, but not limited to:
 - a) Measures to eliminate discrimination gradually and to promote integration by government authorities and/or private entities in providing or making available goods, services, facilities, programs, and activities such as employment, transportation, communications, housing, recreation, education, sports, law enforcement and administration of justice, and political and administrative activities;
 - b) Measures to ensure that new buildings, vehicles, and facilities constructed or manufactured within their respective territories facilitate transportation, communications, and access by persons with disabilities;
 - c) Measures to eliminate, to the extent possible, architectural, transportation, and communication obstacles to facilitate access and use by persons with disabilities; and
 - d) Measures to ensure that persons responsible for applying this Convention and domestic law in this area are trained to do so.
2. To work on a priority basis in the following areas:
 - a) Prevention of all forms of preventable disabilities;
 - b) Early detection and intervention, treatment, rehabilitation, education, job training, and the provision of comprehensive services to ensure the optimal level of independence and quality of life for persons with disabilities; and
 - c) Increasing of public awareness through educational campaigns aimed at eliminating prejudices, stereotypes, and other attitudes that jeopardize the right of persons to live as equals, thus promoting respect for and coexistence with persons with disabilities;

Article IV

To achieve the objectives of this Convention, the states parties undertake to:

1. Cooperate with one another in helping to prevent and eliminate discrimination against persons with disabilities;
2. Collaborate effectively in:
 - a) Scientific and technological research related to the prevention of disabilities and to the treatment, rehabilitation, and integration into society of persons with disabilities; and

- b) The development of means and resources designed to facilitate or promote the independence, self-sufficiency, and total integration into society of persons with disabilities, under conditions of equality.

Article V

1. To the extent that it is consistent with their respective internal laws, the states parties shall promote participation by representatives of organizations of persons with disabilities, nongovernmental organizations working in this area, or, if such organizations do not exist, persons with disabilities, in the development, execution, and evaluation of measures and policies to implement this Convention.
2. The states parties shall create effective communication channels to disseminate among the public and private organizations working with persons with disabilities the normative and juridical advances that may be achieved in order to eliminate discrimination against persons with disabilities.

Article VI

1. To follow up on the commitments undertaken in this Convention, a Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities, composed of one representative appointed by each state party, shall be established.
2. The committee shall hold its first meeting within the 90 days following the deposit of the 11th instrument of ratification. Said meeting shall be convened by the General Secretariat of the Organization of American States and shall be held at the Organization's headquarters, unless a state party offers to host it.
3. At the first meeting, the states parties undertake to submit a report to the Secretary General of the Organization for transmission to the Committee so that it may be examined and reviewed. Thereafter, reports shall be submitted every four years.
4. The reports prepared under the previous paragraph shall include information on measures adopted by the member states pursuant to this Convention and on any progress made by the states parties in eliminating all forms of discrimination against persons with disabilities. The reports shall indicate any circumstances or difficulties affecting the degree of fulfillment of the obligations arising from this Convention.
5. The Committee shall be the forum for assessment of progress made in the application of the Convention and for the exchange of experience among the states parties. The reports prepared by the committee shall reflect the deliberations; shall include information on any measures adopted by the states parties pursuant to this Convention, on any progress they have made in

eliminating all forms of discrimination against persons with disabilities, and on any circumstances or difficulties they have encountered in the implementation of the Convention; and shall include the committee's conclusions, its observations, and its general suggestions for the gradual fulfillment of the Convention.

6. The committee shall draft its rules of procedure and adopt them by a simple majority.
7. The Secretary General shall provide the Committee with the support it requires in order to perform its functions.

Article VII

No provision of this Convention shall be interpreted as restricting, or permitting the restriction by states parties of the enjoyment of the rights of persons with disabilities recognized by customary international law or the international instruments by which a particular state party is bound.

Article VIII

1. This Convention shall be open for signature by all member states in Guatemala City, Guatemala, on June 8, 1999, and, thereafter, shall remain open for signature by all states at the headquarters of the Organization of American States, until its entry into force.
2. This Convention is subject to ratification.
3. This Convention shall enter into force for the ratifying states on the 30th day following the date of deposit of the sixth instrument of ratification by a member state of the Organization of American States.

Article IX

After its entry into force, this Convention shall be open for accession by all states that have not signed it.

Article X

1. The instruments of ratification and accession shall be deposited with the General Secretariat of the Organization of American States.

2. For each state that ratifies or accedes to the Convention after the sixth instrument of ratification has been deposited, the Convention shall enter into force on the 30th day following deposit by that state of its instrument of ratification or accession.

Article XI

1. Any state party may make proposals for amendment of this Convention. Said proposals shall be submitted to the General Secretariat of the OAS for dissemination to the states parties.
2. Amendments shall enter into force for the states ratifying them on the date of deposit of the respective instruments of ratification by two thirds of the member states. For the remaining states parties, they shall enter into force on the date of deposit of their respective instruments of ratification.

Article XII

The states may enter reservations to this Convention when ratifying or acceding to it, provided that such reservations are not incompatible with the aim and purpose of the Convention and relate to one or more specific provisions thereof.

Article XIII

This Convention shall remain in force indefinitely, but any state party may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. The Convention shall cease to have force and effect for the denouncing state one year after the date of deposit of the instrument of denunciation, and shall remain in force for the other states parties. Such denunciation shall not exempt the state party from the obligations imposed upon it under this Convention in respect of any action or omission prior to the date on which the denunciation takes effect.

Article XIV

1. The original instrument of this Convention, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall send a certified

copy thereof to the United Nations Secretariat for registration and publication pursuant to Article 102 of the United Nations Charter.

2. The General Secretariat of the Organization of American States shall notify the member states of that Organization and the states that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation, and any reservations entered.

Appendix A.9

Inter-American Convention on Forced Disappearance of Persons

(Entered into Force March 28, 1996)

[Author's note: available at <http://www.unhcr.org/refworld/docid/3ae6b38ef.html>, accessed February 24, 2009]

Preamble

The member states of the Organization of American States signatory to the present Convention,

Disturbed by the persistence of the forced disappearance of persons;

Reaffirming that the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in this Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights;

Considering that the forced disappearance of persons in an affront to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States;

Considering that the forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights;

Recalling that the international protection of human rights is in the form of a convention reinforcing or complementing the protection provided by domestic law and is based upon the attributes of the human personality;

Reaffirming that the systematic practice of the forced disappearance of persons constitutes a crime against humanity;

Hoping that this Convention may help to prevent, punish, and eliminate the forced disappearance of persons in the Hemisphere and make a decisive contribution to the protection of human rights and the rule of law,

Resolve to adopt the following Inter-American Convention on Forced Disappearance of Persons:

Article I

The States Parties to this Convention undertake:

- a) Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;
- b) To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;
- c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons;
- d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

Article II

For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

Article III

The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person.

Article IV

The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

- a) When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;
- b) When the accused is a national of that state;
- c) When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

This Convention does not authorize any State Party to undertake, in the territory of another State Party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other Party by its domestic law.

Article V

The forced disappearance of persons shall not be considered a political offense for purposes of extradition.

The forced disappearance of persons shall be deemed to be included among the extraditable offenses in every extradition treaty entered into between States Parties.

The States Parties undertake to include the offense of forced disappearance as one which is extraditable in every extradition treaty to be concluded between them in the future.

Every State Party that makes extradition conditional on the existence of a treaty and receives a request for extradition from another State Party with which it has no extradition treaty may consider this Convention as the necessary legal basis for extradition with respect to the offense of forced disappearance.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offense as extraditable, subject to the conditions imposed by the law of the requested state.

Extradition shall be subject to the provisions set forth in the constitution and other laws of the request state.

Article VI

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offense had been committed within its jurisdiction,

for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition.

Article VII

Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.

However, if there should be a norm of a fundamental character preventing application of the stipulation contained in the previous paragraph, the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the corresponding State Party.

Article VIII

The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them.

The States Parties shall ensure that the training of public law-enforcement personnel or officials includes the necessary education on the offense of forced disappearance of persons.

Article IX

Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.

The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.

Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations.

Article X

In no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the

forced disappearance of persons. In such cases, the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom.

In pursuing such procedures or recourse, and in keeping with applicable domestic law, the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction.

Article XI

Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law.

The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.

Article XII

The States Parties shall give each other mutual assistance in the search for, identification, location, and return of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians.

Article XIII

For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights alleging the forced disappearance of persons shall be subject to the procedures established in the American Convention on Human Rights and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures.

Article XIV

Without prejudice to the provisions of the preceding article, when the Inter-American Commission on Human Rights receives a petition or communication regarding an alleged forced disappearance, its Executive Secretariat shall urgently and confidentially address the respective government, and shall request that government to provide as soon as possible information as to the whereabouts of the allegedly disappeared person together with any other information it considers pertinent, and such request shall be without prejudice as to the admissibility of the petition.

Article XV

None of the provisions of this Convention shall be interpreted as limiting other bilateral or multilateral treaties or other agreements signed by the Parties.

This Convention shall not apply to the international armed conflicts governed by the 1949 Geneva Conventions and their Protocols, concerning protection of wounded, sick, and shipwrecked members of the armed forces; and prisoners of war and civilians in time of war.

Article XVI

This Convention is open for signature by the member states of the Organization of American States.

Article XVII

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article XVIII

This Convention shall be open to accession by any other state. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article XIX

The states may express reservations with respect to this Convention when adopting, signing, ratifying or acceding to it, unless such reservations are incompatible with the object and purpose of the Convention and as long as they refer to one or more specific provisions.

Article XX

This Convention shall enter into force for the ratifying states on the thirtieth day from the date of deposit of the second instrument of ratification.

For each state ratifying or acceding to the Convention after the second instrument of ratification has been deposited, the Convention shall enter into force on the thirtieth day from the date on which that state deposited its instrument of ratification or accession.

Article XXI

This Convention shall remain in force indefinitely, but may be denounced by any State Party. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. The Convention shall cease to be in effect for the denouncing state and shall remain in force for the other States Parties one year from the date of deposit of the instrument of denunciation.

Article XXII

The original instrument of this Convention, the Spanish, English, Portuguese, and French texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward certified copies thereof to the United Nations Secretariat, for registration and publication, in accordance with Article 102 of the Charter of the United Nations. The General Secretariat of the Organization of American States shall notify member states of the Organization and states acceding to the Convention of the signatures and deposit of instruments of ratification, accession or denunciation, as well as of any reservations that may be expressed.

Appendix A.10

Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors

(Entered into Force May 26, 1988)

[Author's note: available at <http://www.oas.org/juridico/english/treaties/b-48.html>, accessed February 24, 2009]

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on conflict of laws concerning the adoption of minors, have agreed as follows:

Article 1

This Convention shall apply to the adoption of minors in the form of full adoption, adoptive legitimation and other similar institutions that confer on the adoptee a legally established filiation, when the domicile of the adopter (or of the adopters) is in one State Party and the habitual residence of the adoptee is in another State Party.

Article 2

When signing, ratifying or acceding to this Convention, any State Party may declare that it applies to any other form of international adoption of minors.

Article 3

The law of the habitual residence of the minor shall govern capacity, consent, and other requirements for adoption, as well as those procedures and formalities that are necessary for creating the relationship.

Article 4

The law of the domicile of the adopter (or adopters) shall govern:

- a. The capacity to be an adopter;
- b. The age and marital status requirement to be met by an adopter;
- c. The consent of an adopter's spouse, if required, and
- d. The other requirements for being an adopter.

If, however, the requirements of the law of the adopter (or adopters) are manifestly less strict than those of the law of the adoptees habitual residence, the law of the adoptee shall govern.

Article 5

Adoptions that are in conformity with this Convention shall produce their effects unconditionally in the States Parties, and the exception of the unknown institution may not be invoked.

Article 6

The requirements of publication and registration of adoption shall be subject to the law of the State in which they are to be satisfied.

The particular features and type of adoption shall be stated in the registration.

Article 7

Where called for, the secrecy of the adoption shall be guaranteed. However, whenever possible, medical background information on the minor and on the birth parents, if it is known, shall be communicated to the legally appropriate person, without mention of their names or of other data whereby they may be identified.

Article 8

In adoptions governed by this Convention, the authorities granting the adoption may require the adopter (or adopters) to provide evidence of his physical, moral, psychological and economic capacity, through public or private institutions, the specific purpose is to protect minors. These institutions must be specifically authorized by some State or by some international organization.

The institutions that certify the capacity referred to above shall undertake to report to the authority granting the adoption on the conditions under which the adoption has developed over a period of one year. To this end, the authority granting the adoption shall inform the certifying institution that the adoption has been granted.

Article 9

In case of full adoption, adoptive legitimation, and similar institutions:

- a. The relations between the adopter (or adopters) and the adoptee, including support relations, and the relations between the adoptee and the family of the adopter (or adopters), shall be governed by the same law as would govern the relations between the adopter (or adopters) and his legitimate family;
- b. Ties between the adoptee and his family of origin shall be considered dissolved. However, impediments to marriage shall continue.

Article 10

In the case of adoptions other than full adoption, adoptive legitimation, and similar institutions, relations between the adopter (or adopters) and the adoptee shall be governed by the law of the domicile of the adopter (or adopters).

The relations between the adoptee and his family of origin shall be governed by the law of his habitual residence at the time of adoption.

Article 11

The rights of succession of the adoptee or the adopter (or adopters) shall be governed by the rules applicable to the respective successions.

In case of full adoption, adoptive legitimation, and similar institutions, the adoptee, and the adopter (or adopters) and the family thereof, shall have the same rights of succession as those of legitimate family members.

Article 12

Adoptions referred to in Article I are irrevocable. Revocation of adoptions referred to in Article 2 shall be governed by the law of the habitual residence of the adoptee at the time of adoption.

Article 13

Where it is permitted, conversion of simple adoption into full adoption, adoptive legitimation, or similar institutions shall be governed, at the choice of the petitioner, by the law of the habitual residence of the adoptee at the time of the adoption, or by that of the State in which the adopter (or adopters) has his domicile at the time the conversion is requested.

If the adoptee is more than 14 years of age, his consent shall be required.

Article 14

Annulment of the adoption shall be governed by the law under which it was granted. An annulment shall be decreed only by judicial authorities, and the interests of the minor shall be protected in accordance with Article 19 of this Convention.

Article 15

The authorities of the State of the habitual residence of the adoptee shall be competent to grant the adoptions referred to in this Convention.

Article 16

The judges of the State where the adoptee was habitually resident at the time the adoption was granted shall be competent to decide on annulment or revocation of the adoption.

The authorities of the State of habitual residence of the adoptee at the time of the adoption; those of the State of domicile of the adopter (or adopters); or those of the State of domicile of the adoptee, if he has a domicile of his own at the time the conversion is requested, shall be competent, at the option of the petitioner, to decide on the conversion, where it is permitted, of simple adoption into full adoption, adoptive legitimation, or similar institutions.

Article 17

The judges of the State of the domicile of the adopter (or adopters) shall be competent to rule on matters concerning the relations between the adoptee and

the adopter (or adopters) and the family thereof until the adoptee has a domicile of his own.

As soon as the adoptee has his own domicile, the judge of the domicile of the adoptee or that of the adopter (or adopters) shall, at the option of the petitioner, have jurisdiction.

Article 18

The authorities of a State Party may refuse to apply the law declared applicable under this Convention when the law is manifestly contrary to its public policy (order public).

Article 19

The terms of this Convention and the laws applicable under it shall be interpreted consistently and in favor of the validity of the adoption and the best interests of the adoptee.

Article 20

A State Party may at any time declare that this Convention applies to adoptions of minors habitually resident in it by persons also habitually resident in it when, in the opinion of the authority concerned, the circumstances of a given case indicate that the adopter (or adopters) plans to establish his domicile in another State Party after the adoption has been granted.

Article 21

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 22

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 23

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 24

Each State may, at the time of signature, ratification or accession, make reservations to this Convention, provided that each reservation concerns one or more specific provisions.

Article 25

Adoptions granted according to domestic law when the adoptee and the adopter (or adopters) have their domicile or habitual residence in the same State Party shall produce their effects unconditionally in the other States Parties, without prejudice to their being governed by the law of the new domicile of the adopter (or adopters).

Article 26

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

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

Article 27

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or to only one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the

Organization of American States, and shall become effective thirty days after the date of their receipt.

Article 28

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 29

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall forward an authenticated copy of its text to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of its Charter. The General Secretariat of the Organization of American States shall notify the Member States of that Organization and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession and denunciation as well as of reservations, if any. It shall also transmit the declarations provided for in Articles 2, 20, and 27 of this Convention.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT LA PAZ, Republic of Bolivia, this twenty-fourth day of May, and one thousand nine hundred and eighty-four.

Appendix A.11

Statute of the Inter-American Court of Human Rights

(Adopted by the General Assembly of the OAS at Its Ninth Regular Session, Held in La Paz Bolivia, October 1979 [Resolution No. 448], Entered into Force January 1, 1980)

[Author's note: available at <https://www.cidh.oas.org/Basicos/English/Basic19.Statute%20of%20the%20IA%20Court.htm>, accessed February 24, 2009]

Chapter I

General Provisions

Article 1. Nature and Legal Organization

The Inter-American Court of Human Rights is an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights. The Court exercises its functions in accordance with the provisions of the aforementioned Convention and the present Statute.

Article 2. Jurisdiction

The Court shall exercise adjudicatory and advisory jurisdiction:

1. Its adjudicatory jurisdiction shall be governed by the provisions of Articles 61, 62 and 63 of the Convention, and
2. Its advisory jurisdiction shall be governed by the provisions of Article 64 of the Convention.

Article 3. Seat

1. The seat of the Court shall be San José, Costa Rica; however, the Court may convene in any member state of the Organization of American States (OAS) when a majority of the Court considers it desirable, and with the prior consent of the State concerned.
2. The seat of the Court may be changed by a vote of two-thirds of the States Parties to the Convention, in the OAS General Assembly.

Chapter II***Composition of the Court*****Article 4. Composition**

1. The Court shall consist of seven judges, nationals of the member states of the OAS, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates.
2. No two judges may be nationals of the same State.

Article 5. Judicial Terms

1. The judges of the Court shall be elected for a term of six years and may be reelected only once. A judge elected to replace a judge whose term has not expired shall complete that term.
2. The terms of office of the judges shall run from January 1 of the year following that of their election to December 31 of the year in which their terms expire.
3. The judges shall serve until the end of their terms. Nevertheless, they shall continue to hear the cases they have begun to hear and that are still pending, and shall not be replaced by the newly elected judges in the handling of those cases.

Article 6. Election of the Judges – Date

1. Election of judges shall take place, insofar as possible, during the session of the OAS General Assembly immediately prior to the expiration of the term of the outgoing judges.

2. Vacancies on the Court caused by death, permanent disability, resignation or dismissal of judges shall, insofar as possible, be filled at the next session of the OAS General Assembly. However, an election shall not be necessary when a vacancy occurs within six months of the expiration of a term.
3. If necessary in order to preserve a quorum of the Court, the States Parties to the Convention, at a meeting of the OAS Permanent Council, and at the request of the President of the Court, shall appoint one or more interim judges who shall serve until such time as they are replaced by elected judges.

Article 7. Candidates

1. Judges shall be elected by the States Parties to the Convention, at the OAS General Assembly, from a list of candidates nominated by those States.
2. Each State Party may nominate up to three candidates, nationals of the state that proposes them or of any other member state of the OAS.
3. When a slate of three is proposed, at least one of the candidates must be a national of a state other than the nominating state.

Article 8. Election – Preliminary Procedures

1. Six months prior to expiration of the terms to which the judges of the Court were elected, the Secretary General of the OAS shall address a written request to each State Party to the Convention that it nominate its candidates within the next ninety days.
2. The Secretary General of the OAS shall draw up an alphabetical list of the candidates nominated, and shall forward it to the States Parties, if possible, at least thirty days before the next session of the OAS General Assembly.
3. In the case of vacancies on the Court, as well as in cases of the death or permanent disability of a candidate, the aforementioned time periods shall be shortened to a period that the Secretary General of the OAS deems reasonable.

Article 9. Voting

1. The judges shall be elected by secret ballot and by an absolute majority of the States Parties to the Convention, from among the candidates referred to in Article 7 of the present Statute.
2. The candidates who obtain the largest number of votes and an absolute majority shall be declared elected. Should several ballots be necessary, those candidates who receive the smallest number of votes shall be eliminated successively, in the manner determined by the States Parties.

Article 10. Ad Hoc Judges

1. If a judge is a national of any of the States Parties to a case submitted to the Court, he shall retain his right to hear that case.
2. If one of the judges called upon to hear a case is a national of one of the States Parties to the case, any other State Party to the case may appoint a person to serve on the Court as an *ad hoc* judge.
3. If among the judges called upon to hear a case, none is a national of the States Parties to the case, each of the latter may appoint an *ad hoc* judge. Should several States have the same interest in the case, they shall be regarded as a single party for purposes of the above provisions. In case of doubt, the Court shall decide.
4. The right of any State to appoint an *ad hoc* judge shall be considered relinquished if the State should fail to do so within thirty days following the written request from the President of the Court.
5. The provisions of Articles 4, 11, 15, 16, 18, 19 and 20 of the present Statute shall apply to *ad hoc* judges.

Article 11. Oath

1. Upon assuming office, each judge shall take the following oath or make the following solemn declaration: "I swear" - or "I solemnly declare" - "that I shall exercise my functions as a judge honorably, independently and impartially and that I shall keep secret all deliberations."
2. The oath shall be administered by the President of the Court and, if possible, in the presence of the other judges.

Chapter III

Structure of the Court

Article 12. Presidency

1. The Court shall elect from among its members a President and Vice-President who shall serve for a period of two years; they may be reelected.
2. The President shall direct the work of the Court, represent it, regulate the disposition of matters brought before the Court, and preside over its sessions.
3. The Vice-President shall take the place of the President in the latter's temporary absence, or if the office of the President becomes vacant. In the latter case, the Court shall elect a new Vice-President to serve out the term of the previous Vice-President.

4. In the absence of the President and the Vice-President, their duties shall be assumed by other judges, following the order of precedence established in Article 13 of the present Statute.

Article 13. Precedence

1. Elected judges shall take precedence after the President and Vice-President according to their seniority in office.
2. Judges having the same seniority in office shall take precedence according to age.
3. *Ad hoc* and interim judges shall take precedence after the elected judges, according to age. However, if an *ad hoc* or interim judge has previously served as an elected judge, he shall have precedence over any other *ad hoc* or interim judge.

Article 14. Secretariat

1. The Secretariat of the Court shall function under the immediate authority of the Secretary, in accordance with the administrative standards of the OAS General Secretariat, in all matters that are not incompatible with the independence of the Court.
2. The Secretary shall be appointed by the Court. He shall be a full-time employee serving in a position of trust to the Court, shall have his office at the seat of the Court and shall attend any meetings that the Court holds away from its seat.
3. There shall be an Assistant Secretary who shall assist the Secretary in his duties and shall replace him in his temporary absence.
4. The Staff of the Secretariat shall be appointed by the Secretary General of the OAS, in consultation with the Secretary of the Court.

Chapter IV

Rights, Duties and Responsibilities

Article 15. Privileges and Immunities

1. The judges of the Court shall enjoy, from the moment of their election and throughout their term of office, the immunities extended to diplomatic agents under international law. During the exercise of their functions, they shall, in addition, enjoy the diplomatic privileges necessary for the performance of their duties.

2. At no time shall the judges of the Court be held liable for any decisions or opinions issued in the exercise of their functions.
3. The Court itself and its staff shall enjoy the privileges and immunities provided for in the Agreement on Privileges and Immunities of the Organization of American States, of 15 May, 1949, *mutatis mutandis*, taking into account the importance and independence of the Court.
4. The provision of paragraphs 1, 2 and 3 of this article shall apply to the States Parties to the Convention. They shall also apply to such other member states of the OAS as expressly accept them, either in general or for specific cases.
5. The system of privileges and immunities of the judges of the Court and of its staff may be regulated or supplemented by multilateral or bilateral agreements between the Court, the OAS and its member states.

Article 16. Service

1. The judges shall remain at the disposal of the Court, and shall travel to the seat of the Court or to the place where the Court is holding its sessions as often and for as long a time as may be necessary, as established in the Regulations.
2. The President shall render his service on a permanent basis.

Article 17. Emoluments

1. The emoluments of the President and the judges of the Court shall be set in accordance with the obligations and incompatibilities imposed on them by Articles 16 and 18, and bearing in mind the importance and independence of their functions.
2. The *ad hoc* judges shall receive the emoluments established by Regulations, within the limits of the Court's budget.
3. The judges shall also receive per diem and travel allowances, when appropriate.

Article 18. Incompatibilities

1. The position of judge of the Inter-American Court of Human Rights is incompatible with the following positions and activities:
 - a. Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states;
 - b. Officials of international organizations;

- c. Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office.
2. In case of doubt as to incompatibility, the Court shall decide. If the incompatibility is not resolved, the provisions of Article 73 of the Convention and Article 20(2) of the present Statute shall apply.
3. Incompatibilities may lead only to dismissal of the judge and the imposition of applicable liabilities, but shall not invalidate the acts and decisions in which the judge in question participated.

Article 19. Disqualification

1. Judges may not take part in matters in which, in the opinion of the Court, they or members of their family have a direct interest or in which they have previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity.
2. If a judge is disqualified from hearing a case or for some other appropriate reason considers that he should not take part in a specific matter, he shall advise the President of his disqualification. Should the latter disagree, the Court shall decide.
3. If the President considers that a judge has cause for disqualification or for some other pertinent reason should not take part in a given matter, he shall advise him to that effect. Should the judge in question disagree, the Court shall decide.
4. When one or more judges are disqualified pursuant to this article, the President may request the States Parties to the Convention, in a meeting of the OAS Permanent Council, to appoint interim judges to replace them.

Article 20. Disciplinary Regime

1. In the performance of their duties and at all other times, the judges and staff of the Court shall conduct themselves in a manner that is in keeping with the office of those who perform an international judicial function. They shall be answerable to the Court for their conduct, as well as for any violation, act of negligence or omission committed in the exercise of their functions.
2. The OAS General Assembly shall have disciplinary authority over the judges, but may exercise that authority only at the request of the Court itself, composed for this purpose of the remaining judges. The Court shall inform the General Assembly of the reasons for its request.
3. Disciplinary authority over the Secretary shall lie with the Court, and over the rest of the staff, with the Secretary, who shall exercise that authority with the approval of the President.

4. The Court shall issue disciplinary rules, subject to the administrative regulations of the OAS General Secretariat insofar as they may be applicable in accordance with Article 59 of the Convention.

Article 21. Resignation – Incapacity

1. Any resignation from the Court shall be submitted in writing to the President of the Court. The resignation shall not become effective until the Court has accepted it.
2. The Court shall decide whether a judge is incapable of performing his functions.
3. The President of the Court shall notify the Secretary General of the OAS of the acceptance of a resignation or a determination of incapacity, for appropriate action.

Chapter V

The Workings of the Court

Article 22. Sessions

1. The Court shall hold regular and special sessions.
2. Regular sessions shall be held as determined by the Regulations of the Court.
3. Special sessions shall be convoked by the President or at the request of a majority of the judges.

Article 23. Quorum

1. The quorum for deliberations by the Court shall be five judges.
2. Decisions of the Court shall be taken by a majority vote of the judges present.
3. In the event of a tie, the President shall cast the deciding vote.

Article 24. Hearings, Deliberations, Decisions

1. The hearings shall be public, unless the Court, in exceptional circumstances, decides otherwise.
2. The Court shall deliberate in private. Its deliberations shall remain secret, unless the Court decides otherwise.
3. The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition,

the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate.

Article 25. Rules and Regulations

1. The Court shall draw up its Rules of Procedure.
2. The Rules of Procedure may delegate to the President or to Committees of the Court authority to carry out certain parts of the legal proceedings, with the exception of issuing final rulings or advisory opinions. Rulings or decisions issued by the President or the Committees of the Court that are not purely procedural in nature may be appealed before the full Court.
3. The Court shall also draw up its own Regulations.

Article 26. Budget, Financial System

1. The Court shall draw up its own budget and shall submit it for approval to the General Assembly of the OAS, through the General Secretariat. The latter may not introduce any changes in it.
2. The Court shall administer its own budget.

Chapter VI

Relations with Governments and Organizations

Article 27. Relations with the Host Country, Governments and Organizations

1. The relations of the Court with the host country shall be governed through a headquarters agreement. The seat of the Court shall be international in nature.
2. The relations of the Court with governments, with the OAS and its organs, agencies and entities and with other international governmental organizations involved in promoting and defending human rights shall be governed through special agreements.

Article 28. Relations with the Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights shall appear as a party before the Court in all cases within the adjudicatory jurisdiction of the Court, pursuant to Article 2(1) of the present Statute.

Article 29. Agreements of Cooperation

1. The Court may enter into agreements of cooperation with such nonprofit institutions as law schools, bar associations, courts, academies and educational or research institutions dealing with related disciplines in order to obtain their cooperation and to strengthen and promote the juridical and institutional principles of the Convention in general and of the Court in particular.
2. The Court shall include an account of such agreements and their results in its Annual Report to the OAS General Assembly.

Article 30. Report to the OAS General Assembly

The Court shall submit a report on its work of the previous year to each regular session of the OAS General Assembly. It shall indicate those cases in which a State has failed to comply with the Court's ruling. It may also submit to the OAS General Assembly proposals or recommendations on ways to improve the inter-American system of human rights, insofar as they concern the work of the Court.

Chapter VII***Final Provisions*****Article 31. Amendments to the Statute**

The present Statute may be amended by the OAS General Assembly, at the initiative of any member state or of the Court itself.

Article 32. Entry into Force

The present Statute shall enter into force on 1 January, 1980.

Appendix B.1

Convention for the Protection of Human Rights and Fundamental Freedoms

(As Amended by Protocol No. 11)

with Protocol Nos. 1, 4, 6, 7, 12 and 13

[Author's note: available at <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/0/englishanglais.pdf>, accessed February 25, 2009]

Rome, 4.XI.1950

The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September, 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December, 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January, 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September, 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November, 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October, 1994, is repealed and Protocol No. 10 (ETS No. 146) has lost its purpose.

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December, 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and

the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I – Rights and Freedoms

Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 – Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term .forced or compulsory labour shall not include:
 - a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

- b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- d. any work or service which forms part of normal civic obligations.

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 – No punishment without law

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of

national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15 – Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary

General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16 – Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17 – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18 – Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II – European Court of Human Rights

Article 19 – Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as ‘the Court’. It shall function on a permanent basis.

Article 20 – Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21 – Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22 – Election of judges

1. The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.
2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

Article 23 – Terms of office

1. The judges shall be elected for a period of six years. They may be reelected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.
2. The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.
3. In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.
4. In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.
5. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.
6. The terms of office of judges shall expire when they reach the age of 70.

7. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

Article 24 – Dismissal

No judge may be dismissed from his office unless the other judges decide by a majority of two-thirds that he has ceased to fulfil the required conditions.

Article 25 – Registry and legal secretaries

The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court. The Court shall be assisted by legal secretaries.

Article 26 – Plenary Court

The plenary Court shall

- a. elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- b. set up Chambers, constituted for a fixed period of time;
- c. elect the Presidents of the Chambers of the Court; they may be re-elected;
- d. adopt the rules of the Court; and
- e. elect the Registrar and one or more Deputy Registrars.

Article 27 – Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
2. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the State Party concerned or, if there is none or if he is unable to sit, a person of its choice who shall sit in the capacity of judge.
3. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the State Party concerned.

Article 28 – Declarations of inadmissibility by committees

A committee may, by a unanimous vote, declare inadmissible or strike out of its list of cases an application submitted under Article 34 where such a decision can be taken without further examination. The decision shall be final.

Article 29 – Decisions by Chambers on admissibility and merits

1. If no decision is taken under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34.
2. A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33.
3. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.

Article 31 – Powers of the Grand Chamber

The Grand Chamber shall

- a. determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43; and
- b. consider requests for advisory opinions submitted under Article 47.

Article 32 – Jurisdiction of the Court

1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33 – Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Article 34 – Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35 – Admissibility criteria

1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
2. The Court shall not deal with any application submitted under Article 34 that
 - a. is anonymous; or
 - b. is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
3. The Court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or the protocols thereto, manifestly ill-founded, or an abuse of the right of application.
4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36 – Third party intervention

1. In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

Article 37 – Striking out applications

1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
 - a. the applicant does not intend to pursue his application; or
 - b. the matter has been resolved; or
 - c. for any other reason established by the Court, it is no longer justified to continue the examination of the application. However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.
2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38 – Examination of the case and friendly settlement proceedings

1. If the Court declares the application admissible, it shall
 - a. pursue the examination of the case, together with the representatives of the parties, and if need be, undertake an investigation, for the effective conduct of which the States concerned shall furnish all necessary facilities;
 - b. place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the protocols thereto.
2. Proceedings conducted under paragraph 1.b shall be confidential.

Article 39 – Finding of a friendly settlement

If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

Article 40 – Public hearings and access to documents

1. Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
2. Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41 – Just satisfaction

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42 – Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

Article 43 – Referral to the Grand Chamber

1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
2. A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.
3. If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44 – Final judgments

1. The judgment of the Grand Chamber shall be final.
2. The judgment of a Chamber shall become final
 - a. when the parties declare that they will not request that the case be referred to the Grand Chamber; or
 - b. three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

- c. when the panel of the Grand Chamber rejects the request to refer under Article 43.
3. The final judgment shall be published.

Article 45 – Reasons for judgments and decisions

1. Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
2. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46 – Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

Article 47 – Advisory opinions

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.
2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48 – Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49 – Reasons for advisory opinions

1. Reasons shall be given for advisory opinions of the Court.
2. If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
3. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50 – Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51 – Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made there under.

Section III – Miscellaneous Provisions***Article 52 – Inquiries by the Secretary General***

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

Article 53 – Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 54 – Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55 – Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

Article 56 – Territorial application

1. Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
2. The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
3. The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
4. Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Article 57 – Reservations

1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
2. Any reservation made under this article shall contain a brief statement of the law concerned.

Article 58 – Denunciation

1. A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
2. Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
3. Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.
4. The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Article 59 – Signature and ratification

1. This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
2. The present Convention shall come into force after the deposit of ten instruments of ratification.
3. As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
4. The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Paris, 20.III.1952

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for

the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as ‘the Convention’),

Have agreed as follows:

Article 1 – Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2 – Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Article 3 – Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 4 – Territorial application

Any High Contracting Party may at the time of signature or ratification or at any time thereafter communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the present Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may from time to time communicate a further declaration

modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

Article 5 – Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1, 2, 3 and 4 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 6 – Signature and ratification

This Protocol shall be open for signature by the members of the Council of Europe, who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of ten instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

Done at Paris on the 20th day of March, 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto

Strasbourg, 16.IX.1963

The governments signatory hereto, being members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November, 1950 (hereinafter referred to as the ‘Convention’) and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20 March, 1952,

Have agreed as follows:

Article 1 – Prohibition of imprisonment for debt

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

Article 2 – Freedom of movement

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

Article 3 – Prohibition of expulsion of nationals

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.
2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

Article 4 – Prohibition of collective expulsion of aliens

Collective expulsion of aliens is prohibited.

Article 5 – Territorial application

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary General of the Council of Europe a declaration stating the extent to which it undertakes that the

provisions of this Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.
3. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
4. The territory of any State to which this Protocol applies by virtue of ratification or acceptance by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a State.
5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of all or any of Articles 1 to 4 of this Protocol.

Article 6 – Relationship to the Convention

As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 7 – Signature and ratification

1. This Protocol shall be open for signature by the members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.
2. The instruments of ratification shall be deposited with the Secretary General of the Council of Europe, who will notify all members of the names of those who have ratified.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September, 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory states.

Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty

Strasbourg, 28.IV.1983

The member States of the Council of Europe, signatory to this Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November, 1950 (hereinafter referred to as ‘the Convention’),

Considering that the evolution that has occurred in several member States of the Council of Europe expresses a general tendency in favour of abolition of the death penalty;

Have agreed as follows:

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No-one shall be condemned to such penalty or executed.

Article 2 – Death penalty in time of war

A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law.

Article 3 – Prohibition of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 4 – Prohibition of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 5 – Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the date of receipt of such notification by the Secretary General.

Article 6 – Relationship to the Convention

As between the States Parties the provisions of Articles 1 and 5 of this Protocol shall be regarded as additional articles to the Convention and all the provisions of the Convention shall apply accordingly.

Article 7 – Signature and ratification

The Protocol shall be open for signature by the member States of the Council of Europe, signatories to the Convention. It shall be subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol unless it has, simultaneously or previously, ratified the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 8 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the date on which five member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 7.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the date of the deposit of the instrument of ratification, acceptance or approval.

Article 9 – Depositary functions

The Secretary General of the Council of Europe shall notify the member States of the Council of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Protocol in accordance with articles 5 and 8;
- d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 28th day of April 1983, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Strasbourg, 22.XI.1984

The member States of the Council of Europe signatory hereto,

Being resolved to take further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as ‘the Convention’),

Have agreed as follows:

Article 1 – Procedural safeguards relating to expulsion of aliens

1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:
 - a. to submit reasons against his expulsion,
 - b. to have his case reviewed, and
 - c. to be represented for these purposes before the competent authority or a person or persons designated by that authority.
2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this Article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.

Article 2 – Right of appeal in criminal matters

1. Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.
2. This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

Article 3 – Compensation for wrongful conviction

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

Article 4 – Right not to be tried or punished twice

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this Article shall be made under Article 15 of the Convention.

Article 5 – Equality between spouses

Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during

marriage and in the event of its dissolution. This Article shall not prevent States from taking such measures as are necessary in the interests of the children.

Article 6 – Territorial application

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which the Protocol shall apply and state the extent to which it undertakes that the provisions of this Protocol shall apply to such territory or territories.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of two months after the date of receipt of such notification by the Secretary General.
4. A declaration made in accordance with this Article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.
5. The territory of any State to which this Protocol applies by virtue of ratification, acceptance or approval by that State, and each territory to which this Protocol is applied by virtue of a declaration by that State under this Article, may be treated as separate territories for the purpose of the reference in Article 1 to the territory of a State.
6. Any State which has made a declaration in accordance with paragraph 1 or 2 of this Article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided in Article 34 of the Convention in respect of Articles 1 to 5 of this Protocol.

Article 7 – Relationship to the Convention

As between the States Parties, the provisions of Article 1 to 6 of this Protocol shall be regarded as additional Articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 8 – Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 9 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date on which seven member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of two months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 10 – Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Protocol in accordance with Articles 6 and 9;
- d. any other act, notification or declaration relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 22 November 1984, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

Rome, 4.XI.2000

The member States of the Council of Europe signatory hereto,

Having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law;

Being resolved to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November, 1950 (hereinafter referred to as ‘the Convention’);

Reaffirming that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures, Have agreed as follows:

Article 1 – General prohibition of discrimination

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Article 2 – Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General of the Council of Europe. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.
4. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 56 of the Convention.

5. Any State which has made a declaration in accordance with paragraph 1 or 2 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, nongovernmental organisations or groups of individuals as provided by Article 34 of the Convention in respect of Article 1 of this Protocol.

Article 3 – Relationship to the Convention

As between the States Parties, the provisions of Articles 1 and 2 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 4 – Signature and ratification

This Protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member State of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 5 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member States of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 4.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 6 – Depositary functions

The Secretary General of the Council of Europe shall notify all the member States of the Council of Europe of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Protocol in accordance with Articles 2 and 5;
- d. any other act, notification or communication relating to this Protocol.

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Rome, this 4th day of November 2000, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe.

Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the abolition of the death penalty in all circumstances

Vilnius, 3.V.2002

The member States of the Council of Europe signatory hereto,

Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings;

Wishing to strengthen the protection of the right to life guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 (hereinafter referred to as 'the Convention');

Noting that Protocol No. 6 to the Convention, concerning the Abolition of the Death Penalty, signed at Strasbourg on 28 April, 1983, does not exclude the death penalty in respect of acts committed in time of war or of imminent threat of war;

Being resolved to take the final step in order to abolish the death penalty in all circumstances,

Have agreed as follows:

Article 1 – Abolition of the death penalty

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

Article 2 – Prohibitions of derogations

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

Article 3 – Prohibitions of reservations

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

Article 4 – Territorial application

1. Any state may, at the time of signature or when depositing its instrument of ratification, acceptance or approval, specify the territory or territories to which this Protocol shall apply.
2. Any state may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Protocol to any other territory specified in the declaration. In respect of such territory the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn or modified by a notification addressed to the Secretary General. The withdrawal or modification shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 5 – Relationship to the Convention

As between the states Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

Article 6 – Signature and ratification

This Protocol shall be open for signature by member states of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member state of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 7 – Entry into force

1. This Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which ten member states of the Council of Europe have expressed their consent to be bound by the Protocol in accordance with the provisions of Article 6.
2. In respect of any member state which subsequently expresses its consent to be bound by it, the Protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 8 – Depositary functions

The Secretary General of the Council of Europe shall notify all the member states of the Council of Europe of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance or approval;
- c. any date of entry into force of this Protocol in accordance with Articles 4 and 7;
- d. any other act, notification or communication relating to this Protocol;

In witness whereof the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Vilnius, this 3rd day of May 2002, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member state of the Council of Europe.

Appendix B.2

European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children

(Entry into Force June 1, 2000)

[Author's note: available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/105.htm>, accessed February 25, 2009]

Luxemburg, 20.V.1980

The member States of the Council of Europe, signatory hereto,

Recognising that in the member States of the Council of Europe the welfare of the child is of overriding importance in reaching decisions concerning his custody;

Considering that the making of arrangements to ensure that decisions concerning the custody of a child can be more widely recognised and enforced will provide greater protection of the welfare of children;

Considering it desirable, with this end in view, to emphasise that the right of access of parents is a normal corollary to the right of custody;

Noting the increasing number of cases where children have been improperly removed across an international frontier and the difficulties of securing adequate solutions to the problems caused by such cases;

Desirous of making suitable provision to enable the custody of children which has been arbitrarily interrupted to be restored;

Convinced of the desirability of making arrangements for this purpose answering to different needs and different circumstances;

Desiring to establish legal co-operation between their authorities,
Have agreed as follows:

Article 1

For the purposes of this Convention:

- a. *child* means a person of any nationality, so long as he is under 16 years of age and has not the right to decide on his own place of residence under the law of his habitual residence, the law of his nationality or the internal law of the State addressed;
- b. *authority* means a judicial or administrative authority;
- c. *decision relating to custody* means a decision of an authority in so far as it relates to the care of the person of the child, including the right to decide on the place of his residence, or to the right of access to him;
- d. *improper removal* means the removal of a child across an international frontier in breach of a decision relating to his custody which has been given in a Contracting State and which is enforceable in such a State; improper removal also includes:
 - i. the failure to return a child across an international frontier at the end of a period of the exercise of the right of access to this child or at the end of any other temporary stay in a territory other than that where the custody is exercised;
 - ii. a removal which is subsequently declared unlawful within the meaning of Article 12.

Part 1 – Central authorities

Article 2

1. Each Contracting State shall appoint a central authority to carry out the functions provided for by this Convention.
2. Federal States and States with more than one legal system shall be free to appoint more than one central authority and shall determine the extent of their competence.
3. The Secretary General of the Council of Europe shall be notified of any appointment under this Article.

Article 3

1. The central authorities of the Contracting States shall co-operate with each other and promote co-operation between the competent authorities in their respective countries. They shall act with all necessary despatch.

2. With a view to facilitating the operation of this Convention, the central authorities of the Contracting States:
 - a. shall secure the transmission of requests for information coming from competent authorities and relating to legal or factual matters concerning pending proceedings;
 - b. shall provide each other on request with information about their law relating to the custody of children and any changes in that law;
 - c. shall keep each other informed of any difficulties likely to arise in applying the Convention and, as far as possible, eliminate obstacles to its application.

Article 4

1. Any person who has obtained in a Contracting State a decision relating to the custody of a child and who wishes to have that decision recognised or enforced in another Contracting State may submit an application for this purpose to the central authority in any Contracting State.
2. The application shall be accompanied by the documents mentioned in Article 13.
3. The central authority receiving the application, if it is not the central authority in the State addressed, shall send the documents directly and without delay to that central authority.
4. The central authority receiving the application may refuse to intervene where it is manifestly clear that the conditions laid down by this Convention are not satisfied.
5. The central authority receiving the application shall keep the applicant informed without delay of the progress of his application.

Article 5

1. The central authority in the State addressed shall take or cause to be taken without delay all steps which it considers to be appropriate, if necessary by instituting proceedings before its competent authorities, in order:
 - a. to discover the whereabouts of the child;
 - b. to avoid, in particular by any necessary provisional measures, prejudice to the interests of the child or of the applicant;
 - c. to secure the recognition or enforcement of the decision;
 - d. to secure the delivery of the child to the applicant where enforcement is granted;
 - e. to inform the requesting authority of the measures taken and their results.

2. Where the central authority in the State addressed has reason to believe that the child is in the territory of another Contracting State it shall send the documents directly and without delay to the central authority of that State.
3. With the exception of the cost of repatriation, each Contracting State undertakes not to claim any payment from an applicant in respect of any measures taken under paragraph 1 of this Article by the central authority of that State on the applicant's behalf, including the costs of proceedings and, where applicable, the costs incurred by the assistance of a lawyer.
4. If recognition or enforcement is refused, and if the central authority of the State addressed considers that it should comply with a request by the applicant to bring in that State proceedings concerning the substance of the case, that authority shall use its best endeavours to secure the representation of the applicant in the proceedings under conditions no less favourable than those available to a person who is resident in and a national of that State and for this purpose it may, in particular, institute proceedings before its competent authorities.

Article 6

1. Subject to any special agreements made between the central authorities concerned and to the provisions of paragraph 3 of this Article:
 - a. communications to the central authority of the State addressed shall be made in the official language or in one of the official languages of that State or be accompanied by a translation into that language;
 - b. the central authority of the State addressed shall nevertheless accept communications made in English or in French or accompanied by a translation into one of these languages.
2. Communications coming from the central authority of the State addressed, including the results of enquiries carried out, may be made in the official language or one of the official languages of that State or in English or French.
3. A Contracting State may exclude wholly or partly the provisions of paragraph 1.b of this Article. When a Contracting State has made this reservation any other Contracting State may also apply the reservation in respect of that State.

Part II – Recognition and enforcement of decisions and restoration of custody of children

Article 7

A decision relating to custody given in a Contracting State shall be recognised and, where it is enforceable in the State of origin, made enforceable in every other Contracting State.

Article 8

1. In the case of an improper removal, the central authority of the State addressed shall cause steps to be taken forthwith to restore the custody of the child where:
 - a. at the time of the institution of the proceedings in the State where the decision was given or at the time of the improper removal, if earlier, the child and his parents had as their sole nationality the nationality of that State and the child had his habitual residence in the territory of that State, and
 - b. a request for the restoration was made to a central authority within a period of six months from the date of the improper removal.
2. If, in accordance with the law of the State addressed, the requirements of paragraph 1 of this Article cannot be complied with without recourse to a judicial authority, none of the grounds of refusal specified in this Convention shall apply to the judicial proceedings.
3. Where there is an agreement officially confirmed by a competent authority between the person having the custody of the child and another person to allow the other person a right of access, and the child, having been taken abroad, has not been restored at the end of the agreed period to the person having the custody, custody of the child shall be restored in accordance with paragraphs 1.b and 2 of this Article. The same shall apply in the case of a decision of the competent authority granting such a right to a person who has not the custody of the child.

Article 9

1. In cases of improper removal, other than those dealt with in Article 8, in which an application has been made to a central authority within a period of six months from the date of the removal, recognition and enforcement may be refused only if:
 - a. in the case of a decision given in the absence of the defendant or his legal representative, the defendant was not duly served with the document which instituted the proceedings or an equivalent document in sufficient time to enable him to arrange his defence; but such a failure to effect service cannot constitute a ground for refusing recognition or enforcement where service was not effected because the defendant had concealed his whereabouts from the person who instituted the proceedings in the State of origin;
 - b. in the case of a decision given in the absence of the defendant or his legal representative, the competence of the authority giving the decision was not founded:
 - i. on the habitual residence of the defendant, or
 - ii. on the last common habitual residence of the child's parents, at least one parent being still habitually resident there, or
 - iii. on the habitual residence of the child;

- c. the decision is incompatible with a decision relating to custody which became enforceable in the State addressed before the removal of the child, unless the child has had his habitual residence in the territory of the requesting State for one year before his removal.
2. Where no application has been made to a central authority, the provisions of paragraph 1 of this Article shall apply equally, if recognition and enforcement are requested within six months from the date of the improper removal.
3. In no circumstances may the foreign decision be reviewed as to its substance.

Article 10

1. In cases other than those covered by Articles 8 and 9, recognition and enforcement may be refused not only on the grounds provided for in Article 9 but also on any of the following grounds:
 - a. if it is found that the effects of the decision are manifestly incompatible with the fundamental principles of the law relating to the family and children in the State addressed;
 - b. if it is found that by reason of a change in the circumstances including the passage of time but not including a mere change in the residence of the child after an improper removal, the effects of the original decision are manifestly no longer in accordance with the welfare of the child;
 - c. if at the time when the proceedings were instituted in the State of origin:
 - i. the child was a national of the State addressed or was habitually resident there and no such connection existed with the State of origin;
 - ii. the child was a national both of the State of origin and of the State addressed and was habitually resident in the State addressed;
 - d. if the decision is incompatible with a decision given in the State addressed or enforceable in that State after being given in a third State, pursuant to proceedings begun before the submission of the request for recognition or enforcement, and if the refusal is in accordance with the welfare of the child.
2. In the same cases, proceedings for recognition or enforcement may be adjourned on any of the following grounds:
 - a. if an ordinary form of review of the original decision has been commenced;
 - b. if proceedings relating to the custody of the child, commenced before the proceedings in the State of origin were instituted, are pending in the State addressed;
 - c. if another decision concerning the custody of the child is the subject of proceedings for enforcement or of any other proceedings concerning the recognition of the decision.

Article 11

1. Decisions on rights of access and provisions of decisions relating to custody which deal with the right of access shall be recognised and enforced subject to the same conditions as other decisions relating to custody.
2. However, the competent authority of the State addressed may fix the conditions for the implementation and exercise of the right of access taking into account, in particular, undertakings given by the parties on this matter.
3. Where no decision on the right of access has been taken or where recognition or enforcement of the decision relating to custody is refused, the central authority of the State addressed may apply to its competent authorities for a decision on the right of access, if the person claiming a right of access so requests.

