SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER

Before:	Justice Emmanuel Ayoola, Presiding Justice George Gelaga King Justice Renate Winter Justice Geoffrey Robertson	
Registrar:	Robin Vincent	
Date:	31 May 2004	
PROSECUTOR	Against	SAM HINGA NORMAN (Case No.SCSL-2004-14-AR72(E))

DECISION ON PRELIMINARY MOTION BASED ON LACK OF JURISDICTION (CHILD RECRUITMENT)

Office of the Prosecutor:

Desmond de Silva
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Defence Counsel:

James Blyden Jenkins-Johnson
Sulaiman Banja Tejan-Sie
Timothy Owen
Quincy Whitaker

Amici Curiae:
University of Toronto
International Human Rights Clinic
UNICEF

Intervener:
Michiel Pestman for *Moinina Fofana*

THE APPEALS CHAMBER of the Special Court for Sierra Leone ("the Special Court");

SEIZED of the Defence Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment, filed on 26 June 2003 ("Preliminary Motion") on behalf of Sam Hinga Norman ("Accused");

NOTING that the Prosecution Response was filed on 7 July 2003[1] and the Defence Reply was filed on 14 July 2003[2];

NOTING that the Preliminary Motion was referred to the Appeals Chamber on 17 September 2003 pursuant to Rule 72 (E) of the Rules of Procedure and Evidence of the Special Court ("the Rules")[3];

NOTING that the Appeals Chamber granted an application by the University of Toronto International Human Rights Clinic and interested Human Rights Organisations to submit an amicus curiae brief on 1 November 2003[4] and that the amicus curiae brief was filed on 3 November 2003[5];

NOTING that an oral hearing was held on 6 November 2003;

NOTING that Additional Post-Hearing Submissions of the Prosecution were filed on 24 November 2003[6];

NOTING that the Appeals Chamber invited UNICEF to submit an amicus curiae brief[7] and

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[1] Prosecution Response to Fourth Defence Preliminary Motion on Lack of Jurisdiction (Child Recruitment), 7 July 2003 ("Prosecution Response").
[2] Reply - Preliminary Motion based on Lack of Jurisdiction: Child Recruitment, 14 July 2003 ("Defence Reply").
[3] Order pursuant to Rule 72(E): Preliminary Motion on Lack of Jurisdiction: Child Recruitment, 17 September 2003.
[4] Decision on Application by the University of Toronto International Human Rights Clinic for Leave to File Amicus Curiae Brief, 1 November 2003.
[5] Fourth Defence Preliminary Motion based on Lack of Jurisdiction (Child Recruitment): Amicus Curiae Brief of University of Toronto International Human Rights Clinic and Interested International Human Rights Organisations, 3 November 2003 ("Toronto Amicus Curiae Brief").
[6] Additional Written Submissions of the Prosecution - Recruitment and Use of Child Soldiers, 24 November 2003.
[7] Order on the Appointment of Amicus Curiae, 12 December 2003.

that the amicus curiae brief was filed on 21 January 2003[8];

NOTING that Counsel for Moinina Fofana filed written submissions on 3 November 2003[9] and was granted leave to intervene at the oral hearing;

CONSIDERING THE ORAL AND WRITTEN SUBMISSIONS OF THE PARTIES AND AMICI CURIAE:

I. SUBMISSIONS OF THE PARTIES

A. Defence Preliminary Motion

1. The Defence raises the following points in its submissions:

   a) The Special Court has no jurisdiction to try the Accused for crimes under Article 4(c) of the Statute (as charged in Count 8 of the Indictment) prohibiting the recruitment of children under 15 "into armed forces or groups or using them to participate actively in hostilities" since the crime of child recruitment was not part of customary international law at the times relevant to the Indictment.

   b) Consequently, Article 4(c) of the Special Court Statute violates the principle of *nullum crimen sine lege*.

   c) While Protocol II Additional to the Geneva Conventions of 1977 and the Convention of the Rights of the Child of 1990 may have created an obligation on the part of States to refrain from recruiting child soldiers, these instruments did not criminalise such activity.

   d) The 1998 Rome Statute of the International Criminal Court criminalises child recruitment but it does not codify customary international law.