Article 12

Where, at the time of the removal of a child across an international frontier, there is no enforceable decision given in a Contracting State relating to his custody, the provisions of this Convention shall apply to any subsequent decision, relating to the custody of that child and declaring the removal to be unlawful, given in a Contracting State at the request of any interested person.

Part III – Procedure

Article 13

1. A request for recognition or enforcement in another Contracting State of a decision relating to custody shall be accompanied by:
 - a. a document authorising the central authority of the State addressed to act on behalf of the applicant or to designate another representative for that purpose;
 - b. a copy of the decision which satisfies the necessary conditions of authenticity;
 - c. in the case of a decision given in the absence of the defendant or his legal representative, a document which establishes that the defendant was duly served with the document which instituted the proceedings or an equivalent document;
 - d. if applicable, any document which establishes that, in accordance with the law of the State of origin, the decision is enforceable;
 - e. if possible, a statement indicating the whereabouts or likely whereabouts of the child in the State addressed;
 - f. proposals as to how the custody of the child should be restored.
2. The documents mentioned above shall, where necessary, be accompanied by a translation according to the provisions laid down in Article 6.

Article 14

Each Contracting State shall apply a simple and expeditious procedure for recognition and enforcement of decisions relating to the custody of a child. To that end it shall ensure that a request for enforcement may be lodged by simple application.

Article 15

1. Before reaching a decision under paragraph 1.b of Article 10, the authority concerned in the State addressed:
 - a. shall ascertain the child's views unless this is impracticable having regard in particular to his age and understanding; and
 - b. may request that any appropriate enquiries be carried out.
2. The cost of enquiries in any Contracting State shall be met by the authorities of the State where they are carried out.
3. Request for enquiries and the results of enquiries may be sent to the authority concerned through the central authorities.

Article 16

For the purposes of this Convention, no legalisation or any like formality may be required.

Part IV – Reservations

Article 17

1. A Contracting State may make a reservation that, in cases covered by Articles 8 and 9 or either of these Articles, recognition and enforcement of decisions relating to custody may be refused on such of the grounds provided under Article 10 as may be specified in the reservation.
2. Recognition and enforcement of decisions given in a Contracting State which has made the reservation provided for in paragraph 1 of this Article may be refused in any other Contracting State on any of the additional grounds referred to in that reservation.

Article 18

A Contracting State may make a reservation that it shall not be bound by the provisions of Article 12. The provisions of this Convention shall not apply to decisions referred to in Article 12 which have been given in a Contracting State which has made such a reservation.

Part V – Other instruments

Article 19

This Convention shall not exclude the possibility of relying on any other international instrument in force between the State of origin and the State addressed or on any other law of the State addressed not derived from an international agreement for the purpose of obtaining recognition or enforcement of a decision.

Article 20

1. This Convention shall not affect any obligations which a Contracting State may have towards a non-Contracting State under an international instrument dealing with matters governed by this Convention.
2. When two or more Contracting States have enacted uniform laws in relation to custody of children or created a special system of recognition or enforcement of decisions in this field, or if they should do so in the future, they shall be free to apply, between themselves, those laws or that system in place of this Convention or any part of it. In order to avail themselves of this provision the State shall notify their decision to the Secretary General of the Council of Europe. Any alteration or revocation of this decision must also be notified.

Part VI – Final clauses

Article 21

This Convention shall be open for signature by the member States of the Council of Europe. It is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

Article 22

1. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by the Convention in accordance with the provisions of Article 21.
2. In respect of any member State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of the instrument of ratification, acceptance or approval.

Article 23

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any State not a member of the Council to accede to this Convention, by a decision taken by the majority provided for by Article 20.d of the Statute and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.
2. In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 24

1. Any State may at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
2. Any State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

Article 25

1. A State which has two or more territorial units in which different systems of law apply in matters of custody of children and of recognition and enforcement of decisions relating to custody may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that this Convention shall apply to all its territorial units or to one or more of them.
2. Such a State may at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territorial unit specified in the declaration. In respect of such territorial unit the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt by the Secretary General of such declaration.
3. Any declaration made under the two preceding paragraphs may, in respect of any territorial unit specified in such declaration, be withdrawn by notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notification by the Secretary General.

Article 26

1. In relation to a State which has in matters of custody two or more systems of law of territorial application:
 - a. reference to the law of a person's habitual residence or to the law of a person's nationality shall be construed as referring to the system of law determined by the rules in force in that State or, if there are no such rules, to the system of law with which the person concerned is most closely connected;
 - b. reference to the State of origin or to the State addressed shall be construed as referring, as the case may, be to the territorial unit where recognition or enforcement of the decision or restoration of custody is requested.
2. Paragraph 1.a of this Article also applies *mutatis mutandis* to States which have in matters of custody two or more systems of law of personal application.

Article 27

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, declare that it avails itself of one or more of the reservations provided for in paragraph 3 of Article 6, Article 17 and Article 18 of this Convention. No other reservation may be made.

2. Any Contracting State which has made a reservation under the preceding paragraph may wholly or partly withdraw it by means of a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect on the date of receipt of such notification by the Secretary General.

Article 28

At the end of the third year following the date of the entry into force of this Convention and, on his own initiative, at any time after this date, the Secretary General of the Council of Europe shall invite the representatives of the central authorities appointed by the Contracting States to meet in order to study and to facilitate the functioning of the Convention. Any member State of the Council of Europe not being a party to the Convention may be represented by an observer. A report shall be prepared on the work of each of these meetings and forwarded to the Committee of Ministers of the Council of Europe for information.

Article 29

1. Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of six months after the date of receipt of the notification by the Secretary General.

Article 30

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention, of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. any date of entry into force of this Convention in accordance with Articles 22, 23, 24 and 25;
- d. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Luxembourg, the 20 May 1980, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to any State invited to accede to this Convention.

Appendix B.3

European Convention on the Adoption of Children

Strasbourg, 24.IV.1967
(Entry into Force April 26, 1968)

[Author's note: available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=058&CL=ENG>, accessed February 25, 2009]

Preamble

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members for the purpose, among others, of facilitating their social progress;

Considering that, although the institution of the adoption of children exists in all member countries of the Council of Europe, there are in those countries differing views as to the principles which should govern adoption and differences in the procedure for effecting, and the legal consequences of, adoption; and

Considering that the acceptance of common principles and practices with respect to the adoption of children would help to reduce the difficulties caused by those differences and at the same time promote the welfare of children who are adopted,

Have agreed as follows:

Part I – Undertakings and field of application

Article 1

Each Contracting Party undertakes to ensure the conformity of its law with the provisions of Part II of this Convention and to notify the Secretary General of the Council of Europe of the measures taken for that purpose.

Article 2

Each Contracting Party undertakes to give consideration to the provisions set out in Part III of this Convention, and if it gives effect, or if, having given effect, it ceases to give effect to any of these provisions, it shall notify the Secretary General of the Council of Europe.

Article 3

This Convention applies only to legal adoption of a child who, at the time when the adopter applies to adopt him, has not attained the age of 18, is not and has not been married, and is not deemed in law to have come of age.

Part II – Essential provisions

Article 4

An adoption shall be valid only if it is granted by a judicial or administrative authority (hereinafter referred to as the “competent authority”).

Article 5

1. Subject to paragraphs 2 to 4 of this article, an adoption shall not be granted unless at least the following consents to the adoption have been given and not withdrawn:
 - a. the consent of the mother and, where the child is legitimate, the father; or if there is neither father nor mother to consent, the consent of any person or body who may be entitled in their place to exercise their parental rights in that respect;
 - b. the consent of the spouse of the adopter.
2. The competent authority shall not:
 - a. dispense with the consent of any person mentioned in paragraph 1 of this article, or
 - b. overrule the refusal to consent of any person or body mentioned in the said paragraph 1,save on exceptional grounds determined by law.
3. If the father or mother is deprived of his or her parental rights in respect of the child, or at least of the right to consent to an adoption, the law may provide that it shall not be necessary to obtain his or her consent.

4. A mother's consent to the adoption of her child shall not be accepted unless it is given at such time after the birth of the child, not being less than six weeks, as may be prescribed by law, or, if no such time has been prescribed, at such time as, in the opinion of the competent authority, will have enabled her to recover sufficiently from the effects of giving birth to the child.
5. For the purposes of this article "father" and "mother" mean the persons who are according to law the parents of the child.

Article 6

1. The law shall not permit a child to be adopted except by either two persons married to each other, whether they adopt simultaneously or successively, or by one person.
2. The law shall not permit a child to be again adopted save in one or more of the following circumstances:
 - a. where the child is adopted by the spouse of the adopter;
 - b. where the former adopter has died;
 - c. where the former adoption has been annulled;
 - d. where the former adoption has come to an end.

Article 7

1. A child may be adopted only if the adopter has attained the minimum age prescribed for the purpose, this age being neither less than 21 nor more than 35 years.
2. The law may, however, permit the requirement as to the minimum age to be waived:
 - a. when the adopter is the child's father or mother, or
 - b. by reason of exceptional circumstances.

Article 8

1. The competent authority shall not grant an adoption unless it is satisfied that the adoption will be in the interest of the child.
2. In each case the competent authority shall pay particular attention to the importance of the adoption providing the child with a stable and harmonious home.
3. As a general rule, the competent authority shall not be satisfied as aforesaid if the difference in age between the adopter and the child is less than the normal difference in age between parents and their children.

Article 9

1. The competent authority shall not grant an adoption until appropriate enquiries have been made concerning the adopter, the child and his family.
2. The enquiries, to the extent appropriate in each case, shall concern, *inter alia*, the following matters:
 - a. the personality, health and means of the adopter, particulars of his home and household and his ability to bring up the child;
 - b. why the adopter wishes to adopt the child;
 - c. where only one of two spouses of the same marriage applies to adopt a child, why the other spouse does not join in the application;
 - d. the mutual suitability of the child and the adopter, and the length of time that the child has been in his care and possession;
 - e. the personality and health of the child, and subject to any limitations imposed by law, his antecedents;
 - f. the views of the child with respect to the proposed adoption;
 - g. the religious persuasion, if any, of the adopter and of the child.
3. These enquiries shall be entrusted to a person or body recognised for that purpose by law or by a judicial or administrative body. They shall, as far as practicable, be made by social workers who are qualified in this field as a result of either their training or their experience.
4. The provisions of this article shall not affect the power or duty of the competent authority to obtain any information or evidence, whether or not within the scope of these enquiries, which it considers likely to be of assistance.

Article 10

1. Adoption confers on the adopter in respect of the adopted person the rights and obligations of every kind that a father or mother has in respect of a child born in lawful wedlock.

Adoption confers on the adopted person in respect of the adopter the rights and obligations of every kind that a child born in lawful wedlock has in respect of his father or mother.

2. When the rights and obligations referred to in paragraph 1 of this article are created, any rights and obligations of the same kind existing between the adopted person and his father or mother or any other person or body shall cease to exist. Nevertheless, the law may provide that the spouse of the adopter retains his rights and obligations in respect of the adopted person if the latter is his legitimate, illegitimate or adopted child.

In addition the law may preserve the obligation of the parents to maintain (in the sense of *l'obligation d'entretenir* and *l'obligation alimentaire*) or set up in life or

provide a dowry for the adopted person if the adopter does not discharge any such obligation.

3. As a general rule, means shall be provided to enable the adopted person to acquire the surname of the adopter either in substitution for, or in addition to, his own.
4. If the parent of a child born in lawful wedlock has a right to the enjoyment of that child's property, the adopter's right to the enjoyment of the adopted person's property may, notwithstanding paragraph 1 of this article, be restricted by law.
5. In matters of succession, in so far as the law of succession gives a child born in lawful wedlock a right to share in the estate of his father or mother, an adopted child shall, for the like purposes, be treated as if he were a child of the adopter born in lawful wedlock.

Article 11

1. Where the adopted child does not have, in the case of an adoption by one person, the same nationality as the adopter, or in the case of an adoption by a married couple, their common nationality, the Contracting Party of which the adopter or adopters are nationals shall facilitate acquisition of its nationality by the child.
2. A loss of nationality which could result from an adoption shall be conditional upon possession or acquisition of another nationality.

Article 12

1. The number of children who may be adopted by an adopter shall not be restricted by law.
2. A person who has, or is able to have, a child born in lawful wedlock, shall not on that account be prohibited by law from adopting a child.
3. If adoption improves the legal position of a child, a person shall not be prohibited by law from adopting his own child not born in lawful wedlock.

Article 13

1. Before an adopted person comes of age the adoption may be revoked only by a decision of a judicial or administrative authority on serious grounds, and only if revocation on that ground is permitted by law.
2. The preceding paragraph shall not affect the case of:
 - a. an adoption which is null and void;
 - b. an adoption coming to an end where the adopted person becomes the legitimated child of the adopter.

Article 14

When the enquiries made pursuant to Articles 8 and 9 of this Convention relate to a person who lives or has lived in the territory of another Contracting Party, that Contracting Party shall, if a request for information is made, promptly endeavour to secure that the information requested is provided. The authorities may communicate directly with each other for this purpose.

Article 15

Provision shall be made to prohibit any improper financial advantage arising from a child being given up for adoption.

Article 16

Each Contracting Party shall retain the option of adopting provisions more favourable to the adopted child.

Part III – Supplementary provisions**Article 17**

An adoption shall not be granted until the child has been in the care of the adopters for a period long enough to enable a reasonable estimate to be made by the competent authority as to their future relations if the adoption were granted.

Article 18

The public authorities shall ensure the promotion and proper functioning of public or private agencies to which those who wish to adopt a child or to cause a child to be adopted may go for help and advice.

Article 19

The social and legal aspects of adoption shall be included in the curriculum for the training of social workers.

Article 20

1. Provision shall be made to enable an adoption to be completed without disclosing to the child's family the identity of the adopter.
2. Provision shall be made to require or permit adoption proceedings to take place in camera.
3. The adopter and the adopted person shall be able to obtain a document which contains extracts from the public records attesting the fact, date and place of birth of the adopted person, but not expressly revealing the fact of adoption or the identity of his former parents.
4. Public records shall be kept and, in any event, their contents reproduced in such a way as to prevent persons who do not have a legitimate interest from learning the fact that a person has been adopted or, if that is disclosed, the identity of his former parents.

Part IV – Final clauses**Article 21**

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.
2. This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.
3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

Article 22

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto.
2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

Article 23

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting Party may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.
3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 27 of this Convention.

Article 24

1. Any Contracting Party whose law provides more than one form of adoption shall have the right to apply the provisions of Article 10, paragraphs 1, 2, 3 and 4, and Article 12, paragraphs 2 and 3, of this Convention to one only of such forms.
2. The Contracting Party exercising this right, shall, at the time of signature or when depositing its instrument of ratification, acceptance or accession, or when making a declaration in accordance with paragraph 2 of Article 23 of this Convention, notify the Secretary General of the Council of Europe thereof and indicate the way in which it has been exercised.
3. Such Contracting Party may terminate the exercise of this right and shall give notice thereof to the Secretary General of the Council of Europe.

Article 25

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, or when making a declaration in accordance with paragraph 2 of Article 23 of this Convention, make not more than two reservations in respect of the provisions of Part II of the Convention.

Reservations of a general nature shall not be permitted; each reservation may not affect more than one provision.

A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period.

2. Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

Article 26

Each Contracting Party shall notify the Secretary General of the Council of Europe of the names and addresses of the authorities to which requests under Article 14 may be addressed.

Article 27

1. This Convention shall remain in force indefinitely.
2. Any Contracting Party may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

Article 28

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of:

- a. any signature;
- b. any deposit of an instrument of ratification, acceptance or accession;
- c. any date of entry into force of this Convention in accordance with Article 21 thereof;
- d. any notification received in pursuance of the provisions of Article 1;
- e. any notification received in pursuance of the provisions of Article 2;
- f. any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 23;
- g. any information received in pursuance of the provisions of paragraphs 2 and 3 of Article 24;
- h. any reservation made in pursuance of the provisions of paragraph 1 of Article 25;
- i. the renewal of any reservation carried out in pursuance of the provisions of paragraph 1 of Article 25;
- j. the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 25;
- k. any notification received in pursuance of the provisions of Article 26;
- l. any notification received in pursuance of the provisions of Article 27 and the date on which denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 24 April 1967, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

Appendix B.4

European Convention on the Exercise of Children's Rights

(Entry into Force July 1, 2000)

[Author's note: available at <http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm>, accessed February 25, 2009]

Strasbourg, 25.I.1996

Preamble

The member States of the Council of Europe and the other States signatory hereto,
Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Having regard to the United Nations Convention on the rights of the child and in particular Article 4 which requires States Parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the said Convention;

Noting the contents of Recommendation 1121 (1990) of the Parliamentary Assembly on the rights of the child;

Convinced that the rights and best interests of children should be promoted and to that end children should have the opportunity to exercise their rights, in particular in family proceedings affecting them;

Recognising that children should be provided with relevant information to enable such rights and best interests to be promoted and that due weight should be given to the views of children;

Recognising the importance of the parental role in protecting and promoting the rights and best interests of children and considering that, where necessary, States should also engage in such protection and promotion;

Considering, however, that in the event of conflict it is desirable for families to try to reach agreement before bringing the matter before a judicial authority, Have agreed as follows:

Chapter I – Scope and object of the Convention and definitions

Article 1 – Scope and object of the Convention

1. This Convention shall apply to children who have not reached the age of 18 years.
2. The object of the present Convention is, in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.
3. For the purposes of this Convention proceedings before a judicial authority affecting children are family proceedings, in particular those involving the exercise of parental responsibilities such as residence and access to children.
4. Every State shall, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, specify at least three categories of family cases before a judicial authority to which this Convention is to apply.
5. Any Party may, by further declaration, specify additional categories of family cases to which this Convention is to apply or provide information concerning the application of Article 5, paragraph 2 of Article 9, paragraph 2 of Article 10 and Article 11.
6. Nothing in this Convention shall prevent Parties from applying rules more favourable to the promotion and the exercise of children's rights.

Article 2 – Definitions

For the purposes of this Convention:

- a. the term "judicial authority" means a court or an administrative authority having equivalent powers;
- b. the term "holders of parental responsibilities" means parents and other persons or bodies entitled to exercise some or all parental responsibilities;
- c. the term "representative" means a person, such as a lawyer, or a body appointed to act before a judicial authority on behalf of a child;
- d. the term "relevant information" means information which is appropriate to the age and understanding of the child, and which will be given to enable the

child to exercise his or her rights fully unless the provision of such information were contrary to the welfare of the child.

Chapter II – Procedural measures to promote the exercise of children’s rights

A. Procedural rights of a child

Article 3 – Right to be informed and to express his or her views in proceedings

A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights:

- a. to receive all relevant information;
- b. to be consulted and express his or her views;
- c. to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

Article 4 – Right to apply for the appointment of a special representative

1. Subject to Article 9, the child shall have the right to apply, in person or through other persons or bodies, for a special representative in proceedings before a judicial authority affecting the child where internal law precludes the holders of parental responsibilities from representing the child as a result of a conflict of interest with the latter.
2. States are free to limit the right in paragraph 1 to children who are considered by internal law to have sufficient understanding.

Article 5 – Other possible procedural rights

Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular:

- a. the right to apply to be assisted by an appropriate person of their choice in order to help them express their views;
- b. the right to apply themselves, or through other persons or bodies, for the appointment of a separate representative, in appropriate cases a lawyer;
- c. the right to appoint their own representative;
- d. the right to exercise some or all of the rights of parties to such proceedings.

B. Role of judicial authorities

Article 6 – Decision-making process

In proceedings affecting a child, the judicial authority, before taking a decision, shall:

- a. consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities;
- b. in a case where the child is considered by internal law as having sufficient understanding:
 - ensure that the child has received all relevant information;
 - consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child;
 - allow the child to express his or her views;
- c. give due weight to the views expressed by the child.

Article 7 – Duty to act speedily

In proceedings affecting a child the judicial authority shall act speedily to avoid any unnecessary delay and procedures shall be available to ensure that its decisions are rapidly enforced. In urgent cases the judicial authority shall have the power, where appropriate, to take decisions which are immediately enforceable.

Article 8 – Acting on own motion

In proceedings affecting a child the judicial authority shall have the power to act on its own motion in cases determined by internal law where the welfare of a child is in serious danger.

Article 9 – Appointment of a representative

1. In proceedings affecting a child where, by internal law, the holders of parental responsibilities are precluded from representing the child as a result of a conflict of interest between them and the child, the judicial authority shall have the power to appoint a special representative for the child in those proceedings.

2. Parties shall consider providing that, in proceedings affecting a child, the judicial authority shall have the power to appoint a separate representative, in appropriate cases a lawyer, to represent the child.

C. Role of representatives

Article 10

1. In the case of proceedings before a judicial authority affecting a child the representative shall, unless this would be manifestly contrary to the best interests of the child:
 - a. provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding;
 - b. provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with his or her views and the possible consequences of any action by the representative;
 - c. determine the views of the child and present these views to the judicial authority.
2. Parties shall consider extending the provisions of paragraph 1 to the holders of parental responsibilities.

D. Extension of certain provisions

Article 11

Parties shall consider extending the provisions of Articles 3, 4 and 9 to proceedings affecting children before other bodies and to matters affecting children which are not the subject of proceedings.

E. National bodies

Article 12

1. Parties shall encourage, through bodies which perform, inter alia, the functions set out in paragraph 2, the promotion and the exercise of children’s rights.
2. The functions are as follows:

- a. to make proposals to strengthen the law relating to the exercise of children's rights;
- b. to give opinions concerning draft legislation relating to the exercise of children's rights;
- c. to provide general information concerning the exercise of children's rights to the media, the public and persons and bodies dealing with questions relating to children;
- d. to seek the views of children and provide them with relevant information.

F. Other matters

Article 13 – Mediation or other processes to resolve disputes

In order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties.

Article 14 – Legal aid and advice

Where internal law provides for legal aid or advice for the representation of children in proceedings before a judicial authority affecting them, such provisions shall apply in relation to the matters covered by Articles 4 and 9.

Article 15 – Relations with other international instruments

This Convention shall not restrict the application of any other international instrument which deals with specific issues arising in the context of the protection of children and families, and to which a Party to this Convention is, or becomes, a Party.

Chapter III – Standing Committee

Article 16 – Establishment and functions of the Standing Committee

1. A Standing Committee is set up for the purposes of this Convention.
2. The Standing Committee shall keep under review problems relating to this Convention. It may, in particular:

- a. consider any relevant questions concerning the interpretation or implementation of the Convention. The Standing Committee's conclusions concerning the implementation of the Convention may take the form of a recommendation; recommendations shall be adopted by a three-quarters majority of the votes cast;
- b. propose amendments to the Convention and examine those proposed in accordance with Article 20;
- c. provide advice and assistance to the national bodies having the functions under paragraph 2 of Article 12 and promote international co-operation between them.

Article 17 – Composition

1. Each Party may be represented on the Standing Committee by one or more delegates. Each Party shall have one vote.
2. Any State referred to in Article 21, which is not a Party to this Convention, may be represented in the Standing Committee by an observer. The same applies to any other State or to the European Community after having been invited to accede to the Convention in accordance with the provisions of Article 22.
3. Unless a Party has informed the Secretary General of its objection, at least one month before the meeting, the Standing Committee may invite the following to attend as observers at all its meetings or at one meeting or part of a meeting:
 - any State not referred to in paragraph 2 above;
 - the United Nations Committee on the Rights of the Child;
 - the European Community;
 - any international governmental body;
 - any international non-governmental body with one or more functions mentioned under paragraph 2 of Article 12;
 - any national governmental or non-governmental body with one or more functions mentioned under paragraph 2 of Article 12.
4. The Standing Committee may exchange information with relevant organisations dealing with the exercise of children's rights.

Article 18 – Meetings

1. At the end of the third year following the date of entry into force of this Convention and, on his or her own initiative, at any time after this date, the Secretary General of the Council of Europe shall invite the Standing Committee to meet.
2. Decisions may only be taken in the Standing Committee if at least one-half of the Parties are present.

3. Subject to Articles 16 and 20 the decisions of the Standing Committee shall be taken by a majority of the members present.
4. Subject to the provisions of this Convention the Standing Committee shall draw up its own rules of procedure and the rules of procedure of any working party it may set up to carry out all appropriate tasks under the Convention.

Article 19 – Reports of the Standing Committee

After each meeting, the Standing Committee shall forward to the Parties and the Committee of Ministers of the Council of Europe a report on its discussions and any decisions taken.

Chapter IV – Amendments to the Convention

Article 20

1. Any amendment to the articles of this Convention proposed by a Party or the Standing Committee shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her, at least two months before the next meeting of the Standing Committee, to the member States of the Council of Europe, any signatory, any Party, any State invited to sign this Convention in accordance with the provisions of Article 21 and any State or the European Community invited to accede to it in accordance with the provisions of Article 22.
2. Any amendment proposed in accordance with the provisions of the preceding paragraph shall be examined by the Standing Committee which shall submit the text adopted by a three-quarters majority of the votes cast to the Committee of Ministers for approval. After its approval, this text shall be forwarded to the Parties for acceptance.
3. Any amendment shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.

Chapter V – Final clauses

Article 21 – Signature, ratification and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration.

2. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three States, including at least two member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.
4. In respect of any signatory which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 22 – Non-member States and the European Community

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, on its own initiative or following a proposal from the Standing Committee and after consultation of the Parties, invite any non-member State of the Council of Europe, which has not participated in the elaboration of the Convention, as well as the European Community to accede to this Convention by a decision taken by the majority provided for in Article 20, sub-paragraph d of the Statute of the Council of Europe, and by the unanimous vote of the representatives of the contracting States entitled to sit on the Committee of Ministers.
2. In respect of any acceding State or the European Community, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 23 – Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
2. Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.

3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 24 – Reservations

No reservation may be made to the Convention.

Article 25 – Denunciation

1. Any Party may at any time denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of notification by the Secretary General.

Article 26 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council, any signatory, any Party and any other State or the European Community which has been invited to accede to this Convention of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. any date of entry into force of this Convention in accordance with Articles 21 or 22;
- d. any amendment adopted in accordance with Article 20 and the date on which such an amendment enters into force;
- e. any declaration made under the provisions of Articles 1 and 23;
- f. any denunciation made in pursuance of the provisions of Article 25;
- g. any other act, notification or communication relating to this Convention.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, the 25th day of January 1996, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention, to the European Community and to any State invited to accede to this Convention.

Appendix B.5

European Convention on the Legal Status of Children Born out of Wedlock

(Entry into Force August 11, 1978)

[Author's note: available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/085.htm>, accessed February 25, 2009]

Strasbourg, 15.X.1975

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members, in particular by the adoption of common rules in the field of law;

Noting that in a great number of member States efforts have been, or are being, made to improve the legal status of children born out of wedlock by reducing the differences between their legal status and that of children born in wedlock which are to the legal or social disadvantage of the former;

Recognising that wide disparities in the laws of member States in this field still exist;

Believing that the situation of children born out of wedlock should be improved and that the formulation of certain common rules concerning their legal status would assist this objective and at the same time would contribute to a harmonisation of the laws of the member States in this field;

Considering however that it is necessary to allow progressive stages for those States which consider themselves unable to adopt immediately certain rules of this Convention,

Have agreed as follows:

Article 1

Each Contracting Party undertakes to ensure the conformity of its law with the provisions of this Convention and to notify the Secretary General of the Council of Europe of the measures taken for that purpose.

Article 2

Maternal affiliation of every child born out of wedlock shall be based solely on the fact of the birth of the child.

Article 3

Paternal affiliation of every child born out of wedlock may be evidenced or established by voluntary recognition or by judicial decision.

Article 4

The voluntary recognition of paternity may not be opposed or contested insofar as the internal law provides for these procedures unless the person seeking to recognise or having recognised the child is not the biological father.

Article 5

In actions relating to paternal affiliation scientific evidence which may help to establish or disprove paternity shall be admissible.

Article 6

1. The father and mother of a child born out of wedlock shall have the same obligation to maintain the child as if it were born in wedlock.
2. Where a legal obligation to maintain a child born in wedlock falls on certain members of the family of the father or mother, this obligation shall also apply for the benefit of a child born out of wedlock.

Article 7

1. Where the affiliation of a child born out of wedlock has been established as regards both parents, parental authority may not be attributed automatically to the father alone.
2. There shall be power to transfer parental authority; cases of transfer shall be governed by the internal law.

Article 8

Where the father or mother of a child born out of wedlock does not have parental authority over or the custody of the child, that parent may obtain a right of access to the child in appropriate cases.

Article 9

A child born out of wedlock shall have the same right of succession in the estate of its father and its mother and of a member of its father's or mother's family, as if it had been born in wedlock.

Article 10

The marriage between the father and mother of a child born out of wedlock shall confer on the child the legal status of a child born in wedlock.

Article 11

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
2. This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or approval.
3. In respect of a signatory State ratifying, accepting or approving subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 12

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede to this Convention.
2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

Article 13

1. Any State may, at the time of signature, or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
2. Any State may, when depositing its instrument of ratification, acceptance, approval or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.
3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 15 of this Convention.

Article 14

1. Any State may, at the time of signature, or when depositing its instrument of ratification, acceptance, approval or accession or when making a declaration in accordance with paragraph 2 of Article 13 of this Convention, make not more than three reservations in respect of the provisions of Articles 2 to 10 of the Convention. Reservations of a general nature shall not be permitted; each reservation may not affect more than one provision.
2. A reservation shall be valid for five years from the entry into force of this Convention for the Contracting Party concerned. It may be renewed for successive periods of five years by means of a declaration addressed to the Secretary General of the Council of Europe before the expiration of each period.
3. Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraphs by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

Article 15

1. Any Contracting Party may, insofar as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

Article 16

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of:

- a. any signature;
- b. any deposit of an instrument of ratification, acceptance, approval or accession;
- c. any date of entry into force of this Convention in accordance with Article 11 thereof;
- d. any notification received in pursuance of the provisions of Article 1;
- e. any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 13;
- f. any reservation made in pursuance of the provisions of paragraph 1 of Article 14;
- g. the renewal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 14;
- h. the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 3 of Article 14;
- i. any notification received in pursuance of the provisions of Article 15 and the date on which denunciation takes effect.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 15th day of October 1975, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

Appendix B.6

European Convention on Nationality

(Entry into Force March 1, 2000)

[Author's note: available at <http://conventions.coe.int/Treaty/en/Treaties/Html/166.htm>, accessed February 25, 2009]

Strasbourg, 6.XI.1997

Preamble

The member States of the Council of Europe and the other States signatory to this Convention,

Considering that the aim of the Council of Europe is to achieve greater unity between its members;

Bearing in mind the numerous international instruments relating to nationality, multiple nationality and statelessness;

Recognising that, in matters concerning nationality, account should be taken both of the legitimate interests of States and those of individuals;

Desiring to promote the progressive development of legal principles concerning nationality, as well as their adoption in internal law and desiring to avoid, as far as possible, cases of statelessness;

Desiring to avoid discrimination in matters relating to nationality;

Aware of the right to respect for family life as contained in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Noting the varied approach of States to the question of multiple nationality and recognising that each State is free to decide which consequences it attaches in its internal law to the fact that a national acquires or possesses another nationality;

Agreeing on the desirability of finding appropriate solutions to consequences of multiple nationality and in particular as regards the rights and duties of multiple nationals;

Considering it desirable that persons possessing the nationality of two or more States Parties should be required to fulfil their military obligations in relation to only one of those Parties;

Considering the need to promote international co-operation between the national authorities responsible for nationality matters,
Have agreed as follows:

Chapter I – General matters

Article 1 – Object of the Convention

This Convention establishes principles and rules relating to the nationality of natural persons and rules regulating military obligations in cases of multiple nationality, to which the internal law of States Parties shall conform.

Article 2 – Definitions

For the purpose of this Convention:

- a. “nationality” means the legal bond between a person and a State and does not indicate the person’s ethnic origin;
- b. “multiple nationality” means the simultaneous possession of two or more nationalities by the same person;
- c. “child” means every person below the age of 18 years unless, under the law applicable to the child, majority is attained earlier;
- d. “internal law” means all types of provisions of the national legal system, including the constitution, legislation, regulations, decrees, case-law, customary rules and practice as well as rules deriving from binding international instruments.

Chapter II – General principles relating to nationality

Article 3 – Competence of the State

1. Each State shall determine under its own law who are its nationals.
2. This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality.

Article 4 – Principles

The rules on nationality of each State Party shall be based on the following principles:

- a. everyone has the right to a nationality;
- b. statelessness shall be avoided;
- c. no one shall be arbitrarily deprived of his or her nationality;
- d. neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

Article 5 – Non-discrimination

1. The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.
2. Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.

Chapter III – Rules relating to nationality

Article 6 – Acquisition of nationality

1. Each State Party shall provide in its internal law for its nationality to be acquired ex lege by the following persons:
 - a. children one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party, subject to any exceptions which may be provided for by its internal law as regards children born abroad. With respect to children whose parenthood is established by recognition, court order or similar procedures, each State Party may provide that the child acquires its nationality following the procedure determined by its internal law;
 - b. foundlings found in its territory who would otherwise be stateless.
2. Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality. Such nationality shall be granted:
 - a. at birth ex lege; or
 - b. subsequently, to children who remained stateless, upon an application being lodged with the appropriate authority, by or on behalf of the child concerned, in the manner prescribed by the internal law of the State Party. Such an application may be made subject to the lawful and habitual residence on its territory for a period not exceeding five years immediately preceding the lodging of the application.
3. Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory.

In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application.

4. Each State Party shall facilitate in its internal law the acquisition of its nationality for the following persons:
 - a. spouses of its nationals;
 - b. children of one of its nationals, falling under the exception of Article 6, paragraph 1, sub-paragraph a;
 - c. children one of whose parents acquires or has acquired its nationality;
 - d. children adopted by one of its nationals;
 - e. persons who were born on its territory and reside there lawfully and habitually;
 - f. persons who are lawfully and habitually resident on its territory for a period of time beginning before the age of 18, that period to be determined by the internal law of the State Party concerned;
 - g. stateless persons and recognised refugees lawfully and habitually resident on its territory.

Article 7 – Loss of nationality ex lege or at the initiative of a State Party

1. A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases:
 - a. voluntary acquisition of another nationality;
 - b. acquisition of the nationality of the State Party by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant;
 - c. voluntary service in a foreign military force;
 - d. conduct seriously prejudicial to the vital interests of the State Party;
 - e. lack of a genuine link between the State Party and a national habitually residing abroad;
 - f. where it is established during the minority of a child that the preconditions laid down by internal law which led to the ex lege acquisition of the nationality of the State Party are no longer fulfilled;
 - g. adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.
2. A State Party may provide for the loss of its nationality by children whose parents lose that nationality except in cases covered by sub-paragraphs c and d of paragraph 1. However, children shall not lose that nationality if one of their parents retains it.
3. A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person concerned would thereby become stateless, with the exception of the cases mentioned in paragraph 1, sub-paragraph b, of this article.

Article 8 – Loss of nationality at the initiative of the individual

1. Each State Party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless.
2. However, a State Party may provide in its internal law that renunciation may be effected only by nationals who are habitually resident abroad.

Article 9 – Recovery of nationality

Each State Party shall facilitate, in the cases and under the conditions provided for by its internal law, the recovery of its nationality by former nationals who are lawfully and habitually resident on its territory.

Chapter IV – Procedures relating to nationality***Article 10 – Processing of applications***

Each State Party shall ensure that applications relating to the acquisition, retention, loss, recovery or certification of its nationality be processed within a reasonable time.

Article 11 – Decisions

Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality contain reasons in writing.

Article 12 – Right to a review

Each State Party shall ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality be open to an administrative or judicial review in conformity with its internal law.

Article 13 – Fees

1. Each State Party shall ensure that the fees for the acquisition, retention, loss, recovery or certification of its nationality be reasonable.

2. Each State Party shall ensure that the fees for an administrative or judicial review be not an obstacle for applicants.

Chapter V – Multiple nationality

Article 14 – Cases of multiple nationality

1. A State Party shall allow:
 - a. children having different nationalities acquired automatically at birth to retain these nationalities;
 - b. its nationals to possess another nationality where this other nationality is automatically acquired by marriage.
2. The retention of the nationalities mentioned in paragraph 1 is subject to the relevant provisions of Article 7 of this Convention.

Article 15 – Other possible cases of multiple nationality

The provisions of this Convention shall not limit the right of a State Party to determine in its internal law whether:

- a. its nationals who acquire or possess the nationality of another State retain its nationality or lose it;
- b. the acquisition or retention of its nationality is subject to the renunciation or loss of another nationality.

Article 16 – Conservation of previous nationality

A State Party shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required.

Article 17 – Rights and duties related to multiple nationality

1. Nationals of a State Party in possession of another nationality shall have, in the territory of that State Party in which they reside, the same rights and duties as other nationals of that State Party.
2. The provisions of this chapter do not affect:

- a. the rules of international law concerning diplomatic or consular protection by a State Party in favour of one of its nationals who simultaneously possesses another nationality;
- b. the application of the rules of private international law of each State Party in cases of multiple nationality.

Chapter VI – State succession and nationality

Article 18 – Principles

1. In matters of nationality in cases of State succession, each State Party concerned shall respect the principles of the rule of law, the rules concerning human rights and the principles contained in Articles 4 and 5 of this Convention and in paragraph 2 of this article, in particular in order to avoid statelessness.
2. In deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account in particular of:
 - a. the genuine and effective link of the person concerned with the State;
 - b. the habitual residence of the person concerned at the time of State succession;
 - c. the will of the person concerned;
 - d. the territorial origin of the person concerned.
3. Where the acquisition of nationality is subject to the loss of a foreign nationality, the provisions of Article 16 of this Convention shall apply.

Article 19 – Settlement by international agreement

In cases of State succession, States Parties concerned shall endeavour to regulate matters relating to nationality by agreement amongst themselves and, where applicable, in their relationship with other States concerned. Such agreements shall respect the principles and rules contained or referred to in this chapter.

Article 20 – Principles concerning non-nationals

1. Each State Party shall respect the following principles:
 - a. nationals of a predecessor State habitually resident in the territory over which sovereignty is transferred to a successor State and who have not acquired its nationality shall have the right to remain in that State;
 - b. persons referred to in sub-paragraph a shall enjoy equality of treatment with nationals of the successor State in relation to social and economic rights.

2. Each State Party may exclude persons considered under paragraph 1 from employment in the public service involving the exercise of sovereign powers.

Chapter VII – Military obligations in cases of multiple nationality

Article 21 – Fulfilment of military obligations

1. Persons possessing the nationality of two or more States Parties shall be required to fulfil their military obligations in relation to one of those States Parties only.
2. The modes of application of paragraph 1 may be determined by special agreements between any of the States Parties.
3. Except where a special agreement which has been, or may be, concluded provides otherwise, the following provisions are applicable to persons possessing the nationality of two or more States Parties:
 - a. Any such person shall be subject to military obligations in relation to the State Party in whose territory they are habitually resident. Nevertheless, they shall be free to choose, up to the age of 19 years, to submit themselves to military obligations as volunteers in relation to any other State Party of which they are also nationals for a total and effective period at least equal to that of the active military service required by the former State Party;
 - b. Persons who are habitually resident in the territory of a State Party of which they are not nationals or in that of a State which is not a State Party may choose to perform their military service in the territory of any State Party of which they are nationals;
 - c. Persons who, in accordance with the rules laid down in paragraphs a and b, shall fulfil their military obligations in relation to one State Party, as prescribed by the law of that State Party, shall be deemed to have fulfilled their military obligations in relation to any other State Party or States Parties of which they are also nationals;
 - d. Persons who, before the entry into force of this Convention between the States Parties of which they are nationals, have, in relation to one of those States Parties, fulfilled their military obligations in accordance with the law of that State Party, shall be deemed to have fulfilled the same obligations in relation to any other State Party or States Parties of which they are also nationals;
 - e. Persons who, in conformity with paragraph a, have performed their active military service in relation to one of the States Parties of which they are nationals, and subsequently transfer their habitual residence to the territory of the other State Party of which they are nationals, shall be liable to military service in the reserve only in relation to the latter State Party;
 - f. The application of this article shall not prejudice, in any respect, the nationality of the persons concerned;

- g. In the event of mobilisation by any State Party, the obligations arising under this article shall not be binding upon that State Party.

Article 22 – Exemption from military obligations or alternative civil service

Except where a special agreement which has been, or may be, concluded provides otherwise, the following provisions are also applicable to persons possessing the nationality of two or more States Parties:

- a. Article 21, paragraph 3, sub-paragraph c, of this Convention shall apply to persons who have been exempted from their military obligations or have fulfilled civil service as an alternative;
- b. persons who are nationals of a State Party which does not require obligatory military service shall be considered as having satisfied their military obligations when they have their habitual residence in the territory of that State Party. Nevertheless, they should be deemed not to have satisfied their military obligations in relation to a State Party or States Parties of which they are equally nationals and where military service is required unless the said habitual residence has been maintained up to a certain age, which each State Party concerned shall notify at the time of signature or when depositing its instruments of ratification, acceptance or accession;
- c. also persons who are nationals of a State Party which does not require obligatory military service shall be considered as having satisfied their military obligations when they have enlisted voluntarily in the military forces of that Party for a total and effective period which is at least equal to that of the active military service of the State Party or States Parties of which they are also nationals without regard to where they have their habitual residence.

Chapter VIII – Co-operation between the States Parties

Article 23 – Co-operation between the States Parties

- 1. With a view to facilitating co-operation between the States Parties, their competent authorities shall:
 - a. provide the Secretary General of the Council of Europe with information about their internal law relating to nationality, including instances of statelessness and multiple nationality, and about developments concerning the application of the Convention;

- b. provide each other upon request with information about their internal law relating to nationality and about developments concerning the application of the Convention.
2. States Parties shall co-operate amongst themselves and with other member States of the Council of Europe within the framework of the appropriate intergovernmental body of the Council of Europe in order to deal with all relevant problems and to promote the progressive development of legal principles and practice concerning nationality and related matters.

Article 24 – Exchange of information

Each State Party may at any time declare that it shall inform any other State Party, having made the same declaration, of the voluntary acquisition of its nationality by nationals of the other State Party, subject to applicable laws concerning data protection. Such a declaration may indicate the conditions under which the State Party will give such information. The declaration may be withdrawn at any time.

Chapter IX – Application of the Convention

Article 25 – Declarations concerning the application of the Convention

1. Each State may declare, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, that it will exclude Chapter VII from the application of the Convention.
2. The provisions of Chapter VII shall be applicable only in the relations between States Parties for which it is in force.
3. Each State Party may, at any subsequent time, notify the Secretary General of the Council of Europe that it will apply the provisions of Chapter VII excluded at the time of signature or in its instrument of ratification, acceptance, approval or accession. This notification shall become effective as from the date of its receipt.

Article 26 – Effects of this Convention

1. The provisions of this Convention shall not prejudice the provisions of internal law and binding international instruments which are already in force or may come into force, under which more favourable rights are or would be accorded to individuals in the field of nationality.

2. This Convention does not prejudice the application of:
 - a. the 1963 Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality and its Protocols;
 - b. other binding international instruments in so far as such instruments are compatible with this Convention, in the relationship between the States Parties bound by these instruments.

Chapter X – Final clauses

Article 27 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration. Such States may express their consent to be bound by:
 - a. signature without reservation as to ratification, acceptance or approval; or
 - b. signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval.

Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force, for all States having expressed their consent to be bound by the Convention, on the first day of the month following the expiration of a period of three months after the date on which three member States of the Council of Europe have expressed their consent to be bound by this Convention in accordance with the provisions of the preceding paragraph.
3. In respect of any State which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of signature or of the deposit of its instrument of ratification, acceptance or approval.

Article 28 – Accession

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State of the Council of Europe which has not participated in its elaboration to accede to this Convention.
2. In respect of any acceding State, this Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 29 – Reservations

1. No reservations may be made to any of the provisions contained in Chapters I, II and VI of this Convention. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, make one or more reservations to other provisions of the Convention so long as they are compatible with the object and purpose of this Convention.
2. Any State which makes one or more reservations shall notify the Secretary General of the Council of Europe of the relevant contents of its internal law or of any other relevant information.
3. A State which has made one or more reservations in accordance with paragraph 1 shall consider withdrawing them in whole or in part as soon as circumstances permit. Such withdrawal shall be made by means of a notification addressed to the Secretary General of the Council of Europe and shall become effective as from the date of its receipt.
4. Any State which extends the application of this Convention to a territory mentioned in the declaration referred to in Article 30, paragraph 2, may, in respect of the territory concerned, make one or more reservations in accordance with the provisions of the preceding paragraphs.
5. A State Party which has made reservations in respect of any of the provisions in Chapter VII of the Convention may not claim application of the said provisions by another State Party save in so far as it has itself accepted these provisions.

Article 30 – Territorial application

1. Any State may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
2. Any State may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 31 – Denunciation

1. Any State Party may at any time denounce the Convention as a whole or Chapter VII only by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of notification by the Secretary General.

Article 32 – Notifications by the Secretary General

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, any Signatory, any Party and any other State which has acceded to this Convention of:

- a. any signature;
- b. the deposit of any instrument of ratification, acceptance, approval or accession;
- c. any date of entry into force of this Convention in accordance with Articles 27 or 28 of this Convention;
- d. any reservation and withdrawal of reservations made in pursuance of the provisions of Article 29 of this Convention;
- e. any notification or declaration made under the provisions of Articles 23, 24, 25, 27, 28, 29, 30 and 31 of this Convention;
- f. any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this sixth day of November 1997, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention and to any State invited to accede to this Convention.

Appendix C.1

Statute of the International Criminal Tribunal for Rwanda

[Author's note: available at <http://www2.ohchr.org/english/law/itr.htm>, accessed February 25, 2009]

Adopted by Security Council resolution 955 (1994) of 8 November, 1994

Amended by Security Council resolutions 1165 (1998) of 30 April, 1998, 1329 (2000) of 30 November, 2000, 1411 (2002) of 17 May, 2002 and 1431 (2002) of 14 August, 2002

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January, 1994 and 31 December, 1994 (hereinafter referred to as “the International Tribunal for Rwanda”) shall function in accordance with the provisions of the present Statute.

Article 1 – Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January, 1994 and 31 December, 1994, in accordance with the provisions of the present Statute.

Article 2 – Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this Article or of committing any of the other acts enumerated in paragraph 3 of this Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - a. Killing members of the group;
 - b. Causing serious bodily or mental harm to members of the group;
 - c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d. Imposing measures intended to prevent births within the group;
 - e. Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
 - a. Genocide;
 - b. Conspiracy to commit genocide;
 - c. Direct and public incitement to commit genocide;
 - d. Attempt to commit genocide;
 - e. Complicity in genocide.

Article 3 – Crimes against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation;
- e. Imprisonment;
- f. Torture;
- g. Rape;
- h. Persecutions on political, racial and religious grounds;
- i. Other inhumane acts.

Article 4 – Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August, 1949 for the Protection of War Victims, and

of Additional Protocol II thereto of 8 June, 1977. These violations shall include, but shall not be limited to:

- a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b. Collective punishments;
- c. Taking of hostages;
- d. Acts of terrorism;
- e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f. Pillage;
- g. The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples;
- h. Threats to commit any of the foregoing acts.

Article 5 – Personal Jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6 – Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7 – Territorial and Temporal Jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January, 1994 and ending on 31 December, 1994.

Article 8 – Concurrent Jurisdiction

1. The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of the neighbouring States, between 1 January, 1994 and 31 December, 1994.
2. The International Tribunal for Rwanda shall have the primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9 – *Non Bis in Idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.
2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:
 - a. The act for which he or she was tried was characterised as an ordinary crime; or
 - b. The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account

the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10 – Organisation of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

- a. The Chambers, comprising three Trial Chambers and an Appeals Chamber;
- b. The Prosecutor;
- c. A Registry.

Article 11 – Composition of the Chambers

1. The Chambers shall be composed of 16 permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of four *ad litem* independent judges appointed in accordance with article 12 *ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of four *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgment in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12 – Qualification and Election of Judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 12 *bis* – Election of Permanent Judges

1. Eleven of the permanent judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - a. The Secretary-General shall invite nominations for permanent judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 12 of the present Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as ‘the International Tribunal for the Former Yugoslavia’) in accordance with article 13 *bis* of the Statute of that Tribunal;
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven permanent judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 12 of the present Statute, for the remainder of the term of office concerned.
3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 12 *ter* – Election and Appointment of *Ad Litem* Judges

1. The *ad litem* judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - a. The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than thirty-six candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution;
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eighteen *ad litem* judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;
 - e. The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.
2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal for Rwanda, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal for Rwanda shall bear in mind the criteria set out in article 12 of the present Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 12 *quarter* – Status of *Ad Litem* Judges

1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:

- a. Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal for Rwanda;
 - b. Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;
 - c. Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda.
2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not:
- a. Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;
 - b. Have power:
 - i. To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;
 - ii. To review an indictment pursuant to article 18 of the present Statute;
 - iii. To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute;
 - iv. To adjudicate in pre-trial proceedings.

Article 13 – Officers and Members of the Chambers

1. The permanent judges of the International Tribunal for Rwanda shall elect a President from amongst their number.
2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.
3. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign two of the permanent judges elected or appointed in accordance with article 12 bis of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda.
4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.
5. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal for Rwanda to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.

7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of that Trial Chamber as a whole.

Article 14 – Rules of Procedure and Evidence

The Judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the Rules of Procedure and Evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the former Yugoslavia with such changes as they deem necessary.

Article 15 – The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January, 1994 and 31 December, 1994.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.
3. The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16 – The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four-year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The Staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17 – Investigation and Preparation of Indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.
4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18 – Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19 – Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 20 – Rights of the Accused

1. All persons shall be equal before the International Tribunal for Rwanda.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
 - b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
 - c. To be tried without undue delay;
 - d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;
 - g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 21 – Protection of Victims and Witnesses

The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22 – Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23 – Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24 – Appellate Proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - a. An error on a question of law invalidating the decision; or
 - b. An error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25 – Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26 – Enforcement of Sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27 – Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28 – Cooperation and Judicial Assistance

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:
 - a. The identification and location of persons;
 - b. The taking of testimony and the production of evidence;
 - c. The service of documents;
 - d. The arrest or detention of persons;
 - e. The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29 – The Status, Privileges and Immunities of the International Tribunal for Rwanda

1. The Convention on the Privileges and Immunities of the United Nations of 13 February, 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30 – Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organisation in accordance with Article 17 of the Charter of the United Nations.

Article 31 – Working Languages

The working languages of the International Tribunal for Rwanda shall be English and French.

Article 32 – Annual Report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

Appendix D.1

Updated Statute of the International Criminal Tribunal for the Former Yugoslavia

(Adopted May 25, 1993 by Resolution 827)

(As Amended May 13, 1998 by Resolution 1166)

(As Amended November 30, 2000 by Resolution 1329)

(As Amended May 17, 2002 by Resolution 1411)

(As Amended August 14, 2002 by Resolution 1431)

(As Amended May 19, 2003 by Resolution 1481)

(As Amended April 20, 2005 by Resolution 1597)

(As Amended February 28, 2006 by Resolution 1660)

(As Amended September 29, 2008 by Resolution 1837)

[Author's note: available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf, accessed February 25, 2009; this compilation also includes:

ICTY RELATED RESOLUTIONS:

Resolution 1503 of August 28, 2003 (p. xxxx)

Resolution 1504 of September 4, 2003 (p. xxxx)

Resolution 1534 of March 26, 2004 (p. xxxx)

Resolution 1581 of January 18, 2005 (p. xxxx)

Resolution 1613 of July 26, 2005 (p. xxxx)

Resolution 1629 of September 30, 2005 (p. xxxx)

Resolution 1668 of April 10, 2006 (p. xxxx)

Resolution 1775 of September 14, 2007 (p. xxxx)

Resolution 1786 of November 28, 2007 (p. xxxx)

Resolution 1800 of February 20, 2008 (p. xxxx)]

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as “the International Tribunal”) shall function in accordance with the provisions of the present Statute.

Article 1 – Competence of the International Tribunal

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

Article 2 – Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of August 12, 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- a. wilful killing;
- b. torture or inhuman treatment, including biological experiments;
- c. wilfully causing great suffering or serious injury to body or health;
- d. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- e. compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- f. wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- g. unlawful deportation or transfer or unlawful confinement of a civilian;
- h. taking civilians as hostages.

Article 3 – Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- a. employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- b. wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

- c. attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- d. seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- e. plunder of public or private property.

Article 4 – Genocide

1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - a. killing members of the group;
 - b. causing serious bodily or mental harm to members of the group;
 - c. deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d. imposing measures intended to prevent births within the group;
 - e. forcibly transferring children of the group to another group.
3. The following acts shall be punishable:
 - a. genocide;
 - b. conspiracy to commit genocide;
 - c. direct and public incitement to commit genocide;
 - d. attempt to commit genocide;
 - e. complicity in genocide.

Article 5 – Crimes against humanity

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- a. murder;
- b. extermination;
- c. enslavement;
- d. deportation;
- e. imprisonment;
- f. torture;
- g. rape;

- h. persecutions on political, racial and religious grounds;
- i. other inhumane acts.

Article 6 – Personal jurisdiction

The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 7 – Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

Article 8 – Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on January 1, 1991.

Article 9 – Concurrent jurisdiction

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991.

2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

Article 10 – Non-bis-in-idem

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
 - a. the act for which he or she was tried was characterized as an ordinary crime; or
 - b. the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 11 – Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

- a. the Chambers, comprising three Trial Chambers and an Appeals Chamber;
- b. the Prosecutor; and
- c. a Registry, servicing both the Chambers and the Prosecutor.

Article 12 – Composition of the Chambers

1. The Chambers shall be composed of a maximum of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of twelve *ad litem* independent judges appointed in

accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

2. A maximum at any one time of three permanent judges and six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges, except in the circumstances specified in paragraph 5 below. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
5. The Secretary-General may, at the request of the President of the International Tribunal appoint, from among the *ad litem* judges elected in accordance with Article 13 *ter*, reserve judges to be present at each stage of a trial to which they have been appointed and to replace a judge if that judge is unable to continue sitting.
6. Without prejudice to paragraph 2 above, in the event that exceptional circumstances require for a permanent judge in a section of a Trial Chamber to be replaced resulting in a section solely comprised of *ad litem* judges, that section may continue to hear the case, notwithstanding that its composition no longer includes a permanent judge.

Article 13 – Qualifications of judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 13 bis – Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

- a. The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between January 1, 1994 and December 31, 1994 (hereinafter referred to as “The International Tribunal for Rwanda”) in accordance with article 12 bis of the Statute of that Tribunal;
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.
 3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 13 ter – Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

- a. The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.
 - e. The *ad litem* judges shall be elected for a term of four years. They shall be eligible for re-election.
2. During *any* term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 13 quarter – Status of ad litem judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:
 - a. Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
 - b. Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;
 - c. Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;

- d. Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.
2. *During* the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:
- a. Be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
 - b. Have power:
 - i. To adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
 - ii. To review an indictment pursuant to article 19 of the Statute;
 - iii. To consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute.
3. *Notwithstanding*, paragraphs 1 and 2 above, an *ad litem* judge who is serving as a reserve judge shall, during such time as he or she so serves:
- a. Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
 - b. Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
 - c. Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to and for that purpose to enjoy subject to paragraph 2 above, the same powers as permanent judges.
4. In *the* event that a reserve judge replaces a judge who is unable to continue sitting, he or she will, as of that time, benefit from the provisions of paragraph 1 above.

Article 14 – Officers and members of the Chambers

- 1. The permanent judges of the International Tribunal shall elect a President from amongst their number.
- 2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.
- 3. After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in accordance with Article 13 *bis* of the Statute to the Appeals Chamber and nine to the Trial Chambers.

4. Two of the permanent judges of the International Tribunal for Rwanda elected or appointed in accordance with article 12 *bis* of the Statute of that Tribunal shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal.
5. After consultation with the permanent judges of the International Tribunal, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.

Article 15 – Rules of procedure and evidence

The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.

Article 16 – The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January, 1991.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 17 – The Registry

1. The Registry shall be responsible for the administration and servicing of the International Tribunal.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal. He or she shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.
4. The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 18 – Investigation and preparation of indictment

1. The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and nongovernmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.
2. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
3. If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands.
4. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 19 – Review of the indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 20 – Commencement and conduct of trial proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal, be taken into custody, immediately informed of the charges against him and transferred to the International Tribunal.
3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 21 – Rights of the accused

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - a. to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - b. to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - c. to be tried without undue delay;
 - d. to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any

- case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- e. to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - f. to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
 - g. not to be compelled to testify against himself or to confess guilt.

Article 22 – Protection of victims and witnesses

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 23 – Judgement

1. The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.
2. The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 24 – Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 25 – Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
 - a. an error on a question of law invalidating the decision; or
 - b. an error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 26 – Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement.

Article 27 – Enforcement of sentences

Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal.

Article 28 – Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law.

Article 29 – Co-operation and judicial assistance

1. States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - a. the identification and location of persons;
 - b. the taking of testimony and the production of evidence;
 - c. the service of documents;
 - d. the arrest or detention of persons;
 - e. the surrender or the transfer of the accused to the International Tribunal.

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

1. The Convention on the Privileges and Immunities of the United Nations of February 13, 1946 shall apply to the International Tribunal, the judges, the Prosecutor and his staff, and the Registrar and his staff.
2. The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.

Article 31 – Seat of the International Tribunal

The International Tribunal shall have its seat at The Hague.

Article 32 – Expenses of the International Tribunal

The expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.

Article 33 – Working languages

The working languages of the International Tribunal shall be English and French.

Article 34 – Annual report

The President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.

RESOLUTION 808 (1993)

Adopted by the Security Council at its 3175th meeting, on 22 February, 1993

The Security Council,

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

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

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

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

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

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

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

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

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

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

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

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

1. *Decides* that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991;
2. *Requests* the Secretary-General to submit for consideration by the Council at the earliest possible date, and if possible no later than 60 days after the adoption of the present resolution, a report on all the aspects of this matter, including specific proposals and where appropriate options for the effective and expeditious implementation of the decision contained in paragraph 1 above, taking into account suggestions put forward in this regard by Member States;
3. *Decides* to remain actively seized of the matter.

RESOLUTION 827 (1993)

Adopted by the Security Council at its 3217th meeting, on 25 May, 1993

The Security Council,

Reaffirming its resolution 713 (1991) of 25 September, 1991 and all subsequent relevant resolutions, Having considered the report of the Secretary-General (S/25704 and Add.1) pursuant to paragraph 2 of resolution 808 (1993),

Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of “ethnic cleansing”, including for the acquisition and the holding of territory,

Determining that this situation continues to constitute a threat to international peace and security, Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal and the prosecution of persons responsible

for the above-mentioned violations of international humanitarian law will contribute to ensuring that such

violations are halted and effectively redressed,

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

Reaffirming in this regard its decision in resolution 808 (1993) that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991,

Considering that, pending the appointment of the Prosecutor of the International Tribunal, the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report (S/25274),

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

1. *Approves* the report of the Secretary-General;
2. *Decides* hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January, 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the abovementioned report;
3. *Requests* the Secretary-General to submit to the judges of the International Tribunal, upon their election, any suggestions received from States for the rules of procedure and evidence called for in Article 15 of the Statute of the International Tribunal;
4. *Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute;
5. *Urges* States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;
6. *Decides* that the determination of the seat of the International Tribunal is subject to the conclusion of appropriate arrangements between the United Nations and the Netherlands acceptable to the Council, and that the International Tribunal may sit elsewhere when it considers it necessary for the efficient exercise of its functions;

7. *Decides* also that the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law;
8. *Requests* the Secretary-General to implement urgently the present resolution and in particular to make practical arrangements for the effective functioning of the International Tribunal at the earliest time and to report periodically to the Council;
9. *Decides* to remain actively seized of the matter.

RESOLUTION 1166 (1998)

Adopted by the Security Council at its 3878th meeting, on 13 May, 1998

The Security Council,

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

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

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

Convinced of the need to increase the number of judges and Trial Chambers, in order to enable the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the International Tribunal") to try without delay the large number of accused awaiting trial,

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

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

1. *Decides* to establish a third Trial Chamber of the International Tribunal, and to this end decides to amend articles 11, 12 and 13 of the Statute of the International Tribunal and to replace those articles with the provisions set out in the annex to this resolution;
2. *Decides* that three additional judges shall be elected as soon as possible to serve in the additional Trial Chamber, and decides also, without prejudice to article 13.4 of the Statute of the International Tribunal, that once elected they shall serve until the date of the expiry of the terms of office of the existing judges, and that for the purpose of that election the Security Council shall, notwithstanding article 13.2 (c) of the Statute, establish a list from the nominations received of not less than six and not more than nine candidates;
3. *Urges* all States to cooperate fully with the International Tribunal and its organs in accordance with their obligations under resolution 827 (1993) and the Statute

of the International Tribunal and welcomes the cooperation already extended to the Tribunal in the fulfilment of its mandate;

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

Annex

Article 11 – Organization of the International Tribunal

The International Tribunal shall consist of the following organs:

- a. the Chambers, comprising three Trial Chambers and an Appeals Chamber;
- b. the Prosecutor; and
- c. a Registry, servicing both the Chambers and the Prosecutor.

Article 12 – Composition of the Chambers

The Chambers shall be composed of fourteen independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

- a. three judges shall serve in each of the Trial Chambers; and
- b. five judges shall serve in the Appeals Chamber.

Article 13 – Qualifications and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.
2. The judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

- a. The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality.
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world.
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the fourteen Judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
3. In the event of a vacancy in the Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.
 4. **The judges** shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

RESOLUTION 1329 (2000)

Adopted by the Security Council at its 4240th meeting, on 30 November, 2000

The Security Council,

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

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

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

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

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

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

Taking note of the position expressed by the International Tribunals that civilian, military and paramilitary leaders should be tried before them in preference to minor actors,

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

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

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

1. *Decides* to establish a pool of *ad litem* judges in the International Tribunal for the Former Yugoslavia and to enlarge the membership of the Appeals Chambers of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda, and to this end decides to amend articles 12, 13 and 14 of the Statute of the International Tribunal for the Former Yugoslavia and to replace those articles with the provisions set out in annex I to this resolution and decides also to amend articles 11, 12 and 13 of the Statute of the International Tribunal for Rwanda and to replace those articles with the provisions set out in annex II to this resolution;
2. *Decides* that two additional judges shall be elected as soon as possible as judges of the International Tribunal for Rwanda and decides also, without prejudice to Article 12, paragraph 4, of the Statute of that Tribunal, that, once elected, they shall serve until the date of the expiry of the terms of office of the existing judges, and that for the purpose of that election the Security Council shall, notwithstanding Article 12, paragraph 2 (c) of the Statute, establish a list from the nominations received of not less than four and not more than six candidates;
3. *Decides* that, once two judges have been elected in accordance with paragraph 2 above and have taken up office, the President of the International Tribunal for

Rwanda shall, in accordance with Article 13, paragraph 3, of the Statute of the International Tribunal for Rwanda and Article 14, paragraph 4, of the Statute of the International Tribunal for the Former Yugoslavia, take the necessary steps as soon as is practicable to assign two of the judges elected or appointed in accordance with Article 12 of the Statute of the International Tribunal for Rwanda to be members of the Appeals Chambers of the International Tribunals;

4. *Requests* the Secretary-General to make practical arrangements for the elections mentioned in paragraph 2 above, for the election as soon as possible of twenty-seven *ad litem* judges in accordance with Article 13 *ter* of the Statute of the International Tribunal for the Former Yugoslavia, and for the timely provision to the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda of personnel and facilities, in particular, for the *ad litem* judges and the Appeals Chambers and related offices of the Prosecutor, and further requests him to keep the Security Council closely informed of progress in this regard;
5. *Urges* all States to cooperate fully with the International Tribunals and their organs in accordance with their obligations under resolutions 827 (1993) and 955 (1994) and the Statutes of the International Tribunals, and *welcomes* the cooperation already extended to the Tribunals in the fulfilment of their mandates;
6. *Requests* the Secretary-General to submit to the Security Council, as soon as possible, a report containing an assessment and proposals regarding the date ending the temporal jurisdiction of the International Tribunal for the Former Yugoslavia;
7. *Decides* to remain actively seized of the matter.

Annex I

Article 12 – Composition of the Chambers

1. The Chambers shall be composed of *sixteen* permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of nine *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.

3. *Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.*

Article 13 – Qualifications of judges

The permanent and ad litem judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 13 bis – Election of permanent judges

1. *Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:*
 - a. The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality *and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a judge of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January, 1994 and 31 December, 1994 (hereinafter referred to as “The International Tribunal for Rwanda”)* in accordance with article 12 bis of the Statute of that Tribunal.
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world.
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The

candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.
3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 13 *ter* – Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - a. The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates.
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution.
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected.
 - e. The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.

2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 b. and c. above and the number of votes the *ad litem* judge received in the General Assembly.

Article 13 quarter – Status of ad litem judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:
 - a. benefit from the same terms and conditions of service mutatis mutandis as the permanent judges of the International Tribunal;
 - b. enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;
 - c. enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal.
2. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:
 - a. be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
 - b. have power:
 - i. to adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
 - ii. to review an indictment pursuant to article 19 of the Statute;
 - iii. to consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute;
 - iv. to adjudicate in pre-trial proceedings.

Article 14 – Officers and members of the Chambers

1. The *permanent* judges of the International Tribunal shall elect a President *from amongst their number*.

2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.
3. After consultation with the *permanent* judges of the International Tribunal, the President shall assign *four of the permanent judges elected or appointed in accordance with Article 13 bis of the Statute* to the Appeals Chamber and *nine* to the Trial Chambers.
4. *Two of the permanent judges of the International Tribunal for Rwanda elected or appointed in accordance with article 12 bis of the Statute of that Tribunal shall be assigned by the President of that Tribunal, in consultation with the President of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal.*
5. *After consultation with the permanent judges of the International Tribunal, the President shall assign such ad litem judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.*
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The *permanent* judges of each Trial Chamber shall elect a Presiding Judge *from amongst their number*, who shall *oversee the work* of the Trial Chamber as a whole.

Annex II

Article 11 – Composition of the Chambers

The Chambers shall be composed of *sixteen* independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

- a. three judges shall serve in each of the Trial Chambers;
- b. *seven judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.*

Article 12 – Qualification and election of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.
2. *Eleven of the judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:*

- a. The Secretary-General shall invite nominations for judges from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters.
 - b. Within *sixty* days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge *who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia")* in accordance with article 13 bis of the Statute of that Tribunal.
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than *twenty-two* and not more than *thirty-three* candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world.
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect *eleven* judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
3. In the event of a vacancy in the Chambers *amongst the judges elected or appointed in accordance with this article*, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.
 4. The judges *elected in accordance with this article* shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 13 – Officers and members of the Chambers

1. The judges of the International Tribunal for Rwanda shall elect a President.
2. *The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.*

3. After consultation with the judges of the International Tribunal for Rwanda, the President shall assign *two of the judges elected or appointed in accordance with Article 12 of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda*. A judge shall serve only in the Chamber to which he or she was assigned.
4. *The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.*
5. The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

RESOLUTION 1411 (2002)

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

The Security Council,

Reaffirming its resolutions 827 (1993) of 25 May, 1993, 955 (1994) of 8 November, 1994, 1165 (1998) of 30 April, 1998, 1166 (1998) of 13 May, 1998 and 1329 (2000) of 30 November, 2000,

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

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

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

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

1. *Decides* to amend article 12 of the Statute of the International Tribunal for the former Yugoslavia and to replace that article with the provisions set out in annex I to this resolution;
2. *Decides* also to amend article 11 of the Statute of the International Tribunal for Rwanda and to replace that article with the provisions set out in annex II to this resolution;
3. *Decides* to remain actively seized of the matter.

ANNEX I

Article 12 – Composition of the Chambers

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

time of nine *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.

2. Three permanent judges and a maximum at any one time of six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeal Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

ANNEX II

Article 11 – Composition of the Chambers

1. The Chambers shall be composed of sixteen independent judges, no two of whom may be nationals of the same State, who shall serve as follows:
 - a. three judges shall serve in each of the Trial Chambers;
 - b. seven judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
2. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

RESOLUTION 1431 (2002)

Adopted by the Security Council at its 4601st meeting, on 14 August, 2002

The Security Council,

Reaffirming its resolutions 827 (1993) of 25 May, 1993, 955 (1994) of 8 November, 1994, 1165 (1998) of 30 April, 1998, 1166 (1998) of 13 May, 1998 and 1329 (2000) of 30 November, 2000,

Reaffirming its resolutions 827 (1993) of 25 May 1993, 955 (1994) of 8 November, 1994, 1165 (1998) of 30 April, 1998, 1166 (1998) of 13 May, 1998, 1329 (2000) of 30 November, 2000 and 1411 (2002) of 17 May, 2002,

Having considered the letter from the Secretary-General to the President of the Security Council dated 14 September, 2001 (S/2001/764) and the annexed letter from the President of the International Tribunal for Rwanda addressed to the Secretary-General dated 9 July, 2001,

Having considered also the letter from the Secretary-General to the President of the Security Council dated 4 March, 2002 (S/2002/241) and the annexed letter from the President of the International Tribunal for Rwanda addressed to the Secretary-General dated 6 February, 2002,

Convinced of the need to establish a pool of *ad litem* judges in the International Tribunal for Rwanda in order to enable the International Tribunal for Rwanda to expedite the conclusion of its work at the earliest possible date and determined to follow closely the progress of the operation of the International Tribunal for Rwanda,

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

1. *Decides* to establish a pool of *ad litem* judges in the International Tribunal for Rwanda, and to this end *decides* to amend articles 11, 12 and 13 of the Statute of the International Tribunal for Rwanda and to replace those articles with the provisions set out in annex I to this resolution and *decides also* to amend articles 13 *bis* and 14 of the Statute of the International Tribunal for the Former Yugoslavia and to replace those articles with the provisions set out in annex II to this resolution;
2. *Requests* the Secretary-General to make practical arrangements for the election as soon as possible of eighteen *ad litem* judges in accordance with Article 12 *ter* of the Statute of the International Tribunal for Rwanda and for the timely provision to the International Tribunal for Rwanda of personnel and facilities, in particular, for the *ad litem* judges and related offices of the Prosecutor, and *further requests* him to keep the Security Council closely informed of progress in this regard;
3. *Urges* all States to cooperate fully with the International Tribunal for Rwanda and its organs in accordance with their obligations under resolution 955 (1994) and the Statute of the International Tribunal for Rwanda;
4. *Decides* to remain actively seized of the matter.

International Tribunal for Rwanda – Annex I

Article 11 – Composition of the Chambers

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of four *ad litem* independent judges appointed in accordance with article 12 *ter*, paragraph 2, of the present Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of four *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem*

judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the present Statute and shall render judgement in accordance with the same rules.

3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal for Rwanda could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.

Article 12 – Qualifications of judges

The permanent and *ad litem* judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

Article 12 bis – Election of permanent judges

1. Eleven of the permanent judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - a. The Secretary-General shall invite nominations for permanent judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 12 of the present Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (hereinafter referred to as “the International Tribunal for the Former Yugoslavia”) in accordance with article 13 *bis* of the Statute of that Tribunal;

- c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-two and not more than thirty-three candidates, taking due account of the adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect eleven permanent judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 12 of the present Statute, for the remainder of the term of office concerned.
3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the permanent judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 12 *ter* – Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - a. The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal for Rwanda from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 12 of the present Statute, taking into account the importance of a fair representation of female and male candidates;
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than thirty-six candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution;

- d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the eighteen *ad litem* judges of the International Tribunal for Rwanda. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;
 - e. The *ad litem* judges shall be elected for a term of four years. They shall not be eligible for re-election.
2. During their term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal for Rwanda, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including, three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal for Rwanda shall bear in mind the criteria set out in article 12 of the present Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraphs 1 (b) and (c) above and the number of votes the *ad litem* judge received in the General Assembly.

Article 12 quarter – Status of ad litem judges

- 1. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall:
 - a. Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal for Rwanda;
 - b. Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal for Rwanda;
 - c. Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal for Rwanda.
- 2. During the period in which they are appointed to serve in the International Tribunal for Rwanda, *ad litem* judges shall not:
 - a. Be eligible for election as, or to vote in the election of, the President of the International Tribunal for Rwanda or the Presiding Judge of a Trial Chamber pursuant to article 13 of the present Statute;
 - b. Have power:
 - i. To adopt rules of procedure and evidence pursuant to article 14 of the present Statute. They shall, however, be consulted before the adoption of those rules;
 - ii. To review an indictment pursuant to Article 18 of the present Statute;
 - iii. To consult with the President of the International Tribunal for Rwanda in relation to the assignment of judges pursuant to article

- 13 of the present Statute or in relation to a pardon or commutation of sentence pursuant to article 27 of the present Statute;
- iv. To adjudicate in pre-trial proceedings.

Article 13 – Officers and members of the Chambers

1. The permanent judges of the International Tribunal for Rwanda shall elect a President from amongst their number.
2. The President of the International Tribunal for Rwanda shall be a member of one of its Trial Chambers.
3. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign two of the permanent judges elected or appointed in accordance with Article 12 *bis* of the present Statute to be members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia and eight to the Trial Chambers of the International Tribunal for Rwanda.
4. The members of the Appeals Chamber of the International Tribunal for the Former Yugoslavia shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.
5. After consultation with the permanent judges of the International Tribunal for Rwanda, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal for Rwanda to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of that Trial Chamber as a whole.

International Tribunal for the Former Yugoslavia – Annex II

Article 13 bis – Election of permanent judges

1. Fourteen of the permanent judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:
 - a. The Secretary-General shall invite nominations for judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in article 13 of the Statute, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge who is a member of the Appeals Chamber and who was elected or appointed a permanent judge of the International Criminal Tribunal for the Prosecution of Persons

Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January, 1994 and 13 December, 1994 (hereinafter referred to as “The International Tribunal for Rwanda”) in accordance with article 12 *bis* of the Statute of that Tribunal;

- c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twenty-eight and not more than forty-two candidates, taking due account of the adequate representation of the principal legal systems of the world;
 - d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect fourteen permanent judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.
2. In the event of a vacancy in the Chambers amongst the permanent judges elected or appointed in accordance with this article, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of article 13 of the Statute, for the remainder of the term of office concerned.
 3. The permanent judges elected in accordance with this article shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Court of Justice. They shall be eligible for re-election.

Article 14 – Officers and members of the Chambers

1. The permanent judges of the International Tribunal shall elect a President from amongst their number.
2. The President of the International Tribunal shall be a member of the Appeals Chamber and shall preside over its proceedings.
3. After consultation with the permanent judges of the International Tribunal, the President shall assign four of the permanent judges elected or appointed in accordance with Article 13 *bis* of the Statute to the Appeals Chamber and nine to the Trial Chambers.
4. Two of the permanent judges of the International Tribunal for Rwanda elected or appointed in accordance with article 12 *bis* of the Statute of that Tribunal shall be assigned by the President of that Tribunal, in consultation with the President

of the International Tribunal, to be members of the Appeals Chamber and permanent judges of the International Tribunal.

5. After consultation with the permanent judges of the International Tribunal, the President shall assign such *ad litem* judges as may from time to time be appointed to serve in the International Tribunal to the Trial Chambers.
6. A judge shall serve only in the Chamber to which he or she was assigned.
7. The permanent judges of each Trial Chamber shall elect a Presiding Judge from amongst their number, who shall oversee the work of the Trial Chamber as a whole.

RESOLUTION 1481 (2003)

Adopted by the Security Council at its 4759th meeting, on 19 May, 2003

The Security Council,

Reaffirming its resolutions 827 (1993) of 25 May, 1993, 1166 (1998) of 13 May, 1998, 1329 (2000) of 30 November, 2000, 1411 (2002) of 17 May, 2002 and 1431 (2002) of 14 August, 2002,

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

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

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

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

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

Annex

Article 13 quater – Status of ad litem judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:

- a. Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
 - b. Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;
 - c. Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
 - d. Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.
2. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:
- a. Be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
 - b. Have power:
 - i. To adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
 - ii. To review an indictment pursuant to article 19 of the Statute;
 - iii. To consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute.

RESOLUTION 1597 (2005)

Adopted by the Security Council at its 5165th meeting, on 20 April, 2005

The Security Council,

Reaffirming its resolutions 827 (1993) of 25 May, 1993, 1166 (1998) of 13 May, 1998, 1329 (2000) of 30 November, 2000, 1411 (2002) of 17 May, 2002, 1431 (2002) of 14 August, 2002, 1481 (2003) of 19 May, 2003, 1503 (2003) of 28 August, 2003 and 1534 (2004) of 26 March, 2004,

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

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

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

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

Considering that the 27 *ad litem* judges elected by the General Assembly at its 102nd plenary meeting on 12 June, 2001 whose term of office expires on 11 June, 2005, should be eligible for reelection and wishing to amend the Statute for that purpose,

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

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

1. *Decides* to amend article 13 *ter* of the Statute of the International Tribunal for the Former Yugoslavia and to replace that article with the provision set out in the annex to this resolution;
2. *Decides further* to the Secretary-General's letter of 11 April, 2005 (S/2005/236) to extend the deadline for nominations of *ad litem* judges under the amended provision of the Statute for a further 30 days from the date of the adoption of this resolution;
3. *Decides* to remain actively seized of the matter.

Annex

Article 13 *ter* – Election and appointment of *ad litem* judges

1. The *ad litem* judges of the International Tribunal shall be elected by the General Assembly from a list submitted by the Security Council in the following manner:
 - a. The Secretary-General shall invite nominations for *ad litem* judges of the International Tribunal from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;
 - b. Within sixty days of the date of the invitation of the Secretary-General, each State may nominate up to four candidates meeting the qualifications set out in article 13 of the Statute, taking into account the importance of a fair representation of female and male candidates;
 - c. The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than fifty-four candidates, taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable distribution;

- d. The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the twenty-seven *ad litem* judges of the International Tribunal. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-member States maintaining permanent observer missions at United Nations Headquarters shall be declared elected;
 - e. The *ad litem* judges shall be declared elected for a term of four years. They shall be eligible for re-election.
2. During any term, *ad litem* judges will be appointed by the Secretary-General, upon request of the President of the International Tribunal, to serve in the Trial Chambers for one or more trials, for a cumulative period of up to, but not including three years. When requesting the appointment of any particular *ad litem* judge, the President of the International Tribunal shall bear in mind the criteria set out in article 13 of the Statute regarding the composition of the Chambers and sections of the Trial Chambers, the considerations set out in paragraph 1 b. and c. above and the number of votes the *ad litem* judge received in the General Assembly.

RESOLUTION 1660 (2006)

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

The Security Council,

Reaffirming its resolutions 827 (1993) of 25 May, 1993, 1166 (1998) of 13 May, 1998, 1329 (2000) of 30 November, 2000, 1411 (2002) of 17 May, 2002, 1431 (2002) of 14 August, 2002, 1481 (2003) of 19 May, 2003, 1503 (2003) of 28 August, 2003, 1534 (2004) of 26 March, 2004 and of 1597 (2005) of 20 April, 2005,

Having considered the proposal made by the President of the International Tribunal for the Former Yugoslavia that the Secretary-General at the request of the President appoint reserve judges from among the *ad litem* judges elected in accordance with Article 13 *ter*, to be present at each stage of a trial to which they have been appointed and to replace a judge if that judge is unable to continue sitting,

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

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

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

Annex

Article 12 – Composition of the Chambers

1. The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of twelve *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.
2. Three permanent judges and a maximum at any one time of nine *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem* judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges, except in the circumstances specified in paragraph 5 below. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.
3. Seven of the permanent judges shall be members of the Appeals Chamber. The Appeals Chamber shall, for each appeal, be composed of five of its members.
4. A person who for the purposes of membership of the Chambers of the International Tribunal could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
5. The Secretary-General may, at the request of the President of the International Tribunal appoint, from among the *ad litem* judges elected in accordance with Article 13 *ter*, reserve judges to be present at each stage of a trial to which they have been appointed and to replace a judge if that judge is unable to continue sitting.
6. Without prejudice to paragraph 2 above, in the event that exceptional circumstances require for a permanent judge in a section of a Trial Chamber to be replaced resulting in a section solely comprised of *ad litem* judges, that section may continue to hear the case, notwithstanding that its composition no longer includes a permanent judge.

Article 13 quarter – Status of ad litem judges

1. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall:
 - a. Benefit from the same terms and conditions of service *mutatis mutandis* as the permanent judges of the International Tribunal;
 - b. Enjoy, subject to paragraph 2 below, the same powers as the permanent judges of the International Tribunal;

- c. Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
 - d. Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to try.
2. During the period in which they are appointed to serve in the International Tribunal, *ad litem* judges shall not:
- a. Be eligible for election as, or to vote in the election of, the President of the Tribunal or the Presiding Judge of a Trial Chamber pursuant to article 14 of the Statute;
 - b. Have power:
 - i. To adopt rules of procedure and evidence pursuant to article 15 of the Statute. They shall, however, be consulted before the adoption of those rules;
 - ii. To review an indictment pursuant to article 19 of the Statute;
 - iii. To consult with the President in relation to the assignment of judges pursuant to article 14 of the Statute or in relation to a pardon or commutation of sentence pursuant to article 28 of the Statute.
3. Notwithstanding, paragraphs 1 and 2 above, an *ad litem* judge who is serving as a reserve judge shall, during such time as he or she so serves:
- a. Benefit from the same terms and conditions of service mutatis mutandis as the permanent judges of the International Tribunal;
 - b. Enjoy the privileges and immunities, exemptions and facilities of a judge of the International Tribunal;
 - c. Enjoy the power to adjudicate in pre-trial proceedings in cases other than those that they have been appointed to and for that purpose to enjoy subject to paragraph 2 above, the same powers as permanent judges.
4. In the event that a reserve judge replaces a judge who is unable to continue sitting, he or she will, as of that time, benefit from the provisions of paragraph 1 above.

RESOLUTION 1837 (2008)

Adopted by the Security Council at its 5986th meeting, on 29 September, 2008

The Security Council,

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

Recalling its resolutions 1581 (2005) of 18 January, 2005, 1597 (2005) of 20 April, 2005, 1613 (2005) of 26 July, 2005, 1629 (2005) of 30 September, 2005,

1660 (2006) of 28 February, 2006, 1668 (2006) of 10 April, 2006, and 1800 (2008) of 20 February, 2008,

Recalling in particular its resolutions 1503 (2003) of 28 August, 2003 and 1534 (2004) of 26 March, 2004, in which the Security Council calls on the Tribunal to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010,

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

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

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

1. *Decides* to extend the terms of office of the following permanent judges at the Tribunal who are members of the Appeals Chamber until 31 December, 2010, or until the completion of the cases before the Appeals Chamber if sooner:

- Liu Daqun (China)
- Theodor Meron (United States of America)
- Fausto Pocar (Italy)
- Mohamed Shahabuddeen (Guyana)

2. *Decides* to extend the terms of office of the following permanent judges at the Tribunal who are members of the Trial Chambers until 31 December, 2009, or until the completion of the cases to which they are assigned if sooner:

- Carmel Agius (Malta)
- Jean-Claude Antonetti (France)
- Iain Bonomy (United Kingdom)
- Christoph Flügge (Germany)
- O-Gon Kwon (South Korea)
- Bakone Justice Moloto (South Africa)
- Alphons Orie (The Netherlands)
- Kevin Parker (Australia)
- Patrick Robinson (Jamaica)
- Christine Van den Wyngaert (Belgium)

3. *Decides* to extend the terms of office of the following *ad litem* judges, currently serving at the Tribunal, until 31 December, 2009, or until the completion of the cases to which they are assigned if sooner:

- Ali Nawaz Chowhan (Pakistan)
- Pedro David (Argentina)
- Elizabeth Gwaunza (Zimbabwe)
- Frederik Harhoff (Denmark)
- Tsvetana Kamenova (Bulgaria)
- Uldis Kinis (Latvia)

- Flavia Lattanzi (Italy)
 - Antoine Kesia-Mbe Mindua (Democratic Republic of Congo)
 - Janet Nosworthy (Jamaica)
 - Michèle Picard (France)
 - Árpád Prandler (Hungary)
 - Kimberly Prost (Canada)
 - Ole Bjørn Støle (Norway)
 - Stefan Trechsel (Switzerland)
4. *Decides* to extend the term of office of the following *ad litem* judges, who are not currently appointed to serve at the Tribunal, until 31 December, 2009, or until the completion of any cases to which they may be assigned if sooner:
 - Melville Baird (Trinidad and Tobago)
 - Frans Bauduin (The Netherlands)
 - Burton Hall (The Bahamas)
 - Frank Höpfel (Austria)
 - Raimo Lahti (Finland)
 - Jawdat Naboty (Syrian Arab Republic)
 - Chioma Egondú Nwosu-Iheme (Nigeria)
 - Prisca Matimba Nyambe (Zambia)
 - Brynmor Pollard (Guyana)
 - Vonimbolana Rasoazanany (Madagascar)
 - Krister Thelin (Sweden)
 - Klaus Tolksdorf (Germany)
 - Tan Sri Dato Lamin Haji Mohd Yunus (Malaysia)
 5. *Decides*, without prejudice to the provisions of resolution 1800 (2008) of 20 February, 2008, to amend article 12, paragraphs 1 and 2, of the Statute of the Tribunal and to replace those paragraphs with the provisions set out in the annex to this resolution.
 6. *Decides* to remain seized of the matter.

Annex

Article 12 – Composition of the Chambers

1. The Chambers shall be composed of a maximum of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of twelve *ad litem* independent judges appointed in accordance with article 13 *ter*, paragraph 2, of the Statute, no two of whom may be nationals of the same State.
2. A maximum at any one time of three permanent judges and six *ad litem* judges shall be members of each Trial Chamber. Each Trial Chamber to which *ad litem*

judges are assigned may be divided into sections of three judges each, composed of both permanent and *ad litem* judges, except in the circumstances specified in paragraph 5 below. A section of a Trial Chamber shall have the same powers and responsibilities as a Trial Chamber under the Statute and shall render judgement in accordance with the same rules.

RELATED RESOLUTIONS

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

RESOLUTION 1503 (2003)

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

The Security Council,

Recalling its resolutions 827 (1993) of 25 May 1993, 955 (1994) of 8 November, 1994, 978 (1995) of 27 February, 1995, 1165 (1998) of 30 April, 1998, 1166 (1998) of 13 May, 1998, 1329 (2000) of 30 November, 2000, 1411 (2002) of 17 May, 2002, 1431 (2002) of 14 August, 2002, and 1481 (2003) of 19 May, 2003,

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

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

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

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

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

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

level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions,

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

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

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

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

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

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

1. *Calls* on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR and encourages the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach programmes;
2. *Calls* on all States, especially Serbia and Montenegro, Croatia, and Bosnia and Herzegovina, and on the Republika Srpska within Bosnia and Herzegovina, to intensify cooperation with and render all necessary assistance to the ICTY, particularly to bring Radovan Karadzic and Ratko Mladic, as well as Ante Gotovina and all other indictees to the ICTY and calls on these and all other at-large indictees of the ICTY to surrender to the ICTY;
3. *Calls* on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo, and the Republic of the Congo, to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on this and all other at-large indictees of the ICTR to surrender to the ICTR;
4. *Calls* on all States to cooperate with the International Criminal Police Organization (ICPO Interpol) in apprehending and transferring persons indicted by the ICTY and the ICTR;

5. *Calls* on the donor community to support the work of the High Representative to Bosnia and Herzegovina in creating a special chamber, within the State Court of Bosnia and Herzegovina, to adjudicate allegations of serious violations of international humanitarian law;
6. *Requests* the Presidents of the ICTY and the ICTR and their Prosecutors, in their annual reports to the Council, to explain their plans to implement the ICTY and ICTR Completion Strategies;
7. *Calls* on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies);
8. *Decides* to amend Article 15 of the Statute of the International Tribunal for Rwanda and to replace that Article with the provision set out in Annex I to this resolution, and requests the Secretary-General to nominate a person to be the Prosecutor of the ICTR;
9. *Welcomes* the intention expressed by the Secretary-General in his letter dated 28 July, 2003, to submit to the Security Council the name of Mrs. Carla Del Ponte as nominee for Prosecutor for the ICTY;
10. *Decides* to remain actively seized of the matter.

Annex I

Article 15 – The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January, 1994 and 31 December, 1994.
2. The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any government or from any other source.
3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.
4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.
5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

RESOLUTION 1504 (2003)

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

The Security Council,

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

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

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

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

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

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

RESOLUTION 1534 (2004)

Adopted by the Security Council at its 4935th meeting, on 26 March, 2004

The Security Council,

Recalling its resolutions 827 (1993) of 25 May, 1993, 955 (1994) of 8 November, 1994, 978 (1995) of 27 February, 995, 1165 (1998) of 30 April, 1998, 1166 (1998) of 13 May, 1998, 1329 (2000) of 30 November, 2000, 1411 (2002) of 17 May, 2002, 1431 (2002) of 14 August, 2002, and 1481 (2003) of 19 May, 2003,

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

Recalling that resolution 1503 (2003) called on the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies), and requested the Presidents and Prosecutors of the ICTY and ICTR, in their annual reports to the Council, to explain their plans to implement the Completion Strategies,

Welcoming the presentations made by the ICTY and ICTR Presidents and Prosecutors to the Security Council on 9 October, 2003,

Commending the important work of both Tribunals in contributing to lasting peace and security and national reconciliation and the progress made since their inception, commending them on their efforts so far to give effect to the Completion Strategies and calling on them to ensure effective and efficient use of their budgets, with accountability,

Reiterating its support for the ICTY and ICTR Prosecutors in their continuing efforts to bring at large indictees before the ICTY and the ICTR,

Noting with concern the problems highlighted in the presentations to the Security Council on 9 October, 2003 in securing adequate regional cooperation,

Also noting with concern indications in the presentations made on October 9, that it might not be possible to implement the Completion Strategies set out in resolution 1503 (2003), *Acting* under Chapter VII of the Charter of the United Nations,

1. *Reaffirms* the necessity of trial of persons indicted by the ICTY and reiterates its call on all States, especially Serbia and Montenegro, Croatia and Bosnia and Herzegovina, and on the Republika Srpska within Bosnia and Herzegovina, to intensify cooperation with and render all necessary assistance to the ICTY, particularly to bring Radovan Karadzic and Ratko Mladic, as well as Ante Gotovina and all other indictees to the ICTY and calls on all at-large indictees of the ICTY to surrender to the ICTY;
2. *Reaffirms* the necessity of trial of persons indicted by the ICTR and reiterates its call on all States, especially Rwanda, Kenya, the Democratic Republic of the Congo and the Republic of the Congo to intensify cooperation with and render all necessary assistance to the ICTR, including on investigations of the Rwandan Patriotic Army and efforts to bring Felicien Kabuga and all other such indictees to the ICTR and calls on all at-large indictees of the ICTR to surrender to the ICTR;
3. *Emphasizes* the importance of fully implementing the Completion Strategies, as set out in paragraph 7 of resolution 1503 (2003), that calls on the ICTY and ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008 and to complete all work in 2010, and urges each Tribunal to plan and act accordingly;
4. *Calls on* the ICTY and ICTR Prosecutors to review the case load of the ICTY and ICTR respectively in particular with a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions, as well as the measures which will need to be taken to meet the Completion Strategies referred to in resolution 1503 (2003) and urges them to carry out this review as soon as possible and to include a progress report in the assessments to be provided to the Council under paragraph 6 of this resolution;
5. *Calls on* each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003);
6. *Requests* each Tribunal to provide to the Council, by 31 May, 2004 and every six months thereafter, assessments by its President and Prosecutor, setting out in detail the progress made towards implementation of the Completion Strategy of the Tribunal, explaining what measures have been taken to implement the

Completion Strategy and what measures remain to be taken, including the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions; and expresses the intention of the Council to meet with the President and Prosecutor of each Tribunal to discuss these assessments;

7. *Declares* the Council's determination to review the situation, and in the light of the assessments received under the foregoing paragraph to ensure that the time frames set out in the Completion Strategies and endorsed by resolution 1503 (2003) can be met;
8. *Commends* those States which have concluded agreements for the enforcement of sentences of persons convicted by the ICTY or the ICTR or have otherwise accepted such convicted persons to serve their sentences in their respective territories; encourages other States in a position to do so to act likewise; and invites the ICTY and the ICTR to continue and intensify their efforts to conclude further agreements for the enforcement of sentences or to obtain the cooperation of other States in this regard;
9. *Recalls* that the strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular;
10. *Welcomes* in particular the efforts of the Office of the High Representative, ICTY, and the donor community to create a war crimes chamber in Sarajevo; encourages all parties to continue efforts to establish the chamber expeditiously; and encourages the donor community to provide sufficient financial support to ensure the success of domestic prosecutions in Bosnia and Herzegovina and in the region;
11. *Decides* to remain actively seized of the matter.

RESOLUTION 1581 (2005)

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

The Security Council,

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

Recalling its resolutions 1503 (2003) of 28 August, 2003 and 1534 (2004) of 26 March, 2004,

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

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

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

- a. Judge Rasoazany and Judge Swart, once replaced as *ad litem* judges of the International Tribunal, finish the *Hadžihasanović* case, which they have begun before expiry of their term of office;
- b. Judge Brydensholt and Judge Eser, once replaced as *ad litem* judges of the International Tribunal, finish the *Orić* case, which they have begun before expiry of their term of office;
- c. Judge Thelin and Judge Van Den Wyngaert, once replaced as *ad litem* judges of the International Tribunal, finish the *Limaj* case, which they have begun before expiry of their term of office;
- d. Judge Canivell, once replaced as an *ad litem* judge of the International Tribunal, finishes the *Krajišnik* case, which he has begun before expiry of his term of office;
- e. Judge Szénási, if appointed to serve in the International Tribunal for the trial of the *Halilović* case, proceed, once replaced as an *ad litem* judge of the International Tribunal, to finish that case, which he would have begun before expiry of his term of office;
- f. Judge Hanoteau, if appointed to serve in the International Tribunal for the trial of the *Krajišnik* case, proceed, once replaced as an *ad litem* judge of the International Tribunal, to finish that case, which he would have begun before expiry of his term of office;

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

RESOLUTION 1613 (2005)

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

The Security Council,

Recalling its resolution 827 (1993) of 25 May, 1993, 1166 (1998) of 13 May, 1998, 1329 (2000) of 30 November, 2000, 1411 (2002) of 17 May, 2002, 1431 (2002) of 14 August, 2002, 1481 (2003) of 19 May, 2003, 1503 (2003) of 28 August, 2003, 1534 (2004) of 26 March, 2004 and 1597 (2005) of 20 April, 2005,

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

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

- Mr. Tanvir Bashir Ansari (Pakistan)
- Mr. Melville Baird (Trinidad and Tobago)
- Mr. Frans Bauduin (The Netherlands)
- Mr. Giancarlo Roberto Belleli (Italy)

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

RESOLUTION 1629 (2005)

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

The Security Council,

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

Decides that notwithstanding Article 12 of the Statute of the International Tribunal for the Former Yugoslavia and notwithstanding that Judge Christine Van Den Wyngaert's elected term as a permanent judge of the Tribunal will in accordance with Article 13 *bis* of the Tribunal's Statute only begin on 17 November, 2005, she be assigned as a permanent judge to the *Mrk{i} et al.* case which is due to commence on 3 October, 2005.

RESOLUTION 1668 (2006)

Adopted by the Security Council at its 5407th meeting, on 10 April, 2006

The Security Council,

Recalling Security Council resolution 1581 (2005) of 18 January, 2005,

Taking note of the letter to the President of the Security Council from the Secretary-General dated 27 March, 2006,

Decides in response to the request by the Secretary-General to confirm that Judge Joaquín Canivell can continue to sit in the Krajišnik case beyond April 2006 and see the case through to its completion, notwithstanding the fact that the cumulative period of his service in the International Criminal Tribunal for the Former Yugoslavia would then attain and exceed three years,

Decides to remain seized of the matter.

RESOLUTION 1775 (2007)

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

The Security Council,

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

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

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

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

Having considered the request of the Secretary-General to extend the appointment of Ms. Del Ponte from 15 September, 2007 to 31 December, 2007 (S/2007/538),

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

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

RESOLUTION 1786 (2007)

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

The Security Council,

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

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

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

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

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

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

RESOLUTION 1800 (2008)

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

The Security Council,

Recalling its resolutions 1581 (2005) of 18 January, 2005, 1597 (2005) of 20 April, 2005, 1613 (2005) of 26 July, 2005, 1629 (2005) of 30 September, 2005, 1660 (2006) of 28 February, 2006 and 1668 (2006) of 10 April, 2006,

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

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

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

Convinced of the advisability of allowing the Secretary-General to appoint additional *ad litem* Judges to the twelve *ad litem* Judges authorized by the Statute,

as a temporary measure to enable the International Tribunal to conduct additional trials as soon as possible in order to meet completion strategy objectives,

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

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

Appendix E.1

Statute of the Special Court for Sierra Leone

(Date: January 16, 2002)

[Author's note: available at <http://www.specialcourt.org/documents/Statute.html>, accessed February 25, 2009]

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August, 2000, the Special Court for Sierra Leone (hereinafter “the Special Court”) shall function in accordance with the provisions of the present Statute.

Article 1 – Competence of the Special Court

1. The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November, 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.
2. Any transgressions by peacekeepers and related personnel present in Sierra Leone pursuant to the Status of Mission Agreement in force between the United Nations and the Government of Sierra Leone or agreements between Sierra Leone and other Governments or regional organizations, or, in the absence of such agreement, provided that the peacekeeping operations were undertaken with the consent of the Government of Sierra Leone, shall be within the primary jurisdiction of the sending State.

3. In the event the sending State is unwilling or unable genuinely to carry out an investigation or prosecution, the Court may, if authorized by the Security Council on the proposal of any State, exercise jurisdiction over such persons.

Article 2 – Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

- a. Murder;
- b. Extermination;
- c. Enslavement;
- d. Deportation;
- e. Imprisonment;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;
- h. Persecution on political, racial, ethnic or religious grounds;
- i. Other inhumane acts.

Article 3 – Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August, 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June, 1977. These violations shall include:

- a. Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b. Collective punishments;
- c. Taking of hostages;
- d. Acts of terrorism;
- e. Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- f. Pillage;
- g. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- h. Threats to commit any of the foregoing acts.

Article 4 – Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

- a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

Article 5 – Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

- a. Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):
 - i. Abusing a girl under 13 years of age, contrary to section 6;
 - ii. Abusing a girl between 13 and 14 years of age, contrary to section 7;
 - iii. Abduction of a girl for immoral purposes, contrary to section 12.
- b. Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:
 - i. Setting fire to dwelling - houses, any person being therein, contrary to section 2;
 - ii. Setting fire to public buildings, contrary to sections 5 and 6;
 - iii. Setting fire to other buildings, contrary to section 6.

Article 6 – Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.
5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7 – Jurisdiction over persons of 15 years of age

1. The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.
2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8 – Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.
2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9 – Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.
2. A person who has been tried by a national court for the acts referred to in articles 2 to 4 of the present Statute may be subsequently tried by the Special Court if:
 - a. The act for which he or she was tried was characterized as an ordinary crime; or
 - b. The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10 – Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11 – Organization of the Special Court

The Special Court shall consist of the following organs:

- a. The Chambers, comprising one or more Trial Chambers and an Appeals Chamber;
- b. The Prosecutor; and
- c. The Registry.

Article 12 – Composition of the Chambers

1. The Chambers shall be composed of not less than eight (8) or more than eleven (11) independent judges, who shall serve as follows:
 - a. Three judges shall serve in the Trial Chamber, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter “the Secretary-General”).

- b. Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.
2. Each judge shall serve only in the Chamber to which he or she has been appointed.
3. The judges of the Appeals Chamber and the judges of the Trial Chamber, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.
4. If, at the request of the President of the Special Court, an alternate judge or judges have been appointed by the Government of Sierra Leone or the Secretary-General, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate such an alternate judge to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 13 – Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.
2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.
3. The judges shall be appointed for a three-year period and shall be eligible for reappointment.

Article 14 – Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.
2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15 – The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November, 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.
2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.
3. The Prosecutor shall be appointed by the Secretary-General for a three-year term and shall be eligible for re-appointment. He or she shall be of high moral character and possess the highest level of professional competence, and have extensive experience in the conduct of investigations and prosecutions of criminal cases.
4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.
5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16 – The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.
2. The Registry shall consist of a Registrar and such other staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a three-year term and be eligible for re-appointment.
4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropri-

ate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17 – Rights of the accused

1. All accused shall be equal before the Special Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
 - b. To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
 - c. To be tried without undue delay;
 - d. To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
 - e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
 - f. To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;
 - g. Not to be compelled to testify against himself or herself or to confess guilt.