   The Defence applies for a declaration that the Court lacks jurisdiction to try the Accused on Count 8 of the Indictment against him.

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[8] Fourth Defence Preliminary Motion based on Lack of Jurisdiction (Child Recruitment): Amicus Curiae Brief of the United Nations Children's Fund (UNICEF), 21 January 2003 ("UNICEF Amicus Brief").
[9] Reply to the Prosecution Response to the Motion on Behalf of Moinina Fofana for Leave to Intervene as an Interested Party in the Preliminary Motion filed by Mr. Norman on Lack of Jurisdiction: Child Recruitment and Substantive Submissions, 3 November 2003 ("Fofana - Reply to the Prosecution Response to the Motion").

B. Prosecution Response

2. The Prosecution submits as follows:

   a) The crime of child recruitment was part of customary international law at the relevant time. The Geneva Conventions established the protection of children under 15 as an undisputed norm of international humanitarian law. The number of states that made the practice of child recruitment illegal under their domestic law and the subsequent international conventions addressing child recruitment demonstrate the existence of this customary international norm.

   b) The ICC Statute codified existing customary international law.

   c) In any case, individual criminal responsibility can exist notwithstanding lack of treaty provisions specifically referring to criminal liability in accordance with the *Tadić* case.[10]

   d) The principle of *nullum crimen sine lege* should not be rigidly applied to an act universally regarded as abhorrent. The question is whether it was foreseeable and accessible to a possible perpetrator that the conduct was punishable.

C. Defence Reply

3. The Defence submits in its Reply that if the Special Court accepts the Prosecution proposition that the prohibition on the recruitment of child soldiers has acquired the status of a crime under international law, the Court must pinpoint the moment at which this recruitment became a crime in order to determine over which acts the Court has jurisdiction. Furthermore, the Defence argues, a prohibition under international law does not necessarily entail criminal responsibility.

D. Prosecution Additional Submissions

4. The Prosecution argues further that:

   a) In international law, unlike in a national legal system, there is no Parliament with legislative power with respect to the world as a whole. Thus, there will never be a statute declaring conduct to be criminal under customary law as from

[10] Prosecution Response, para.11.

a specified date. Criminal liability for child recruitment is a culmination of numerous factors which must all be considered together.

b) As regards the principle of *nullum crimen sine lege*, the fact that an Accused could not foresee the creation of an international criminal tribunal is of no consequence, as long as it was foreseeable to them that the underlying acts were punishable. The possible perpetrator did not need to know the specific description of the offence. The dictates of the public conscience are important in determining what constitutes a criminal act, and this will evolve over time.

c) Alternatively, individual criminal responsibility for child recruitment had become established by 30 April 1997, the date on which the "Capetown Principles" were adopted by the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa, which provides that "those responsible for illegally recruiting children should be brought to justice".[11]

d) Alternatively, individual criminal responsibility for child recruitment had become established by 29 June 1998, the date on which the President of the Security Council condemned the use of child soldiers and called on parties to comply with their obligations under international law and prosecute those responsible for grave breaches of international humanitarian law.

e) Alternatively, individual criminal responsibility for child recruitment had become established by 17 July 1998 when the ICC Statute was adopted.

E. Submissions of the Intervener

5. Defence Counsel for Fofana submits that child recruitment was not a crime under customary international law, and that there was no sufficient state practice indicating an intention to criminalise it.

F. Submissions of the Amici Curiae

University of Toronto International Human Rights Clinic and interested Human Rights

[11] *Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*, Symposium of the NGO working group on the Convention of the Rights of the Child and UNICEF, 30 April 1997, para.4.