Article 18 – Judgment

The judgment shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19 – Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.
2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20 – Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
 - a. A procedural error;
 - b. An error on a question of law invalidating the decision;
 - c. An error of fact which has occasioned a miscarriage of justice.
2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.
3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21 – Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgment.
2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- a. Reconvene the Trial Chamber;
- b. Retain jurisdiction over the matter.

Article 22 – Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Criminal Tribunal for the former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.
2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23 – Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24 – Working language

The working language of the Special Court shall be English.

Article 25 – Annual Report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

Appendix F.1

Rome Statute of the International Criminal Court

(Text of the Rome Statute Circulated as Document A/CONF.183/9 of July 17, 1998 and Corrected by procès-verbaux of November 10, 1998, July 12, 1999, November 30, 1999, May 8, 2000, January 17, 2001 and January 16, 2002. The Statute Entered into Force on July 1, 2002.)

[Author's note: available at <http://untreaty.un.org/cod/icc/statute/romefra.htm>, accessed February 26, 2009]

Preamble

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship

with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows:

Part 1. Establishment of the Court

Article 1 – The Court

An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 2 – Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Article 3 – Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands (“the host State”).
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Article 4 – Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Part 2. Jurisdiction, Admissibility and Applicable Law

Article 5 – Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
 - a. The crime of genocide;
 - b. Crimes against humanity;
 - c. War crimes;
 - d. The crime of aggression.
2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6 – Genocide

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

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

Article 7 – Crimes against humanity

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - a. Murder;
 - b. Extermination;

- c. Enslavement;
- d. Deportation or forcible transfer of population;
- e. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- f. Torture;
- g. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- h. Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- i. Enforced disappearance of persons;
- j. The crime of apartheid;
- k. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- a. “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- b. “Extermination” includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- c. “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- d. “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- e. “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- f. “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- g. “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

- h. “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - i. “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term “gender” refers to the two sexes, male and female, within the context of society. The term “gender” does not indicate any meaning different from the above.

Article 8 – War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, “war crimes” means:
- a. Grave breaches of the Geneva Conventions of August 12, 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - i. Wilful killing;
 - ii. Torture or inhuman treatment, including biological experiments;
 - iii. Wilfully causing great suffering, or serious injury to body or health;
 - iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - v. Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - vi. Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - vii. Unlawful deportation or transfer or unlawful confinement;
 - viii. Taking of hostages.
 - b. Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

- ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
- iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace-keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- iv. Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
- v. Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- vi. Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- vii. Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- viii. The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- ix. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- x. Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xi. Killing or wounding treacherously individuals belonging to the hostile nation or army;
- xii. Declaring that no quarter will be given;
- xiii. Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- xiv. Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- xv. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- xvi. Pillaging a town or place, even when taken by assault;
- xvii. Employing poison or poisoned weapons;

- xviii. Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - xix. Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - xx. Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
 - xxi. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - xxii. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
 - xxiii. Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - xxiv. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - xxv. Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
 - xxvi. Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
- c. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- i. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - ii. Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - iii. Taking of hostages;
 - iv. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

- d. Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- e. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
 - i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii. Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peace-keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv. Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - v. Pillaging a town or place, even when taken by assault;
 - vi. Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - vii. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - viii. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - ix. Killing or wounding treacherously a combatant adversary;
 - x. Declaring that no quarter will be given;
 - xi. Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
 - xii. Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
- f. Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State

when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 9 – Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Elements of Crimes may be proposed by:
 - a. Any State Party;
 - b. The judges acting by an absolute majority;
 - c. The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Article 10

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Article 11 – Jurisdiction *ratione temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12 – Preconditions to the exercise of jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph a. or c., the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - a. The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - b. The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13 – Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- a. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- b. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- c. The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 14 – Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Article 15 – Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16 – Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17 – Issues of admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
 - a. The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

- b. The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
 - c. The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
 - d. The case is not of sufficient gravity to justify further action by the Court.
2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - a. The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
 - b. There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - c. The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.
3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 18 – Preliminary rulings regarding admissibility

1. When a situation has been referred to the Court pursuant to article 13 (a) and the Prosecutor has determined that there would be a reasonable basis to commence an investigation, or the Prosecutor initiates an investigation pursuant to articles 13 (c) and 15, the Prosecutor shall notify all States Parties and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned. The Prosecutor may notify such States on a confidential basis and, where the Prosecutor believes it necessary to protect persons, prevent destruction of evidence or prevent the absconding of persons, may limit the scope of the information provided to States.
2. Within one month of receipt of that notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes referred to in article 5 and which relate to the information provided in the notification to States. At the request of that State, the Prosecutor shall defer to the State's

investigation of those persons unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

3. The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.
4. The State concerned or the Prosecutor may appeal to the Appeals Chamber against a ruling of the Pre-Trial Chamber, in accordance with article 82. The appeal may be heard on an expedited basis.
5. When the Prosecutor has deferred an investigation in accordance with paragraph 2, the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.
6. Pending a ruling by the Pre-Trial Chamber, or at any time when the Prosecutor has deferred an investigation under this article, the Prosecutor may, on an exceptional basis, seek authority from the Pre-Trial Chamber to pursue necessary investigative steps for the purpose of preserving evidence where there is a unique opportunity to obtain important evidence or there is a significant risk that such evidence may not be subsequently available.
7. A State which has challenged a ruling of the Pre-Trial Chamber under this article may challenge the admissibility of a case under article 19 on the grounds of additional significant facts or significant change of circumstances.

Article 19 – Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
 - a. An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
 - b. A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
 - c. A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.
4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall

take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).

5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
 - a. To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
 - b. To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
 - c. In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.
9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.
10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.
11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Article 20 – Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
 - a. Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
 - b. Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Article 21 – Applicable law

1. The Court shall apply:
 - a. In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
 - b. In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - c. Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Part 3. General Principles of Criminal Law

Article 22 – Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Article 23 – Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Article 24 – Non-retroactivity ratione personae

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Article 25 – Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - a. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - b. Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - c. For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - d. In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - ii. Be made in the knowledge of the intention of the group to commit the crime;
 - e. In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - f. Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.
4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 26 – Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Article 27 – Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 28 – Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- a. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - i. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - ii. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- b. With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - i. The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - ii. The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - iii. The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 29 – Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Article 30 – Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - a. In relation to conduct, that person means to engage in the conduct;
 - b. In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

Article 31 – Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:
 - a. The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
 - b. The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
 - c. The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
 - d. The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - i. Made by other persons; or
 - ii. Constituted by other circumstances beyond that person’s control.
2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Article 32 – Mistake of fact or mistake of law

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33 – Superior orders and prescription of law

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - a. The person was under a legal obligation to obey orders of the Government or the superior in question;
 - b. The person did not know that the order was unlawful; and
 - c. The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

Part 4. Composition and Administration of the Court

Article 34 – Organs of the Court

The Court shall be composed of the following organs:

- a. The Presidency;
- b. An Appeals Division, a Trial Division and a Pre-Trial Division;
- c. The Office of the Prosecutor;
- d. The Registry.

Article 35 – Service of judges

1. All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.
2. The judges composing the Presidency shall serve on a full-time basis as soon as they are elected.
3. The Presidency may, on the basis of the workload of the Court and in consultation with its members, decide from time to time to what extent the remaining judges shall be required to serve on a full-time basis. Any such arrangement shall be without prejudice to the provisions of article 40.
4. The financial arrangements for judges not required to serve on a full-time basis shall be made in accordance with article 49.

Article 36 – Qualifications, nomination and election of judges

1. Subject to the provisions of paragraph 2, there shall be 18 judges of the Court.
2.
 - a. The Presidency, acting on behalf of the Court, may propose an increase in the number of judges specified in paragraph 1, indicating the reasons why this is considered necessary and appropriate. The Registrar shall promptly circulate any such proposal to all States Parties.
 - b. Any such proposal shall then be considered at a meeting of the Assembly of States Parties to be convened in accordance with article 112. The proposal shall be considered adopted if 19 approved at the meeting by a vote of two thirds of the members of the Assembly of States Parties and shall enter into force at such time as decided by the Assembly of States Parties.
 - c.
 - i. Once a proposal for an increase in the number of judges has been adopted under subparagraph b., the election of the additional judges shall take place at the next session of the Assembly of States Parties in accordance with paragraphs 3 to 8, and article 37, paragraph 2;
 - ii. Once a proposal for an increase in the number of judges has been adopted and brought into effect under subparagraphs b. and c. i., it shall be open to the Presidency at any time thereafter, if the workload of the Court justifies it, to propose a reduction in the number of judges, provided that the number of judges shall not be reduced below that specified in paragraph 1. The proposal shall be dealt with in accordance with the procedure laid down in subparagraphs a. and b. In the event that the proposal is adopted, the number of judges shall be progressively decreased as the terms of office of serving judges expire, until the necessary number has been reached.
3.
 - a. The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

- b. Every candidate for election to the Court shall:
 - i. Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
 - ii. Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
- c. Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
- 4. a. Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:
 - i. By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
 - ii. By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

- b. Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party.
- c. The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.
- 5. For the purposes of the election, there shall be two lists of candidates:

List A containing the names of candidates with the qualifications specified in paragraph 3 b. i.; and

List B containing the names of candidates with the qualifications specified in paragraph 3 b. ii.

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists.

- 6. a. The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, the persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

- b. In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held in accordance with the procedures laid down in subparagraph a. until the remaining places have been filled.
- 7. No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.
- 8. a. The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
 - i. The representation of the principal legal systems of the world;
 - ii. Equitable geographical representation; and
 - iii. A fair representation of female and male judges.
- b. States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.
- 9. a. Subject to subparagraph b., judges shall hold office for a term of nine years and, subject to subparagraph c. and to article 37, paragraph 2, shall not be eligible for re-election.
- b. At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six years; and the remainder shall serve for a term of nine years.
 - c. A judge who is selected to serve for a term of three years under subparagraph b. shall be eligible for re-election for a full term.
- 10. Notwithstanding paragraph 9, a judge assigned to a Trial or Appeals Chamber in accordance with article 39 shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.

Article 37 – Judicial vacancies

- 1. In the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy.
- 2. A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.

Article 38 – The Presidency

- 1. The President and the First and Second Vice-Presidents shall be elected by an absolute majority of the judges. They shall each serve for a term of three years or

until the end of their respective terms of office as judges, whichever expires earlier. They shall be eligible for re-election once.

2. The First Vice-President shall act in place of the President in the event that the President is unavailable or disqualified. The Second Vice-President shall act in place of the President in the event that both the President and the First Vice-President are unavailable or disqualified.
3. The President, together with the First and Second Vice-Presidents, shall constitute the Presidency, which shall be responsible for:
 - a. The proper administration of the Court, with the exception of the Office of the Prosecutor; and
 - b. The other functions conferred upon it in accordance with this Statute.
4. In discharging its responsibility under paragraph 3 (a), the Presidency shall coordinate with and seek the concurrence of the Prosecutor on all matters of mutual concern.

Article 39 – Chambers

1. As soon as possible after the election of the judges, the Court shall organize itself into the divisions specified in article 34, paragraph (b). The Appeals Division shall be composed of the President and four other judges, the Trial Division of not less than six judges and the Pre-Trial Division of not less than six judges. The assignment of judges to divisions shall be based on the nature of the functions to be performed by each division and the qualifications and experience of the judges elected to the Court, in such a way that each division shall contain an appropriate combination of expertise in criminal law and procedure and in international law. The Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience.
2.
 - a. The judicial functions of the Court shall be carried out in each division by Chambers.
 - b.
 - i. The Appeals Chamber shall be composed of all the judges of the Appeals Division;
 - ii. The functions of the Trial Chamber shall be carried out by three judges of the Trial Division;
 - iii. The functions of the Pre-Trial Chamber shall be carried out either by three judges of the Pre-Trial Division or by a single judge of that division in accordance with this Statute and the Rules of Procedure and Evidence;
 - c. Nothing in this paragraph shall preclude the simultaneous constitution of more than one Trial Chamber or Pre-Trial Chamber when the efficient management of the Court's workload so requires.

3. a. Judges assigned to the Trial and Pre-Trial Divisions shall serve in those divisions for a period of three years, and thereafter until the completion of any case the hearing of which has already commenced in the division concerned.
b. Judges assigned to the Appeals Division shall serve in that division for their entire term of office.
4. Judges assigned to the Appeals Division shall serve only in that division. Nothing in this article shall, however, preclude the temporary attachment of judges from the Trial Division to the Pre-Trial Division or vice versa, if the Presidency considers that the efficient management of the Court's workload so requires, provided that under no circumstances shall a judge who has participated in the pre-trial phase of a case be eligible to sit on the Trial Chamber hearing that case.

Article 40 – Independence of the judges

1. The judges shall be independent in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.
3. Judges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.
4. Any question regarding the application of paragraphs 2 and 3 shall be decided by an absolute majority of the judges. Where any such question concerns an individual judge, that judge shall not take part in the decision.

Article 41 – Excusing and disqualification of judges

1. The Presidency may, at the request of a judge, excuse that judge from the exercise of a function under this Statute, in accordance with the Rules of Procedure and Evidence.
2. a. A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.
b. The Prosecutor or the person being investigated or prosecuted may request the disqualification of a judge under this paragraph.
c. Any question as to the disqualification of a judge shall be decided by an absolute majority of the judges. The challenged judge shall be entitled to present his or her comments on the matter, but shall not take part in the decision.

Article 42 – The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.
2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.
3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.
5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.
6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.
7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.
8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.
 - a. The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;
 - b. The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter;

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Article 43 – The Registry

1. The Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor in accordance with article 42.
2. The Registry shall be headed by the Registrar, who shall be the principal administrative officer of the Court. The Registrar shall exercise his or her functions under the authority of the President of the Court.
3. The Registrar and the Deputy Registrar shall be persons of high moral character, be highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the Court.
4. The judges shall elect the Registrar by an absolute majority by secret ballot, taking into account any recommendation by the Assembly of States Parties. If the need arises and upon the recommendation of the Registrar, the judges shall elect, in the same manner, a Deputy Registrar.
5. The Registrar shall hold office for a term of five years, shall be eligible for re-election once and shall serve on a full-time basis. The Deputy Registrar shall hold office for a term of five years or such shorter term as may be decided upon by an absolute majority of the judges, and may be elected on the basis that the Deputy Registrar shall be called upon to serve as required.
6. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

Article 44 – Staff

1. The Prosecutor and the Registrar shall appoint such qualified staff as may be required to their respective offices. In the case of the Prosecutor, this shall include the appointment of investigators.
2. In the employment of staff, the Prosecutor and the Registrar shall ensure the highest standards of efficiency, competency and integrity, and shall have regard, *mutatis mutandis*, to the criteria set forth in article 36, paragraph 8.

3. The Registrar, with the agreement of the Presidency and the Prosecutor, shall propose Staff Regulations which include the terms and conditions upon which the staff of the Court shall be appointed, remunerated and dismissed. The Staff Regulations shall be approved by the Assembly of States Parties.
4. The Court may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or non-governmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor. Such gratis personnel shall be employed in accordance with guidelines to be established by the Assembly of States Parties.

Article 45 – Solemn undertaking

Before taking up their respective duties under this Statute, the judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall each make a solemn undertaking in open court to exercise his or her respective functions impartially and conscientiously.

Article 46 – Removal from office

1. A judge, the Prosecutor, a Deputy Prosecutor, the Registrar or the Deputy Registrar shall be removed from office if a decision to this effect is made in accordance with paragraph 2, in cases where that person:
 - a. Is found to have committed serious misconduct or a serious breach of his or her duties under this Statute, as provided for in the Rules of Procedure and Evidence; or
 - b. Is unable to exercise the functions required by this Statute.
2. A decision as to the removal from office of a judge, the Prosecutor or a Deputy Prosecutor under paragraph 1 shall be made by the Assembly of States Parties, by secret ballot:
 - a. In the case of a judge, by a two-thirds majority of the States Parties upon a recommendation adopted by a two-thirds majority of the other judges;
 - b. In the case of the Prosecutor, by an absolute majority of the States Parties;
 - c. In the case of a Deputy Prosecutor, by an absolute majority of the States Parties upon the recommendation of the Prosecutor.
3. A decision as to the removal from office of the Registrar or Deputy Registrar shall be made by an absolute majority of the judges.
4. A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar whose conduct or ability to exercise the functions of the office as required by this

Statute is challenged under this article shall have full opportunity to present and receive evidence and to make submissions in accordance with the Rules of Procedure and Evidence. The person in question shall not otherwise participate in the consideration of the matter.

Article 47 – Disciplinary measures

A judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar who has committed misconduct of a less serious nature than that set out in article 46, paragraph 1, shall be subject to disciplinary measures, in accordance with the Rules of Procedure and Evidence.

Article 48 – Privileges and immunities

1. The Court shall enjoy in the territory of each State Party such privileges and immunities as are necessary for the fulfilment of its purposes.
2. The judges, the Prosecutor, the Deputy Prosecutors and the Registrar shall, when engaged on or with respect to the business of the Court, enjoy the same privileges and immunities as are accorded to heads of diplomatic missions and shall, after the expiry of their terms of office, continue to be accorded immunity from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity.
3. The Deputy Registrar, the staff of the Office of the Prosecutor and the staff of the Registry shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.
4. Counsel, experts, witnesses or any other person required to be present at the seat of the Court shall be accorded such treatment as is necessary for the proper functioning of the Court, in accordance with the agreement on the privileges and immunities of the Court.
5. The privileges and immunities of:
 - a. A judge or the Prosecutor may be waived by an absolute majority of the judges;
 - b. The Registrar may be waived by the Presidency;
 - c. The Deputy Prosecutors and staff of the Office of the Prosecutor may be waived by the Prosecutor;
 - d. The Deputy Registrar and staff of the Registry may be waived by the Registrar.

Article 49 – Salaries, allowances and expenses

The judges, the Prosecutor, the Deputy Prosecutors, the Registrar and the Deputy Registrar shall receive such salaries, allowances and expenses as may be decided upon by the Assembly of States Parties. These salaries and allowances shall not be reduced during their terms of office.

Article 50 – Official and working languages

1. The official languages of the Court shall be Arabic, Chinese, English, French, Russian and Spanish. The judgments of the Court, as well as other decisions resolving fundamental issues before the Court, shall be published in the official languages. The Presidency shall, in accordance with the criteria established by the Rules of Procedure and Evidence, determine which decisions may be considered as resolving fundamental issues for the purposes of this paragraph.
2. The working languages of the Court shall be English and French. The Rules of Procedure and Evidence shall determine the cases in which other official languages may be used as working languages.
3. At the request of any party to a proceeding or a State allowed to intervene in a proceeding, the Court shall authorize a language other than English or French to be used by such a party or State, provided that the Court considers such authorization to be adequately justified.

Article 51 – Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.
2. Amendments to the Rules of Procedure and Evidence may be proposed by:
 - a. Any State Party;
 - b. The judges acting by an absolute majority; or
 - c. The Prosecutor.

Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties.

3. After the adoption of the Rules of Procedure and Evidence, in urgent cases where the Rules do not provide for a specific situation before the Court, the judges may, by a two-thirds majority, draw up provisional Rules to be applied until adopted, amended or rejected at the next ordinary or special session of the Assembly of States Parties.

4. The Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute. Amendments to the Rules of Procedure and Evidence as well as provisional Rules shall not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.
5. In the event of conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail.

Article 52 – Regulations of the Court

1. The judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning.
2. The Prosecutor and the Registrar shall be consulted in the elaboration of the Regulations and any amendments thereto.
3. The Regulations and any amendments thereto shall take effect upon adoption unless otherwise decided by the judges. Immediately upon adoption, they shall be circulated to States Parties for comments. If within six months there are no objections from a majority of States Parties, they shall remain in force.

Part 5. Investigation and Prosecution

Article 53 – Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
 - a. The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; 27
 - b. The case is or would be admissible under article 17; and
 - c. Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
 - a. There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
 - b. The case is inadmissible under article 17; or
 - c. A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;

the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

3. a. At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph b., the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision.
- b. In addition, the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 c. or 2 c.. In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.
4. The Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.

Article 54 – Duties and powers of the Prosecutor with respect to investigations

1. The Prosecutor shall:
 - a. In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
 - b. Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
 - c. Fully respect the rights of persons arising under this Statute.

2. The Prosecutor may conduct investigations on the territory of a State:
 - a. In accordance with the provisions of Part 9; or
 - b. As authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d).
3. The Prosecutor may:
 - a. Collect and examine evidence;
 - b. Request the presence of and question persons being investigated, victims and witnesses;
 - c. Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate;
 - d. Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person;
 - e. Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and
 - f. Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

Article 55 – Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:
 - a. Shall not be compelled to incriminate himself or herself or to confess guilt;
 - b. Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
 - c. Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
 - d. Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.
2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
 - a. To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;

- b. To remain silent, without such silence being a consideration in the determination of guilt or innocence;
- c. To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- d. To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

Article 56 – Role of the Pre-Trial Chamber in relation to a unique investigative opportunity

1. a. Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.
- b. In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence.
- c. Unless the Pre-Trial Chamber orders otherwise, the Prosecutor shall provide the relevant information to the person who has been arrested or appeared in response to a summons in connection with the investigation referred to in subparagraph a., in order that he or she may be heard on the matter.
2. The measures referred to in paragraph 1 b. may include:
 - a. Making recommendations or orders regarding procedures to be followed;
 - b. Directing that a record be made of the proceedings;
 - c. Appointing an expert to assist;
 - d. Authorizing counsel for a person who has been arrested, or appeared before the Court in response to a summons, to participate, or where there has not yet been such an arrest or appearance or counsel has not been designated, appointing another counsel to attend and represent the interests of the defence;
 - e. Naming one of its members or, if necessary, another available judge of the Pre-Trial or Trial Division to observe and make recommendations or orders regarding the collection and preservation of evidence and the questioning of persons;
 - f. Taking such other action as may be necessary to collect or preserve evidence.
3. a. Where the Prosecutor has not sought measures pursuant to this article but the Pre-Trial Chamber considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall

consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the Pre-Trial Chamber may take such measures on its own initiative.

- b. A decision of the Pre-Trial Chamber to act on its own initiative under this paragraph may be appealed by the Prosecutor. The appeal shall be heard on an expedited basis.
4. The admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69, and given such weight as determined by the Trial Chamber.

Article 57 – Functions and powers of the Pre-Trial Chamber

1. Unless otherwise provided in this Statute, the Pre-Trial Chamber shall exercise its functions in accordance with the provisions of this article.
2.
 - a. Orders or rulings of the Pre-Trial Chamber issued under articles 15, 18, 19, 54, paragraph 2, 61, paragraph 7, and 72 must be concurred in by a majority of its judges.
 - b. In all other cases, a single judge of the Pre-Trial Chamber may exercise the functions provided for in this Statute, unless otherwise provided for in the Rules of Procedure and Evidence or by a majority of the Pre-Trial Chamber.
3. In addition to its other functions under this Statute, the Pre-Trial Chamber may:
 - a. At the request of the Prosecutor, issue such orders and warrants as may be required for the purposes of an investigation;
 - b. Upon the request of a person who has been arrested or has appeared pursuant to a summons under article 58, issue such orders, including measures such as those described in article 56, or seek such cooperation pursuant to Part 9 as may be necessary to assist the person in the preparation of his or her defence;
 - c. Where necessary, provide for the protection and privacy of victims and witnesses, the preservation of evidence, the protection of persons who have been arrested or appeared in response to a summons, and the protection of national security information;
 - d. Authorize the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that State under Part 9 if, whenever possible having regard to the views of the State concerned, the Pre-Trial Chamber has determined in that case that the State is clearly unable to execute a request for cooperation due to the unavailability of any authority or any component of its judicial system competent to execute the request for cooperation under Part 9.

- e. Where a warrant of arrest or a summons has been issued under article 58, and having due regard to the strength of the evidence and the rights of the parties concerned, as provided for in this Statute and the Rules of Procedure and Evidence, seek the cooperation of States pursuant to article 93, paragraph 1 (k), to take protective measures for the purpose of forfeiture, in particular for the ultimate benefit of victims.

Article 58 – Issuance by the Pre-Trial Chamber of a warrant of arrest or a summons to appear

1. At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that:
 - a. There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court; and
 - b. The arrest of the person appears necessary:
 - i. To ensure the person's appearance at trial,
 - ii. To ensure that the person does not obstruct or endanger the investigation or the court proceedings, or
 - iii. Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances.
2. The application of the Prosecutor shall contain:
 - a. The name of the person and any other relevant identifying information;
 - b. A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed;
 - c. A concise statement of the facts which are alleged to constitute those crimes;
 - d. A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and
 - e. The reason why the Prosecutor believes that the arrest of the person is necessary.
3. The warrant of arrest shall contain:
 - a. The name of the person and any other relevant identifying information;
 - b. A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and
 - c. A concise statement of the facts which are alleged to constitute those crimes.
4. The warrant of arrest shall remain in effect until otherwise ordered by the Court.

5. On the basis of the warrant of arrest, the Court may request the provisional arrest or the arrest and surrender of the person under Part 9.
6. The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.
7. As an alternative to seeking a warrant of arrest, the Prosecutor may submit an application requesting that the Pre-Trial Chamber issue a summons for the person to appear. If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear. The summons shall contain:
 - a. The name of the person and any other relevant identifying information;
 - b. The specified date on which the person is to appear;
 - c. A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; and
 - d. A concise statement of the facts which are alleged to constitute the crime.

The summons shall be served on the person.

Article 59 – Arrest proceedings in the custodial State

1. A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9.
2. A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:
 - a. The warrant applies to that person;
 - b. The person has been arrested in accordance with the proper process; and
 - c. The person's rights have been respected.
3. The person arrested shall have the right to apply to the competent authority in the custodial State for interim release pending surrender.
4. In reaching a decision on any such application, the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the Court. It shall not be open to the competent

authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58, paragraph 1 a. and b.

5. The Pre-Trial Chamber shall be notified of any request for interim release and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.
6. If the person is granted interim release, the Pre-Trial Chamber may request periodic reports on the status of the interim release.
7. Once ordered to be surrendered by the custodial State, the person shall be delivered to the Court as soon as possible.

Article 60 – Initial proceedings before the Court

1. Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.
2. A person subject to a warrant of arrest may apply for interim release pending trial. If the Pre-Trial Chamber is satisfied that the conditions set forth in article 58, paragraph 1, are met, the person shall continue to be detained. If it is not so satisfied, the Pre-Trial Chamber shall release the person, with or without conditions.
3. The Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person, and may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require.
4. The Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions.
5. If necessary, the Pre-Trial Chamber may issue a warrant of arrest to secure the presence of a person who has been released.

Article 61 – Confirmation of the charges before trial

1. Subject to the provisions of paragraph 2, within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor

intends to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

2. The Pre-Trial Chamber may, upon request of the Prosecutor or on its own motion, hold a hearing in the absence of the person charged to confirm the charges on which the Prosecutor intends to seek trial when the person has:
 - a. Waived his or her right to be present; or
 - b. Fled or cannot be found and all reasonable steps have been taken to secure his or her appearance before the Court and to inform the person of the charges and that a hearing to confirm those charges will be held.

In that case, the person shall be represented by counsel where the Pre-Trial Chamber determines that it is in the interests of justice.

3. Within a reasonable time before the hearing, the person shall:
 - a. Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
 - b. Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

4. Before the hearing, the Prosecutor may continue the investigation and may amend or withdraw any charges. The person shall be given reasonable notice before the hearing of any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the Pre-Trial Chamber of the reasons for the withdrawal.
5. At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.
6. At the hearing, the person may:
 - a. Object to the charges;
 - b. Challenge the evidence presented by the Prosecutor; and
 - c. Present evidence.

7. The Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged. Based on its determination, the Pre-Trial Chamber shall:
 - a. Confirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed;
 - b. Decline to confirm those charges in relation to which it has determined that there is insufficient evidence;

- c. Adjourn the hearing and request the Prosecutor to consider:
 - i. Providing further evidence or conducting further investigation with respect to a particular charge; or
 - ii. Amending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court.
8. Where the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.
9. After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges.
10. Any warrant previously issued shall cease to have effect with respect to any charges which have not been confirmed by the Pre-Trial Chamber or which have been withdrawn by the Prosecutor.
11. Once the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings.

Part 6. The Trial

Article 62 – Place of trial

Unless otherwise decided, the place of the trial shall be the seat of the Court.

Article 63 – Trial in the presence of the accused

1. The accused shall be present during the trial.
2. If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required.

Article 64 – Functions and powers of the Trial Chamber

1. The functions and powers of the Trial Chamber set out in this article shall be exercised in accordance with this Statute and the Rules of Procedure and Evidence.
2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
 - a. Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;
 - b. Determine the language or languages to be used at trial; and
 - c. Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.
4. The Trial Chamber may, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber or, if necessary, to another available judge of the Pre-Trial Division.
5. Upon notice to the parties, the Trial Chamber may, as appropriate, direct that there be joinder or severance in respect of charges against more than one accused.
6. In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary:
 - a. Exercise any functions of the Pre-Trial Chamber referred to in article 61, paragraph 11;
 - b. Require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States as provided in this Statute;
 - c. Provide for the protection of confidential information;
 - d. Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties;
 - e. Provide for the protection of the accused, witnesses and victims; and
 - f. Rule on any other relevant matters.
7. The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.
8. a. At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber. The Trial Chamber shall satisfy itself that the accused understands the nature of

the charges. It shall afford him or her the opportunity to make an admission of guilt in accordance with article 65 or to plead not guilty.

- b. At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the provisions of this Statute.
9. The Trial Chamber shall have, inter alia, the power on application of a party or on its own motion to:
- a. Rule on the admissibility or relevance of evidence; and
 - b. Take all necessary steps to maintain order in the course of a hearing.
10. The Trial Chamber shall ensure that a complete record of the trial, which accurately reflects the proceedings, is made and that it is maintained and preserved by the Registrar.

Article 65 – Proceedings on an admission of guilt

1. Where the accused makes an admission of guilt pursuant to article 64, paragraph 8 a., the Trial Chamber shall determine whether:
- a. The accused understands the nature and consequences of the admission of guilt;
 - b. The admission is voluntarily made by the accused after sufficient consultation with defence counsel; and
 - c. The admission of guilt is supported by the facts of the case that are contained in:
 - i. The charges brought by the Prosecutor and admitted by the accused;
 - ii. Any materials presented by the Prosecutor which supplement the charges and which the accused accepts; and
 - iii. Any other evidence, such as the testimony of witnesses, presented by the Prosecutor or the accused.
2. Where the Trial Chamber is satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt, together with any additional evidence presented, as establishing all the essential facts that are required to prove the crime to which the admission of guilt relates, and may convict the accused of that crime.
3. Where the Trial Chamber is not satisfied that the matters referred to in paragraph 1 are established, it shall consider the admission of guilt as not having been made, in which case it shall order that the trial be continued under the ordinary

trial procedures provided by this Statute and may remit the case to another Trial Chamber.

4. Where the Trial Chamber is of the opinion that a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may:
 - a. Request the Prosecutor to present additional evidence, including the testimony of witnesses; or
 - b. Order that the trial be continued under the ordinary trial procedures provided by this Statute, in which case it shall consider the admission of guilt as not having been made and may remit the case to another Trial Chamber.
5. Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court.

Article 66 – Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Article 67 – Rights of the accused

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:
 - a. To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
 - b. To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
 - c. To be tried without undue delay;
 - d. Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
 - e. To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf

- under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
- f. To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks;
 - g. Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
 - h. To make an unsworn oral or written statement in his or her defence; and
 - i. Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.
2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

Article 68 – Protection of the victims and witnesses and their participation in the proceedings

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
2. As an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.
3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and

impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6.
5. Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
6. A State may make an application for necessary measures to be taken in respect of the protection of its servants or agents and the protection of confidential or sensitive information.

Article 69 – Evidence

1. Before testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness.
2. The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of viva voce (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused.
3. The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.
4. The Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.
5. The Court shall respect and observe privileges on confidentiality as provided for in the Rules of Procedure and Evidence.
6. The Court shall not require proof of facts of common knowledge but may take judicial notice of them.
7. Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- a. The violation casts substantial doubt on the reliability of the evidence; or
 - b. The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.
8. When deciding on the relevance or admissibility of evidence collected by a State, the Court shall not rule on the application of the State's national law.

Article 70 – Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
 - a. Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
 - b. Presenting evidence that the party knows is false or forged;
 - c. Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
 - d. Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
 - e. Retaliating against an official of the Court on account of duties performed by that or another official;
 - f. Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.
2. The principles and procedures governing the Court's exercise of jurisdiction over offences under this article shall be those provided for in the Rules of Procedure and Evidence. The conditions for providing international cooperation to the Court with respect to its proceedings under this article shall be governed by the domestic laws of the requested State.
3. In the event of conviction, the Court may impose a term of imprisonment not exceeding five years, or a fine in accordance with the Rules of Procedure and Evidence, or both.
4.
 - a. Each State Party shall extend its criminal laws penalizing offences against the integrity of its own investigative or judicial process to offences against the administration of justice referred to in this article, committed on its territory, or by one of its nationals;
 - b. Upon request by the Court, whenever it deems it proper, the State Party shall submit the case to its competent authorities for the purpose of prosecution. Those authorities shall treat such cases with diligence and devote sufficient resources to enable them to be conducted effectively.

Article 71 – Sanctions for misconduct before the Court

1. The Court may sanction persons present before it who commit misconduct, including disruption of its proceedings or deliberate refusal to comply with its directions, by administrative measures other than imprisonment, such as temporary or permanent removal from the courtroom, a fine or other similar measures provided for in the Rules of Procedure and Evidence.
2. The procedures governing the imposition of the measures set forth in paragraph 1 shall be those provided for in the Rules of Procedure and Evidence.

Article 72 – Protection of national security information

1. This article applies in any case where the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. Such cases include those falling within the scope of article 56, paragraphs 2 and 3, article 61, paragraph 3, article 64, paragraph 3, article 67, paragraph 2, article 68, paragraph 6, article 87, paragraph 6 and article 93, as well as cases arising at any other stage of the proceedings where such disclosure may be at issue.
2. This article shall also apply when a person who has been requested to give information or evidence has refused to do so or has referred the matter to the State on the ground that disclosure would prejudice the national security interests of a State and the State concerned confirms that it is of the opinion that disclosure would prejudice its national security interests.
3. Nothing in this article shall prejudice the requirements of confidentiality applicable under article 54, paragraph 3 e. and f., or the application of article 73.
4. If a State learns that information or documents of the State are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests, that State shall have the right to intervene in order to obtain resolution of the issue in accordance with this article.
5. If, in the opinion of a State, disclosure of information would prejudice its national security interests, all reasonable steps will be taken by the State, acting in conjunction with the Prosecutor, the defence or the Pre-Trial Chamber or Trial Chamber, as the case may be, to seek to resolve the matter by cooperative means. Such steps may include:
 - a. Modification or clarification of the request;
 - b. A determination by the Court regarding the relevance of the information or evidence sought, or a determination as to whether the evidence, though relevant, could be or has been obtained from a source other than the requested State;
 - c. Obtaining the information or evidence from a different source or in a different form; or
 - d. Agreement on conditions under which the assistance could be provided including, among other things, providing summaries or redactions, limitations

on disclosure, use of in camera or ex parte proceedings, or other protective measures permissible under the Statute and the Rules of Procedure and Evidence.

6. Once all reasonable steps have been taken to resolve the matter through cooperative means, and if the State considers that there are no means or conditions under which the information or documents could be provided or disclosed without prejudice to its national security interests, it shall so notify the Prosecutor or the Court of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the State's national security interests.
7. Thereafter, if the Court determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused, the Court may undertake the following actions:
 - a. Where disclosure of the information or document is sought pursuant to a request for cooperation under Part 9 or the circumstances described in paragraph 2, and the State has invoked the ground for refusal referred to in article 93, paragraph 4:
 - i. The Court may, before making any conclusion referred to in subparagraph 7 a. ii., request further consultations for the purpose of considering the State's representations, which may include, as appropriate, hearings in camera and ex parte;
 - ii. If the Court concludes that, by invoking the ground for refusal under article 93, paragraph 4, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; and
 - iii. The Court may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances; or
 - b. In all other circumstances:
 - i. Order disclosure; or
 - ii. To the extent it does not order disclosure, make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.

Article 73 – Third-party information or documents

If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the

consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.

Article 74 – Requirements for the decision

1. All the judges of the Trial Chamber shall be present at each stage of the trial and throughout their deliberations. The Presidency may, on a case-by-case basis, designate, as available, one or more alternate judges to be present at each stage of the trial and to replace a member of the Trial Chamber if that member is unable to continue attending.
2. The Trial Chamber's decision shall be based on its evaluation of the evidence and the entire proceedings. The decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges. The Court may base its decision only on evidence submitted and discussed before it at the trial.
3. The judges shall attempt to achieve unanimity in their decision, failing which the decision shall be taken by a majority of the judges.
4. The deliberations of the Trial Chamber shall remain secret.
5. The decision shall be in writing and shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions. The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority. The decision or a summary thereof shall be delivered in open court.

Article 75 – Reparations to victims

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

Article 76 – Sentencing

1. In the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence.
2. Except where article 65 applies and before the completion of the trial, the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence.
3. Where paragraph 2 applies, any representations under article 75 shall be heard during the further hearing referred to in paragraph 2 and, if necessary, during any additional hearing.
4. The sentence shall be pronounced in public and, wherever possible, in the presence of the accused.

Part 7. Penalties

Article 77 – Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
 - a. Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
 - b. A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:
 - a. A fine under the criteria provided for in the Rules of Procedure and Evidence;
 - b. A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Article 78 – Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 b.

Article 79 – Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Article 80 – Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

Part 8. Appeal and Revision

Article 81 – Appeal against decision of acquittal or conviction or against sentence

1. A decision under article 74 may be appealed in accordance with the Rules of Procedure and Evidence as follows:
 - a. The Prosecutor may make an appeal on any of the following grounds:
 - i. Procedural error,
 - ii. Error of fact, or
 - iii. Error of law;
 - b. The convicted person, or the Prosecutor on that person's behalf, may make an appeal on any of the following grounds:
 - i. Procedural error,
 - ii. Error of fact,
 - iii. Error of law, or
 - iv. Any other ground that affects the fairness or reliability of the proceedings or decision.
2.
 - a. A sentence may be appealed, in accordance with the Rules of Procedure and Evidence, by the Prosecutor or the convicted person on the ground of disproportion between the crime and the sentence;
 - b. If on an appeal against sentence the Court considers that there are grounds on which the conviction might be set aside, wholly or in part, it may invite the Prosecutor and the convicted person to submit grounds under article 81, paragraph 1 a. or b., and may render a decision on conviction in accordance with article 83;
 - c. The same procedure applies when the Court, on an appeal against conviction only, considers that there are grounds to reduce the sentence under paragraph 2 a.
3.
 - a. Unless the Trial Chamber orders otherwise, a convicted person shall remain in custody pending an appeal;
 - b. When a convicted person's time in custody exceeds the sentence of imprisonment imposed, that person shall be released, except that if the Prosecutor is also appealing, the release may be subject to the conditions under subparagraph c. below;
 - c. In case of an acquittal, the accused shall be released immediately, subject to the following:
 - i. Under exceptional circumstances, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and

- the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal;
- ii. A decision by the Trial Chamber under subparagraph c. i. may be appealed in accordance with the Rules of Procedure and Evidence.
4. Subject to the provisions of paragraph 3 a. and b., execution of the decision or sentence shall be suspended during the period allowed for appeal and for the duration of the appeal proceedings.

Article 82 – Appeal against other decisions

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:
- a. A decision with respect to jurisdiction or admissibility;
 - b. A decision granting or denying release of the person being investigated or prosecuted;
 - c. A decision of the Pre-Trial Chamber to act on its own initiative under article 56, paragraph 3;
 - d. A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
2. A decision of the Pre-Trial Chamber under article 57, paragraph 3 d., may be appealed against by the State concerned or by the Prosecutor, with the leave of the Pre-Trial Chamber. The appeal shall be heard on an expedited basis.
3. An appeal shall not of itself have suspensive effect unless the Appeals Chamber so orders, upon request, in accordance with the Rules of Procedure and Evidence.
4. A legal representative of the victims, the convicted person or a bona fide owner of property adversely affected by an order under article 75 may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence.

Article 83 – Proceedings on appeal

1. For the purposes of proceedings under article 81 and this article, the Appeals Chamber shall have all the powers of the Trial Chamber.
2. If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error, it may:

- a. Reverse or amend the decision or sentence; or
- b. Order a new trial before a different Trial Chamber.

For these purposes, the Appeals Chamber may remand a factual issue to the original Trial Chamber for it to determine the issue and to report back accordingly, or may itself call evidence to determine the issue. When the decision or sentence has been appealed only by the person convicted, or the Prosecutor on that person's behalf, it cannot be amended to his or her detriment.

- 3. If in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.
- 4. The judgment of the Appeals Chamber shall be taken by a majority of the judges and shall be delivered in open court. The judgment shall state the reasons on which it is based. When there is no unanimity, the judgment of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law.
- 5. The Appeals Chamber may deliver its judgment in the absence of the person acquitted or convicted.

Article 84 – Revision of conviction or sentence

- 1. The convicted person or, after death, spouses, children, parents or one person alive at the time of the accused's death who has been given express written instructions from the accused to bring such a claim, or the Prosecutor on the person's behalf, may apply to the Appeals Chamber to revise the final judgment of conviction or sentence on the grounds that:
 - a. New evidence has been discovered that:
 - i. Was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and
 - ii. Is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict;
 - b. It has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified;
 - c. One or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46.
- 2. The Appeals Chamber shall reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

- a. Reconvene the original Trial Chamber;
- b. Constitute a new Trial Chamber; or
- c. Retain jurisdiction over the matter,

with a view to, after hearing the parties in the manner set forth in the Rules of Procedure and Evidence, arriving at a determination on whether the judgment should be revised.

Article 85 – Compensation to an arrested or convicted person

1. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
2. When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her.
3. In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation, according to the criteria provided in the Rules of Procedure and Evidence, to a person who has been released from detention following a final decision of acquittal or a termination of the proceedings for that reason.

Part 9. International Cooperation and Judicial Assistance

Article 86 – General obligation to cooperate

States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.

Article 87 – Requests for cooperation: general provisions

1. a. The Court shall have the authority to make requests to States Parties for cooperation. The requests shall be transmitted through the diplomatic channel or any other appropriate channel as may be designated by each State Party upon ratification, acceptance, approval or accession.

Subsequent changes to the designation shall be made by each State Party in accordance with the Rules of Procedure and Evidence.

- b. When appropriate, without prejudice to the provisions of subparagraph a., requests may also be transmitted through the International Criminal Police Organization or any appropriate regional organization.
2. Requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into an official language of the requested State or one of the working languages of the Court, in accordance with the choice made by that State upon ratification, acceptance, approval or accession.

Subsequent changes to this choice shall be made in accordance with the Rules of Procedure and Evidence.

3. The requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request.
4. In relation to any request for assistance presented under this Part, the Court may take such measures, including measures related to the protection of information, as may be necessary to ensure the safety or physical or psychological well-being of any victims, potential witnesses and their families. The Court may request that any information that is made available under this Part shall be provided and handled in a manner that protects the safety and physical or psychological well-being of any victims, potential witnesses and their families.
5.
 - a. The Court may invite any State not party to this Statute to provide assistance under this Part on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis.
 - b. Where a State not party to this Statute, which has entered into an ad hoc arrangement or an agreement with the Court, fails to cooperate with requests pursuant to any such arrangement or agreement, the Court may so inform the Assembly of States Parties or, where the Security Council referred the matter to the Court, the Security Council.
6. The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.
7. Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the

Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Article 88 – Availability of procedures under national law

States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part.

Article 89 – Surrender of persons to the Court

1. The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall, in accordance with the provisions of this Part and the procedure under their national law, comply with requests for arrest and surrender.
2. Where the person sought for surrender brings a challenge before a national court on the basis of the principle of *ne bis in idem* as provided in article 20, the requested State shall immediately consult with the Court to determine if there has been a relevant ruling on admissibility. If the case is admissible, the requested State shall proceed with the execution of the request. If an admissibility ruling is pending, the requested State may postpone the execution of the request for surrender of the person until the Court makes a determination on admissibility.
3.
 - a. A State Party shall authorize, in accordance with its national procedural law, transportation through its territory of a person being surrendered to the Court by another State, except where transit through that State would impede or delay the surrender.
 - b. A request by the Court for transit shall be transmitted in accordance with article 87. The request for transit shall contain:
 - i. A description of the person being transported;
 - ii. A brief statement of the facts of the case and their legal characterization; and
 - iii. The warrant for arrest and surrender;
 - c. A person being transported shall be detained in custody during the period of transit;
 - d. No authorization is required if the person is transported by air and no landing is scheduled on the territory of the transit State;
 - e. If an unscheduled landing occurs on the territory of the transit State, that State may require a request for transit from the Court as provided for in subparagraph b. The transit State shall detain the person being transported until the request for transit is received and the transit is effected, provided that detention for purposes of this subparagraph may not be extended beyond

96 hours from the unscheduled landing unless the request is received within that time.

4. If the person sought is being proceeded against or is serving a sentence in the requested State for a crime different from that for which surrender to the Court is sought, the requested State, after making its decision to grant the request, shall consult with the Court.

Article 90 – Competing requests

1. A State Party which receives a request from the Court for the surrender of a person under article 89 shall, if it also receives a request from any other State for the extradition of the same person for the same conduct which forms the basis of the crime for which the Court seeks the person's surrender, notify the Court and the requesting State of that fact.
2. Where the requesting State is a State Party, the requested State shall give priority to the request from the Court if:
 - a. The Court has, pursuant to article 18 or 19, made a determination that the case in respect of which surrender is sought is admissible and that determination takes into account the investigation or prosecution conducted by the requesting State in respect of its request for extradition; or
 - b. The Court makes the determination described in subparagraph (a) pursuant to the requested State's notification under paragraph 1.
3. Where a determination under paragraph 2 a. has not been made, the requested State may, at its discretion, pending the determination of the Court under paragraph 2 b., proceed to deal with the request for extradition from the requesting State but shall not extradite the person until the Court has determined that the case is inadmissible. The Court's determination shall be made on an expedited basis.
4. If the requesting State is a State not Party to this Statute the requested State, if it is not under an international obligation to extradite the person to the requesting State, shall give priority to the request for surrender from the Court, if the Court has determined that the case is admissible.
5. Where a case under paragraph 4 has not been determined to be admissible by the Court, the requested State may, at its discretion, proceed to deal with the request for extradition from the requesting State.
6. In cases where paragraph 4 applies except that the requested State is under an existing international obligation to extradite the person to the requesting State not Party to this Statute, the requested State shall determine whether to surrender the person to the Court or extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to:

- a. The respective dates of the requests;
 - b. The interests of the requesting State including, where relevant, whether the crime was committed in its territory and the nationality of the victims and of the person sought; and
 - c. The possibility of subsequent surrender between the Court and the requesting State.
7. Where a State Party which receives a request from the Court for the surrender of a person also receives a request from any State for the extradition of the same person for conduct other than that which constitutes the crime for which the Court seeks the person's surrender:
 - a. The requested State shall, if it is not under an existing international obligation to extradite the person to the requesting State, give priority to the request from the Court;
 - b. The requested State shall, if it is under an existing international obligation to extradite the person to the requesting State, determine whether to surrender the person to the Court or to extradite the person to the requesting State. In making its decision, the requested State shall consider all the relevant factors, including but not limited to those set out in paragraph 6, but shall give special consideration to the relative nature and gravity of the conduct in question.
8. Where pursuant to a notification under this article, the Court has determined a case to be inadmissible, and subsequently extradition to the requesting State is refused, the requested State shall notify the Court of this decision.

Article 91 – Contents of request for arrest and surrender

1. A request for arrest and surrender shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 a.
2. In the case of a request for the arrest and surrender of a person for whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58, the request shall contain or be supported by:
 - a. Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
 - b. A copy of the warrant of arrest; and
 - c. Such documents, statements or information as may be necessary to meet the requirements for the surrender process in the requested State, except that those requirements should not be more burdensome than those applicable to requests for extradition pursuant to treaties or arrangements between the requested State and other States and should, if possible, be less burdensome, taking into account the distinct nature of the Court.

3. In the case of a request for the arrest and surrender of a person already convicted, the request shall contain or be supported by:
 - a. A copy of any warrant of arrest for that person;
 - b. A copy of the judgment of conviction;
 - c. Information to demonstrate that the person sought is the one referred to in the judgment of conviction; and
 - d. If the person sought has been sentenced, a copy of the sentence imposed and, in the case of a sentence for imprisonment, a statement of any time already served and the time remaining to be served.
4. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 c. During the consultations, the State Party shall advise the Court of the specific requirements of its national law.

Article 92 – Provisional arrest

1. In urgent cases, the Court may request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in article 91.
2. The request for provisional arrest shall be made by any medium capable of delivering a written record and shall contain:
 - a. Information describing the person sought, sufficient to identify the person, and information as to that person's probable location;
 - b. A concise statement of the crimes for which the person's arrest is sought and of the facts which are alleged to constitute those crimes, including, where possible, the date and location of the crime;
 - c. A statement of the existence of a warrant of arrest or a judgment of conviction against the person sought; and
 - d. A statement that a request for surrender of the person sought will follow. 50
3. A person who is provisionally arrested may be released from custody if the requested State has not received the request for surrender and the documents supporting the request as specified in article 91 within the time limits specified in the Rules of Procedure and Evidence. However, the person may consent to surrender before the expiration of this period if permitted by the law of the requested State. In such a case, the requested State shall proceed to surrender the person to the Court as soon as possible.
4. The fact that the person sought has been released from custody pursuant to paragraph 3 shall not prejudice the subsequent arrest and surrender of that person if the request for surrender and the documents supporting the request are delivered at a later date.

Article 93 – Other forms of cooperation

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
 - a. The identification and whereabouts of persons or the location of items;
 - b. The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
 - c. The questioning of any person being investigated or prosecuted;
 - d. The service of documents, including judicial documents;
 - e. Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
 - f. The temporary transfer of persons as provided in paragraph 7;
 - g. The examination of places or sites, including the exhumation and examination of grave sites;
 - h. The execution of searches and seizures;
 - i. The provision of records and documents, including official records and documents;
 - j. The protection of victims and witnesses and the preservation of evidence;
 - k. The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
1. Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.
2. The Court shall have the authority to provide an assurance to a witness or an expert appearing before the Court that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State.
3. Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.
4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.
5. Before denying a request for assistance under paragraph 1 (l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an

alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

6. If a request for assistance is denied, the requested State Party shall promptly inform the Court or the Prosecutor of the reasons for such denial.
7. a. The Court may request the temporary transfer of a person in custody for purposes of identification or for obtaining testimony or other assistance. The person may be transferred if the following conditions are fulfilled:
 - i. The person freely gives his or her informed consent to the transfer; and
 - ii. The requested State agrees to the transfer, subject to such conditions as that State and the Court may agree.
- b. The person being transferred shall remain in custody. When the purposes of the transfer have been fulfilled, the Court shall return the person without delay to the requested State.
8. a. The Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.
- b. The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis. The Prosecutor may then use them solely for the purpose of generating new evidence.
- c. The requested State may, on its own motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information. They may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.
9. a. i. In the event that a State Party receives competing requests, other than for surrender or extradition, from the Court and from another State pursuant to an international obligation, the State Party shall endeavour, in consultation with the Court and the other State, to meet both requests, if necessary by postponing or attaching conditions to one or the other request.
- ii. Failing that, competing requests shall be resolved in accordance with the principles established in article 90.
- b. Where, however, the request from the Court concerns information, property or persons which are subject to the control of a third State or an international organization by virtue of an international agreement, the requested States shall so inform the Court and the Court shall direct its request to the third State or international organization.
10. a. The Court may, upon request, cooperate with and provide assistance to a State Party conducting an investigation into or trial in respect of conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State.
- b. i. The assistance provided under subparagraph a. shall include, inter alia:

- aa. The transmission of statements, documents or other types of evidence obtained in the course of an investigation or a trial conducted by the Court; and
- bb. The questioning of any person detained by order of the Court; 52
- ii. In the case of assistance under subparagraph b. i. aa.:
 - aa. If the documents or other types of evidence have been obtained with the assistance of a State, such transmission shall require the consent of that State;
 - bb. If the statements, documents or other types of evidence have been provided by a witness or expert, such transmission shall be subject to the provisions of article 68.
- c. The Court may, under the conditions set out in this paragraph, grant a request for assistance under this paragraph from a State which is not a Party to this Statute.

Article 94 – Postponement of execution of a request in respect of ongoing investigation or prosecution

1. If the immediate execution of a request would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court. However, the postponement shall be no longer than is necessary to complete the relevant investigation or prosecution in the requested State. Before making a decision to postpone, the requested State should consider whether the assistance may be immediately provided subject to certain conditions.
2. If a decision to postpone is taken pursuant to paragraph 1, the Prosecutor may, however, seek measures to preserve evidence, pursuant to article 93, paragraph 1 j.

Article 95 – Postponement of execution of a request in respect of an admissibility challenge

Where there is an admissibility challenge under consideration by the Court pursuant to article 18 or 19, the requested State may postpone the execution of a request under this Part pending a determination by the Court, unless the Court has specifically ordered that the Prosecutor may pursue the collection of such evidence pursuant to article 18 or 19.

Article 96 – Contents of request for other forms of assistance under article 93

1. A request for other forms of assistance referred to in article 93 shall be made in writing. In urgent cases, a request may be made by any medium capable of delivering a written record, provided that the request shall be confirmed through the channel provided for in article 87, paragraph 1 a.
2. The request shall, as applicable, contain or be supported by the following:
 - a. A concise statement of the purpose of the request and the assistance sought, including the legal basis and the grounds for the request;
 - b. As much detailed information as possible about the location or identification of any person or place that must be found or identified in order for the assistance sought to be provided;
 - c. A concise statement of the essential facts underlying the request;
 - d. The reasons for and details of any procedure or requirement to be followed;
 - e. Such information as may be required under the law of the requested State in order to execute the request; and
 - f. Any other information relevant in order for the assistance sought to be provided.
3. Upon the request of the Court, a State Party shall consult with the Court, either generally or with respect to a specific matter, regarding any requirements under its national law that may apply under paragraph 2 e. During the consultations, the State Party shall advise the Court of the specific requirements of its national law.
4. The provisions of this article shall, where applicable, also apply in respect of a request for assistance made to the Court.

Article 97 – Consultations

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

- a. Insufficient information to execute the request;
- b. In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or
- c. The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Article 98 – Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.
2. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Article 99 – Execution of requests under articles 93 and 96

1. Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State and, unless prohibited by such law, in the manner specified in the request, including following any procedure outlined therein or permitting persons specified in the request to be present at and assist in the execution process.
2. In the case of an urgent request, the documents or evidence produced in response shall, at the request of the Court, be sent urgently.
3. Replies from the requested State shall be transmitted in their original language and form.
4. Without prejudice to other articles in this Part, where it is necessary for the successful execution of a request which can be executed without any compulsory measures, including specifically the interview of or taking evidence from a person on a voluntary basis, including doing so without the presence of the authorities of the requested State Party if it is essential for the request to be executed, and the examination without modification of a public site or other public place, the Prosecutor may execute such request directly on the territory of a State as follows:
 - a. When the State Party requested is a State on the territory of which the crime is alleged to have been committed, and there has been a determination of admissibility pursuant to article 18 or 19, the Prosecutor may directly execute such request following all possible consultations with the requested State Party;
 - b. In other cases, the Prosecutor may execute such request following consultations with the requested State Party and subject to any reasonable conditions or concerns raised by that State Party. Where the requested State

Party identifies problems with the execution of a request pursuant to this subparagraph it shall, without delay, consult with the Court to resolve the matter.

5. Provisions allowing a person heard or examined by the Court under article 72 to invoke restrictions designed to prevent disclosure of confidential information connected with national security shall also apply to the execution of requests for assistance under this article.

Article 100 – Costs

1. The ordinary costs for execution of requests in the territory of the requested State shall be borne by that State, except for the following, which shall be borne by the Court:
 - a. Costs associated with the travel and security of witnesses and experts or the transfer under article 93 of persons in custody;
 - b. Costs of translation, interpretation and transcription;
 - c. Travel and subsistence costs of the judges, the Prosecutor, the Deputy Prosecutors, the Registrar, the Deputy Registrar and staff of any organ of the Court;
 - d. Costs of any expert opinion or report requested by the Court;
 - e. Costs associated with the transport of a person being surrendered to the Court by a custodial State; and
 - f. Following consultations, any extraordinary costs that may result from the execution of a request.
2. The provisions of paragraph 1 shall, as appropriate, apply to requests from States Parties to the Court. In that case, the Court shall bear the ordinary costs of execution.

Article 101 – Rule of speciality

1. A person surrendered to the Court under this Statute shall not be proceeded against, punished or detained for any conduct committed prior to surrender, other than the conduct or course of conduct which forms the basis of the crimes for which that person has been surrendered.
2. The Court may request a waiver of the requirements of paragraph 1 from the State which surrendered the person to the Court and, if necessary, the Court shall provide additional information in accordance with article 91. States Parties shall have the authority to provide a waiver to the Court and should endeavour to do so.

Article 102 – Use of terms

For the purposes of this Statute:

- a. “surrender” means the delivering up of a person by a State to the Court, pursuant to this Statute.
- b. “extradition” means the delivering up of a person by one State to another as provided by treaty, convention or national legislation.

Part 10. Enforcement***Article 103 – Role of States in enforcement of sentences of imprisonment***

1.
 - a. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
 - b. At the time of declaring its willingness to accept sentenced persons, a State may attach conditions to its acceptance as agreed by the Court and in accordance with this Part.
 - c. A State designated in a particular case shall promptly inform the Court whether it accepts the Court’s designation.
2.
 - a. The State of enforcement shall notify the Court of any circumstances, including the exercise of any conditions agreed under paragraph 1, which could materially affect the terms or extent of the imprisonment. The Court shall be given at least 45 days’ notice of any such known or foreseeable circumstances. During this period, the State of enforcement shall take no action that might prejudice its obligations under article 110.
 - b. Where the Court cannot agree to the circumstances referred to in subparagraph a., it shall notify the State of enforcement and proceed in accordance with article 104, paragraph 1.
3. In exercising its discretion to make a designation under paragraph 1, the Court shall take into account the following:
 - a. The principle that States Parties should share the responsibility for enforcing sentences of imprisonment, in accordance with principles of equitable distribution, as provided in the Rules of Procedure and Evidence;
 - b. The application of widely accepted international treaty standards governing the treatment of prisoners;
 - c. The views of the sentenced person;

- d. The nationality of the sentenced person;
 - e. Such other factors regarding the circumstances of the crime or the person sentenced, or the effective enforcement of the sentence, as may be appropriate in designating the State of enforcement.
4. If no State is designated under paragraph 1, the sentence of imprisonment shall be served in a prison facility made available by the host State, in accordance with the conditions set out in the headquarters agreement referred to in article 3, paragraph 2. In such a case, the costs arising out of the enforcement of a sentence of imprisonment shall be borne by the Court.

Article 104 – Change in designation of State of enforcement

1. The Court may, at any time, decide to transfer a sentenced person to a prison of another State.
2. A sentenced person may, at any time, apply to the Court to be transferred from the State of enforcement.

Article 105 – Enforcement of the sentence

1. Subject to conditions which a State may have specified in accordance with article 103, paragraph 1 b., the sentence of imprisonment shall be binding on the States Parties, which shall in no case modify it.
2. The Court alone shall have the right to decide any application for appeal and revision. The State of enforcement shall not impede the making of any such application by a sentenced person.

Article 106 – Supervision of enforcement of sentences and conditions of imprisonment

1. The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.
2. The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favourable than those available to prisoners convicted of similar offences in the State of enforcement.

3. Communications between a sentenced person and the Court shall be unimpeded and confidential.

Article 107 – Transfer of the person upon completion of sentence

1. Following completion of the sentence, a person who is not a national of the State of enforcement may, in accordance with the law of the State of enforcement, be transferred to a State which is obliged to receive him or her, or to another State which agrees to receive him or her, taking into account any wishes of the person to be transferred to that State, unless the State of enforcement authorizes the person to remain in its territory.
2. If no State bears the costs arising out of transferring the person to another State pursuant to paragraph 1, such costs shall be borne by the Court.
3. Subject to the provisions of article 108, the State of enforcement may also, in accordance with its national law, extradite or otherwise surrender the person to a State which has requested the extradition or surrender of the person for purposes of trial or enforcement of a sentence.

Article 108 – Limitation on the prosecution or punishment of other offences

1. A sentenced person in the custody of the State of enforcement shall not be subject to prosecution or punishment or to extradition to a third State for any conduct engaged in prior to that person's delivery to the State of enforcement, unless such prosecution, punishment or extradition has been approved by the Court at the request of the State of enforcement.
2. The Court shall decide the matter after having heard the views of the sentenced person.
3. Paragraph 1 shall cease to apply if the sentenced person remains voluntarily for more than 30 days in the territory of the State of enforcement after having served the full sentence imposed by the Court, or returns to the territory of that State after having left it.

Article 109 – Enforcement of fines and forfeiture measures

1. States Parties shall give effect to fines or forfeitures ordered by the Court under Part 7, without prejudice to the rights of bona fide third parties, and in accordance with the procedure of their national law.

2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. Property, or the proceeds of the sale of real property or, where appropriate, the sale of other property, which is obtained by a State Party as a result of its enforcement of a judgement of the Court shall be transferred to the Court.

Article 110 – Review by the Court concerning reduction of sentence

1. The State of enforcement shall not release the person before expiry of the sentence pronounced by the Court.
2. The Court alone shall have the right to decide any reduction of sentence, and shall rule on the matter after having heard the person.
3. When the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced. Such a review shall not be conducted before that time.
4. In its review under paragraph 3, the Court may reduce the sentence if it finds that one or more of the following factors are present:
 - a. The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions;
 - b. The voluntary assistance of the person in enabling the enforcement of the judgments and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims; or
 - c. Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence.
5. If the Court determines in its initial review under paragraph 3 that it is not appropriate to reduce the sentence, it shall thereafter review the question of reduction of sentence at such intervals and applying such criteria as provided for in the Rules of Procedure and Evidence.

Article 111 – Escape

If a convicted person escapes from custody and flees the State of enforcement, that State may, after consultation with the Court, request the person's surrender from the State in which the person is located pursuant to existing bilateral or multilateral arrangements, or may request that the Court seek the person's surrender, in accordance with Part 9. It may direct that the person be delivered to the State in which he or she was serving the sentence or to another State designated by the Court.

Part 11. Assembly of States Parties

Article 112 – Assembly of States Parties

1. An Assembly of States Parties to this Statute is hereby established. Each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers. Other States which have signed this Statute or the Final Act may be observers in the Assembly.
2. The Assembly shall:
 - a. Consider and adopt, as appropriate, recommendations of the Preparatory Commission;
 - b. Provide management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court;
 - c. Consider the reports and activities of the Bureau established under paragraph 3 and take appropriate action in regard thereto;
 - d. Consider and decide the budget for the Court;
 - e. Decide whether to alter, in accordance with article 36, the number of judges;
 - f. Consider pursuant to article 87, paragraphs 5 and 7, any question relating to non-cooperation;
 - g. Perform any other function consistent with this Statute or the Rules of Procedure and Evidence.
3.
 - a. The Assembly shall have a Bureau consisting of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms.
 - b. The Bureau shall have a representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world.
 - c. The Bureau shall meet as often as necessary, but at least once a year. It shall assist the Assembly in the discharge of its responsibilities.
4. The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy.
5. The President of the Court, the Prosecutor and the Registrar or their representatives may participate, as appropriate, in meetings of the Assembly and of the Bureau.
6. The Assembly shall meet at the seat of the Court or at the Headquarters of the United Nations once a year and, when circumstances so require, hold special sessions. Except as otherwise specified in this Statute, special sessions shall be convened by the Bureau on its own initiative or at the request of one third of the States Parties.
7. Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

- a. Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting;
 - b. Decisions on matters of procedure shall be taken by a simple majority of States Parties present and voting.
8. A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.
9. The Assembly shall adopt its own rules of procedure.
10. The official and working languages of the Assembly shall be those of the General Assembly of the United Nations.

Part 12. Financing

Article 113 – Financial Regulations

Except as otherwise specifically provided, all financial matters related to the Court and the meetings of the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be governed by this Statute and the Financial Regulations and Rules adopted by the Assembly of States Parties.

Article 114 – Payment of expenses

Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court.

Article 115 – Funds of the Court and of the Assembly of States Parties

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- a. Assessed contributions made by States Parties;
- b. Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

Article 116 – Voluntary contributions

Without prejudice to article 115, the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.

Article 117 – Assessment of contributions

The contributions of States Parties shall be assessed in accordance with an agreed scale of assessment, based on the scale adopted by the United Nations for its regular budget and adjusted in accordance with the principles on which that scale is based.

Article 118 – Annual audit

The records, books and accounts of the Court, including its annual financial statements, shall be audited annually by an independent auditor.

Part 13. Final Clauses

Article 119 – Settlement of disputes

1. Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court.
2. Any other dispute between two or more States Parties relating to the interpretation or application of this Statute which is not settled through negotiations within three months of their commencement shall be referred to the Assembly of States Parties. The Assembly may itself seek to settle the dispute or may make recommendations on further means of settlement of the dispute, including referral to the International Court of Justice in conformity with the Statute of that Court.

Article 120 – Reservations

No reservations may be made to this Statute.

Article 121 – Amendments

1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties.
2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants.
3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties.
4. Except as provided in paragraph 5, an amendment shall enter into force for all States Parties one year after instruments of ratification or acceptance have been deposited with the Secretary-General of the United Nations by seven-eighths of them.
5. Any amendment to articles 5, 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory.
6. If an amendment has been accepted by seven-eighths of States Parties in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.
7. The Secretary-General of the United Nations shall circulate to all States Parties any amendment adopted at a meeting of the Assembly of States Parties or at a Review Conference.

Article 122 – Amendments to provisions of an institutional nature

1. Amendments to provisions of this Statute which are of an exclusively institutional nature, namely, article 35, article 36, paragraphs 8 and 9, article 37, article 38,

article 39, paragraphs 1 (first two sentences), 2 and 4, article 42, paragraphs 4 to 9, article 43, paragraphs 2 and 3, and articles 44, 46, 47 and 49, may be proposed at any time, notwithstanding article 121, paragraph 1, by any State Party. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations or such other person designated by the Assembly of States Parties who shall promptly circulate it to all States Parties and to others participating in the Assembly.

2. Amendments under this article on which consensus cannot be reached shall be adopted by the Assembly of States Parties or by a Review Conference, by a two-thirds majority of States Parties. Such amendments shall enter into force for all States Parties six months after their adoption by the Assembly or, as the case may be, by the Conference.

Article 123 – Review of the Statute

1. Seven years after the entry into force of this Statute the Secretary-General of the United Nations shall convene a Review Conference to consider any amendments to this Statute. Such review may include, but is not limited to, the list of crimes contained in article 5. The Conference shall be open to those participating in the Assembly of States Parties and on the same conditions.
2. At any time thereafter, at the request of a State Party and for the purposes set out in paragraph 1, the Secretary-General of the United Nations shall, upon approval by a majority of States Parties, convene a Review Conference.
3. The provisions of article 121, paragraphs 3 to 7, shall apply to the adoption and entry into force of any amendment to the Statute considered at a Review Conference.

Article 124 – Transitional Provision

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

Article 125 – Signature, ratification, acceptance, approval or accession

1. This Statute shall be open for signature by all States in Rome, at the headquarters of the Food and Agriculture Organization of the United Nations, on 17 July 1998. Thereafter, it shall remain open for signature in Rome at the Ministry of Foreign Affairs of Italy until 17 October 1998. After that date, the Statute shall remain open for signature in New York, at United Nations Headquarters, until 31 December 2000.
2. This Statute is subject to ratification, acceptance or approval by signatory States. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 126 – Entry into force

1. This Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 127 – Withdrawal

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.
2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Article 128 – Authentic texts

The original of this Statute, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Statute.

DONE at Rome, this 17 July 1998.

Appendix F.2

Elements of Crimes

[Author's note: available at http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf, accessed February 26, 2009]

(Explanatory note: The structure of the elements of the crimes of genocide, crimes against humanity and war crimes follows the structure of the corresponding provisions of articles 6, 7 and 8 of the Rome Statute. Some paragraphs of those articles of the Rome Statute list multiple crimes. In those instances, the elements of crimes appear in separate paragraphs which correspond to each of those crimes to facilitate the identification of the respective elements.)

General introduction

1. Pursuant to article 9, the following Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8, consistent with the Statute. The provisions of the Statute, including article 21 and the general principles set out in Part 3, are applicable to the Elements of Crimes.
2. As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. Where no reference is made in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to the article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below.

3. Existence of intent and knowledge can be inferred from relevant facts and circumstances.
4. With respect to mental elements associated with elements involving value judgement, such as those using the terms ‘inhumane’ or ‘severe’, it is not necessary that the perpetrator personally completed a particular value judgement, unless otherwise indicated.
5. Grounds for excluding criminal responsibility or the absence thereof are generally not specified in the elements of crimes listed under each crime.¹
6. The requirement of ‘unlawfulness’ found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.
7. The elements of crimes are generally structured in accordance with the following principles:
 - As the elements of crimes focus on the conduct, consequences and circumstances associated with each crime, they are generally listed in that order;
 - When required, a particular mental element is listed after the affected conduct, consequence or circumstance;
 - Contextual circumstances are listed last.
8. As used in the Elements of Crimes, the term ‘perpetrator’ is neutral as to guilt or innocence. The elements, including the appropriate mental elements, apply, *mutatis mutandis*, to all those whose criminal responsibility may fall under articles 25 and 28 of the Statute.
9. A particular conduct may constitute one or more crimes.
10. The use of short titles for the crimes has no legal effect.

Article 6

Genocide

Introduction

With respect to the last element listed for each crime:

- The term ‘in the context of’ would include the initial acts in an emerging pattern;

¹This paragraph is without prejudice to the obligation of the Prosecutor under article 54, paragraph 1, of the Statute.

- The term ‘manifest’ is an objective qualification;
Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.

Article 6 (a)

Genocide by killing

Elements

1. The perpetrator killed² one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (b)

Genocide by causing serious bodily or mental harm

Elements

1. The perpetrator caused serious bodily or mental harm to one or more persons.³
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

²The term ‘killed’ is interchangeable with the term ‘caused death’.

³This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.

Article 6 (c)**Genocide by deliberately inflicting conditions of life calculated to bring about physical destruction****Elements**

1. The perpetrator inflicted certain conditions of life upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.⁴
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 6 (d)**Genocide by imposing measures intended to prevent births****Elements**

1. The perpetrator imposed certain measures upon one or more persons.
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The measures imposed were intended to prevent births within that group.
5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

⁴The term 'conditions of life' may include, but is not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes.

Article 6 (e)

Genocide by forcibly transferring children

Elements

1. The perpetrator forcibly transferred one or more persons.⁵
2. Such person or persons belonged to a particular national, ethnical, racial or religious group.
3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
4. The transfer was from that group to another group.
5. The person or persons were under the age of 18 years.
6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.
7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

Article 7

Crimes against humanity

Introduction

1. Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.
2. The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the

⁵The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment.

precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.

3. 'Attack directed against a civilian population' in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population.⁶

Article 7 (1) (a)

Crime against humanity of murder

Elements

1. The perpetrator killed⁷ one or more persons.
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

Article 7 (1) (b)

Crime against humanity of extermination

Elements

1. The perpetrator killed⁸ one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.⁹

⁶A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

⁷The term 'killed' is interchangeable with the term 'caused death'. This footnote applies to all elements which use either of these concepts.

⁸The conduct could be committed by different methods of killing, either directly or indirectly.

⁹The infliction of such conditions could include the deprivation of access to food and medicine.

2. The conduct constituted, or took place as part of,¹⁰ a mass killing of members of a civilian population.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (c)

Crime against humanity of enslavement

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.¹¹
2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (d)

Crime against humanity of deportation or forcible transfer of population

Elements

1. The perpetrator deported or forcibly¹² transferred,¹³ without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts.

¹⁰The term ‘as part of’ would include the initial conduct in a mass killing.

¹¹It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

¹²The term ‘forcibly’ is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment.

¹³‘Deported or forcibly transferred’ is interchangeable with ‘forcibly displaced’.

2. Such person or persons were lawfully present in the area from which they were so deported or transferred.
3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (I) (e)

Crime against humanity of imprisonment or other severe deprivation of physical liberty

Elements

1. The perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty.
2. The gravity of the conduct was such that it was in violation of fundamental rules of international law.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (I) (f)

Crime against humanity of torture¹⁴

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

¹⁴It is understood that no specific purpose need be proved for this crime.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-1

Crime against humanity of rape

Elements

1. The perpetrator invaded¹⁵ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.¹⁶
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-2

Crime against humanity of sexual slavery¹⁷

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending

¹⁵The concept of ‘invasion’ is intended to be broad enough to be gender-neutral.

¹⁶It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 7 (1) (g)-3, 5 and 6.

¹⁷Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.¹⁸

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-3

Crime against humanity of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-4

Crime against humanity of forced pregnancy

Elements

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

¹⁸It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

2. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
3. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-5

Crime against humanity of enforced sterilization

Elements

1. The perpetrator deprived one or more persons of biological reproductive capacity.¹⁹
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.²⁰
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (g)-6

Crime against humanity of sexual violence

Elements

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

¹⁹The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

²⁰It is understood that 'genuine consent' does not include consent obtained through deception.

4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (h)

Crime against humanity of persecution

Elements

1. The perpetrator severely deprived, contrary to international law,²¹ one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.²²
5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (i)

Crime against humanity of enforced disappearance of persons^{23,24}

Elements

1. The perpetrator:

²¹This requirement is without prejudice to paragraph 6 of the General Introduction to the Elements of Crimes.

²²It is understood that no additional mental element is necessary for this element other than that inherent in element 6.

²³Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose.

²⁴This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute.

- (a) Arrested, detained²⁵, ²⁶ or abducted one or more persons; or
 - (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2. (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
 3. The perpetrator was aware that:²⁷
 - (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons;²⁸ or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
 4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
 5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
 6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
 7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
 8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (j)

Crime against humanity of apartheid

Elements

1. The perpetrator committed an inhumane act against one or more persons.
2. Such act was an act referred to in article 7, paragraph 1, of the Statute, or was an act of a character similar to any of those acts.²⁹

²⁵The word ‘detained’ would include a perpetrator who maintained an existing detention.

²⁶It is understood that under certain circumstances an arrest or detention may have been lawful.

²⁷This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes.

²⁸It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.

²⁹It is understood that ‘character’ refers to the nature and gravity of the act.

3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups.
5. The perpetrator intended to maintain such regime by that conduct.
6. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
7. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 7 (1) (k)

Crime against humanity of other inhumane acts

Elements

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.
2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.³⁰
3. The perpetrator was aware of the factual circumstances that established the character of the act.
4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Article 8

War crimes

Introduction

The elements for war crimes under article 8, paragraph 2 (c) and (e), are subject to the limitations addressed in article 8, paragraph 2 (d) and (f), which are not elements of crimes. The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the established framework of the international

³⁰It is understood that ‘character’ refers to the nature and gravity of the act.

law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea. With respect to the last two elements listed for each crime:

- There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
- In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
- There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms ‘took place in the context of and was associated with’.

Article 8 (2) (a)

Article 8 (2) (a) (i)

War crime of wilful killing

Elements

1. The perpetrator killed one or more persons.³¹
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.^{32,33}
4. The conduct took place in the context of and was associated with an international armed conflict.³⁴
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

³¹The term ‘killed’ is interchangeable with the term ‘caused death’. This footnote applies to all elements which use either of these concepts.

³²This mental element recognizes the interplay between articles 30 and 32. This footnote also applies to the corresponding element in each crime under article 8 (2) (a), and to the element in other crimes in article 8 (2) concerning the awareness of factual circumstances that establish the status of persons or property protected under the relevant international law of armed conflict.

³³With respect to nationality, it is understood that the perpetrator needs only to know that the victim belonged to an adverse party to the conflict. This footnote also applies to the corresponding element in each crime under article 8 (2) (a).

³⁴The term ‘international armed conflict’ includes military occupation. This footnote also applies to the corresponding element in each crime under article 8 (2) (a).

Article 8 (2) (a) (ii)-1

War crime of torture³⁵

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (ii)-2

War crime of inhuman treatment

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.

³⁵As element 3 requires that all victims must be ‘protected persons’ under one or more of the Geneva Conventions of 1949, these elements do not include the custody or control requirement found in the elements of article 7 (1) (e).

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (ii)-3

War crime of biological experiments

Elements

1. The perpetrator subjected one or more persons to a particular biological experiment.
2. The experiment seriously endangered the physical or mental health or integrity of such person or persons.
3. The intent of the experiment was non-therapeutic and it was neither justified by medical reasons nor carried out in such person's or persons' interest.
4. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (iii)

War crime of wilfully causing great suffering

Elements

1. The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (iv)

War crime of destruction and appropriation of property

Elements

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (v)

War crime of compelling service in hostile forces

Elements

1. The perpetrator coerced one or more persons, by act or threat, to take part in military operations against that person's own country or forces or otherwise serve in the forces of a hostile power.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (vi)**War crime of denying a fair trial****Elements**

1. The perpetrator deprived one or more persons of a fair and regular trial by denying judicial guarantees as defined, in particular, in the third and the fourth Geneva Conventions of 1949.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (vii)-1**War crime of unlawful deportation and transfer****Elements**

1. The perpetrator deported or transferred one or more persons to another State or to another location.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (vii)-2**War crime of unlawful confinement****Elements**

1. The perpetrator confined or continued to confine one or more persons to a certain location.

2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (a) (viii)

War crime of taking hostages

Elements

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b)

Article 8 (2) (b) (i)

War crime of attacking civilians

Elements

1. The perpetrator directed an attack.

2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (ii)

War crime of attacking civilian objects

Elements

1. The perpetrator directed an attack.
2. The object of the attack was civilian objects, that is, objects which are not military objectives.
3. The perpetrator intended such civilian objects to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (iii)

War crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission

Elements

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.

5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (iv)

War crime of excessive incidental death, injury, or damage

Elements

1. The perpetrator launched an attack.
2. The attack was such that it would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.³⁶
3. The perpetrator knew that the attack would cause incidental death or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.³⁷
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

³⁶The expression ‘concrete and direct overall military advantage’ refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

³⁷As opposed to the general rule set forth in paragraph 4 of the General Introduction, this knowledge element requires that the perpetrator make the value judgement as described therein. An evaluation of that value judgement must be based on the requisite information available to the perpetrator at the time.

Article 8 (2) (b) (v)**War crime of attacking undefended places³⁸**

Elements

1. The perpetrator attacked one or more towns, villages, dwellings or buildings.
2. Such towns, villages, dwellings or buildings were open for unresisted occupation.
3. Such towns, villages, dwellings or buildings did not constitute military objectives.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (vi)**War crime of killing or wounding a person *hors de combat***

Elements

1. The perpetrator killed or injured one or more persons.
2. Such person or persons were *hors de combat*.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (vii)-1**War crime of improper use of a flag of truce**

Elements

1. The perpetrator used a flag of truce.
2. The perpetrator made such use in order to feign an intention to negotiate when there was no such intention on the part of the perpetrator.

³⁸The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.

3. The perpetrator knew or should have known of the prohibited nature of such use.³⁹
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (vii)-2

War crime of improper use of a flag, insignia or uniform of the hostile party

Elements

1. The perpetrator used a flag, insignia or uniform of the hostile party.
2. The perpetrator made such use in a manner prohibited under the international law of armed conflict while engaged in an attack.
3. The perpetrator knew or should have known of the prohibited nature of such use.⁴⁰
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (vii)-3

War crime of improper use of a flag, insignia or uniform of the United Nations

Elements

1. The perpetrator used a flag, insignia or uniform of the United Nations.
2. The perpetrator made such use in a manner prohibited under the international law of armed conflict.
3. The perpetrator knew of the prohibited nature of such use.⁴¹

³⁹This mental element recognizes the interplay between article 30 and article 32. The term 'prohibited nature' denotes illegality.

⁴⁰This mental element recognizes the interplay between article 30 and article 32. The term 'prohibited nature' denotes illegality.

⁴¹This mental element recognizes the interplay between article 30 and article 32. The 'should have known' test required in the other offences found in article 8 (2) (b) (vii) is not applicable here because of the variable and regulatory nature of the relevant prohibitions.

4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (vii)-4

War crime of improper use of the distinctive emblems of the Geneva Conventions

Elements

1. The perpetrator used the distinctive emblems of the Geneva Conventions.
2. The perpetrator made such use for combatant purposes⁴² in a manner prohibited under the international law of armed conflict.
3. The perpetrator knew or should have known of the prohibited nature of such use.⁴³
4. The conduct resulted in death or serious personal injury.
5. The perpetrator knew that the conduct could result in death or serious personal injury.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (viii)

The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory

Elements

1. The perpetrator:

⁴²‘Combatant purposes’ in these circumstances means purposes directly related to hostilities and not including medical, religious or similar activities.

⁴³This mental element recognizes the interplay between article 30 and article 32. The term ‘prohibited nature’ denotes illegality.

- (a) Transferred,⁴⁴ directly or indirectly, parts of its own population into the territory it occupies; or
 - (b) Deported or transferred all or parts of the population of the occupied territory within or outside this territory.
2. The conduct took place in the context of and was associated with an international armed conflict.
 3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (ix)

War crime of attacking protected objects⁴⁵

Elements

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (x)-I

War crime of mutilation

Elements

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.

⁴⁴The term ‘transfer’ needs to be interpreted in accordance with the relevant provisions of international humanitarian law.

⁴⁵The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.

2. The conduct caused death or seriously endangered the physical or mental health of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.⁴⁶
4. Such person or persons were in the power of an adverse party.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (x)-2

War crime of medical or scientific experiments

Elements

1. The perpetrator subjected one or more persons to a medical or scientific experiment.
2. The experiment caused death or seriously endangered the physical or mental health or integrity of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person's or persons' interest.
4. Such person or persons were in the power of an adverse party.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xi)

War crime of treacherously killing or wounding

Elements

1. The perpetrator invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.

⁴⁶Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. This footnote also applies to the same element for article 8 (2) (b) (x)-2.

2. The perpetrator intended to betray that confidence or belief.
3. The perpetrator killed or injured such person or persons.
4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
5. Such person or persons belonged to an adverse party.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xii)

War crime of denying quarter

Elements

1. The perpetrator declared or ordered that there shall be no survivors.
2. Such declaration or order was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.
3. The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xiii)

War crime of destroying or seizing the enemy's property

Elements

1. The perpetrator destroyed or seized certain property.
2. Such property was property of a hostile party.
3. Such property was protected from that destruction or seizure under the international law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not justified by military necessity.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xiv)**War crime of depriving the nationals of the hostile power of rights or actions**

Elements

1. The perpetrator effected the abolition, suspension or termination of admissibility in a court of law of certain rights or actions.
2. The abolition, suspension or termination was directed at the nationals of a hostile party.
3. The perpetrator intended the abolition, suspension or termination to be directed at the nationals of a hostile party.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xv)**War crime of compelling participation in military operations**

Elements

1. The perpetrator coerced one or more persons by act or threat to take part in military operations against that person's own country or forces.
2. Such person or persons were nationals of a hostile party.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xvi)**War crime of pillaging**

Elements

1. The perpetrator appropriated certain property.

2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.⁴⁷
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xvii)

War crime of employing poison or poisoned weapons

Elements

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xviii)

War crime of employing prohibited gases, liquids, materials or devices

Elements

1. The perpetrator employed a gas or other analogous substance or device.
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.⁴⁸
3. The conduct took place in the context of and was associated with an international armed conflict.

⁴⁷As indicated by the use of the term ‘private or personal use’, appropriations justified by military necessity cannot constitute the crime of pillaging.

⁴⁸Nothing in this element shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law with respect to the development, production, stockpiling and use of chemical weapons.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xix)

War crime of employing prohibited bullets

Elements

1. The perpetrator employed certain bullets.
2. The bullets were such that their use violates the international law of armed conflict because they expand or flatten easily in the human body.
3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xx)

War crime of employing weapons, projectiles or materials or methods of warfare listed in the Annex to the Statute

Elements

[Elements will have to be drafted once weapons, projectiles or material or methods of warfare have been included in an annex to the Statute.]

Article 8 (2) (b) (xxi)

War crime of outrages upon personal dignity

Elements

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.⁴⁹

⁴⁹For this crime, 'persons' can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-1

War crime of rape

Elements

1. The perpetrator invaded⁵⁰ the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁵¹
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-2

War crime of sexual slavery⁵²

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending

⁵⁰The concept of 'invasion' is intended to be broad enough to be gender-neutral.

⁵¹It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements of article 8 (2) (b) (xxii)-3, 5 and 6.

⁵²Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁵³

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-3

War crime of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-4

War crime of forced pregnancy

Elements

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.

⁵³It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

2. The conduct took place in the context of and was associated with an international armed conflict.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-5

War crime of enforced sterilization

Elements

1. The perpetrator deprived one or more persons of biological reproductive capacity.⁵⁴
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.⁵⁵
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxii)-6

War crime of sexual violence

Elements

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The conduct was of a gravity comparable to that of a grave breach of the Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.

⁵⁴The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

⁵⁵It is understood that 'genuine consent' does not include consent obtained through deception.

4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxiii)

War crime of using protected persons as shields

Elements

1. The perpetrator moved or otherwise took advantage of the location of one or more civilians or other persons protected under the international law of armed conflict.
2. The perpetrator intended to shield a military objective from attack or shield, favour or impede military operations.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxiv)

War crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions

Elements

1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.
2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxv)

War crime of starvation as a method of warfare

Elements

1. The perpetrator deprived civilians of objects indispensable to their survival.
2. The perpetrator intended to starve civilians as a method of warfare.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (b) (xxvi)

War crime of using, conscripting or enlisting children

Elements

1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c)

Article 8 (2) (c) (i)-1

War crime of murder

Elements

1. The perpetrator killed one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel⁵⁶ taking no active part in the hostilities.

⁵⁶The term 'religious personnel' includes those non-confessional non-combatant military personnel carrying out a similar function.

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

Article 8 (2) (c) (i)-2

War crime of mutilation

Elements

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interests.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (i)-3

War crime of cruel treatment

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.

5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (i)-4

War crime of torture

Elements

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
4. The perpetrator was aware of the factual circumstances that established this status.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (ii)

War crime of outrages upon personal dignity

Elements

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.⁵⁷
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.
3. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

⁵⁷For this crime, 'persons' can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

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

Article 8 (2) (c) (iii)

War crime of taking hostages

Elements

1. The perpetrator seized, detained or otherwise held hostage one or more persons.
2. The perpetrator threatened to kill, injure or continue to detain such person or persons.
3. The perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons.
4. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
5. The perpetrator was aware of the factual circumstances that established this status.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (c) (iv)

War crime of sentencing or execution without due process

Elements

1. The perpetrator passed sentence or executed one or more persons.⁵⁸
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.

⁵⁸The elements laid down in these documents do not address the different forms of individual criminal responsibility, as enunciated in articles 25 and 28 of the Statute.

3. The perpetrator was aware of the factual circumstances that established this status.
4. There was no previous judgement pronounced by a court, or the court that rendered judgement was not ‘regularly constituted’, that is, it did not afford the essential guarantees of independence and impartiality, or the court that rendered judgement did not afford all other judicial guarantees generally recognized as indispensable under international law.⁵⁹
5. The perpetrator was aware of the absence of a previous judgement or of the denial of relevant guarantees and the fact that they are essential or indispensable to a fair trial.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e)

Article 8 (2) (e) (i)

War crime of attacking civilians

Elements

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

⁵⁹With respect to elements 4 and 5, the Court should consider whether, in the light of all relevant circumstances, the cumulative effect of factors with respect to guarantees deprived the person or persons of a fair trial.

Article 8 (2) (e) (ii)**War crime of attacking objects or persons using the distinctive emblems of the Geneva Conventions****Elements**

1. The perpetrator attacked one or more persons, buildings, medical units or transports or other objects using, in conformity with international law, a distinctive emblem or other method of identification indicating protection under the Geneva Conventions.
2. The perpetrator intended such persons, buildings, units or transports or other objects so using such identification to be the object of the attack.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (iii)**War crime of attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission****Elements**

1. The perpetrator directed an attack.
2. The object of the attack was personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations.
3. The perpetrator intended such personnel, installations, material, units or vehicles so involved to be the object of the attack.
4. Such personnel, installations, material, units or vehicles were entitled to that protection given to civilians or civilian objects under the international law of armed conflict.
5. The perpetrator was aware of the factual circumstances that established that protection.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (iv)

War crime of attacking protected objects⁶⁰

Elements

1. The perpetrator directed an attack.
2. The object of the attack was one or more buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives.
3. The perpetrator intended such building or buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals or places where the sick and wounded are collected, which were not military objectives, to be the object of the attack.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (v)

War crime of pillaging

Elements

1. The perpetrator appropriated certain property.
2. The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.⁶¹
3. The appropriation was without the consent of the owner.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

⁶⁰The presence in the locality of persons specially protected under the Geneva Conventions of 1949 or of police forces retained for the sole purpose of maintaining law and order does not by itself render the locality a military objective.

⁶¹As indicated by the use of the term ‘private or personal use’, appropriations justified by military necessity cannot constitute the crime of pillaging.

Article 8 (2) (e) (vi)-1

War crime of rape

Elements

1. The perpetrator invaded⁶² the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.⁶³
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-2

War crime of sexual slavery⁶⁴

Elements

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.⁶⁵

⁶²The concept of ‘invasion’ is intended to be broad enough to be gender-neutral.

⁶³It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity. This footnote also applies to the corresponding elements in article 8 (2) (e) (vi)-3, 5 and 6.

⁶⁴Given the complex nature of this crime, it is recognized that its commission could involve more than one perpetrator as a part of a common criminal purpose.

⁶⁵It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.

2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-3

War crime of enforced prostitution

Elements

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-4

War crime of forced pregnancy

Elements

1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.
2. The conduct took place in the context of and was associated with an armed conflict not of an international character.
3. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-5**War crime of enforced sterilization****Elements**

1. The perpetrator deprived one or more persons of biological reproductive capacity.⁶⁶
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.⁶⁷
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (vi)-6**War crime of sexual violence****Elements**

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.
2. The conduct was of a gravity comparable to that of a serious violation of article 3 common to the four Geneva Conventions.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

⁶⁶The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.

⁶⁷It is understood that 'genuine consent' does not include consent obtained through deception.

Article 8 (2) (e) (vii)**War crime of using, conscripting and enlisting children****Elements**

1. The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities.
2. Such person or persons were under the age of 15 years.
3. The perpetrator knew or should have known that such person or persons were under the age of 15 years.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (viii)**War crime of displacing civilians****Elements**

1. The perpetrator ordered a displacement of a civilian population.
2. Such order was not justified by the security of the civilians involved or by military necessity.
3. The perpetrator was in a position to effect such displacement by giving such order.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (ix)**War crime of treacherously killing or wounding****Elements**

1. The perpetrator invited the confidence or belief of one or more combatant adversaries that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict.
2. The perpetrator intended to betray that confidence or belief.
3. The perpetrator killed or injured such person or persons.

4. The perpetrator made use of that confidence or belief in killing or injuring such person or persons.
5. Such person or persons belonged to an adverse party.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (x)

War crime of denying quarter

Elements

1. The perpetrator declared or ordered that there shall be no survivors.
2. Such declaration or order was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors.
3. The perpetrator was in a position of effective command or control over the subordinate forces to which the declaration or order was directed.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xi)-1

War crime of mutilation

Elements

1. The perpetrator subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage.
2. The conduct caused death or seriously endangered the physical or mental health of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of the person or persons concerned nor carried out in such person's or persons' interest.⁶⁸

⁶⁸Consent is not a defence to this crime. The crime prohibits any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty. This footnote also applies to the similar element in article 8 (2) (e) (xi)-2.

4. Such person or persons were in the power of another party to the conflict.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xi)-2

War crime of medical or scientific experiments

Elements

1. The perpetrator subjected one or more persons to a medical or scientific experiment.
2. The experiment caused the death or seriously endangered the physical or mental health or integrity of such person or persons.
3. The conduct was neither justified by the medical, dental or hospital treatment of such person or persons concerned nor carried out in such person's or persons' interest.
4. Such person or persons were in the power of another party to the conflict.
5. The conduct took place in the context of and was associated with an armed conflict not of an international character.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Article 8 (2) (e) (xii)

War crime of destroying or seizing the enemy's property

Elements

1. The perpetrator destroyed or seized certain property.
2. Such property was property of an adversary.
3. Such property was protected from that destruction or seizure under the international law of armed conflict.
4. The perpetrator was aware of the factual circumstances that established the status of the property.
5. The destruction or seizure was not required by military necessity.
6. The conduct took place in the context of and was associated with an armed conflict not of an international character.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Appendix G.1

African Charter on the Rights and Welfare of the Child

(OAU Doc. CAB/LEG/24.9/49 (1990), Entered into Force Nov. 29, 1999)

[Author's note: available at http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf, accessed February 27, 2009]

Preamble

The African Member States of the Organization of African Unity, Parties to the present Charter entitled 'African Charter on the Rights and Welfare of the Child',

Considering that the Charter of the Organization of African Unity recognizes the paramountcy of Human Rights and the African Charter on Human and People's Rights proclaimed and agreed that everyone is entitled to all the rights and freedoms recognized and guaranteed therein, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status,

Recalling the Declaration on the Rights and Welfare of the African Child (AHG/ST.4 Rev.I) adopted by the Assembly of Heads of State and Government of the Organization of African Unity, at its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July 1979, recognized the need to take appropriate measures to promote and protect the rights and welfare of the African Child,

Noting with concern that the situation of most African children, remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs special safeguards and care,

Recognizing that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of his personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding,

Recognizing that the child, due to the needs of his physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security,

Taking into consideration the virtues of their cultural heritage, historical background and the values of the African civilization which should inspire and characterize their reflection on the concept of the rights and welfare of the child,

Considering that the promotion and protection of the rights and welfare of the child also implies the performance of duties on the part of everyone,

Reaffirming adherence to the principles of the rights and welfare of the child contained in the declaration, conventions and other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; and the OAU Heads of State and Government's Declaration on the Rights and Welfare of the African Child.

Have agreed as follows:

Part 1: Rights and Duties

Chapter One: Rights and Welfare of the Child

Article 1 – Obligation of States Parties

1. Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
2. Nothing in this Charter shall affect any provisions that are more conducive to the realization of the rights and welfare of the child contained in the law of a State Party or in any other international Convention or agreement in force in that State.
3. Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Article 2 – Definition of a Child

For the purposes of this Charter a child means every human being below the age of 18 years.

Article 3 – Non-Discrimination

Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status.

Article 4 – Best Interests of the Child

1. In all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.
2. In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

Article 5 – Survival and Development

1. Every child has an inherent right to life. This right shall be protected by law.
2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child.
3. Death sentence shall not be pronounced for crimes committed by children.

Article 6 – Name and Nationality

1. Every child shall have the right from his birth to a name.
2. Every child shall be registered immediately after birth.
3. Every child has the right to acquire a nationality.
4. States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

Article 7 – Freedom of Expression

Every child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

Article 8 – Freedom of Association

Every child shall have the right to free association and freedom of peaceful assembly in conformity with the law.

Article 9 – Freedom of Thought, Conscience and Religion

1. Every child shall have the right to freedom of thought conscience and religion.
2. Parents, and where applicable, legal guardians shall have a duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.
3. States Parties shall respect the duty of parents and where applicable, legal guardians to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

Article 10 – Protection of Privacy

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

Article 11 – Education

1. Every child shall have the right to an education.
2. The education of the child shall be directed to:
 - (a) the promotion and development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) fostering respect for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions;
 - (c) the preservation and strengthening of positive African morals, traditional values and cultures;
 - (d) the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups;
 - (e) the preservation of national independence and territorial integrity;
 - (f) the promotion and achievements of African Unity and Solidarity;
 - (g) the development of respect for the environment and natural resources;
 - (h) the promotion of the child's understanding of primary health care.

3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realization of this right and shall in particular:
 - (a) provide free and compulsory basic education;
 - (b) encourage the development of secondary education in its different forms and to progressively make it free and accessible to all;
 - (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means;
 - (d) take measures to encourage regular attendance at schools and the reduction of drop-out rates;
 - (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.
4. States Parties to the present Charter shall respect the rights and duties of parents, and where applicable, of legal guardians to choose for their children's schools, other than those established by public authorities, which conform to such minimum standards may be approved by the State, to ensure the religious and moral education of the child in a manner with the evolving capacities of the child.
5. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is subjected to schools or parental discipline shall be treated with humanity and with respect for the inherent dignity of the child and in conformity with the present Charter.
6. States Parties to the present Charter shall have all appropriate measures to ensure that children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.
7. No part of this Article shall be construed as to interfere with the liberty of individuals and bodies to establish and direct educational institutions subject to the observance of the principles set out in paragraph I of this Article and the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the States.

Article 12 – Leisure, Recreation and Cultural Activities

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 13 – Handicapped Children

1. Every child who is mentally or physically disabled shall have the right to special measures of protection in keeping with his physical and moral needs and under

conditions which ensure his dignity, promote his self-reliance and active participation in the community.

2. States Parties to the present Charter shall ensure, subject to available resources, to a disabled child and to those responsible for his care, of assistance for which application is made and which is appropriate to the child's condition and in particular shall ensure that the disabled child has effective access to training, preparation for employment and recreation opportunities in a manner conducive to the child achieving the fullest possible social integration, individual development and his cultural and moral development.
3. The States Parties to the present Charter shall use their available resources with a view to achieving progressively the full convenience of the mentally and physically disabled person to movement and access to public highway buildings and other places to which the disabled may legitimately want to have access to.

Article 14 – Health and Health Services

1. Every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health.
2. States Parties to the present Charter shall undertake to pursue the full implementation of this right and in particular shall take measures:
 - (a) to reduce infant and child mortality rate;
 - (b) to ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) to ensure the provision of adequate nutrition and safe drinking water;
 - (d) to combat disease and malnutrition within the framework of primary health care through the application of appropriate technology;
 - (e) to ensure appropriate health care for expectant and nursing mothers;
 - (f) to develop preventive health care and family life education and provision of service;
 - (g) to integrate basic health service programmes in national development plans;
 - (h) to ensure that all sectors of the society, in particular, parents, children, community leaders and community workers are informed and supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of domestic and other accidents;
 - (i) to ensure the meaningful participation of non-governmental organizations, local communities and the beneficiary population in the planning and management of a basic service programme for children;
 - (j) to support through technical and financial means, the mobilization of local community resources in the development of primary health care for children.

Article 15 – Child Labour

1. Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.
2. States Parties to the present Charter take all appropriate legislative and administrative measures to ensure the full implementation of this Article which covers both the formal and informal sectors of employment and having regard to the relevant provisions of the International Labour Organization's instruments relating to children, States Parties shall in particular:
 - (a) provide through legislation, minimum wages for admission to every employment;
 - (b) provide for appropriate regulation of hours and conditions of employment;
 - (c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article;
 - (d) promote the dissemination of information on the hazards of child labour to all sectors of the community.

Article 16 – Protection Against Child Abuse and Torture

1. States Parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of the child.
2. Protective measures under this Article shall include effective procedures for the establishment of special monitoring units to provide necessary support for the child and for those who have the care of the child, as well as other forms of prevention and for identification, reporting referral investigation, treatment, and follow-up of instances of child abuse and neglect.

Article 17 – Administration of Juvenile Justice

1. Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.
2. States Parties to the present Charter shall in particular:
 - (a) ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment;

- (b) ensure that children are separated from adults in their place of detention or imprisonment;
 - (c) ensure that every child accused in infringing the penal law:
 - (i) shall be presumed innocent until duly recognized guilty;
 - (ii) shall be informed promptly in a language that he understands and in detail of the charge against him, and shall be entitled to the assistance of an interpreter if he or she cannot understand the language used;
 - (iii) shall be afforded legal and other appropriate assistance in the preparation and presentation of his defence;
 - (iv) shall have the matter determined as speedily as possible by an impartial tribunal and if found guilty, be entitled to an appeal by a higher tribunal;
 - (d) prohibit the press and the public from trial.
3. The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation.
 4. There shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.

Article 18 – Protection of the Family

1. The family shall be the natural unit and basis of society. it shall enjoy the protection and support of the State for its establishment and development.
2. States Parties to the present Charter shall take appropriate steps to ensure equality of rights and responsibilities of spouses with regard to children during marriage and in the even of its dissolution. In case of the dissolution, provision shall be made for the necessary protection of the child.
3. No child shall be deprived of maintenance by reference to the parents' marital status.

Article 19 – Parent Care and Protection

1. Every child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents. No child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law, that such separation is in the best interest of the child.
2. Every child who is separated from one or both parents shall have the right to maintain personal relations and direct contact with both parents on a regular basis.
3. Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of

the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.

4. Where a child is apprehended by a State Party, his parents or guardians shall, as soon as possible, be notified of such apprehension by that State Party.

Article 20 – Parental Responsibilities

1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty:
 - (a) to ensure that the best interests of the child are their basic concern at all times,
 - (b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and
 - (c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.
2. States Parties to the present Charter shall in accordance with their means and national conditions the all appropriate measures;
 - (a) to assist parents and other persons responsible for the child and in case of need provide material assistance and support programmes particularly with regard to nutrition, health, education, clothing and housing;
 - (b) to assist parents and others responsible for the child in the performance of child-rearing and ensure the development of institutions responsible for providing care of children; and
 - (c) to ensure that the children of working parents are provided with care services and facilities.

Article 21 – Protection against Harmful Social and Cultural Practices

1. States Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
 - (a) those customs and practices prejudicial to the health or life of the child; and
 - (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

Article 22 – Armed Conflicts

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child.
2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

Article 23 – Refugee Children

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.
2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.
3. Where no parents, legal guardians or close relatives can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his family environment for any reason.
4. The provisions of this Article apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

Article 24 – Adoption

States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

- (a) establish competent authorities to determine matters of adoption and ensure that the adoption is carried out in conformity with applicable laws and procedures and on the basis of all relevant and reliable information, that the adoption

- is permissible in view of the child's status concerning parents, relatives and guardians and that, if necessary, the appropriate persons concerned have given their informed consent to the adoption on the basis of appropriate counselling;
- (b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
 - (c) ensure that the child affected by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption; (d) take all appropriate measures to ensure that in inter-country adoption, the placement does not result in trafficking or improper financial gain for those who try to adopt a child;
 - (e) promote, where appropriate, the objectives of this Article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework to ensure that the placement of the child in another country is carried out by competent authorities or organs;
 - (f) establish a machinery to monitor the well-being of the adopted child.

Article 25 – Separation from Parents

1. Any child who is permanently or temporarily deprived of his family environment for any reason shall be entitled to special protection and assistance;
2. States Parties to the present Charter:
 - (a) shall ensure that a child who is parentless, or who is temporarily or permanently deprived of his or her family environment, or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include, among others, foster placement, or placement in suitable institutions for the care of children;
 - (b) shall take all necessary measures to trace and re-unite children with parents or relatives where separation is caused by internal and external displacement arising from armed conflicts or natural disasters.
3. When considering alternative family care of the child and the best interests of the child, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious or linguistic background.

Article 26 – Protection Against Apartheid and Discrimination

1. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under Apartheid and in States subject to military destabilization by the Apartheid regime.

2. States Parties to the present Charter shall individually and collectively undertake to accord the highest priority to the special needs of children living under regimes practising racial, ethnic, religious or other forms of discrimination as well as in States subject to military destabilization.
3. States Parties shall undertake to provide whenever possible, material assistance to such children and to direct their efforts towards the elimination of all forms of discrimination and Apartheid on the African Continent.

Article 27 – Sexual Exploitation

1. States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent:
 - (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
 - (b) the use of children in prostitution or other sexual practices;
 - (c) the use of children in pornographic activities, performances and materials.

Article 28 – Drug Abuse

States Parties to the present Charter shall take all appropriate measures to protect the child from the use of narcotics and illicit use of psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the production and trafficking of such substances.

Article 29 – Sale, Trafficking and Abduction

States Parties to the present Charter shall take appropriate measures to prevent:

- (a) the abduction, the sale of, or traffick of children for any purpose or in any form, by any person including parents or legal guardians of the child;
- (b) the use of children in all forms of begging.

Article 30 – Children of Imprisoned Mothers

1. States Parties to the present Charter shall undertake to provide special treatment to expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law and shall in particular:
 - (a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;

- (b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;
- (c) establish special alternative institutions for holding such mothers;
- (d) ensure that a mother shall not be imprisoned with her child;
- (e) ensure that a death sentence shall not be imposed on such mothers;
- (f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation.

Article 31 – Responsibility of the Child

Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty;

- (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
- (b) to serve his national community by placing his physical and intellectual abilities at its service;
- (c) to preserve and strengthen social and national solidarity;
- (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
- (e) to preserve and strengthen the independence and the integrity of his country;
- (f) to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity.

Part 11

Chapter Two: Establishment and Organization of the Committee on the Rights and Welfare of the Child

Article 32 – The Committee

An African Committee of Experts on the Rights and Welfare of the Child hereinafter called ‘the Committee’ shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child.

Article 33 – Composition

1. The Committee shall consist of 11 members of high moral standing, integrity, impartiality and competence in matters of the rights and welfare of the child.
2. The members of the Committee shall serve in their personal capacity.
3. The Committee shall not include more than one national of the same State.

Article 34 – Election

As soon as this Charter shall enter into force the members of the Committee shall be elected by secret ballot by the Assembly of Heads of State and Government from a list of persons nominated by the States Parties to the present Charter.

Article 35 – Candidates

Each State Party to the present Charter may nominate not more than two candidates. The candidates must have one of the nationalities of the States Parties to the present Charter. When two candidates are nominated by a State, one of them shall not be a national of that State.

Article 36

1. The Secretary-General of the Organization of African Unity shall invite States Parties to the present Charter to nominate candidates at least six months before the elections.
2. The Secretary-General of the Organization of African Unity shall draw up in alphabetical order, a list of persons nominated and communicate it to the Heads of State and Government at least two months before the elections.

Article 37 – Term of Office

1. The members of the Committee shall be elected for a term of five years and may not be re-elected, however, the term of four of the members elected at the first election shall expire after two years and the term of six others, after four years.
2. Immediately after the first election, the Chairman of the Assembly of Heads of State and Government of the Organization of African Unity shall draw lots to determine the names of those members referred to in sub-paragraph 1 of this Article.
3. The Secretary-General of the Organization of African Unity shall convene the first meeting of Committee at the Headquarters of the Organization within six months of the election of the members of the Committee, and thereafter the Committee shall be convened by its Chairman whenever necessary, at least once a year.

Article 38 – Bureau

1. The Committee shall establish its own Rules of Procedure.
2. The Committee shall elect its officers for a period of two years.
3. Seven Committee members shall form the quorum.
4. In case of an equality of votes, the Chairman shall have a casting vote.
5. The working languages of the Committee shall be the official languages of the OAU.

Article 39 – Vacancy

If a member of the Committee vacates his office for any reason other than the normal expiration of a term, the State which nominated that member shall appoint another member from among its nationals to serve for the remainder of the term – subject to the approval of the Assembly.

Article 40 – Secretariat

The Secretary-General of the Organization of African Unity shall appoint a Secretary for the Committee.

Article 41 – Privileges and Immunities

In discharging their duties, members of the Committee shall enjoy the privileges and immunities provided for in the General Convention on the Privileges and Immunities of the Organization of African Unity.

Chapter Three: Mandate and Procedure of the Committee**Article 42 – Mandate**

The functions of the Committee shall be:

- (a) To promote and protect the rights enshrined in this Charter and in particular to:
 - (i) collect and document information, commission inter-disciplinary assessment of situations on African problems in the fields of the rights and welfare of the child, organize meetings, encourage national and local institutions concerned with the rights and welfare of the child, and where necessary give its views and make recommendations to Governments;
 - (ii) formulate and lay down principles and rules aimed at protecting the rights and welfare of children in Africa;
 - (iii) cooperate with other African, international and regional Institutions and organizations concerned with the promotion and protection of the rights and welfare of the child.
- (b) To monitor the implementation and ensure protection of the rights enshrined in this Charter.
- (c) To interpret the provisions of the present Charter at the request of a State Party, an Institution of the Organization of African Unity or any other person or Institution recognized by the Organization of African Unity, or any State Party.
- (d) Perform such other task as may be entrusted to it by the Assembly of Heads of State and Government, Secretary-General of the OAU and any other organs of the OAU or the United Nations.

Article 43 – Reporting Procedure

1. Every State Party to the present Charter shall undertake to submit to the Committee through the Secretary-General of the Organization of African Unity, reports on the measures they have adopted which give effect to the provisions of this Charter and on the progress made in the enjoyment of these rights:
 - (a) within two years of the entry into force of the Charter for the State Party concerned; and
 - (b) and thereafter, every three years.
2. Every report made under this Article shall:
 - (a) contain sufficient information on the implementation of the present Charter to provide the Committee with comprehensive understanding of the implementation of the Charter in the relevant country; and
 - (b) shall indicate factors and difficulties, if any, affecting the fulfilment of the obligations contained in the Charter.
3. A State Party which has submitted a comprehensive first report to the Committee need not, in its subsequent reports submitted in accordance with paragraph I (a) of this Article, repeat the basic information previously provided.

Article 44 – Communications

1. The Committee may receive communication, from any person, group or nongovernmental organization recognized by the Organization of African Unity, by a Member State, or the United Nations relating to any matter covered by this Charter.
2. Every communication to the Committee shall contain the name and address of the author and shall be treated in confidence.

Article 45 – Investigations by the Committee

1. The Committee may, resort to any appropriate method of investigating any matter falling within the ambit of the present Charter, request from the States Parties any information relevant to the implementation of the Charter and may also resort to any appropriate method of investigating the measures the State Party has adopted to implement the Charter.
2. The Committee shall submit to each Ordinary Session of the Assembly of Heads of State and Government every two years, a report on its activities and on any communication made under Article [44] of this Charter.
3. The Committee shall publish its report after it has been considered by the Assembly of Heads of State and Government.
4. States Parties shall make the Committee's reports widely available to the public in their own countries.

Chapter Four: Miscellaneous Provisions

Article 46 – Sources of Inspiration

The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organization of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

Article 47 – Signature, Ratification or Adherence

1. The present Charter shall be open to signature by all the Member States of the Organization of African Unity.
2. The present Charter shall be subject to ratification or adherence by Member States of the Organization of African Unity. The instruments of ratification or adherence to the present Charter shall be deposited with the Secretary-General of the Organization of African Unity.
3. The present Charter shall come into force 30 days after the reception by the Secretary-General of the Organization of African Unity of the instruments of ratification or adherence of 15 Member States of the Organization of African Unity.

Article 48 – Amendment and Revision of the Charter

1. The present Charter may be amended or revised if any State Party makes a written request to that effect to the Secretary-General of the Organization of African Unity, provided that the proposed amendment is not submitted to the Assembly of Heads of State and Government for consideration until all the States Parties have been duly notified of it and the Committee has given its opinion on the amendment.
2. An amendment shall be approved by a simple majority of the States Parties.

Appendix G.2

Cape Town Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Integration of Child Soldiers in Africa

[Author's note: available at http://www.tamilnation.org/humanrights/child/instruments_resolutions/capetown.htm, accessed February 29, 2009]

Adopted by the participants in the Symposium on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, organized by UNICEF in cooperation with the NGO Sub-group of the NGO Working Group on the Convention on the Rights of the Child, Cape Town, 30 April 1997

Definitions

“Child soldier” in this document means any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.

“Recruitment” encompasses compulsory, forced and voluntary recruitment into any kind of regular or irregular armed force or armed group.

“Demobilization” means the formal and controlled discharge of child soldiers from the army or from an armed group.

The term “psycho-social” underlines the close relationship between the psychological and social effects of armed conflict, the one type of effect continually influencing the other. By “psychological effects” is meant those experiences which affect emotions, behaviour, thoughts, memory and learning ability and how a situation may be perceived and understood. By “social effects” is meant how the diverse experiences of war alter people’s relationships to each other, in that such experiences change people, but also through death, separation, estrangement and other losses. “Social” may be extended to include an economic dimension, many individuals and

families becoming destitute through the material and economic devastation of war, thus losing their social status and place in their familiar social network.

Prevention of Child Recruitment

1. Establish 18 as the minimum age for any participation in hostilities and for all forms of recruitment into all armed forces and armed groups.
2. Governments should adopt and ratify an Optional Protocol to the Convention on the Rights of the Child raising the minimum ages from 15 to 18.
3. Governments should ratify and implement pertinent regional and international treaties and incorporate them into national law, namely:
 - a. The African Charter on the Rights and Welfare of the Child which upon entry into force will establish 18 as the minimum age for recruitment and participation;
 - b. The two Additional Protocols to the 1949 Geneva Conventions and the Convention on the Rights of the Child, which currently establish 15 as the minimum age for recruitment and participation.
4. Governments should adopt national legislation on voluntary and compulsory recruitment with a minimum age of 18 years and should establish proper recruitment procedures and the means to enforce them. Those responsible for illegally recruiting children should be brought to justice. These recruitment procedures must include:
 - a. Requirement of proof of age;
 - b. Safeguards against violations;
 - c. Dissemination of the standards to the military, especially the recruiters;
 - d. Publicization of the standards and safeguards to the civilian population, especially children at risk of recruitment and their families and those organizations working with them;
 - e. Where the government establishes, condones or arms militias or other armed groups, including private security forces, it must also regulate recruitment into them.
5. A permanent International Criminal Court should be established whose jurisdiction would cover, inter alia, the illegal recruitment of children.
6. Written agreements between or with all parties to the conflict which include a commitment on the minimum age of recruitment should be concluded. The SPLM/Operation Lifeline Sudan Agreement on Ground Rules (July 1995) is a useful example.
7. Monitoring, documentation and advocacy are fundamental to eliminating child recruitment and to informing programmes to this end. Community efforts to prevent recruitment should be developed and supported.

- a. Local human rights organisations, the media, former child soldiers, and teachers, health workers, church leaders and other community leaders can play an important advocacy role.
 - b. Establish a dialogue between government and communities in which children are regarded as adults before the age of 18 about the importance of the 18-year limit for recruitment.
 - c. Provide children with alternative models to the glorification of war, including in the media;
 - d. Government representatives, military personnel and former opposition leaders can be instrumental in advocating, negotiating and providing technical assistance to their counterparts in other countries in relation to the prevention of recruitment of child soldiers, as well as their demobilization and reintegration.
8. Programmes to prevent recruitment of children should be developed in response to the expressed needs and aspirations of the children.
9. In programmes for children, particular attention should be paid to those most at risk of recruitment: children in conflict zones, children (especially adolescents) separated from or without families, including children in institutions; other marginalized groups (e.g. street children, certain minorities, refugees and the internally displaced); economically and socially deprived children.
 - a. Risk mapping can be helpful to identify the groups at risk in particular situations, including such issues as areas of concentration of fighting, the age and type of children being militarized and the main agents of militarization;
 - b. Promote respect for international humanitarian law;
 - c. To reduce volunteerism into opposing armed forces, avoid harassment of or attacks on children, their homes and families;
 - d. Monitor recruitment practices and put pressure on recruiters to abide by the standards and to avoid forced recruitment.
10. All efforts should be made to keep or reunite children with their families or to place them within a family structure.
 - a. This can be done for example through warnings (e.g. by radio or posters) of the need to avoid separation, or through attaching identification to young children, except where this would expose them to additional risk. For further ideas, see “Unaccompanied Minors: Priority Action Handbook for UNICEF/ UNHCR Field Staff”.
11. Ensure birth registration, including for refugees and internally displaced children, and the provision of identity documents to all children, particularly those most at risk of recruitment.
12. Access to education, including secondary education and vocational training, should be promoted for all children, including refugee and internally displaced children.

- a. Adequate economic provision or opportunities also need to be considered for children or their families.
- 13. Special protection measures are needed to prevent recruitment of children in camps for refugees and internally displaced persons.
 - a. Refugee camps should be established at a reasonable distance from the border, wherever possible;
 - b. The civilian nature and humanitarian character of camps for refugees and internally displaced persons should be ensured. Where this is a problem, specific educational and vocational programmes for children, including adolescents, are even more critical;
 - c. Host governments, if necessary with the assistance of the international community, should prevent the infiltration of armed elements into camps for refugees and internally displaced persons, and provide physical protection to persons in such camps.
- 14. The international community should recognize that children who leave their country of origin to avoid illegal recruitment or participation in hostilities are in need of international protection. Children who are not nationals of the country in which they are fighting are also in need of international protection.
- 15. Controls should be imposed on the manufacture and transfer of arms, especially small arms. No arms should be supplied to parties to an armed conflict who are recruiting children or allowing them to take part in hostilities.

Demobilization

- 16. All persons under the age of 18 should be demobilized from any kind of regular or irregular armed force or armed group.
 - a. Direct and free access to all child soldiers should be granted to relevant authorities or organizations in charge of collecting information concerning their demobilization and of implementing specific programmes.
- 17. Children should be given priority in any demobilization process.
- 18. In anticipation of peace negotiations or as soon as they begin, preparations should be made to respond to children who will be demobilized.
 - a. Prepare initial situation analysis/needs assessment of children and their communities;
 - b. Ensure coordination between all parties to avoid duplication and gaps;
 - c. Where there is access to governmental and other local structures, incorporate and (where necessary) strengthen existing capacities to respond;
 - d. Ensure training of staff who will be involved in the process;

- e. Organize logistical and technical support in collaboration with agencies responsible for the formal demobilization process;
 - f. Ensure that the demobilization package is of a long-term, sustaining nature rather than in the form of an immediate “reward”, taking into account the implications of the nature of the package for future recruitment of children.
19. The issue of demobilization of children should be included in the peace process from the beginning.
 20. Where children have participated in armed conflict, peace agreements and related documents should acknowledge this fact.
 21. The demobilization process should be designed as the first step in the social reintegration process.
 22. The demobilization process should be as short as possible and take into account the human dignity of the child and the need for confidentiality.
 - a. Ensure adequate time and appropriate personnel to make children feel secure and comfortable so that they are able to receive information, including about their rights, and to share concerns;
 - b. Wherever possible, staff dealing with the children should be nationals;
 - c. Special measures must be taken to ensure the protection of children who are in demobilization centres for extended periods of time;
 - d. Children should be interviewed individually and away from their superiors and peers;
 - e. It is not appropriate to raise sensitive issues in the initial interview. If they are raised subsequently, it must be done only when in the best interest of the child and by a competent person;
 - f. Confidentiality must be respected;
 - g. All children should be informed throughout the process of the reasons why the information is being collected and that confidentiality will be respected. Children should be further informed about what will happen to them at each step of the process;
 - h. Wherever possible, communication and information should be in the mother tongue of the children;
 - i. Particular attention should be paid to the special needs of girls and special responses should be developed to this end.
 23. As soon as possible start establishing family tracing, contacts and reunification.
 24. Health assessment and treatment should be priorities.
 - a. As soon as possible during the demobilization process, all children should undergo assessment of their physical health and receive treatment as necessary;
 - b. Particular responses should be developed for girls;
 - c. Particular responses are needed for children with special needs, e.g. children with disabilities, child soldiers with children of their own, children

with substance abuse problems and sexually-transmitted diseases (HIV/AIDS, etc.);

- d. Ensure linkages between the demobilization process and existing programmes which are competent to deal with the health needs of children.

25. Monitoring and documentation of child involvement, as well as advocacy for demobilization and release of children, should be undertaken throughout the armed conflict. Community efforts to this end should be supported.

26. Children who leave any armed forces or groups during on-going hostilities have special needs for protection which must be addressed.

During on-going hostilities there is rarely any formal demobilization. However, children may leave the army, for example by escaping or as a result of being captured or wounded. This may compromise their security, protection and access to services. Despite difficulties in identifying such children, there must be recognition of their special needs for protection:

- a. Efforts should be made for an early start to programmes and family tracing for unaccompanied children;
 - b. Efforts should be made to ensure that re-recruitment does not occur. The likelihood of re-recruitment can be reduced if: (i) children are returned to their care-givers as soon as possible; (ii) children are informed of their rights not to be recruited; and (iii) where children have been formally demobilized, others are informed of this fact;
 - c. Any assembly areas must be sufficiently far from the conflict zones to ensure security. Particular problems may include: (i) some children may not be able to go home; (ii) some areas may be inaccessible for tracing; (iii) families of some children may be in camps for refugees or internally displaced persons; and (iv) the risk of the children being placed in institutions.
27. Illegally recruited children who leave the armed forces or armed groups at any time should not be considered as deserters. Child soldiers retain their rights as children.
28. Special assistance and protection measures must be taken on behalf of children and those recruited as children. See for example "Basic Rights Recognized For the Angolan Under-aged Soldiers".
29. Ensure to the extent possible that demobilized children return to their communities under conditions of safety.
30. Ensure that demobilized children are not discriminated against in services and benefits for demobilized soldiers.
31. Ensure that the rights of children involved in the demobilization process are respected by the media, researchers and others.
- a. With specific regard to journalists, a code of conduct should be developed in order to prevent the exploitation of child soldiers by the media. Such a code should take account of inter alia the manner in which sensitive issues are raised, the child's right to anonymity and the frequency of contacts with the media.

Return to Family and Community Life

32. Family reunification is the principal factor in effective social reintegration.
 - a. For family reunification to be successful, special attention must be paid to re-establishing the emotional link between the child and the family prior to and following return;
 - b. Where children have not been reunited with their family, their need to establish and maintain stable emotional relationships must be recognized;
 - c. Institutionalization should only be used as a last resort, for the shortest possible time, and efforts to find family-based solutions should continue.
33. Programmes should be developed with the communities, built on existing resources, taking account of the context and community priorities, values and traditions.
 - a. Programmes responding to the needs of the children should be developed. They should seek to enhance the self-esteem of children, promote their capacity to protect their own integrity and to construct a positive life. Activities must take into account the age and stage of development of the child and accommodate the particular requirements of girls and children with special needs;
 - b. Programmes can only develop through relationships of trust and confidence, require time and a commitment of resources, and will necessitate a close and on-going cooperation between all actors involved;
 - c. The impact of the conflict on children and their families must be assessed in order to develop effective programming. This should be undertaken through interviews and discussions with the children concerned, the families and the community as well as, where appropriate, the government. The information should be gathered as early as possible to enable preparation and planning;
 - d. Policies and strategies to address the situation of demobilized child soldiers should be developed and implemented on the basis of such assessments.
34. The capacity of the family and community to care for and protect the child should be developed and supported.
 - a. Identify and support traditional resources and practices in the community which can support the psycho-social integration of children affected by war;
 - b. Assess and understand the socio-economic context with specific reference to poverty, and food and nutritional security;
 - c. Identify and build on the traditional ways of generating income, traditional apprenticeships, credit and money-making schemes;
 - d. Initiate dialogue with communities to understand their main concerns for their children and their perception of their own roles and responsibilities with regard to the children.

35. Programmes targeted at former child soldiers should be integrated into programmes for the benefit of all war-affected children.
 - a. Whilst stressing that it is essential to normalize the life of child soldiers, it is important to recognize that all children in a community will have been affected to some degree by the conflict. Programmes for former child soldiers should therefore be integrated into efforts to address the situation of all children affected by the conflict, while ensuring the continuing implementation of specific rights and benefits of demobilized children;
 - b. The existing health, education and social services within the communities should be supported.
36. Provision should be made for educational activities which reflect: the loss of educational opportunities as a consequence of participation; the age and stage of development of the children; and their potential for promoting development of self-esteem.
37. Provision should be made for relevant vocational training and opportunities or (self-) employment, including for children with disabilities.
 - a. Upon completion of vocational skills training, trainees should be provided with the relevant tools and, where possible, with start-up loans to promote self-reliance.
38. Recreational activities are essential for psycho-social well-being.
 - a. Recreational activities should be included in all reintegration programmes for war-affected children. These contribute to the children's psycho-social well-being, facilitate the reconciliation process and form part of their rights as children.
39. Programme development and implementation should incorporate the participation of the children and, with due regard for the context of reintegration, reflect their needs and concerns.
40. Psycho-social programmes should assist children to develop and build those capacities that will facilitate a re-attachment to families and communities.
41. Monitoring and follow-up of the children should take place to ensure reintegration and receipt of rights and benefits. Use community resources for this, e.g. catechists, teachers or others, depending on the situation.
42. In order to be successful, reintegration of the child within the community should be carried out in the framework of efforts towards national reconciliation.
43. Programmes to prevent, demobilize and reintegrate child soldiers should be jointly and constantly monitored and evaluated with communities.

Cape Town, 30 April 1997

Appendix G.3

Convention on the Rights of the Child

(Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 44/25 of November 20, 1989, Entry into Force September 2, 1990, in Accordance with Article 49)

[Author's note: available at <http://www.unhchr.ch/html/menu3/b/k2crc.htm>, accessed February 29, 2009]

Preamble

The States Parties to the present Convention,

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

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

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

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

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly

children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

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

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

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

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

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

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

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

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

Have agreed as follows:

Part I

Article 1

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

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

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

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by

local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

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

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.
2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.
2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

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

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

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

Article 17

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

- (a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

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

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

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

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

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

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.
3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.
2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:
 - (a) To diminish infant and child mortality;
 - (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;
 - (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
 - (d) To ensure appropriate pre-natal and post-natal health care for mothers;
 - (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic

- knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
- (f) To develop preventive health care, guidance for parents and family planning education and services.
3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.
 4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

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

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

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

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

- (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

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

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

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

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

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

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

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

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

Article 36

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

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of

eighteen years, States Parties shall endeavour to give priority to those who are oldest.

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

Article 39

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

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best

- interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
- (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
- (c) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (d) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

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

- (a) The law of a State party; or
- (b) International law in force for that State.

Part II

Article 42

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

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a *Committee on the Rights of the Child*, which shall carry out the functions hereinafter provided.
2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems. (amendment)
3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.
4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.
5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.
6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.
7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.
8. The Committee shall establish its own rules of procedure.
9. The Committee shall elect its officers for a period of two years.
10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of

the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.
12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:
 - (a) Within two years of the entry into force of the Convention for the State Party concerned;
 - (b) Thereafter every five years.
2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.
3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.
4. The Committee may request from States Parties further information relevant to the implementation of the Convention.
5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.
6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

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

- (a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;
- (b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;
- (c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;
- (d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

Part III

Article 46

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

Article 47

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

Article 48

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

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.
3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

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

Article 53

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

Article 54

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

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

Appendix G.4

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

(Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution A/RES/54/263 of May 25, 2000, Entered into Force on February 12, 2002)

[Author's note: available online at <http://www.unhchr.ch/html/menu2/6/protocolchild.htm>, accessed February 27, 2009]

The States Parties to the present Protocol,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Have agreed as follows:

Article 1

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

Article 2

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

Article 3

1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:
 - (a) Such recruitment is genuinely voluntary;
 - (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
 - (c) Such persons are fully informed of the duties involved in such military service;
 - (d) Such persons provide reliable proof of age prior to acceptance into national military service.
4. Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.
5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Article 4

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

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.
3. The application of the present article shall not affect the legal status of any party to an armed conflict.

Article 5

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

Article 6

1. Each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction.
2. States Parties undertake to make the principles and provisions of the present Protocol widely known and promoted by appropriate means, to adults and children alike.
3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.

Article 7

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.
2. States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes or, inter alia, through a voluntary fund established in accordance with the rules of the General Assembly.

Article 8

1. Each State Party shall, within two years following the entry into force of the present Protocol for that State Party, submit a report to the Committee on the Rights of the Child providing comprehensive information on the measures it has taken to implement the provisions of the Protocol, including the measures taken to implement the provisions on participation and recruitment.
2. Following the submission of the comprehensive report, each State Party shall include in the reports it submits to the Committee on the Rights of the Child, in accordance with article 44 of the Convention, any further information with respect to the implementation of the Protocol. Other States Parties to the Protocol shall submit a report every five years.
3. The Committee on the Rights of the Child may request from States Parties further information relevant to the implementation of the present Protocol.

Article 9

1. The present Protocol is open for signature by any State that is a party to the Convention or has signed it.
2. The present Protocol is subject to ratification and is open to accession by any State. Instruments of ratification or accession shall be deposited with the Secretary-General of the United Nations.
3. The Secretary-General, in his capacity as depositary of the Convention and the Protocol, shall inform all States Parties to the Convention and all States that have signed the Convention of each instrument of declaration pursuant to article 3.

Article 10

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

Article 11

1. Any State Party may denounce the present Protocol at any time by written notification to the Secretary-General of the United Nations, who shall thereafter

inform the other States Parties to the Convention and all States that have signed the Convention. The denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General. If, however, on the expiry of that year the denouncing State Party is engaged in armed conflict, the denunciation shall not take effect before the end of the armed conflict.

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

Article 12

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties that have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments they have accepted.

Article 13

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States Parties to the Convention and all States that have signed the Convention.

Appendix G.5

The Paris Principles

Principles and Guidelines on Children Associated with Armed Forces or Armed Groups February 2007

[Author's note: available at http://www.diplomatie.gouv.fr/en/IMG/pdf/Paris_Conference_Principles_English_31_January.pdf, accessed February 27, 2009; internal footnotes have been omitted. For most internal quotes, the content of the footnotes in the original has been referenced in the body of the text through author's notes.]

1 Introduction

- 1.0 Hundreds of thousands of children are associated with armed forces and armed groups in conflicts around the world. Girls and boys are used in a variety of ways from support roles, such as cooking or portering, to active fighting, laying mines or spying and girls are frequently used for sexual purposes. This recruitment and use of children violates their rights and causes them physical, developmental, emotional, mental, and spiritual harm.
- 1.1 The recruitment and use of children by armed forces and armed groups has been a focus of international attention and has been widely condemned, yet children continue to be involved in adult wars and to become disabled or die in such conflicts. While the release and reintegration into civilian life of many of these children has been supported through interventions and programmes designed to assist them, others have returned home on their own, often to face an uncertain future and a further fight for acceptance from their family and community. Girls in particular are likely to be stigmatized and even rejected by their community if it is known that they have been used by an armed force or armed group and the rejection of their children may be even more severe. Other children are encouraged by their families and communities to participate in armed conflict, despite the danger and harm this involves. Despite their experiences, such children are

resilient and can contribute constructively to reconstruction and reconciliation efforts if given appropriate help, support and encouragement.

Background to the principles

- 1.2 Almost a decade after they were agreed, UNICEF initiated a global review of the “Cape Town Principles and Best Practices on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa” (“the Cape Town Principles”). Adopted in, 1997, the Cape Town Principles were the result of a symposium organised by UNICEF and the NGO Working Group on the Convention on the Rights on the Child to develop strategies for preventing recruitment of children, demobilising child soldiers and helping them to reintegrate into society. The Principles have obtained recognition well beyond this original group to become a key instrument to inform the development of international norms as well as shifts in policy at the national, regional and international levels.
- 1.3 The accumulated knowledge gained from wide ranging and diverse experience in this field since 1997 has led to a more community-based and inclusive approach. There is a growing awareness of the multiple dimensions of the use of children by armed forces or armed groups and the complexities of dealing with the problem and addressing root causes. Together with changes such as the inclusion of recruitment of children under 15 years as a war crime in the International Criminal Court Statute and the development of jurisprudence in this area, these factors prompted recognition of the need to update the Principles and to increase their endorsement beyond actors who specialise in children’s rights.
- 1.4 An extensive review process was undertaken by UNICEF together with partners involving seven regional reviews, some including regional or sub-regional workshops, carried out in 2005 and 2006. This led to agreement on the need for two documents; the first a short and concise document – The Paris Commitments to Protect Children Unlawfully Recruited or Used by Armed Forces or Armed Groups (“The Paris Commitments”) and this second, complementary document The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (“the Paris Principles”), which provide more detailed guidance for those who are implementing programmes. Drafting of the documents was carried out in consultation with a reference group representing a wide range of actors. Revisions were made to incorporate recommendations made during a meeting held in New York in October 2006 which brought together implementing organisations, experts and other interested parties from across the globe. Broad political endorsement from States for the Paris Commitments and Paris Principles at a ministerial meeting held in Paris in February 2007.

Overview of the principles

- 1.5 Based on international law and standards and on the original Cape Town Principles this document incorporates knowledge and lessons learned and in particular emphasises the informal ways in which boys and girls both become associated with and leave armed forces or armed groups. Taking a child rights-based approach to the problem of children associated with armed forces or armed groups, the Principles underscore the humanitarian imperative to seek the unconditional release of children from armed forces or armed groups at all times, even in the midst of conflict and for the duration of the conflict.
- 1.6 The Principles recognise that, in situations of armed conflict, States and armed groups are the primary actors responsible for the protection of civilians in their effective control and that if they are unable or unwilling to meet all of their humanitarian responsibilities directly they are charged with enabling the provision of humanitarian action by impartial actors.
- 1.7 The Principles are based on the following lessons drawn from global experience in implementing programmatic interventions to prevent recruitment, protect children, support their release from armed forces or armed groups and reintegrate them into civilian life:
 - 1.7.0 The precise nature of the problem and the solution will vary according to the context. A situation analysis, including a gender analysis, should inform and guide all interventions;
 - 1.7.1 Any solution should address the needs of all children affected by armed conflict and incorporate activities to develop and support local capacity to provide a protective environment for children;
 - 1.7.2 The protective environment should incorporate measures to prevent discrimination against girls whose use in armed conflicts is pervasive yet often unrecognised and to promote their equal status in society;
 - 1.7.3 A long term commitment by all actors to prevent the unlawful recruitment or use of children, promote their release from armed forces or armed groups, protect them and support their reintegration is essential;
 - 1.7.4 The family including the extended family and clan and the community should be actively incorporated in the development and implementation of interventions and activities, and they in turn should participate in finding solutions. The inclusion of continuous advocacy to raise awareness of the criminality of recruiting children (including toward parents who “volunteer” the services of their children).
- 1.8 For solutions to be sustainable, child protection needs to span humanitarian and development programmes, requiring a strategic, child-centred coordination between civil society, humanitarian/emergency, peacekeeping and development and reconstruction actors. In order to address the underlying causes of child recruitment, to address the fluid nature of most armed conflicts and to address the need to take action for children while conflict is still active, the

preparation of an appropriate strategic response, supported by adequate funding, is required urgently as soon as children's unlawful recruitment or use by armed forces or armed groups is identified as a possibility and for the immediate, medium and long term. From the earliest possible stages, development actors should also involve themselves in strategies for the prevention of unlawful recruitment and the reintegration of children into civilian life.

Purpose of the principles

- 1.9 These Principles reflect experience and knowledge from across the globe and are intended to both foster greater programmatic coherence and support and promote good practice.

Scope and target audience

- 1.10 The Principles were developed by, and intend to affect the behaviour of, a broad range of actors including: States (both affected countries and donor governments), human rights actors, humanitarian actors, development actors, military and security actors (state and non-state), associated organisations including UN organisations, other inter-governmental actors, national and international organisations and community based organisations. While some of these actors have a specific mandate or role in relation to children, all have a role to play and broad responsibility for the rights and wellbeing of children associated with armed forces or groups.
- 1.11 These Principles are designed to guide interventions for the protection and well-being of such children and to assist in making policy and programming decisions. The principles aim to guide interventions with the following objectives:
 - 1.11.1 To prevent unlawful recruitment or use of children;
 - 1.11.2 To facilitate the release of children associated with armed forces and armed groups;
 - 1.11.3 To facilitate the reintegration of all children associated with armed forces and armed groups;
 - 1.11.4 To ensure the most protective environment for all children.
- 1.12 While it is recognised that no one set of 'best practice' applies in all contexts, these Principles are designed to provide a framework and bring together ideas and approaches which have been used successfully across the globe.
- 1.13 The Principles should be used alongside other resources; the UN Integrated Disarmament, Demobilisation and Reintegration Standards (IDDRS) modules

on children, youth and gender provide comprehensive guidance particularly in relation to those children who enter a formal “Disarmament, Demobilisation and Reintegration” (DDR) process.

- 1.14 The Principles, as well as the Paris Commitments, are also designed to assist States and donors in meeting their obligations and taking funding decisions. Effort has been made to ensure that the Principles are consistent with relevant international law, notably legislation related to the minimum age of recruitment. While recognising that States have different obligations under international law, a majority of child protection actors will continue advocating for States to strive to raise the minimum age of recruitment or use to 18 in all circumstances.

2 Definitions

For the purposes of these Principles

- 2.0 “Child” refers to any person less than 18 years of age in accordance with the Convention on the Rights of the Child.
- 2.1 “A child associated with an armed force or armed group” refers to any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.
- 2.2 “Armed forces” refers to the armed forces of a State.
- 2.3 “Armed groups” refers to groups distinct from armed forces as defined by Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.
- 2.4 “Recruitment” refers to compulsory, forced and voluntary conscription or enlistment of children into any kind of armed force or armed group.
- 2.5 “Unlawful recruitment or use” is recruitment or use of children under the age stipulated in the international treaties applicable to the armed force or armed group in question or under applicable national law.
- 2.6 “Release” Includes the process of formal and controlled disarmament and demobilisation of children from an armed force or armed group as well as the informal ways in which children leave by escaping, being captured or by any other means. It implies a disassociation from the armed force or armed group and the beginning of the transition from military to civilian life. Release can take place during a situation of armed conflict; it is not dependent on the temporary or permanent cessation of hostilities. Release is not dependent on children having weapons to forfeit.
- 2.7 “Disarmament” is the collection, documentation, control and disposal of small arms, ammunition, explosives and light and heavy weapons of combatants

and often also of the civilians population. Disarmament also includes the development of responsible arms management programmes.

- 2.8 “Child Reintegration” is the process through which children transition into civil society and enter meaningful roles and identities as civilians who are accepted by their families and communities in a context of local and national reconciliation. Sustainable reintegration is achieved when the political, legal, economic and social conditions needed for children to maintain life, livelihood and dignity have been secured. This process aims to ensure that children can access their rights, including formal and non-formal education, family unity, dignified livelihoods and safety from harm.
- 2.9 “Formal DDR process” is the formal and controlled discharge of active combatants from armed forces or other armed groups. The first stage of demobilisation may extend from the processing of individual combatants in temporary centres to the massing of troops in camps designated for this purpose (cantonment sites, encampments, assembly areas or barracks). The second stage of demobilisation encompasses the support package provided to the demobilised [adults], which is called reinsertion.

3 Overarching Principles

General principles

Preamble

- 3.0 All children are entitled to protection and care under a broad range of international, regional and national instruments. The most widely ratified human rights instrument is the 1989 Convention on the Rights of the Child. States have primary responsibility for the protection of all children in their jurisdiction. A child rights approach, meaning that all interventions are developed within a human rights framework, should underpin all interventions aimed at preventing recruitment or use, securing the release of, protecting, and reintegrating children who have been associated with an armed force or armed group. Funding should be made available for this programming, according to the rights and needs of the children, irrespective of formal or informal peace processes or the progress of formal adult DDR processes.

Non-discrimination [Author’s Note: 1989 Convention on the Rights of the Child, Article 2]

- 3.1 Discrimination may arise in various ways: on the basis of sex, between vulnerable groups upon reintegration and between children who were associated with different armed forces or armed groups or based on social definitions such as ethnicity, religion, disability or caste.

- 3.2 Girls and their children: Pro-active measures must be taken to ensure the full involvement and inclusion of girls in all aspects of prevention of recruitment, release and reintegration, and services should always respond to their specific needs for protection and assistance. Extreme sensitivity is required when seeking to identify and assist girls in order not to increase the stigma attached to their involvement and make their situation worse. It is central to programming interventions that attention be paid to the particular needs for protection and support both of girl mothers and of children born to girls as a result of their recruitment by an armed force or armed group.
- 3.3 Reintegration: Measures to secure the reintegration of children into civilian life should not stigmatise or make any negative distinction between children who have been recruited or used and those who have not, nor between children who have been recruited or used for temporary or short periods of time and those who have been recruited or used permanently or for longer periods of time. It is also detrimental to all conflict-affected children if other vulnerable children who have not been associated with armed forces or armed groups are placed at a disadvantage vis-à-vis those who have been so associated.

Best interests of the child [Author's Note: 1989 Convention on the Rights of the Child, Article 3 (1)]

- 3.4.0 The release of children from armed forces or armed groups, their reintegration and prevention of recruitment and re-recruitment require priority attention. Actions in this regard must not be dependent or contingent on or attached in any way to the progress of peace processes. All measures to assure the release of children, their protection and the prevention of the recruitment of children shall be determined by the best interests of such children.
- 3.4.1 Prevention of recruitment, release, protection and reintegration are interdependent and indivisible. Efforts to develop lasting solutions to children's recruitment or use by armed forces or armed groups, and to prevent its future occurrence, should be inclusive of all children affected by armed conflict and address other egregious violations of children's rights under applicable international law or the national law of the countries affected.

Children and justice

Treatment of those accused of violations of children's rights

- 3.5 Those suspected of committing crimes against children under international law should receive particular attention in post-conflict or transitional justice mechanisms. No amnesty for crimes under international law, including those committed against children, should be granted in any peace or cease-fire agreement.

Treatment of children accused of crimes under international law

- 3.6 Children who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law which offers children special protection through numerous agreements and principles.
- 3.7 Wherever possible, alternatives to judicial proceedings must be sought, in line with the Convention on the Rights of the Child and other international standards for juvenile justice. [Author's Note: 1967 International Covenant on Civil and Political Rights, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") GA Res. 40/33 (1985); United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines") U.N. Doc. A/45/49 (1990)]
- 3.8 Where truth-seeking and reconciliation mechanisms are established, children's involvement should be promoted and supported and their rights protected throughout the process. Their participation must be voluntary and by informed consent by both the child and her or his parent or guardian where appropriate and possible. Special procedures should be permitted to minimize greater susceptibility to distress.

The right to life, survival and development [Author's Note: 1989 Convention on the Rights of the Child, Article 6]

- 3.9 Capital punishment or imprisonment for life without possibility of release shall never be used against any person who is proved to have committed an offence against international or domestic criminal law while under 18 years of age [1989 Convention on the Rights of the Child, Article 37].
- 3.10 Programmes and policies intended to benefit children associated with armed forces or armed groups should also be informed by a child development perspective. This includes considering and addressing the way children's relationships with significant persons in their lives have been affected by their experiences as well as the way children's experiences impact on their own evolving capacities. A consideration of child development will always include recognising the individual capacities and resources of children in surviving and overcoming their difficulties.

Children's right to release from armed forces or armed groups

- 3.11 The unlawful recruitment or use of children is a violation of their rights; therefore preventive activities must be carried out continuously. The release, protection and reintegration of children unlawfully recruited or used must be

sought at all times, without condition and must not be dependent on any parallel release or demobilisation process for adults.

- 3.12 Where there are formal disarmament, demobilisation and reintegration (DDR) processes, special provision should be made for children. The absence of a formal DDR process, however, should not prevent activities in pursuit of the release of children from armed forces or armed groups. These actions may require or include separate negotiations with armed forces or armed groups that are unrelated to the broader agenda driven by security reform or by other formal negotiations processes. Where formal processes are in place, linkages should be made to ensure coordinated and comprehensive support to the reintegration of children and their communities of return.
- 3.13 Where armed forces or armed groups have unlawfully recruited or used children, advocacy efforts – undertaken in accordance with respective mandates – should guard against the securing of advantages from such unlawful recruitment or use during peace negotiations and security sector reforms.

Participation and respect for the views of the child

- 3.14 All stages of programme assessment, planning, implementation and evaluation activities to prevent the association of children with armed forces or armed groups secure their release, provide protection and reintegrate them into civilian life should include the active participation of those communities concerned, including children. The views of children in particular, as well as the families and the communities to which children return, should always be sought.

Operational principles

Preamble

- 3.15 Children's reintegration into civilian life is the ultimate goal of the process of securing their release from armed forces or armed groups. Planning for reintegration should inform all stages of the process and should commence at the earliest possible stage.

Accountability and transparency

- 3.16 Actors seeking to support the children who are or who have been associated with armed forces or armed groups and to prevent such association should ensure that their actions are based on child rights and humanitarian principles,

that applicable minimum standards in programmes are met and that systems for accountability are developed.

- 3.17 All staff working with children must, as a condition of employment, be informed of the requirement to be familiar with and adhere to an effective code of conduct of their respective organisations which directly or implicitly includes the protection of children. Child protection and other actors should disseminate these standards and where possible provide training to partner organisations and any other individuals or groups working with children including volunteers, local community based or religious groups. Mechanisms for monitoring and reporting violations and holding those responsible to account should be established and used. Moreover, violations of these codes of conduct that are also criminal offences under national law must also be reported to the relevant law-enforcement authorities.

Context-specific programming

- 3.18 Strategies and programmes should be based on a comprehensive analysis of the political, social, economic and cultural context, informed by a gender analysis. The comprehensive analysis should include threats, deficits and weaknesses as well as opportunities, capacities and resources. Such an analysis should describe the reasons why children have or may become associated with armed forces or armed groups and identify ways to address them. Likewise, a comprehensive analysis should be undertaken to understand the motivations and incentives of those recruiting or using children.
- 3.19 A thorough risk analysis should be conducted to ensure that the children, families and communities assisted by programmes are not placed at greater risk for being part of any programme.
- 3.20 A regional or sub-regional approach should be taken, especially where conflicts spill across international borders, in order to prevent children's unlawful recruitment and re-recruitment into armed forces or armed groups in neighbouring countries or conflicts and other forms of violations of children's rights across borders.

Capacity strengthening

- 3.21 Programmes should always build on, support and develop regional, national, local and community efforts and capacity to prevent unlawful recruitment or use of children by armed forces or armed groups, support their release and reintegration and protect all children.
- 3.22 It should be recognised that communities, particularly the women and adolescent girls, are often already over-burdened. Efforts should always be taken

to involve the community in planning for programming to ensure that it is adequately supported to care for children released from armed forces or armed groups and to prevent association with armed forces or armed groups from taking place.

Funding and other support for the prevention of unlawful recruitment or use and the release and reintegration of children

- 3.23 Funding should be made available to child protection actors as early as possible and independently of the progress of any formal or informal peace process and formal DDR planning. Funding should remain available, regardless of the success or progress of formal peace and DDR processes.
- 3.24 Funding should be made available for activities in communities benefiting a wide range of conflict-affected children and reintegration activities should, so far as possible, avoid maintaining distinctions between children formerly associated with an armed force or armed group and other children in the communities to which they reintegrate.
- 3.25 Measures are necessary to ameliorate, as far as possible, the negative consequences for children of having been associated with an armed force or armed group whether these are physical, developmental, emotional, mental or spiritual. Reintegration is a long term process requiring a long term commitment from states, supported or assisted by child protection actors and donors alike. Funding should, therefore, be available for the time required to ensure full reintegration of children who have been associated with armed forces or armed groups. It should be flexible, enabling programmes to be more responsive to the expressed needs of girls and boys and the needs for capacity-building of actors involved in these activities. Reintegration programmes should link at the earliest possible stage with other development programs and actors to build the local and national capacity necessary to provide longer-term support to these children and their communities.

Coordination, Collaboration and Cooperation

- 3.26 Communication, cooperation, coordination, information sharing and transparency among all those involved – from the community level to national institutions and international organisations – in preventing the association of children with armed forces or armed groups and supporting their release, providing protection and reintegrating children are essential at all times. This must be done in compliance with the respective mandates and working modalities of those involved.

- 3.27 Actors implementing programmes for children who are or have been associated with armed forces or armed groups should coordinate their efforts by establishing and maintaining an interagency group where inter alia: roles and responsibilities are agreed and communicated, respective modes of action are understood and respected, possible collaborative action is planned, policy and programme approaches are defined and protocols for information sharing are developed.
- 3.28 UNICEF and its partners, working together with government ministries and other bodies with a child protection mandate, including child protection actors, shall support relevant States by providing the required technical and operational expertise and leadership in decision-making and programme implementation in prevention of unlawful recruitment, release, demobilisation and reintegration programmes for children.

Confidentiality

Information-sharing

- 3.29 It is essential for the protection of children and their families that personal information relating to violations of children's rights including unlawful recruitment or use by armed forces or armed groups be treated as confidential. Inter-agency information management systems should be developed and agreed between all actors implementing programmes who are collecting information, based on the need to protect children and to enable effective action on their behalf. Confidentiality rules applied by certain actors must also be taken into account. Principles on protection of all data should be developed and implemented and training should be provided as necessary. All data stored by UN departments, funds, offices and programmes must comply with the UN Fundamental Principles of Official Statistics.

Media coverage

- 3.30 Inappropriate media coverage can place children and their families at risk of physical harm and cause psychological damage. Media and publication principles [Author's Note: UNICEF Media Guidelines – Guidelines on Ethical Reporting], including a code of conduct for journalists, should be implemented by actors working with children associated with armed forces or armed groups to provide safeguards and prevent placing them at risk, violating confidentiality standards, and otherwise causing harm to the children or their families.

- 3.31 Ethical standards are also essential for researchers, academics and any other persons who interview or work with children associated with armed forces or armed groups.

4 Addressing the Specific Situation of Girls

- 4.0 There are almost always a significant number of girls amongst children associated with armed forces or armed groups. For a range of reasons, however, these girls are rarely provided with assistance. While there are commonalities between the circumstances and experiences of girls and boys, the situation for girls can be very different in relation to the reasons and manner in which they join the armed forces or armed groups; the potential for their release; the effects that the experience of being in the armed force or armed group has on their physical, social and emotional well being; and the consequences this may have for their ability to successfully adapt to civilian life or reintegrate into family and community life after their release.
- 4.1 From the planning stage onwards, through the design of eligibility criteria and screening procedures for inclusion in release and reintegration programmes and informal release processes through to programming for reintegration, monitoring and follow-up, actors should recognise that girls are at risk of being ‘invisible’ and take measures to ensure that girls are included and relevant issues addressed at all stages. It is important that the differences between girls’ and boys’ experiences are understood and taken into account by all actors and that programming for children who are or have been associated with armed forces or armed groups explicitly reflects the particular situation of both girls and boys.
- 4.2 Actors should establish the means to share and learn from one another’s experience and expertise including findings on research and outcomes of pilot programmes for girls associated with armed forces or armed groups.
- 4.3 Issues relating particularly or specifically to girls are considered throughout the Principles.

5 Refugee and Internally Displaced Children

- 5.0 Children who have been internally displaced, whether due to natural disasters or armed conflict may be at greater risk of recruitment or use by armed forces or armed groups due to reduced social protection and coping mechanisms, discrimination on the basis of their displaced status or their perceived allegiance with a belligerent in the armed conflict. Additionally, the impact

of lack of economic, educational or other opportunities caused by displacement also places refugee and internally displaced children at greater risk of recruitment in armed forces or armed groups. All actors must be sensitive to these increased risk factors. Humanitarian access to monitor the situation of internally displaced children is of particular importance in addressing these risks.

- 5.1 Children who have joined armed forces and armed groups and whose families are displaced are at greater risk of remaining separated from their families and communities. Efforts to trace and reunify children with their families once they have been released or demobilised must be guided by the Inter-agency Guiding Principles on Unaccompanied and Separated Children

Refugee children

- 5.2 Acknowledging their right to seek and enjoy asylum, children who are seeking international protection, irrespective of their age and sex and including those who are unaccompanied or separated, must be referred to available asylum procedures and assisted in gaining access to asylum or complementary forms of protection addressing their specific protection needs. Programmes should be guided by the following legal principles:
- 5.3 States, recognizing the right to seek and enjoy asylum, shall grant children who are seeking asylum, including those who are unaccompanied or separated, access to asylum procedures and other forms of complementary protection, irrespective of their age. When assessing their claims, States shall take into account the development of, and formative relationship between, international human rights and refugee law, including positions developed by UNHCR in exercising its supervisory functions under the 1951 Refugee Convention. In particular, the refugee definition in that Convention must be interpreted in an age and gender-sensitive manner, taking into account particular motives for, and forms and manifestations of, persecution experienced by children. Unlawful recruitment or use of children is one of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should therefore give utmost attention to such child-specific forms and manifestations of persecution in national refugee status determination procedures [Author's Note: Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6].
- 5.4 Children must not be returned in any manner to the borders of a State where there is real risk, assessed on a case by case basis, of unlawful recruitment or re-recruitment or use by armed forces or armed groups or participation in hostilities.

- 5.5 In the case that the requirements for granting refugee status under the 1951 Refugee Convention are not met, children who are not in their state of nationality shall benefit from available forms of complementary protection to the extent determined by their protection needs. The application of such complementary forms of protection does not obviate States' obligations to address the particular protection needs of the unaccompanied and separated child. Therefore, children granted complementary forms of protection are entitled, to the fullest extent, to the enjoyment of their human rights, while in the territory or subject to the jurisdiction of the State, including those rights which require a lawful stay in the territory.
- 5.6 In line with the generally applicable principles and, in particular, those relating to the responsibilities of States with regard to unaccompanied or separated children finding themselves in their territory, children who are neither granted refugee status nor benefit from complementary forms of protection, will still enjoy protection under the Convention on the Rights of the Child and other international human rights norms and if applicable, international humanitarian law.

Internally displaced children

- 5.7 The majority of children who are displaced during or as a result of armed conflict remain within the boundaries of their own country. They may be displaced with their communities or families or be completely alone.
- 5.8 The Guiding Principles on Internal Displacement and the binding rules of international humanitarian law and human rights law on which they are based should inform all programmes and planning of programmes for children and their families who are internally displaced. This includes children who have returned from another country but not to their area of origin, whether they were abroad to seek international protection or as a result of being associated with armed forces or armed groups.
- 5.9 States and internally displaced persons (IDP) communities alike should be encouraged to recognise the protection needs of internally displaced children who have returned from being associated with armed forces or armed groups – particularly where those armed forces or armed groups acted against the State or against the displaced communities, respectively. Intensive advocacy should be conducted with States and displaced communities on behalf of these children.
- 5.10 Advocacy with governments and local authorities should remind them that children and their families may often become internally displaced as a result of the threat of the recruitment or use of children. These children and their families should not be regarded as taking a supportive stance to, or collaborating with either side to an armed conflict.

6 Prevention of Unlawful Recruitment or Use

- 6.0 Children become associated with armed forces or armed groups for numerous reasons. Many are forcibly recruited; others “volunteer” because of their circumstances. While war itself is a major determinant, children may view enlistment as their best option for survival for themselves, their families or communities in contexts of extreme poverty, violence, social inequality or injustice. Gender inequalities, discrimination and violence are frequently exacerbated in times of armed conflict. Girls and boys may be seeking to escape gender-based violence or other forms of discrimination. Successful prevention programs will address the underlying causes of recruitment, and efforts will be made to provide alternatives to the dangers inherent in association with armed forces or armed groups.
- 6.1 A lasting solution to the involvement of children in armed conflict will involve a comprehensive prevention plan by States. This should include the ratification and implementation of international treaties and the adoption and enforcement of national laws which criminalize the unlawful recruitment or use of children in armed conflict. Legal reform should be accompanied by public information campaigns on child protection laws and support for community efforts to provide protection for children at the local level.
- 6.2 Successful prevention requires a collaborative set of actions to be undertaken, broadly inclusive of all actors, including multi-national peacekeeping forces where they are present, relevant to the national or regional context in which children are, or are likely to be, associated with armed forces or armed groups. These actions should include the application of international humanitarian law, relevant human rights instruments and mechanisms, practical measures to improve children’s safety, programming that addresses factors that may encourage the involvement of children in armed forces or armed groups, broadly focused social mobilisation to make the use of children in conflict culturally and morally unacceptable and any other locally relevant measures.
- 6.3 Effective prevention of the unlawful recruitment or use of girls and boys includes safe attendance at schools, prevention of family separation and early identification, protection and reunification programmes for separated children. Viable alternatives to joining armed forces or armed groups should be available for children, including adolescents. This will include educational and vocational programmes, income generating activities, and access to livelihood opportunities. Child protection mechanisms must be in place, including raising awareness on children’s rights. However, as the gender context may not support girls’ attendance at school, in addition to carrying out certain domestic chores (walking long distances for water and firewood etc.) this may increase their vulnerability to recruitment and requires additional interventions to enrol and retain girls in school.

Ratification and implementation of international legal standards

- 6.4 Advocacy and other programming with States must be guided by the following: States should take necessary steps to ensure that all relevant international standards are ratified, respected and reflected in national law, including:
 - 6.4.0 The Convention on the Rights of the Child
 - 6.4.1 The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, which raises the minimum age for compulsory recruitment into armed forces to 18 years; exhorts armed groups not to recruit or use children under the age of 18 and requires State Parties to take all feasible measures to criminalize such practices;
 - 6.4.2 The African Charter on the Rights and Welfare of the Child, which establishes the age of 18 as the minimum age for recruitment and participation in any armed force or armed group;
 - 6.4.3 The two Additional Protocols to the 1949 Geneva Conventions and the Convention on the Rights of the Child, which set 15 as the minimum age for recruitment or participation in hostilities; as well as the four Geneva Conventions of 1949 which offer important protections to children affected by armed conflict more generally;
 - 6.4.4 The Rome Statute of the International Criminal Court, which states that conscripting or enlisting children under 15 years into national armed forces or armed groups or using them to participate actively in all kinds of hostilities is a war crime. It grants the International Criminal Court jurisdiction over this crime. By ratification, States should import the proscription of recruitment of children under 15 years of age into national legislation;
 - 6.4.5 The ILO Convention No.182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, which defines forced and compulsory recruitment of children in armed conflict as one of the worst forms of child labour and obliges States parties to provide and apply appropriate sanctions, including penal sanctions;
 - 6.4.6 The 1951 Convention Relating to the Status of Refugees and its Protocol of 1967.
- 6.5 States should take all feasible measures to comply with UN Security Council resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005).
- 6.6 States should take all feasible steps to establish and enforce recruitment procedures in line with the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and other relevant international law. Recruitment procedures and measures for implementation must include:

- 6.6.0 Requirement of proof of age. Where documentary evidence of the recruit's age is not available other means of verification – such as cross checking with other persons and medical screening – may be required; responsibility for establishing the age of the recruit lies with the recruiting party;
 - 6.6.1 Legal and disciplinary measures to sanction those who contravene proof of age requirements;
 - 6.6.2 Legal provisions on minimum recruitment age requirements should be disseminated to those responsible for the conscription and enlistment of military recruits.
- 6.7 To further ensure that minimum recruitment ages are respected, States, assisted by other relevant bodies and others working for or on behalf of children, should:
- 6.7.0 Carry out a national awareness raising campaign to disseminate information on international and national laws, standards and procedures protecting children from underage recruitment;
 - 6.7.1 Provide training on legal standards on minimum age for relevant military personnel;
 - 6.7.2 Implement a national birth registration system for all children within the jurisdiction, including for refugees, internally displaced and returnee children, and provide identity documents to all children.
- 6.8 Training on applicable standards should be provided for armed forces both for senior officers and rank and file personnel, and where feasible to armed groups. Any training provided should include monitoring and evaluation mechanisms to assess its impact.
- 6.9 In line with their obligations under international law States must take all feasible measures to prevent the unlawful recruitment or use of children by armed groups.
- 6.10 Where feasible, governmental, inter-governmental and non-governmental organisations, should offer support and technical assistance to governments and to armed groups, to enable them to comply with their obligations under international law;
- 6.11 States and armed groups should comply with the Guiding Principles on Internal Displacement which restate the existing obligations that in no circumstances shall displaced children be unlawfully recruited nor be required or permitted to take part in hostilities;
- 6.12 In situations where provisions have been made to release children from armed forces or armed groups pursuant to the conclusion of peace or cease-fire agreements, mechanisms should be established to ensure that the agreements are respected, that children are immediately released and that no further unlawful recruitment or re-recruitment of children occurs;
- 6.13 Registration of all children within the jurisdiction of a State is key to preventing unlawful recruitment or use and to reducing the likelihood of

children becoming stateless, which in turn may make them more vulnerable to recruitment or use.

Prevention in relation to refugees and internally displaced persons

6.14 Children who are displaced as refugees or are internally displaced whether in camps, with host communities or families or in urban situations can be particularly vulnerable to recruitment. States shall take additional measures to ensure the protection of displaced children against unlawful recruitment or use. Where necessary, States should take additional measures to ensure the protection of displaced children with, where necessary, the assistance of the international community, including by the implementation of the following principles:

- 6.14.0 States must respect and ensure the civilian and humanitarian character of camps for refugees and internally displaced persons at all times;
- 6.14.1 States have the responsibility to provide physical protection to persons in camps for refugees and internally displaced persons, which includes the prevention of infiltration in these camps by combatants;
- 6.14.2 States should make all efforts to locate refugee camps at a reasonable distance from the border, generally at least 50 kilometres, to maintain law and order, to curtail the flow of arms into the camps and to disarm armed elements and identify, separate and intern combatants and to prevent cross-border recruitment;
- 6.14.3 Individual registration and documentation of displaced children is an important tool for the protection of children against unlawful recruitment or use, especially for unaccompanied and separated children.

Monitoring and reporting

- 6.15 Systematic monitoring and reporting of the unlawful recruitment or use of children by armed forces or armed groups as well as other human rights violations against children affected by armed conflict is an essential protection measure; it additionally serves as the basis for actions to pressure armed forces or armed groups to respect fundamental humanitarian and human rights norms and for actions to end impunity for those who violate these norms.
- 6.16 Pursuant to Security Council Resolutions 1539 (2004) and 1612 (2005) the Secretary General UNICEF and the Office of the Special Representative of

the Secretary General for Children Affected by Armed Conflict (SRSG-CAAC) are tasked with a lead role in the implementation of a mechanism for monitoring and reporting on unlawful recruitment or use of children and other egregious violations against children in armed conflict. They are tasked with working alongside UN Peacekeeping forces and UN Country Teams. They act in collaboration with local and international NGOs, civil society actors and other partners. The following guidance should guide the work of monitoring and reporting mechanisms established within the UN framework:

- 6.16.0 Monitoring and reporting mechanisms should be linked to, support and develop community efforts to prevent the unlawful recruitment or use of children by armed forces or armed groups and facilitate community based outreach strategies;
 - 6.16.1 International and national organisations should be informed of the provisions and available support to enable them to conduct monitoring and reporting in a way that preserves important evidence while reducing the risk to themselves and any children;
 - 6.16.2 Information on recruitment patterns and other grave violations should be used to put pressure on those who recruit children to abide by the relevant law and standards;
 - 6.16.3 Where feasible, monitoring and reporting structures should document cross border recruitment;
 - 6.16.4 Creation of inter-agency information management systems, including databases, at local and sub-regional levels where appropriate, should be considered by international child protection agencies;
 - 6.16.5 Country teams should decide collectively on the establishment of monitoring and reporting task forces as set forth in the Security Council Resolution 1612 (2005) Response measures should be implemented by the mission SRSG or the UN RC as appropriate;
 - 6.16.6 Humanitarian assistance mapping and planning should include the reality and risks of the recruitment of children. The UN Office for the Coordination of Humanitarian Affairs (OCHA) should be involved in this work at the earliest possible stage.
- 6.17 Monitoring and reporting at the national and local levels, as well as the regional and international levels, may constitute an effective means for preventing the unlawful recruitment of children and obtaining their release. International organizations, including UNICEF, peacekeeping mission, field presences of the Office of the High Commissioner for Human Rights, and other members of UN Country Teams, international humanitarian and human rights NGOs, peacekeeping operations and bilateral donors should, wherever possible, support national and local level monitoring and reporting initiatives, and other community-level initiatives.
- 6.18 Independently of inter-agency mechanisms, States should take all feasible measures to prevent violations and ensure that perpetrators are adequately prosecuted.

- 6.19 The European Union Guidelines for Children and Armed Conflict adopted in 2003 include a request for monitoring and reporting of recruitment and other violations and abuses against children through European Union Heads of Mission and outline actions to be taken. Information gathered through the monitoring and reporting mechanism can be used to request European Union bodies to take action on children's association with armed forces or armed groups.
- 6.20 Reports on the unlawful recruitment and use of children by armed forces or armed groups should be amongst those submitted to the Committee on the Rights of the Child which monitors government implementation on the Convention on the Rights of the Child and the Optional Protocol on the involvement of children in armed conflict. Information should also be shared with relevant special procedure mandates of the Human Rights Council as appropriate.

Advocacy for prevention

- 6.21 Prevention strategies and programmes by governments, UN, NGOs and other civil society actors should, wherever possible, be coordinated and effective information-sharing mechanisms should be developed. Where feasible, coordinated strategies targeting armed forces or armed groups recruiting or using children should be developed, and these should seek to involve those – from the local to the international levels – who may be able to influence the conduct of the forces and armed groups responsible.
- 6.22 A range of actors should be engaged to advocate for an end to the association of children with armed forces of armed groups. They include:
- 6.22.0 Local human rights defenders, children formerly associated with armed forces or armed groups, teachers, organised civil society, parents, health workers, religious leaders and other community leaders;
 - 6.22.1 Government officials, military personnel, and current or former opposition leaders may be effective as advocates or negotiators in the context of actions to release children or implement prevention strategies, including in neighbouring countries;
 - 6.22.2 Regional bodies such as the Economic Community of West African States (ECOWAS) the African Union (AU), Association of South East Asian Nations, (ASEAN), Organisation of American States (OAS), and the European Union (EU) can play a vital role in advocacy as can strong and influential individuals, including those exerting authority at a regional level;
 - 6.22.3 Neighbouring and other States can exert political pressure on armed forces or armed groups who recruit or use children, particularly when armed groups are based in those other countries;

- 6.22.4 The International Committee of the Red Cross has a particular role in relation to its mandate to protect and assist persons affected by armed conflict and in promoting respect for international humanitarian law;
 - 6.22.5 Multi-national peacekeeping forces have particular responsibilities according to their mandates for the protection of civilians including the protection of children against unlawful recruitment or use by armed forces or groups;
 - 6.22.6 Media personnel are frequently well informed on the recruitment or use of children by armed forces or armed groups or the impending risk of such recruitment and can provide the information to enable advocacy.
- 6.23 States, national and international humanitarian and human rights actors, religious bodies, and other civil society actors are strongly encouraged to use all means of communication to assert that using children to participate in armed conflict is not acceptable. Establishing this prohibition as an absolute social norm is a critical dimension in making it a reality.
 - 6.24 States, national and international humanitarian and human rights actors, religious bodies, and other civil society actors should seek to limit the supply of arms and other support to parties unlawfully recruiting or using children in armed conflict. Control of the availability of small arms and light weapons may be especially important in reducing children's capacity to participate in armed conflict.
 - 6.25 Children are more likely to join or be re-recruited into armed forces or armed groups if they are harassed or attacked or their rights are violated in any other way. Advocacy should therefore also include demands for respect of the humanitarian and human rights principles during and after armed conflict.

Prevention and education

- 6.26 Education provides opportunities to learn and, when effective, gives children the skills and competence to meet their needs, protect themselves and build hope for the future. Access to education, including appropriate education for older children, life skills and relevant vocational training should be promoted for all boys and girls including returnees and stateless, refugee and internally displaced children. The following principles should be considered to reduce the likelihood of recruitment and use:
 - 6.26.0 Education should be free to all children and of good quality;
 - 6.26.1 Measures must be taken to prevent propaganda or active recruitment taking place in or around schools and to protect children in the school environment.

Building local initiatives

6.27 Programmes to prevent unlawful recruitment should support community efforts and be context-specific. They should be based on an analysis of the factors underlying children's involvement in armed forces or armed groups, preferably in collaboration with local communities and children themselves. Particular attention should be paid to those children most vulnerable to involvement with armed forces or armed groups, including adolescents, refugees, internally displaced children, children living in conflict zones and occupied territories and those who live in highly politicised environments. Attention should also be paid to children separated from their families (whether accompanied or not) or in institutions, those living or working on the streets, or in conflict with the law, and those who have been subjected to sexual and gender based violence. The following principles should be adhered to reduce the likelihood of unlawful recruitment and use:

- 6.27.0 Risk mapping can identify areas where conflict is concentrated, the groups at risk, the age of children being recruited and the type of risks they face, as well as the principal recruiting agents and tactics. Targeted strategies should be based on this information. Any risks associated with prevention activities should also be assessed;
- 6.27.1 Understanding the attitude and motivations of families and communities is vital; children living in highly militarised or politicised communities or those where violence is organised or commonplace may be particularly vulnerable to recruitment; children often join armed groups to support or remain with their families;
- 6.27.2 Where communities view children as adults before they are 18 years old, opportunities should be sought for involving the government and local communities in reflecting on the need to protect children from the dangers of participation in armed conflict and its negative consequences;
- 6.27.3 Community and family efforts to protect children from unlawful recruitment or enlistment should be identified and supported and where appropriate replicated;
- 6.27.4 Children and families should be involved in the design and implementation of prevention activities. Children who have joined up are best placed to describe why they did so. Strategies can be created to reflect on and address these issues, involving parents, children, teachers and community leaders. The influence of parents and other significant adults has been shown to be important in preventing children from joining an armed force or armed group;
- 6.27.5 Programmes should encourage the formation and continuation of youth groups which bring young people together, especially those from opposing communities. Sports, music or drama or work on conflict resolution or peace studies provide children with a positive alternative to taking up arms and can also promote reconciliation.

Preventing the unlawful recruitment or use of girls

- 6.28 General prevention strategies apply to girls in the same way as to boys. Girls should be included in the design of programmes as well as in monitoring and evaluation of programmes to ensure interventions are relevant and effective.
- 6.29 Girls may join armed forces or armed groups to escape sexual and gender-based violence, early marriage or other harmful practices and exploitation. Programmes should address these issues nationally and locally. They should seek to promote gender equality and freedom of choice for girls in line with international human rights norms. Programmes should be developed to provide girls with opportunities to develop skills and generate income in non-exploitative settings.
- 6.30 The following issues need to be given special consideration and addressed in relation to the prevention of the association of girls with armed forces or armed groups:
 - 6.30.1 Dialogue with armed forces or armed groups should emphasize that the use of girls as “wives” or other forced sexual relations, actual forced marriage, and the use of girls for domestic labour or logistical support in armed conflict constitute acts of recruitment or use and can be thus contrary to fundamental human rights and humanitarian law and standards if not also contrary to national law;
 - 6.30.2 Girls have an equal right to education irrespective of their status as mothers or wives and girls’ lack of access to education should be addressed;
 - 6.30.3 Girls may be particularly vulnerable to forced recruitment or use by armed forces or armed groups if sufficient protection is not afforded, for example by having to fetch water and firewood unaccompanied in conflict zones. All possible measures must be taken to provide effective protection in these and other cases.

Family unity

- 6.31 The family and community generally provide the most effective protection for children. Every effort should be made to keep children with their families or to reunite them or place them within a family or community setting where they can be adequately cared for and protected.
- 6.32 Where families decide to send children away temporarily to avoid recruitment, steps should be taken to ensure that these are informed decisions, that, wherever possible, children are consulted and that, above all, these decisions are motivated by the best interests of the child.
- 6.33 Child protection agencies and other relevant actors should work with governments in providing an urgent response that supports family reunification and

the interim care of separated children in the context of armed conflict or natural disaster. In particular,

- 6.33.0 By providing children with registration documents or at least name tags and teaching them their name and place of origin;
- 6.34.1 When children have to be evacuated, inter-agency guiding principles indicate: “Whenever possible, children should be evacuated from their place of residence with adult family members. Evacuating children without family members should be a last resort, carried out only after it has been carefully determined that protection and assistance cannot be provided in place and that evacuation of the entire family is not feasible;”
- 6.35.2 An assessment of the motivation and capacity of families to provide care and protection should be carried out before unaccompanied or separated children are placed with the extended family or in foster care; these arrangements require monitoring to ensure children are not neglected, abused or exploited;
- 6.35.2 In many instances, children’s vulnerability to recruitment may be increased if they are in institutional settings. It is preferable, therefore, that families and communities are provided with adequate support to ensure a protective environment for children, including the capacity for monitoring.

7 Release and Reintegration

Planning and preparation

- 7.0 At all stages, the planning and programming for children who have been associated with armed forces or armed groups should have the objective of enabling children to play an active role as a civilian member of society, integrated into the community and, where possible, reconciled with her/his family.
- 7.1 Planning for programmes to support the release and reintegration of children should commence as soon as it becomes apparent or possible that there will be children associated with armed forces or armed groups and should not be dependent either on the progress of any formal peace process or on any formal DDR process. Actors working towards the release of children should have agreed contingency plans in place to manage any unexpected, rapid or large-scale release of children by an armed force or armed group.
- 7.2 Funding for the release and reintegration of children into civilian life should be available at the earliest possible stages and continue after the cessation of formal adult or child DDR processes. Preparations should include an appeal for the necessary funding to support a programme of adequate duration.

- 7.3 The situation analysis required in planning for the release and reintegration of children associated with armed forces or armed groups should include careful attention to the circumstances of other war-affected children and families in the areas to which they will return.
- 7.4 Planning for programmes should emphasize community engagement, involve children and the communities to which they return, build on existing resources and take account of the rights and aspirations of children, balanced with community priorities and values. Assessments for programme planning should also acknowledge the changing roles, responsibilities, hierarchies and social dynamics that may have occurred in a community as a result of the disruption caused by the conflict in addition to the skills and experiences children have gained and how this will affect their reintegration process.
- 7.5 Preparation should include a strategy to meet the needs both of children who enter a release process and those who do not go through any kind of process but leave armed forces or armed groups and either return to their family and community or seek to integrate elsewhere.

Protection of children who have been associated with armed forces or armed groups

- 7.6 Children who leave armed forces or armed groups by any means, including those who escape, are abandoned or are captured by an opposing armed force or armed group or by multinational forces retain their human rights as children, and relevant international law and standards must be applied, inter alia:
 - 7.6.0 No child may be subjected to torture or other cruel, inhuman or degrading treatment or punishment;
 - 7.6.1 Neither capital punishment nor life imprisonment without possibility of release should be imposed for offences committed by persons below eighteen years of age;
 - 7.6.2 No child may be deprived of his or her liberty unlawfully or arbitrarily;
 - 7.6.3 Children who escape unlawful recruitment must never be considered deserters;
 - 7.6.4 All appropriate measures to promote physical and psychological recovery and social reintegration must be taken;
 - 7.6.5 All appropriate action must be taken to ensure and re-establish family unity;
 - 7.6.6 Unless contrary to the best interests of the child, all allegations of violence, including sexual and gender-based violence must be promptly, thoroughly, and independently investigated and prosecuted and adequate and effective follow-up care offered to the child and her/his family.
- 7.7 Many girls give birth during or after their time with an armed force or armed group; the surviving children are likely to face numerous child protection

problems, so other specific programmes should be developed which seek to address the particular nature of the challenges faced by these children as infants and as they grow up. They are likely to suffer from health problems, neglect, rejection and abuse or there may be custody battles with the father or his family trying to reclaim the child. The legal status of these children according to both domestic and international law is likely to be unclear. Primarily, the state where the child currently resides has responsibility for ensuring that the best interests of the child are protected. This will include registration at birth or as soon as possible afterwards, the child's right to its identity, a nationality and its family and the right not to be discriminated against.

Advocacy

- 7.8 All actors should endeavour to work together in accordance with their mandate and respective working modalities to develop a coordinated advocacy strategy with the objective of securing the release and reintegration of children, including a particular focus on girls. Such advocacy should take place at all stages of a conflict, based on continuous monitoring and information collection. It should take place with all those responsible for the recruitment and retention in armed forces or armed groups, communities from where the children were recruited and / or to where they will be released or eventually integrated and with the children themselves.
- 7.9 Even when a collective or large scale release is agreed, some children (particularly girls) may be kept back and others may be reluctant to leave. Actors should continue to negotiate with armed forces or armed groups for the release of all children recruited or used unlawfully, provide accurate information about the release and reintegration process to children who remain inside armed forces or armed groups, and also consult children already released to find ways to communicate with and encourage those remaining to leave.
- 7.10 Where appropriate in and accordance with the best interests of the child, direct and free access to all children associated with armed forces or armed groups, regardless of their nationality, should always be granted. This should be done so, without hindrance, to those relevant authorities or actors who have committed to operate in accordance with the relevant standards and who are implementing programmes to support the release, protection and reintegration of children.

Armed groups

- 7.11 Based on their analysis of armed groups, actors working to promote and support the release of children should make contact with those armed groups

who are recruiting or have recruited children and affiliated bodies where this can be done safely, in order to negotiate commitments to establish a minimum age of 18 years for recruitment or participation in armed conflict and to release children in their ranks.

In such contacts:

- 7.11.0 Rigorous adherence to the principles of neutrality and impartiality are essential;
- 7.11.1 Actors should adopt a co-coordinated and transparent approach to the extent their mandate and working modalities allow in order to agree on a common strategy and ensure consistent communications. It can be helpful for one agency to take a lead role when making contact with armed groups;
- 7.11.2 Dialogue and negotiations should take place without media coverage;
- 7.11.3 Formal agreements should be sought, and should include mechanisms to monitor implementation;
- 7.11.4 Training and capacity-building on obligations under international law relating to the recruitment or use of children should be provided;
- 7.11.5 Training provided to armed groups should include monitoring and evaluating mechanisms to assess impact.

Peace processes and peace agreements

- 7.12 The issue of the release and reintegration of children should be included in all stages of any peace process; where children have participated in armed conflict, peace agreements and related documents should acknowledge this fact. Peace agreements should include specific provision for the needs of children, including the particular needs of girls and any children they have or will have as a result of their association with an armed force or armed group. Such provision should explicitly include financial and other resources required for programmes to support the swift and safe release, return and reintegration or integration of children at the earliest opportunity. There should be no liability for future conscription for those who fought as children.

The release process

- 7.13. The transition of the child from a military environment and the first step towards reintegration into civilian life begins with their release from armed forces or armed groups.

- 7.14 It is usually in the best interests of children associated with armed forces or armed groups to go through some form of formal release process where they can receive support and assistance. Processes should be designed to ensure that all children who wish to are able to benefit from formal programmes. Concerned agencies should therefore:
- 7.14.0 Design and conduct an information campaign so that children, particularly girls, who are currently associated with armed forces or armed groups, are aware of their right to be released and the options available to them;
 - 7.14.1 Liaise with families and communities of recruited children so that, where possible, they can inform the children of their rights and options;
 - 7.14.2 Advocate with armed forces or armed groups for access to children to explain their rights and options.
- 7.15 At the same time, particularly for children (largely but not exclusively girls) who do not wish to join such formal processes, programming should develop community based mechanisms where children can be supported without being stigmatised. The following guidance should be adhered to during the release process:
- 7.15.0 Where there are existing governmental or other, local, structures, these capacities should be incorporated into programming and strengthened as necessary;
 - 7.15.1 Actors supporting the release and reintegration of children must ensure that all those persons who will be working with children are trained and supervised;
 - 7.15.2 Logistical and technical support should be organised in collaboration with agencies responsible for this in the case of a formal DDR process;
 - 7.15.3 Actors should agree on documentation, data collection and storage (including databases) and information sharing, with particular attention to confidentiality and protection of sensitive information, especially vis a vis parties to the armed conflict.
- 7.16 Where children had not been separated from their families or communities, the release process should not do so unless this is absolutely necessary for the protection of the child.
- 7.17 Where it would enable children to more easily assume a civilian identity, demobilisation or release papers may be provided. Decisions regarding the provision of such documentation should take into account the local context and balance the help this may give to children against the risk it may entail. Actors working to support the release of children should agree, together with any formal DDR coordination body, on best practice in this regard.

Eligibility for the release process

- 7.18 The “Definitions” contained in this document should form the basis for criteria on deciding when a child is or has been associated with armed forces or armed groups. The criteria should be clearly laid down and communicated to all who have a role in screening who should be trained and supervised. The criteria must explicitly include girls; armed forces and armed groups and other actors must understand that girls, whatever their roles, are eligible for release and must be included in formal and informal release processes. Release programmes need to ensure that programme activities support policy level agreement to include girls.
- 7.19 All children who meet the criteria and wish to do so must be allowed to enter a release process.
- 7.20 All measures to ensure that girls see themselves as eligible for release need to be taken. In particular, information should be given that explicitly includes girls’ eligibility, and special vigilance given to monitoring their release given the reluctance of commanders to allow this.

The release

- 7.21 The duration of the release process should be as brief as possible and the safety and dignity of the child and their need for confidentiality must be primary considerations. Children should be rapidly separated from adult fighters and handed over to an appropriate, mandated, independent civilian process. Particular consideration should be given to the particular situation of children who are solely dependents of adult fighters and of children born to adults or children who are already in armed forces or armed groups. Formal or informal release processes may take place in a centre or community based environment. Throughout the release process, the following measures are necessary:
 - 7.21.0 Children should be accommodated at a distance from adult ex-combatants with sufficient security to prevent harassment or abuse;
 - 7.21.1 Measures to prevent sexual and gender based violence and ensure safety such as secure accommodation, adequate lighting and separate latrines are essential and girls and boys should be consulted to ensure these measures are sufficient and effective;
 - 7.21.2 Child protection actors and children themselves should be involved in decision making throughout the process;
 - 7.21.3 Adequate time and appropriate personnel, including females, are essential in order to help children feel secure and comfortable enough to receive information about what will happen to them and to be able to participate in decision making;

- 7.21.4 Wherever possible, staff dealing with children should be of the same nationality and all communication and information should be in the child's mother tongue;
- 7.21.5 Measures should be taken to ensure the cultural diversity of the area is taken into account and to meet any particular needs of children in relation to their ethnicity or religion;
- 7.21.6 Original documentation forms should accompany the child throughout the process;
- 7.21.7 Information should be provided to children explaining that they have a right not to be abused by anybody (including humanitarian and security staff) and providing details of safe and efficient reporting and complaints mechanisms they can use should abuse occur;

The release of children who are not in their state of nationality

- 7.22 While these Principles apply equally to the release of children from armed forces and armed groups outside their country of origin or habitual residence, their situation needs special attention. Upon release the child must enjoy access to asylum procedures and other complementary protection. Refugee status determination procedures must be conducted and the refugee definition of the 1951 Refugee Convention interpreted in a gender and age-sensitive manner, while paying due consideration to child-specific forms of persecution. For unaccompanied or separated children, their degree of mental development and maturity needs to be considered when deciding how refugee status will be determined. The best interests of the child should guide any subsequent decision on a durable solution. The provision of identification documents to unaccompanied and separated children is crucial regardless of which durable solution is deemed most appropriate.

Girls and the release process

- 7.23 From the planning stage onwards, eligibility criteria and screening procedures for inclusion in release and reintegration programmes and informal release processes should always recognise that girls are at risk of being 'invisible'. Girls may often remain in the armed forces or armed groups while boys are released due in many cases to the view that as "wives" or in other domestic roles, girls are not in the same category of "child soldiers" as boys. This should also be a key consideration in any release negotiations with parties to a conflict.
- 7.24 If the conditions pertaining throughout the release process are not explicitly inclusive of the specific needs of girls, they will bypass the formal release

processes, will leave them prematurely to go straight to their communities or will return to the armed force or armed group. In order to increase the likelihood of girls associated with armed forces or armed groups including those who are pregnant or girl mothers accessing release programmes and to ensure their needs are met, release programmes for children should always be designed to include the following:

- 7.24.0 The presence of accessible female employees at all times during the process;
- 7.24.1 Safe and private accommodation for girls where accommodation is required, either at cantonment or transit//interim care or any residential care sites, with specific health services, including reproductive health care, separate washing and toilet facilities, adapted hygiene kits, and clean birthing kits;
- 7.24.2 Measures to ensure the safety and protection of girls in residential settings such as regulated access of male former combatants to the sites, proper lighting and regular surveillance and patrolling by security forces in which women are a majority wherever possible and in any event for girls' areas;
- 7.24.3 Nutrition and health care for infants and young children where necessary and support to girl mothers to care for their children, where possible;
- 7.24.4 Education in parenting skills and mother and child health for girl mothers or pregnant girls; options for their future should be presented in a supportive environment;
- 7.24.5 Education and skills training that is unrelated to girls' reproductive status and made equally accessible to girls who are or are not pregnant or mothers.

Interviewing children

- 7.25 Children may need to be interviewed for a number of reasons; to determine whether they meet the criteria for eligibility for release programmes, to establish information about their current circumstances and future plans, to facilitate family tracing, for explicitly therapeutic reasons or for forensic purposes. Interviews should never be conducted to collect information for military purposes.
- 7.26 Measures should be taken to ensure the safety of the information gathered and a document control mechanism should be established. The safety of the interviewee should be considered paramount in information management mechanisms. Information collected from interviews should remain the property of the collecting organisation.

- 7.27 Throughout release and reintegration processes, all children should be informed as to why information is being collected, who will have access to it, and which steps have been taken to ensure confidentiality. Children should be kept informed about what will happen to them at each step of the process.
- 7.28 The following measures should be put in place by organisations whose personnel need to interview children:
- 7.28.0 Interviewing personnel should be clear about their purpose and should concentrate on information required for these purposes only;
 - 7.28.1 Interviews should be carried out by personnel who are trained in interviewing children;
 - 7.28.2 Children should be interviewed by adults of the same sex wherever possible;
 - 7.28.3 Multiple interviews should be avoided;
 - 7.28.3 Sensitive issues should be raised with children only when essential and in their best interests;
 - 7.28.4 Additional support should be provided as necessary to children during and after the interview;
 - 7.28.5 In all cases, psychological support should be available to children before, during and after interviews;
 - 7.28.6 Interviews should be conducted in private where they cannot be overheard and confidentiality should be respected at all times by the organisation collecting the information.
- 7.29 See section eight for principles relating to forensic use of information gathered from children.

An inclusive approach to reintegration

- 7.30 Children who have been associated with armed forces or armed groups may be further stigmatised with a narrow provision of benefits and support only to that sector of children; community divisions and tensions can be increased. Inclusive programming which supports children who have been recruited or used as well as other vulnerable children benefits the wider community.
- 7.31 While the reintegration of children into civilian communities should wherever possible be carried out in ways that facilitate local and national reconciliation, it should always be preceded by a risk assessment including a cultural and gender analysis addressing issues of discrimination and should be based on the child's best interests irrespective of national considerations or priorities.

- 7.31.0 Programmes should build on the resilience of children, enhance self-worth and promote their capacity to protect their own integrity and construct a positive life;
 - 7.31.1 The participation of women and girls in programme development and implementation should incorporate their views with regard to reintegration into family, community and economic and political life;
 - 7.31.2 Activities should always take into account the age and stage of development of each child and any specific needs.
- 7.32 Programmes to support the reintegration of children associated with armed forces or armed groups should develop links with all programmes, policies and initiatives which may benefit these children and their families either directly, for example through local or national social welfare programmes, or indirectly, through reconstruction and rehabilitation of national institutions and other development programmes.

Material assistance

- 7.33 Assistance at the release or reintegration stages should aim to enable children leaving an armed force or armed group to assume a place within their community and standard of living comparable to that of other children of the same age. Circumstances vary, and it should not be assumed that all children who have been associated with an armed force or armed group require direct material assistance in order to reintegrate. While material assistance and particular attention may well be necessary, for instance, for children with disabilities or girl mothers, inappropriate assistance can impede reintegration, particularly if it is perceived to be rewarding children who have committed acts harmful to their community. Benefits in terms of services should be structured and provided in a manner that does not either stigmatize or inappropriately privilege children or place them at risk. This is generally best achieved by providing support to children, families, and communities. For example, assistance might be provided to schools which enable them to incorporate such additional children.
- 7.34 Where reintegration will require appropriate material and social assistance, appropriate planning involves assessing how such children and their actions are regarded by their respective communities, how long they have been away and what they require in order to re-enter civilian life in an age-appropriate stage of the life cycle.
- 7.35 Direct cash benefits to released or returning children are not an appropriate form of assistance, as experience has repeatedly shown.

Family tracing

- 7.36 Family tracing, if required, should begin urgently and contact with families and communities established as soon as possible with a view to timely reunification or placement of the child within a supportive protective environment, ideally their family. Child protection coordination groups or networks should agree on a strategy for family tracing, reunification and follow up of children and ensure that it includes children associated with armed forces or armed groups. Consideration should be given to the mandate and experience of the ICRC with regard to tracing and re-establishing family links in cooperation with the national Red Cross and Red Crescent societies.

Support for families and communities to which children return or integrate

- 7.37 The capacity of the family and community to care for and protect all children affected by conflict should be developed and supported from the earliest possible stage. Dialogue with the communities to which children will return or be integrated into should be initiated at the earliest possible opportunity.
- 7.38 As much as possible and when in the best interests of the child, this should be done before release in order to clarify their concerns and strengthen the community's understanding of their own roles and responsibilities with regard to released children. Discussions should explore any fears and prejudices towards returning children and the potential for stigmatisation of such children and should help communities understand that children have suffered, that experience from other conflicts indicates that children can, with appropriate support, integrate effectively into civilian life, and that the children are the responsibility of the community as well as the State. These discussions should set the stage for community initiatives to support the released children along with other vulnerable children in the community. Staff capacity should be developed to undertake such initiatives.
- 7.39 The stigmatization of children associated with armed forces or armed groups is one of the greatest barriers to reintegration and girls may be particularly ostracised. Children are frequently perceived initially as troublemakers prone to aggressive behaviour or criminal activities. The preparation of communities and on-going support to communities needs to address these perceptions and to help communities understand that the children are primarily victims.
- 7.40 Actors should advocate with programming partners and with donors for the necessary linkages between short term humanitarian assistance and

longer term development assistance which will enable the reintegration of children.

- 7.41 Children may be reunited or integrated with families and communities that have suffered displacement, disruption, deprivation, and loss of social cohesion as a result of conflict. To enable children's return and reintegration, it is vital to prepare the family and community and also to provide mediation and support following children's return. Work with families and communities should:
 - 7.41.0 Identify and build upon ways of supporting long term livelihoods within affected communities;
 - 7.41.1 Offer economic support to families through income-generating activities provided in such a way that financial incentives are not the main attraction of caring for children;
 - 7.41.2 Advocate on behalf of displaced families who are dependent on external support to ensure they receive adequate rations enabling them to support children who are reunited with them;
 - 7.41.3 Raise awareness of the problems that may occur when children return, such as aggressive and rebellious behaviour and drug or alcohol use;
 - 7.41.4 Emphasize the importance of families showing children they are loved and cared for despite these difficulties;
 - 7.41.5 Encourage communities to provide mutual support in dealing with problems and facilitating the formation of constructive social relationships for returning children;
 - 7.41.6 Support non-violent ways of managing conflict;
 - 7.41.7 Encourage communities to realise that an investment in young people will support the long term peace and security of the community, which may otherwise suffer problems if reintegration is not achieved.
- 7.42 A risk assessment, including on the basis of gender, will indicate where it is likely that children will be feared, become targets of hostility for having been in enemy groups or be ostracised or neglected. In these cases, intensive community sensitisation should be undertaken before children return. Similarly, children who need to be integrated into new communities or different ethnic groups may require individual preparation and support.
- 7.43 Where children from different, opposing armed groups are returning to the same communities, there is urgent need for work on non-violent conflict resolution or management.
- 7.44 Where children have been encouraged by their communities or families to take part in hostilities, or are regarded as 'freedom fighters' or 'heroes', actors should encourage families and communities to remember that the children are primarily children and are entitled to the rights held by all children.

Family reunification and family based care arrangements

7.45 The majority of children should be returned to their family and community or integrated into a family and community environment as soon as possible after their release from an armed force or armed group. The principal factor for reintegration is for a child to be returned to or placed in a supportive and otherwise appropriate protective environment. Where it is not possible to integrate them with their own families, alternative family based care arrangements should generally be found. For some older adolescents, who may not wish to live as part of a family, supervised and supported independent living arrangements in a community setting may be an acceptable alternative. The following guidance should be adhered to:

7.45.0 Institutionalization does not constitute reintegration but is a short-term measure to facilitate release;

7.45.1 Local capacity should be developed to identify and support alternative care/fostering arrangements for children and also to monitor the well-being and non-discriminatory treatment of children placed in extended family or alternative care/ fostering placements.

Supporting children in finding a role in their community

7.46 For some children, there may be positive aspects to association with an armed force or armed group. These children may be unwilling to give up new-found freedoms, power, increased status and respect particularly from their peers, remuneration, having a productive role and the opportunities to learn skills. Girls and boys may be reluctant to comply with traditional expectations or harmful cultural practices or otherwise be determined not to return to violence, neglect or abuse.

7.47 Programmes should recognise and build upon the skills and confidence that girls and boys may have learned while associated with the armed force or armed group. This will entail creating options and choices for them, so that they are not channelled into inappropriate or de-skilling training or livelihood options.

7.48 In particular, adolescent boys and girls need to be recognised for their particular capacities and resilience as well as their vulnerabilities. Their full participation should be included in the assessment, design and implementation of programmes. Engaging children in community service and helping them enter respected social roles are essential in breaking stigma and enabling children to develop appropriate support networks in the community.

7.49 Reintegration and reconciliation activities should recognise the need to redirect the potential of children and young people in developing leadership and conflict resolution skills and taking responsibility for their actions including

through participation in the rebuilding of their communities and in peace building activities. Programmes that involve women's organisations can be particularly useful in this regard with girls who need both positive role models and a supportive environment.

Children with a disability and others requiring particular support

- 7.50 Association with armed forces or armed groups frequently results in children acquiring a disability. The marginalisation and disempowerment which a child with a disability may face in a stable situation can be exacerbated for child formerly associated with armed group or force. S/he can face isolation and negative attitudes and be at greater risk of abuse, neglect; s/he may be subject to longer term psychosocial distress than another child. The need to consult with children affected by a disability prior to planning any intervention is particularly important given that the needs and impact of disability can differ from child to child. The following principles ensure that the needs of children with disability are provided for:
- 7.50.0 Needs assessments should include questions to highlight the situation of children with disability;
 - 7.50.1 Data management systems (including monitoring, reporting and follow-up mechanisms) should disaggregate data by disability as well as age and sex;
 - 7.50.2 Children with disabilities should not be treated separately. Attention to their needs should be incorporated into ongoing programmes which should be adapted accordingly;
 - 7.50.3 Structured activities in the community should be designed to ensure they increase social inclusion and mobility of affected children;
 - 7.50.4 Children with disabilities should be given opportunities to participate in planning and decision on matters that affect them;
 - 7.50.5 Advocacy and training activities should target decision makers in communities and government and humanitarian actors to raise awareness of the importance of including disabled children in decision making processes.
- 7.51 Other children who may require particular support include those who have problems related to drug or alcohol abuse, those who have serious health problems, those who have experienced rape or other forms of sexual abuse or those who witnessed or were forced to participate in atrocities, as well as those children whose family members cannot be found or who have died, those whose family have rejected them or those who face hostility from their family or community.
- 7.52 These or other children may benefit from a period of intensive psychological or medical support in the community or through a period in residential care or

another supported environment. Any such plan should be firmly rooted in the community, involve the family and community, including children, where possible and consistently be aimed at facilitating the child's reintegration.

- 7.53 In some communities, children are viewed and view themselves as carrying bad spirits from their experiences with armed forces or armed groups. Appropriate cultural practices, as long as they are not harmful to children, can be essential to a child's reintegration and should be supported.

Interim care

- 7.54 Interim care for children who have been associated with armed forces or armed groups is not universally necessary for their reintegration; decisions about whether to organise interim care centres should be based on a careful situation analysis. Certain children may benefit from a period in interim care and where possible the needs of children should be considered on a case by case basis. Except where it is contrary to the best interests of the child, for instance where children are ill or have left their homes because of abuse or neglect, children leaving armed forces or armed groups should be assisted to return directly to their family as soon as they have been through the release process.
- 7.55 Where interim care is agreed this should be for as short a period as possible. The purpose of interim care is to provide care and protection for children while tracing is carried out and other durable solutions are being identified. Where interim care is necessary, it should be part of a community based programme to facilitate the return of children to their communities and to promote the protection of conflict affected children in general. Interim care may include placement in a foster family, an institution, or other supported care arrangements in the community. Institutional care is not an alternative to the development of adequate services in the community. In the case of all such arrangements criteria and standards must be developed and agreed, a code of conduct must be implemented and all interim care arrangements must be carefully monitored.

Children who were not separated from family or community

- 7.56 Some children associated with armed forces or armed groups remain with their family and community or maintain close ties. The children may be used by an armed force or an armed group with community support and involvement. In these circumstances reintegration entails the reorientation of children towards civilian life. Key steps are to work with affected children and their families and communities to change attitudes which promote children's

involvement and also to provide alternatives that enable transition to a civilian mode of living.

Prevention of re-recruitment

- 7.57 Re-recruitment is a particular danger for children who have been released from armed forces or armed groups during armed conflict and those who have remained with their communities while being part of an armed force or armed group. Actors should work with these children, their families and communities as well as the armed force or armed group in order to find a solution to their care and protection needs. This may include short term foster care with other families.
- 7.58 Ongoing monitoring and, as necessary, intervention should be provided to ensure that the chain of command between children and armed forces or armed groups is broken and children are not vulnerable to re-recruitment. The following guidance should be adhered to prevent rerecruitment:
- 7.58.0 Demobilisation sites or assembly areas should be sufficiently far from the conflict zones to ensure security;
 - 7.58.1 Children should be reunited with their family or placed within a protective community-based environment as soon as possible;
 - 7.58.2 Adequate, appropriate assistance is necessary to enable genuine reintegration;
 - 7.58.3 Children should be informed of their right not to be recruited in any way.

The reintegration of girls

- 7.59 Girls face specific consequences from their time in armed forces or armed groups. The stigma facing girls is fundamentally different in kind – it lasts much longer, is critically more difficult to reduce and is more severe. Essentially, many girls will have lost their “value” as perceived by the community including in relation to marriage. Programmes should seek to establish positive values for the girls in their communities and families. In addition, a girl will often have to deal with residual relationships or feelings for her captor, as he may be both her “husband” and the father of her child or children. In appropriate circumstances, girls should be consulted and counselled about whether they wish to recognise or reject the relationship they had with a member of the armed group or force.
- 7.60 Programmes to assist girls associated with armed forces or armed groups need to strike a careful balance between seeking to identify them in order to ensure their particular needs are met and not stigmatizing them further. The key to

any intervention is to consult with and be led by those affected - many of the following suggestions have come from girls associated with armed forces or armed groups [Author's Note: Girls formerly associated with fighting forces and their children – returned and neglected” by Susan McKay, Malia Robinson, Maria Gonsalves and Miranda Worthen 2004 www.childsoldiers.org].

- 7.61 Extensive community dialogue and mediation is needed to support girls' reintegration. Key messages are that girls, especially those who are pregnant or girl mothers need the support of their family and community. Strategies should enable girls' acceptance through steps such as conducting traditional rituals, making reparations, providing health care and livelihoods support, and developing links with women's groups.
- 7.62 Some girls associated with armed forces or armed groups and girl mothers in particular may require a period of intensive, additional or lengthier support during reintegration. Although only a minority of girls may need residential care, most will benefit from family or community support for purposes of healing and adjustment, medical care, learning parenting and vocational skills, and the development of community support networks.
- 7.63 Girls may be viewed as an additional burden on their family and without value in terms of their potential to be married. With little hope of earning an income and limited opportunity to participate in educational and vocational training programmes without financial support or child care, girls may become depressed and isolated from their peers and wider community. Specialised, culturally appropriate responses should be identified or developed for those girls who have become depressed and even suicidal. Long term support may be necessary.
- 7.64 Families may expect girls to provide an income, which may result in them being sexually exploited. Girls need to be protected from such exploitation through advocacy with communities, educational and vocational skills training and the provision of alternative economic strategies.
- 7.65 Links should be established and maintained with existing women's groups, as social activities reduce the girls' isolation and promote their well-being.
- 7.66 Communities may need support in adjusting to girls who have learned non-traditional skills and have developed non-traditional expectations.
- 7.67 Not all girls wish to return to their previous community. Where girls prefer to live in urban centres in order to be invisible and to earn money, they need to be supported to ensure that they make choices in line with their best interests and that they can still access education and skills training.

Health

- 7.68 Children who have been associated with armed forces or armed groups are likely to have a variety of health-related needs that may be apparent immediately or may emerge over time. Disability, lower limb problems for children who have portered and sensory problems for children who have fired

guns, pathologies resulting from sexual and gender based violence and drug and alcohol dependency are amongst those that require generalised as well as specialist treatment. The rebuilding of health infrastructure is necessary for these children and other vulnerable children such as mines victims as well as being positive for the entire community. Linkages between release and reintegration processes and existing programmes for dealing with children's health needs should be developed.

7.69 The following principles should apply to health programming for children at the release or reintegration stages:

- 7.69.0 As soon as possible during the release process, all children should undergo assessment of their physical health including nutritional screening, and receive treatment or referral on to specialist services as necessary. Principles should be developed to ensure that screening identifies medical problems relating to the children's recruitment or use and that all clinically serious medical needs are addressed;
 - 7.69.1 Health care facilities should be made available immediately continuously through the release and reintegration stages;
 - 7.69.2 Health education, including in relation to reproductive health, is an important aspect of health care and should be provided to all children;
 - 7.69.3 Reproductive health responses should be based on a thorough cultural analysis of gender relations, in order to ensure the most effective response;
 - 7.69.4 Outreach programmes through facilities such as health centres and schools are essential to improve access for children, particularly girls, who have been recruited or used by armed forces or armed groups. Existing staff in these facilities can be trained;
 - 7.69.5 Female and male health workers should be trained in dealing with children who have been used by armed forces or armed groups and respect the basic principles of confidentiality.
- 7.70 Specific responses and follow up are required for children likely to be infected with HIV, testing for which must be voluntary and the results of which must be confidential.
- 7.71 Appropriate responses should be developed to meet the particular needs of girls including those who are pregnant or child mothers and their children; health care should be provided with a mother and child perspective.
- 7.72 In many contexts, girls who have been associated with armed forces or armed groups are highly likely to have been subjected to gender based violence (GBV), including sexual violence. Boys can also be subjected to such violence. The provision of support services (including health, psychosocial and legal support) to survivors of GBV should follow international guiding principles of respect, dignity, non-discrimination, safety, security and the best interests of the survivor. In particular:

- 7.72.0 Programmes should include measures to deal with the physical impact of GBV on survivors, such as including injury, reproductive health problems including infertility, fistula and sexually transmitted infections, as well as the risks and results of early pregnancy and induced abortion or miscarriage or birth without adequate medical care;
- 7.72.1 Medical facilities should (where possible) provide clinical management of rape and deal in a sensitive manner with the consequences (sexually transmitted infections, attempted abortions etc). Other services available should include pregnancy testing, and management of pregnancy including management of induced abortion, safe termination, and provision of antenatal and postnatal care. Staff dealing with GBV must be fully trained and aware of child-friendly assessment and interview protocols;
- 7.72.3 Any programme offering girls access to medical facilities for GBV should also link in with girls or women's groups to ensure emotional support is available to address the psychosocial impact of GBV, including stigma, discrimination and depression;
- 7.72.4 Access to legal services should also be available to survivors, including as part of the health care response.

Psychosocial aspects

- 7.73 Psychosocial support should be incorporated into the release process at the earliest stages and into all stages of reintegration programming to assist children, families and communities in developing and building their strengths and resilience and involving them actively in their own recovery. Encouraging and facilitating children's active participation in developing responsive and sensitive activities and programmes is central to reducing their vulnerability and increasing their resilience.
- 7.74 Psychosocial support should focus on identifying and addressing any obstacles to the ability to develop an appropriate social role and engage in culturally expected social relationships.
- 7.75 Agencies and donors concerned with programming for the release and reintegration of children associated with armed forces or armed groups should make use of the Inter-Agency Standing Committee's Guidance on Psychosocial Support [Author's Note: http://www.humanitarianinfo.org/iasc/content/subsidi/tf_mhps/default.asp?bodyID=5&publish=0]. The following principles should inform approaches to psycho-social support:
 - 7.75.0 The development of strong networks of peer support through youth groups or other community based programmes such as girls' clubs can allow young people to work together to solve problems, develop social competencies appropriate to civilian life and define their roles and responsibilities in their community;

- 7.75.1 Culturally appropriate approaches to assisting children with emotional and behavioural problems should be identified and assessed. Programmes should include recreational activities in order to promote development and well being, enable recovery, and to replace the military mentality with the community spirit needed to rebuild communities and support reconciliation;
 - 7.75.2 It should not be assumed that all children associated with an armed force or armed group are traumatised – practical concerns such as identifying education or livelihood opportunities may be the priority for many children;
 - 7.75.3 Referral support should be available for children who have been severely affected. Actors should avoid assumptions about which children may be most affected and which sets of violations will result in children becoming severely affected;
 - 7.75.4 The provision of a safe and supportive environment where children are kept fully informed about what is going to happen and where health and other basic needs can be met is fundamental to psychosocial well being;
 - 7.75.5 Children should be allowed the opportunity to talk individually or in a group about their future or about past experiences, if they wish to do so. There should not be an expectation that children have to “open up” and counselling should not be forced on them. Most children benefit from a sensitive combination of traditional approaches and opportunities for supportive conversations;
 - 7.75.6 Programmes should acknowledge that girls’ and boys’ experiences may be very different and that their psychosocial needs will reflect their differential experiences;
 - 7.75.7 Programmes should acknowledge that children’s experiences will vary according to their age and level of responsibilities within the armed force or armed group and that this will have an impact on their psychosocial needs.
- 7.76 Trained staff members should be available to provide psychosocial assistance to children who have been subjected to sexual violence. Such violations are likely to have a profound and long lasting impact on their capacities for social relations and reintegration into the community.

Reintegration, education, vocational and skills training and livelihoods

- 7.77 Education, vocational and skills training and / or opportunities to support their own and their family’s livelihoods are essential elements for reintegration. Reintegration programmes should allow and encourage access for all

groups, including children who need child care facilities. This support should be free, available on a part time as well as full time basis, and include informal as well as formal assistance. Children who participate should receive food whilst they are there and the hours should be flexible to allow for other commitments. Approaches to providing support of this kind should be adapted according to the child's age, experiences, and circumstances.

- 7.78 Educational activities should take into account the children's lost educational opportunities, their age and stage of development, their experiences with armed forces or armed groups and the potential to promote psychosocial well being, including a sense of self worth. Children with disability should be included in educational activities with their peers.
- 7.79 Educational and skills training should recognise that many children who were associated with armed forces or armed groups, while missing years of education, have learned other skills and competencies that they do not want to lose and which can be useful in civilian society.
- 7.80 Accelerated learning programmes suitable for adolescents who have missed years of school should be compatible with and recognised by the formal system of education.
- 7.81 Alternative forms of education such as adult literacy classes or evening classes should be offered to children who cannot or do not wish to enter the formal educational system.
- 7.82 Access to education or training programmes is likely to be even more difficult for girls than for boys for a variety of reasons including cultural expectations, poverty, and the need for girls to earn a livelihood, work at home, or look after children. Training programmes should include but not be restricted to occupations considered suitable for girls to enable subsequent income generation while building on the skills and abilities they have developed while with the armed force or armed group.
- 7.83 Provision should be made for relevant vocational training and opportunities for employment, suitable for the needs of all girls and boys including those with disabilities. The following guidance should be adhered to:
 - 7.83.0 An adequate technical analysis of the livelihood systems, market opportunities, and household economies in the places to which children are returning should be used to develop economically relevant training, alternative forms of education, and opportunities for economic reintegration;
 - 7.83.1 Actors supporting children's reintegration should coordinate their work, learn from each other, develop joint programmes, ensure appropriate referrals to those having particular expertise in income generation and vocational training and take measures to avoid variations in the benefits of their respective programmes;
 - 7.83.2 Consultation with communities should develop local programmes such as collective initiatives that benefit small groups of children and the community they return to;

- 7.83.3 Training in very basic business skills is also needed to prepare children to keep accounts and handle money;
 - 7.83.4 Young people with no previous work experience should be offered apprenticeship and/or 'on-the-job' training opportunities;
 - 7.83.5 Children who need to earn a living immediately upon return to their family and community should have opportunities to do so while they obtain professional training and/or an improved education. For example, the sale of some objects produced in the training phase could allow them to purchase the tools they need for future work. In some circumstances, limited materials can be provided as start up support;
 - 7.83.6 Life skills training – including civic education, parenting skills, rights at work and home, prevention of HIV/AIDS, and education to counter interpersonal violence – should also be part of all programmes designed for young people;
 - 7.83.7 Life skills programming should be sensitive to the particular challenges faced by girls upon reintegration. It should allow both girls and boys to acquire a greater understanding of the challenges faced by the other and foster positive gender relationships;
 - 7.83.8 Providing children with opportunities to begin to learn or relearn skills such as non-violent conflict resolution and anger management can be very helpful to children who have learnt to use violence and aggression in their everyday lives;
 - 7.83.9 Training programmes for girls should take into account child care and meet other needs while training, such as flexible training schedules.
- 7.84 Care must be taken that vocational or skills training programmes do not support or lead to exploitation of children or child labour. Work and education should be balanced.

8 Justice

- 8.0 These principles should be referred to when monitoring and reporting on the treatment of children within various justice mechanisms, including transitional justice and truth commissions. They should form the basis of advocacy with national and international institutions and bodies on the treatment of children who have been associated with armed forces or armed groups.

Ending the culture of impunity

- 8.1 Ending impunity for those responsible for unlawfully recruiting or using children in armed conflict, and the existence of mechanisms to hold

such individuals to account can serve as a powerful deterrent against such violations.

- 8.2 National justice mechanisms and the adoption and implementation of laws to uphold international law, as well as international or hybrid tribunals to address violations of humanitarian and human rights law should be supported at all times.
- 8.3 Advocacy should be directed at states to ratify the Rome Statute of the International Criminal Court and to adopt its provisions in national law.
- 8.4 All feasible measures should be taken to protect the rights of child witnesses and victims who may be called upon to provide evidence of any sort against or on behalf of alleged perpetrators of crimes against them or others. In no circumstances should the provision of services or support be dependent on a child's full participation in justice mechanisms.
- 8.5 States should ensure that perpetrators of violence against children associated with armed forces or armed groups, including sexual violence against girls are prosecuted, either through national legislation or through the International Criminal Court.

The treatment of children within justice mechanisms

- 8.6 The Rome Statute of the International Criminal Court states that the Court shall have no jurisdiction over any person who was under 18 at the time of the alleged commission of a crime. Children should not be prosecuted by an international court or tribunal.
- 8.7 Children who have been associated with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership of those forces or groups.
- 8.8 Children accused of crimes under international or national law allegedly committed while associated with armed forces or armed groups are entitled to be treated in accordance with international standards for juvenile justice.
- 8.9 All relevant international laws and standards must be respected, with due consideration to the defendants' status as children; moreover:
 - 8.9.0 Alternatives to judicial proceedings should be sought for children at the national level;
 - 8.9.1 If national judicial proceedings take place, children are entitled to the highest standards of safeguards available according to international law and standards and every effort should be made to seek alternatives to placing the child in institutions.
- 8.10 Where large numbers of people are facing criminal proceedings as a result of armed conflict, the processing the cases of children and of mothers who have children with them in detention should take priority.
- 8.11 Children associated with armed forces or armed groups who return to communities without undergoing any judicial or other proceedings should be

closely monitored to ensure that they are not treated as scapegoats or subjected to any processes or mechanisms that contravene their rights.

Information management

- 8.12 Information should be gathered from children only in a manner that respects their rights and protects against causing additional distress to the child. It should be regarded as confidential.
- 8.13 Material drawn from information gathered from children might be shared for the purposes of supporting justice mechanisms that are themselves designed in a way that respects children's rights and does not cause distress to the child, as long as the material so disclosed does not identify particular children. Specific information gathered from children should in general only be disclosed upon a court order and in responding to such an order all efforts should be made to secure a further court order ensuring that the information will be treated in a way that respects children's rights and does not cause distress to the child. Note that certain organisations, including United Nations organisations and the ICRC, are afforded broad immunities from, among other things, court orders, though they are generally expected to cooperate in the proper administration of justice.

Truth-seeking and reconciliation mechanisms

- 8.14 Where truth-seeking and reconciliation mechanisms are established, and where the involvement of children is supported and promoted, all feasible measures shall be taken to protect the rights of children throughout the process, in accordance with international human rights and legal standards.
- 8.15 All children who take part in these mechanisms, including those who have been associated with armed forces or armed groups should be treated equally as witnesses or as victims.
- 8.16 Children's participation in these mechanisms must be voluntary. No provision of services or support should be dependent on their participation in these mechanisms.

Civil proceedings

- 8.17 Specific issues that only emerge over time, such as land and property rights, have presented major obstacles to the reintegration of children in some

contexts. Where necessary, children must be represented and assisted in the appropriate fora.

9 Monitoring and Follow-up

- 9.0 Monitoring and follow-up of children are essential to ensure long term reintegration, the protection and upholding of rights and benefits, to prevent re-recruitment, and to identify and respond appropriately to children who experience serious difficulties with reintegration. In order to be effective, the community, including children formerly associated with armed forces or armed groups and other children affected by armed conflict, should be involved in planning the criteria and process for follow-up. Local capacity should be supported or developed to provide long term monitoring, support and intervention if children are felt to be at significant risk.
- 9.1 Actors should be alert to the possibility that individually focused monitoring may have for stigmatising children and take adequate measures to avoid this happening.
- 9.2 The community as described above should also be involved in deciding at which point a child can be considered to be successfully reintegrated into civilian life.
- 9.3 Such monitoring and decision-making should include and link local leaders, mechanisms and structures with relevant national and sub-regional mechanisms.
- 9.4 Girls may require a longer period of follow-up than boys or different approaches. Girl mothers will need to be supported in both the emotional and practical challenge of being in a mothering role and provided with appropriate options in a supportive environment.

10 Monitoring and Evaluation of Programme Interventions

- 10.0 Programmes to prevent recruitment of children and to protect, release and reintegrate them should be jointly and constantly monitored and evaluated with communities. Children, particularly girls, who have been associated with armed forces or armed groups, should be involved in the monitoring and evaluation of initiatives aimed at supporting them.
- 10.1 All actors working to support children's reintegration should develop common approaches and inform children of the nature of support available. There should be no discrimination based on age, gender, political or religious, affiliation race or ethnicity or on the nature or the level of the child's involvement in the armed forces or armed groups.

Appendix G.6

The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups

[Author's note: available at http://www.diplomatie.gouv.fr/en/france-priorities_1/democracy-human-rights_1101/children-rights_3265/paris-commitments_8658.html, accessed February 27, 2009]

We,

Ministers and representatives of countries having gathered in Paris on 5 and 6 February 2007 to strongly reaffirm our collective concern at the plight of children affected by armed conflict, our recognition of the physical, developmental, emotional, mental, social and spiritual harm to children resulting from the violation of their rights during armed conflict, and our commitment to identifying and implementing lasting solutions to the problem of unlawful recruitment or use of children in armed conflict,

Recalling all the international instruments relevant to the prevention of recruitment or use of children in armed conflict, their protection and reintegration, and to the fight against impunity for violators of children's rights, as well as relevant regional instruments, as listed in the Annexe hereto, and in particular calling upon all States which have not done so yet to consider ratifying as a matter of priority the Convention on the Rights of the Child and the Optional Protocols thereto,

Recalling UN Security Council resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004) and 1612 (2005) which have repeatedly condemned and called for an end to the unlawful recruitment and use of children by parties to armed conflict contrary to international law, and led to the establishment of a Monitoring and Reporting mechanism and of a Working Group to address violations of children's rights committed in times of armed conflict,

Recalling the 1997 Cape Town principles ("Cape Town principles and best practices on the prevention of recruitment of children into the armed forces and on demobilization and social reintegration of child soldiers in Africa"), that have been helpful to guide decisions and actions taken to prevent the unlawful recruitment of children under 18 years of age into armed forces or groups, stop their use,

secure their release, provide protection and support their reintegration or integration into family, community and civilian life.

Deeply concerned that girls continue to be largely invisible in programming and diplomatic initiatives regarding the unlawful recruitment and use of children by armed forces or groups and committed to reversing and redressing this imbalance,

Deeply concerned that the Millennium Development Goals of universal primary education and the development of decent and productive work for youth will not be reached as long as children continue to be unlawfully recruited or used in armed conflicts,

Recognizing that States bear the primary responsibility for providing security to and ensuring the protection of all children within their jurisdiction, that children's reintegration into civilian life is the ultimate goal of the process of securing their release from armed forces or groups, and that planning for reintegration should inform all stages of the process and should commence at the earliest possible stage;

We commit ourselves:

1. To spare no effort to end the unlawful recruitment and use of children by armed forces or groups in all regions of the world, i.a. through the ratification and implementation of all relevant international instruments and through international cooperation;
2. To make every effort to uphold and apply the Paris principles ("The Guidelines to Protect Children from Unlawful Recruitment or Use by Armed Forces and Armed Groups") wherever possible in our political, diplomatic, humanitarian, technical assistance and funding roles and consistent with our international obligations.

In particular, we commit ourselves:

3. To ensure that conscription and enlistment procedures for recruitment into armed forces are established and that they comply with applicable international law, including the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, and to establish mechanisms to ensure that age of entry requirements are fully respected and that responsibility for establishing the age of the recruit rests with the recruiting party,
4. To take all feasible measures, including legal and administrative measures, to prevent armed groups within the jurisdiction of our State that are distinct from our armed forces from recruiting or using children under 18 years of age in hostilities.
5. To adhere to the principle that the release of all children recruited or used contrary to international law by armed forces or groups shall be sought

unconditionally at all times, including during armed conflict, and that actions to secure the release, protection and reintegration of such children should not be dependent on a cease-fire or peace agreement or on any release or demobilisation process for adults,

6. To fight against impunity, and to effectively investigate and prosecute those persons who have unlawfully recruited children under 18 years of age into armed forces or groups, or used them to participate actively in hostilities, bearing in mind that peace or other agreements aiming to bring about an end to hostilities should not include amnesty provisions for perpetrators of crimes under international law, including those committed against children,
7. To use all available means to support monitoring and reporting efforts at the national, regional and international levels on violations of child rights during of armed conflict, including in relation to the unlawful recruitment or use of children, and in particular to support the monitoring and reporting mechanism established by Security Council resolutions 1539 and 1612,
8. To fully cooperate with the implementation of targeted measures taken by Security Council against parties to an armed conflict which unlawfully recruit or use children, such as, but not limited to, a ban on arms and equipment transfers or military assistance to these parties.
9. To take all necessary measures, including the elaboration of rules of engagement and standard operating procedures, and the training of all relevant personnel therein, to ensure that children recruited or used by enemy armed forces or groups who are deprived of their liberty are treated in accordance with international humanitarian law and human rights law, with special consideration for their status as children.
10. To ensure that all children under 18 years of age who are detained on criminal charges are treated in accordance with relevant international law and standards, including those provisions which are specifically applicable to children; and that children who have been unlawfully recruited or used by armed forces are not considered as deserters under applicable domestic law.
11. To ensure that children under 18 years of age who are or who have been unlawfully recruited or used by armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators. They should be treated in accordance with international standards for juvenile justice, such as in a framework of restorative justice and social rehabilitation.
12. In line with the Convention on the Rights of the Child and other international standards for juvenile justice, to seek alternatives to judicial proceedings wherever appropriate and desirable, and to ensure that, where truth-seeking and reconciliation mechanisms are established, the involvement of children is supported and promoted, that measures are taken to protect the rights of children throughout the process, and in particular that children's participation is voluntary.
13. To ensure that children who are released from or have left armed forces or groups are not used for political purposes by any party, including political propaganda.

14. To ensure that children who cross international borders are treated in accordance with international human rights and humanitarian and refugee law, and in particular, that children who flee to another country to escape unlawful recruitment or use by armed forces or armed groups can effectively exercise their right to seek asylum, that asylum procedures are age and gender-sensitive and that the refugee definition is interpreted in an age and gender-sensitive manner taking into account the particular forms of persecution experienced by girls and boys, including unlawful under-age recruitment or use in armed conflict, and that no child is returned in any manner to the borders of a State where there is real risk of torture or cruel and unusual treatment or punishment or when that child is recognized as a Convention refugee according to the 1951 Refugee Convention, or of unlawful recruitment, re-recruitment or use by armed forces or groups, assessed on a case by case basis.
15. To ensure that children who are not in their state of nationality, including those recognized as refugees and granted asylum are fully entitled to the enjoyment of their human rights on an equal basis with other children.
16. To advocate and seek for the inclusion in peace and ceasefire agreements by parties to armed conflict that have unlawfully recruited or used children of minimum standards regarding the cessation of all recruitments, the registration, the release and the treatment thereafter of children, including provisions to meet the specific needs of girls and their children for protection and assistance.
17. To ensure that any programmes or actions conducted or funded to prevent unlawful recruitment and to support children unlawfully recruited or used by armed forces or groups are based on humanitarian principles, meet applicable minimum standards, and develop systems for accountability, including the adoption of a code of conduct on the protection of children and on sexual exploitation and abuse.
18. To ensure that armed forces or groups having recruited or used children unlawfully are not allowed to secure advantages during peace negotiations and security sector reforms, such as using the number of children in their ranks to increase their share of troop size in a power sharing agreement.
19. To ensure that any funding for child protection is made available as early as possible, including in the absence of any formal peace process and formal disarmament, demobilisation and reintegration (DDR) planning, and to also ensure that funding remains available for the time required and for activities in communities benefiting a wide range of children affected by armed conflict in order to achieve full and effective integration or reintegration into civilian life.
20. In that context, we, Ministers and representatives of countries having gathered in Paris on 5 and 6 February 2007, welcome the update of the 1997 Cape Town principles (“the Paris principles”), which will be a useful guide in our common efforts to fight against the plight of children affected by armed conflicts.

Appendix G.7

United Nations Resolution 1820 (2008): S/RES/1820 (2008)

[Author's note: resolution regarding sexual violence against vulnerable groups, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement>, accessed February 27, 2009]

Adopted by the Security Council at its 5916th meeting, on June 19, 2008

The Security Council,

Reaffirming its commitment to the continuing and full implementation of resolution 1325 (2000), 1612 (2005) and 1674 (2006) and recalling the Statements of its president of 31 October, 2001 (Security Council/PRST/2001/31), 31 October, 2002 (Security Council/PRST/2002/32), 28 October, 2004 (Security Council/PRST/2004/40), 27 October, 2005 (Security Council/PRST/2005/52), 8 November, 2006 (Security Council/PRST/2006/42), 7 March, 2007 (Security Council/PRST/2007/5), and 24 October, 2007 (Security Council/PRST/2007/40);

Guided by the purposes and principles of the Charter of the United Nations,

Reaffirming also the resolve expressed in the 2005 World Summit Outcome Document to eliminate all forms of violence against women and girls, including by ending impunity and by ensuring the protection of civilians, in particular women and girls, during and after armed conflicts, in accordance with the obligations States have undertaken under international humanitarian law and international human rights law;

Recalling the commitments of the Beijing Declaration and Platform for Action (A/52/231) as well as those contained in the outcome document of the twenty-third Special Session of the United Nations General Assembly entitled "Women 2000: Gender Equality, Development and Peace for the Twenty-first Century" (A/S-23/10/Rev.1), in particular those concerning sexual violence and women in situations of armed conflict;

Reaffirming also the obligations of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, the Optional Protocol thereto, the Convention on the Rights of the Child and the Optional Protocols thereto, and urging states that have not yet done so to consider ratifying or acceding to them,

Noting that civilians account for the vast majority of those adversely affected by armed conflict; that women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group; and that sexual violence perpetrated in this manner may in some instances persist after the cessation of hostilities;

Recalling its condemnation in the strongest terms of all sexual and other forms of violence committed against civilians in armed conflict, in particular women and children;

Reiterating deep concern that, despite its repeated condemnation of violence against women and children in situations of armed conflict, including sexual violence in situations of armed conflict, and despite its calls addressed to all parties to armed conflict for the cessation of such acts with immediate effect, such acts continue to occur, and in some situations have become systematic and widespread, reaching appalling levels of brutality,

Recalling the inclusion of a range of sexual violence offences in the Rome Statute of the International Criminal Court and the statutes of the ad hoc international criminal tribunals,

Reaffirming the important role of women in the prevention and resolution of conflicts and in peacebuilding, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution,

Deeply concerned also about the persistent obstacles and challenges to women's participation and full involvement in the prevention and resolution of conflicts as a result of violence, intimidation and discrimination, which erode women's capacity and legitimacy to participate in post-conflict public life, and acknowledging the negative impact this has on durable peace, security and reconciliation, including post-conflict peacebuilding,

Recognizing that States bear primary responsibility to respect and ensure the human rights of their citizens, as well as all individuals within their territory as provided for by relevant international law,

Reaffirming that parties to armed conflict bear the primary responsibility to take all feasible steps to ensure the protection of affected civilians,

Welcoming the ongoing coordination of efforts within the United Nations system, marked by the inter-agency initiative "United Nations Action against Sexual Violence in Conflict," to create awareness about sexual violence in armed conflicts and post-conflict situations and, ultimately, to put an end to it,

1. *Stresses* that sexual violence, when used or commissioned as a tactic of war in order to deliberately target civilians or as a part of a widespread or systematic attack against civilian populations, can significantly exacerbate situations of armed conflict and may impede the restoration of international peace and security, *affirms* in this regard that effective steps to prevent and respond to such acts of sexual violence can significantly contribute to the maintenance of international peace and security, and *expresses its readiness*, when considering situations on the agenda of the Council, to, where necessary, adopt appropriate steps to address widespread or systematic sexual violence;
2. *Demands* the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians with immediate effect;
3. *Demands* that all parties to armed conflict immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence, which could include, inter alia, enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the categorical prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting armed and security forces to take into account past actions of rape and other forms of sexual violence, and evacuation of women and children under imminent threat of sexual violence to safety; and *requests* the Secretary-General, where appropriate, to encourage dialogue to address this issue in the context of broader discussions of conflict resolution between appropriate UN officials and the parties to the conflict, taking into account, inter alia, the views expressed by women of affected local communities;
4. *Notes* that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, *stresses the need for* the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and *calls upon* Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and *stresses* the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation;
5. *Affirms its intention*, when establishing and renewing state-specific sanctions regimes, to take into consideration the appropriateness of targeted and graduated measures against parties to situations of armed conflict who commit rape and other forms of sexual violence against women and girls in situations of armed conflict;
6. *Requests* the Secretary-General, in consultation with the Security Council, the Special Committee on Peacekeeping Operations and its Working Group and relevant States, as appropriate, to develop and implement appropriate training programs for all peacekeeping and humanitarian personnel deployed by the United Nations in the context of missions as mandated by the Council to help

them better prevent, recognize and respond to sexual violence and other forms of violence against civilians;

7. *Requests* the Secretary-General to continue and strengthen efforts to implement the policy of zero tolerance of sexual exploitation and abuse in United Nations peacekeeping operations; and *urges* troop and police contributing countries to take appropriate preventative action, including pre-deployment and in-theater awareness training, and other action to ensure full accountability in cases of such conduct involving their personnel;
8. *Encourages* troop and police contributing countries, in consultation with the Secretary-General, to consider steps they could take to heighten awareness and the responsiveness of their personnel participating in UN peacekeeping operations to protect civilians, including women and children, and prevent sexual violence against women and girls in conflict and post-conflict situations, including wherever possible the deployment of a higher percentage of women peacekeepers or police;
9. *Requests* the Secretary-General to develop effective guidelines and strategies to enhance the ability of relevant UN peacekeeping operations, consistent with their mandates, to protect civilians, including women and girls, from all forms of sexual violence and to systematically include in his written reports to the Council on conflict situations his observations concerning the protection of women and girls and recommendations in this regard;
10. *Requests* the Secretary-General and relevant United Nations agencies, inter alia, through consultation with women and women-led organizations as appropriate, to develop effective mechanisms for providing protection from violence, including in particular sexual violence, to women and girls in and around UN managed refugee and internally displaced persons camps, as well as in all disarmament, demobilization, and reintegration processes, and in justice and security sector reform efforts assisted by the United Nations;
11. *Stresses* the important role the Peacebuilding Commission can play by including in its advice and recommendations for post-conflict peacebuilding strategies, where appropriate, ways to address sexual violence committed during and in the aftermath of armed conflict, and in ensuring consultation and effective representation of women's civil society in its country-specific configurations, as part of its wider approach to gender issues;
12. *Urges* the Secretary-General and his Special Envoys to invite women to participate in discussions pertinent to the prevention and resolution of conflict, the maintenance of peace and security, and post-conflict peacebuilding, and encourages all parties to such talks to facilitate the equal and full participation of women at decision-making levels;
13. *Urges* all parties concerned, including Member States, United Nations entities and financial institutions, to support the development and strengthening of the capacities of national institutions, in particular of judicial and health systems, and of local civil society networks in order to provide sustainable assistance to victims of sexual violence in armed conflict and post-conflict situations;

14. *Urges* appropriate regional and sub-regional bodies in particular to consider developing and implementing policies, activities, and advocacy for the benefit of women and girls affected by sexual violence in armed conflict;
15. *Also requests* the Secretary-General to submit a report to the Council by 30 June 2009 on the implementation of this resolution in the context of situations which are on the agenda of the Council, utilizing information from available United Nations sources, including country teams, peacekeeping operations, and other United Nations personnel, which would include, inter alia, information on situations of armed conflict in which sexual violence has been widely or systematically employed against civilians; analysis of the prevalence and trends of sexual violence in situations of armed conflict; proposals for strategies to minimize the susceptibility of women and girls to such violence; benchmarks for measuring progress in preventing and addressing sexual violence; appropriate input from United Nations implementing partners in the field; information on his plans for facilitating the collection of timely, objective, accurate, and reliable information on the use of sexual violence in situations of armed conflict, including through improved coordination of UN activities on the ground and at Headquarters; and information on actions taken by parties to armed conflict to implement their responsibilities as described in this resolution, in particular by immediately and completely ceasing all acts of sexual violence and in taking appropriate measures to protect women and girls from all forms of sexual violence;
16. *Decides* to remain actively seized of the matter.

Appendix H.1

Brussels Principles Against Impunity and for International Justice

Adopted by the “Brussels Group for International Justice”, Following on from the Colloquium “The Fight Against Impunity: Stakes and Perspectives” (Brussels, March 11–13, 2002)

[Author’s note: available at <http://www.iccnw.org/documents/BrusselsPrinciples6Nov02.pdf>, accessed February 27, 2009]

In numerous countries, the most serious crimes affecting the international community as a whole remain unpunished. The victims dare not speak out; the perpetrators are either not pursued or cannot be found; the authorities either lack the will or the means to ensure justice. Impunity holds disastrous consequences: it allows the perpetrators to think that they will not have to face the consequences of their actions, it ignores the distress of the victims and serves to perpetuate crime. Impunity also weakens state institutions, it denies human values and debases the whole of humanity.

Nonetheless, the international community has stepped up its efforts to fight against impunity. In 1993 and 1994, two ad hoc tribunals were set up to try the serious crimes committed in the former Yugoslavia and Rwanda; in 2002, the United Nations established the Special Tribunal for Sierra Leone; the Rome Statute of the International Criminal Court (ICC) came into force on 1 July, 2002.

However, the jurisdiction of the ad hoc tribunals is limited in terms of time and geographic reach. As regards the ICC, it is only called on to try the tip of the iceberg of the serious crimes of international humanitarian law. Indeed, the Rome Statute of the International Criminal Court confines its jurisdiction to crimes committed since its entry into force, to cases referred to it by the UN Security Council, or to crimes either committed on the territory or by a national of the states that are a party to it or have recognized its jurisdiction. Furthermore, the latter provision is only valid in instances where the states competent to judge the crimes do not try the perpetrators themselves.

Thus, international justice is, henceforth, founded on the principles of complementarity and collaboration between international jurisdictions and national jurisdictions. Each one acts as a court of the international community when it tries serious crimes of international humanitarian law.

The globalization of criminal justice is not, however, limited to the establishment of new international institutions. It also manifests itself in certain spectacular

applications of international law, particularly through the case law of the ad hoc international tribunals. In addition, an increasing number of trials, based on universal jurisdiction, are conducted in several states, mainly spurred by the victims and non-governmental organizations. Judges are becoming aware of the role they can and must play in the fight against impunity. Through the work of the International Law Commission, the International Law Association and other learned societies (see the Princeton Principles on Universal Jurisdiction), legal doctrine plays a part in the efforts aimed at codifying international criminal law as regards the repression of serious crimes of international humanitarian law.

Certain notorious cases have, however, undermined the implementation of these principles, be it with regard to the scope of the immunity from criminal jurisdiction of foreign government officials or the exercise of universal jurisdiction in absentia.

Under such circumstances, the international community, states and civil society are faced with the question of knowing whether they really want to fight impunity and how to do it effectively.

It was in this context and spirit that the colloquium entitled “The fight against impunity: stakes and perspectives” was held from 11 to 13, March 2002, in Brussels, under the auspices of the Belgian Ministry of Foreign Affairs and the Coalition for the International Criminal Court. This colloquium resulted in the creation of the Brussels Group for International Justice”, composed of the following individual members, Irune AGUIRREZABAL QUIJERA (in her personal capacity), Federico ANDREU, Montserrat CARRERAS, Carlos CASTRESANA FERNANDEZ, Eric DAVID, Claude DEBRULLE (in his personal capacity), Eric GILLET, Patricia JASPIS, Stephan PARMENTIER, Jan WOUTERS. The Group formulated a body of principles that were discussed during the course of the colloquium, without necessarily corresponding with the ensuing recommendations.

Considering that impunity and democracy are incompatible with one another, the Group expresses the wish that these principles may make a significant contribution towards the development of international justice and the fight against impunity.

The Brussels Principles address themselves to the international community in all its constitutive parts: states, international organizations, civil society, NGOs. First and foremost, however, they address themselves to all professionals in the justice system: public prosecutors, judges, investigators, and lawyers.

The principles are divided in five sections:

1. Definitions and fundamental principles (principles 1 to 5)
2. Criminal prosecution and obstacles (principles 6 to 12).
3. Universal jurisdiction (principles 13 to 16).
4. International police and judicial co-operation (principles 17 to 22).
5. Non-judicial mechanisms (principles 23 and 24).

The Brussels Principles are based on international law. However, when in some cases they depart from it, they are formulated according to the optative or conditional mode. The Principles are interlinked in their interpretation and implementation, and each principle should be read taking into account the other principles. The principles have been translated into four languages: French, Flemish, Spanish and English.

I. Definitions and fundamental principles

Principle 1 – Impunity and international justice

1. “Impunity” is understood as failing to investigate, prosecute and try natural and legal persons guilty of serious violations of human rights and international humanitarian law. For the purpose of these Principles, serious violations of human rights and international humanitarian law mean in particular war crimes, crimes against humanity, genocide, torture, extrajudicial executions and forced disappearances (hereinafter “serious crimes”).
2. The scope of serious crimes extends beyond the limits of the territories where they are committed. They constitute a challenge for the public conscience and result in their authors being considered as enemies of humanity (*hostes humani generis*). Within this context, the fight against impunity forms part of the fight for international justice and constitutes a responsibility for the entire international community.
3. The obligation to repress serious crimes constitutes a peremptory norm (*jus cogens*) of international law.

Principle 2 – Victims rights

1. Fighting against impunity and for international justice implies the recourse to strategies associating the victims (direct and indirect), with a view to defending their rights. These rights include:
 - (a) the right to know the truth about serious crimes;
 - (b) the right to obtain justice, notably, the right
 - to obtain the prosecution and trial by a criminal jurisdiction of the presumed authors of the serious crimes;
 - to obtain adequate redress for the damages suffered;
 - to have access, if necessary, to administrative bodies.
2. These rights may never be compromised.
3. All final judgments must be executed.

Principle 3 – Jurisdictions concerned

These Principles are applicable to all international or national jurisdictions of statute or common law.

Principle 4 – Co-operation and complementarity between jurisdictions

1. The fight against impunity and the protection of the rights of the victims are dependent upon co-operation between, and inseparable and complementary action by:
 - (a) the courts of the countries where the crimes were committed;
 - (b) the courts of third states, including, if necessary, when they exercise universal jurisdiction;
 - (c) the international courts.
2. The members of the international community must ensure, individually and collectively, and in conformity with international law, that the forum state executes the final judgments pronounced by its courts in relation to serious crimes.
3. Third states must take all the necessary steps to ensure that the awards of reparations in civil cases or the decisions regarding awards of reparations in criminal judgments relating to serious crimes pronounced in the forum state are recognized and executed in the said third states.
4. In the event that the author of a serious crime should find himself or herself on the territory of a state that fails to extradite him or her to the state where he or she has been sentenced for the crime in question, the state of the place where he or she finds himself or herself should grant itself jurisdiction to execute the criminal sanction, pronounced by virtue of a fair trial by the forum state and duly enforceable on the latter's territory.

Principle 5 – Sources of rights and obligations of states

1. The rules governing the incrimination and repression of serious crimes are set forth in a number of international treaties of a general nature as well as in the general customary international law ensuing from these treaties, from the acts of international organizations (UN, specialized institutions, regional organizations), from the practice of states, from international and national case law, as well as from the most highly qualified publicists (notably the works of the International Law Commission).
2. States should become parties to the treaties that sanction the observance of fundamental rights and freedoms and international humanitarian law, in particular the treaties that provide for the incrimination and repression of serious crimes.
3. States should not formulate reservations and, if necessary, should remove any existing reservations whenever these limit the scope of the treaties mentioned in the previous paragraph.

II. Criminal prosecution and obstacles

Principle 6 – Legality and non-retroactivity of the norms of criminal law

1. The criminal nature of the facts in question should be appraised in relation to national or international law. It is therefore not contrary to the principles of legality and non-retroactivity of criminal laws to prosecute the authors of acts or omissions considered criminal under international law alone at the time when they were committed.
2. Without prejudice to the first paragraph of the present Principle, states should criminalize conduct amounting to serious crimes in their national laws.

Principle 7 – Imprescriptibility

1. War crimes, crimes against humanity and genocide are imprescriptible [note of the author: not subject to time limitation periods for the bringing of a prosecutorial criminal or civil action against the perpetrators].
2. Given the peremptory nature (*jus cogens*) of the prohibitions under international law, namely torture, extrajudicial executions and forced disappearances, they should be imprescriptible, even when they do not constitute the serious crimes mentioned in the first paragraph of this Principle.
3. As regards the serious crimes mentioned in the second paragraph of this Principle, prescription will, in any event, be suspended for:
 - (a) the periods during which the victims find themselves unable to exercise their rights;
 - (b) the periods during which the authorities, *de jure* or *de facto*, are unwilling or unable to conduct investigations and to bring the presumed authors of these serious crimes before the courts.
4. In cases where serious crimes constitute continuing violations, their possible prescription will take effect only once the said violations have ended. This applies, in particular, to cases of forced disappearances.

Principle 8 – Immunities

1. Immunities or special procedural rules that can be attached to the official status of a person, by virtue of domestic or international law, cannot prevent international criminal jurisdictions from exercising their jurisdiction with regard to this

person. In accordance with the peremptory nature (*jus cogens*) of the obligation to repress serious crimes (Principle 1, § 3), the same principle applies to the national courts of the state for which this person exercises official functions. It should also apply to the national courts of third states.

2. Should immunity nevertheless apply before the court of a third state, it only remains in effect during the exercise of the official function. Nevertheless, it does not affect the principle of universal jurisdiction (cf. Principle 14) in that it does not rule out the launching of legal proceedings in this state, without act of coercion.
3. Any state can request the state for which the presumed author of a serious crime exercises official functions either that it prosecute this person itself, or that it lift the immunity that prevents the courts of the prosecuting third state from exercising its jurisdiction. The rule is applicable irrespective of the duration of the functions exercised. This implies that the state for which these functions are exercised should accept, in the shortest possible time, either to prosecute itself the presumed author of the serious crimes, or to lift the immunity so that justice can be done.
4. Immunity only remains in force for the duration of the official functions of the author of a serious crime. Although the immunity remains in effect for acts that are official functions, once the said functions have come to an end, serious crimes may, under no circumstances, be considered as acts that are official functions.

Principle 9 – Order and responsibility of the superior

1. In the case of serious crimes, the duty of obedience is not a ground for justification.
2. The hierarchical superior is responsible for the behaviour of his or her subordinates in all cases whereby he or she has had, or should have had knowledge of their acts, and for which he or she had the authority to prevent or to put an end to them.
3. The responsibility of the hierarchical superior does not preclude that of the subordinate.

Principle 10 – Amnesties and pardon

1. Measures of amnesty, pardon and other such measures may not undermine the obligations imposed on states by international law to investigate serious crimes, to bring the presumed authors to justice and to grant redress to the victims.
2. This principle applies even at the end of armed conflicts and in processes of reconciliation or transition towards democracy.

3. This principle does not preclude individual measures of pardon or a review of the sentence, provided these are properly motivated and take into account the gravity of the crimes committed.

Principle 11 – Non bis in idem

The principle of non bis in idem is applicable to any final and enforced judgment pronounced at the end of a trial that is fair both for the accused and for the victims.

Principle 12 – Disciplinary sanctions

In the case of serious crimes, a disciplinary action cannot replace legal action.

III. Universal jurisdiction

Principle 13 – Definition and legal basis of universal jurisdiction

1. “Universal jurisdiction” is the right of a state to institute legal proceedings and to try the presumed author of an offence, irrespective of the place where the said offence has been committed, the nationality or the place of residence of its presumed author or of the victim.
2. This jurisdiction is exercisable, in accordance with the rules of fair trial, regardless of whether or not the presumed author is present on the territory of the forum state.
3. If the domestic law of the forum state does not explicitly provide for universal jurisdiction, the courts of this state may exercise it, insofar as international customary law forms a part of the domestic legal system of the state in question.

Principle 14 – Scope of the obligations of states

1. By virtue of international law, any state has the obligation to exercise universal jurisdiction in relation to the presumed author of a serious crime from the moment the said presumed author is present on the territory of that state.
2. International law does not require a state to exercise universal jurisdiction, should the presumed author of a serious crime not be present on its territory (jurisdiction in absentia). In the absence of jurisdiction of an international court,

it would, however, be desirable that a state be able to exercise universal jurisdiction in absentia to make the fight against impunity more effective, even more so when the victims are present on the territory of the forum state. The exercise of such a jurisdiction should, however, not impede the exercise of the jurisdiction of the International Criminal Court.

3. A state is under no obligation to exercise universal jurisdiction if it extradites the presumed author to any other state that requests the extradition with a view to instituting legal proceedings in relation to a serious crime, or if it hands over this person to the International Criminal Court or to any other international jurisdiction.
4. If a demand for extradition is put forward concurrently by various states, the state to which the request is submitted shall rule in light of all the circumstances and, in particular, those laid down in Principle 15 § 2.

Principle 15 – Conflicts of jurisdiction

1. Universal jurisdiction excludes negative conflicts of jurisdiction: a national court may decline its jurisdiction for serious crimes only if it is assumed by a court in another country or an international court.
2. Positive conflicts of jurisdiction that may ensue from the exercise of universal jurisdiction in the case of serious crimes should be settled through consultations or negotiations between the states concerned, and taking into account all relevant circumstances, in particular, the gravity of the crime, the place where it occurred, the date on which the proceedings were initiated, the place of residence of the victims, the nationality of the presumed author, or the observance of the rules governing the right to a fair trial.

Principle 16 – Right of the victims to seek prosecution and to obtain redress

1. States should provide for the possibility for the victims (direct and indirect), irrespective of their nationality, their origin or their place of residence, to seek prosecution through the filing of a complaint and to take part in the trials as parties, with a view to obtaining appropriate redress for the damages suffered.
2. In states where the criminal procedure allows for victims to seek prosecution and to take part in the trials, the law cannot limit these rights or subject them to conditions that would substantially reduce their scope.
3. Associations for the protection of human rights and fundamental freedom and associations of victims (direct and indirect) should be granted an appropriate right to initiate the prosecution through the filing of a complaint, as well as the

possibility to obtain adequate redress for the damages suffered by their members collectively. These rights could only be subject to conditions that would allow the court to which the case was referred to verify that the plaintiff associations are truly independent, as well as to ascertain the democratic nature of their modus operandi and the transparency concerning their sources of funding.

IV. International police and judicial co-operation

Principle 17 – Information and training

In the international domain, even more so than at the national level, the fight against impunity and for international justice rests on two prerequisites:

1. Information should be disseminated regarding the instruments available in this respect: international treaties, domestic laws, implementation procedures, archives open to the public.
2. Training programmes should also be developed for the members of the judicial authorities and police forces who are likely to be involved in this fight.

Principle 18 – Police and judicial co-operation

1. States must provide to each other the greatest possible police and judicial co-operation in any criminal law proceeding relating to serious crimes.
2. The sovereignty, security, public order (*ordre public*) or other essential interests of the state the co-operation of which is requested should not impede the said co-operation, in light of the gravity of the crimes.
3. This co-operation may not undermine the rules of confidentiality which flow from the requirements of the fundamental rights and freedoms, as well as from international humanitarian law.

Principle 19 – A criminal law policy with universal reach

1. The fight against impunity and for international justice calls for the development of a criminal law policy with universal reach. This implies the need for collaboration between the bodies in charge of ensuring the observance of the law, both at national, regional and universal levels. Such collaboration rests, in particular, on police and judicial networks capable of identifying the presumed authors of these crimes, of locating them, searching them and prosecuting them before the most appropriate jurisdictions.

2. One of the linchpins of this policy should consist in the protection of the witnesses and informants prior to, during and after the proceedings, judicial or otherwise. To this effect, intergovernmental agreements should be concluded that would ensure not only that the confidentiality of the persons involved is guaranteed, but also that the costs of moving them to a safe place and accommodating them are reimbursed.
3. To ensure that all the aforementioned measures are effective, both at national and international level, states must provide the necessary financial resources for police and judicial co-operation, as well as for the exercise of universal jurisdiction, in particular, when such funds are necessary to the proper administration of justice in the state in which the presumed author of the serious crime is prosecuted.

Principle 20 – Universal treaty on extradition and judicial co-operation on criminal law

1. Without prejudice to the other sources of international law, the conclusion of a treaty with universal reach in relation to extradition and judicial co-operation in criminal matters would facilitate the effective implementation of universal jurisdiction for the repression of serious crimes.
2. While respecting the international standards already applicable in respect of ordinary offences, this treaty should, at a minimum, provide for:
 - (a) the observance of the principle «aut dedere aut judicare»;
 - (b) the power to extradite nationals.
3. The treaty should likewise provide for:
 - a) the refusal to extradite a person to a state where he or she would run the risk of being sentenced to death; however, such an extradition could be authorized if sufficient guarantees are provided that the sentence in question will not be executed.
 - b) the refusal to extradite when there are serious grounds to believe that:
 - i. the person liable to be extradited will be subjected to torture or to sentences or treatments deemed inhuman or degrading;
 - ii. the extradition request was submitted with a view to prosecuting or punishing a person because of his or her race, religion, nationality or political views, or that the situation of the person in question is likely to be aggravated for one of these reasons.
 - iii. the person liable to be extradited has been the object or will be the object of a flagrant denial of justice.
4. In case of application of the «aut judicare» principle, the said treaty should provide for the transfer of the presumed authors before national jurisdictions that respect the principles of a fair trial.

Principle 21 – Mutual monitoring and observance of the accepted law

1. The United Nations and regional organizations with a democratic vocation should ensure that their members become party to the treaties that incorporate respect for fundamental rights and freedoms, as well as international humanitarian law, and, if necessary, ensure the effective incorporation of these conventions into domestic law.
2. The verification of the implementation of this accepted law should be ensured through the establishment of a mechanism for the mutual monitoring of the commitments made. The said monitoring should be carried out by independent experts appointed by the organization concerned.
3. Should the member states of the organizations mentioned in the first paragraph of this Principle fail to respect the rules in relation to the repression of serious crimes, the said failure should be reported and appropriately publicized. If this is the case, the organizations concerned should sanction the defaulting state, for instance, by depriving it of the rights and privileges deriving from its membership.

Principle 22 – International Criminal Court

1. All states should become Parties to the Rome Statute of the International Criminal Court, adopted on July 17, 1998.
2. Each state party to the Statute must incorporate in its domestic criminal law the crimes referred to in the Statute of the Court, the rules of jurisdiction allowing it to deal with such crimes, pursuant to the principle of complementarity, as well as the means to co-operate with the Court.
3. All Members of the United Nations should do likewise. This principle is based on the possibility for the Security Council to refer to the Prosecutor of the International Criminal Court a situation in which crimes stipulated in the Statute have been committed (Statute, Article 13(b)).
4. In light of the commitment of the United Nations to protect fundamental rights and freedoms and the duty of all states to co-operate to this effect by virtue of the Charter of the United Nations, and given also the “historical importance” attributed by the UN General Assembly to the adoption of the Rome Statute of the International Criminal Court and its wish to see “all states” become party thereto, it would clearly be contrary to international law that a state that is not party to the Statute should take any step or initiative whatsoever that may disrupt or prevent the functioning of the Court.
5. The necessary human and material resources should be provided to the International Criminal Court that will enable it to carry out its important mission

effectively and fully independently, and thus to come up to the expectations of the international community.

V. Non-judicial mechanisms

Principle 23 – Non-judicial commissions of inquiry

1. Non-judicial commissions of inquiry (such as “truth and reconciliation” commissions) and judicial procedures, far from excluding each other, are mutually complementary in the fight against impunity and for international justice. The constitution and activity of these commissions cannot, however, replace judicial procedures.
2. Non-judicial commissions of enquiry can effectively contribute towards the fight against impunity and for international justice, provided they meet the following minimum conditions:
 - (a) they must be preceded by a broad public debate;
 - (b) they must rest on a proper legal basis that clearly establishes their mandate, their composition and their *modus operandi*;
 - (c) they must reflect the composition of society;
 - (d) they must be free from any political or government interference;
 - (e) they must operate in accordance with the minimum standards of a fair trial and of protection of the victims, the offenders, the witnesses and all other persons concerned;
 - (f) they must have the power to call witnesses;
 - (g) they must have the power to make recommendations;
 - (h) they must have the necessary resources at their disposal;
 - (i) they must publish and widely disseminate a final report, at least, in the official languages of the country.
3. The recommendations of such commissions should be implemented and undergo regular evaluations, both by state bodies and by the international community.

Principle 24 – Policies of reparations

1. In addition to judicial redress, policies of reparations devised by national governments and international organizations constitute a useful mechanism in the fight against impunity and for international justice. Such policies should seek to ensure the effectiveness of judicial redress and to promote adequate individual and collective redress, so as to prevent such serious crimes from recurring in future.

2. The policies should not be limited to financial compensations. They should also include, inter alia: the restitution to the victims of their belongings, the rehabilitation of the victims through the provision of appropriate medical, psychological and social assistance, the granting of satisfaction in the form of, for instance, apologies or requests for forgiveness, guarantees of non-repetition of serious crimes including, for example, educational measures and institutional reforms aimed at preventing serious crimes.
3. In addition to judicial measures and redress, these policies should also promote reconciliation.
4. Within the framework of transition to democracy, it may be necessary to proceed to institutional reforms in relation to the army, the justice system, the police, the education system and the means of communication.

About the Author

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