Organisations

6. The University of Toronto International Human Rights Law Clinic sets out its arguments as follows:

a) In invoking the principle *nullum crimen sine lege*, the Defence assumes a clear distinction between war crimes and violations of international humanitarian law, and that only the former may be prosecuted without violating this principle. This premise is false and the jurisprudence supports the ability to prosecute serious violations of international humanitarian law.

b) Both conventional and customary international law supports the contention that the recruitment of child soldiers under the age of 15 was prohibited at the time in question. State practice provides evidence of this custom, in that almost all states with military forces prohibit child recruitment under 15.

c) Since child recruitment can attract prosecution by violating laws against, for example, kidnapping, it is overly formalistic to characterise regulation of military recruitment as merely restricting recruitment rather than prohibiting or criminalising it.

d) International resolutions and instruments expressing outrage at the practice of child recruitment since 1996 demonstrate acceptance of the prohibition as binding.

e) International humanitarian law permits the prosecution of individuals for the commission of serious violations of the laws of war, irrespective of whether or not they are expressly criminalised, and this is confirmed in international jurisprudence, state practice, and academic opinion.

f) The prohibition on recruitment of children is contained in the "Fundamental Guarantees" of Additional Protocol II and the judgments of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") provide compelling evidence that the violation was a pre-existing crime under customary international law.

g) The principle of *nullum crimen sine lege* is meant to protect the innocent who in

good faith believed their acts were lawful. The Accused could not reasonably have believed that his acts were lawful at the time they were committed and so cannot rely on *nullum crimen sine lege* in his defence.

UNICEF

7. UNICEF presents its submissions along the following lines:

a) By 30 November 1996, customary international law had established the recruitment or use in hostilities of children under 15 as a criminal offence and this was the view of the Security Council when the language of Article 4(c) of the Statute was proposed. While the first draft of the Special Court Statute referred to "abduction and forced recruitment of children under the age of fifteen", the language in the final version was found by the members of the Security Council to conform to the statement of the law existing in 1996 and as currently accepted by the international community.

b) This finding by the Security Council is supported by conventional law, state practice, the judgments of the ICTY and ICTR, and also declarations and resolutions by States, even though the recruitment of children under 15 is first referred to expressly as a crime in the Rome Statute of the ICC of 17 July 1998.

c) Children under 15 are a protected group under the Geneva Convention IV. Both Additional Protocols extend a specific protection to this group and contain explicit references to the recruitment and participation of children in hostilities. Article 4 of Additional Protocol II specifically includes the (absolute) prohibition on the recruitment and use of children in hostilities and this prohibition is well established.

d) The Convention on the Rights of the Child ("CRC") is the most widely ratified human rights treaty and prohibits, in its Article 38, the recruitment and use of children under 15 in hostilities. States parties are required to take appropriate steps at national level in order to ensure that children under 15 do not take part in hostilities. This obligation was stressed in the drafting process of the Optional Protocol to the CRC, which came into force on 12 February 2002, Article 4 of which states that "States Parties shall take all feasible measures to

prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalise such practices."

e) The prohibition on recruitment and use of child soldiers below 15 has been universally recognised in the practice of states.

f) Upon signature and ratification of the CRC, some states lodged declarations or reservations concerning Article 38 advocating for a higher age limit with regard to child recruitment.

g) Most states have enacted legislation for the implementation of their minimum age for recruitment and some have explicitly criminalised child recruitment, for example Columbia, Argentina, Spain, Ireland and Norway.

h) The prohibition of child recruitment which was included in the two Additional Protocols and the CRC has developed into a criminal offence. The ICTY Statute provides, and its jurisprudence confirms, that breaches of Additional Protocol I lead to criminal sanctions and the ICTR Statute recognises that criminal liability attaches to serious violations of Additional Protocol II. The Trial Chamber in the ICTR case of *Akayesu* confirmed the view that in 1994 'serious violations' of the fundamental guarantees contained within Additional Protocol II to the Geneva Conventions were subject to criminal liability and child recruitment shares the same character as the violations listed therein.

i) The expert Report by Graça Machel to the General Assembly on the impact of armed conflict on children, the resolutions of the Organisation for African Unity, and the Security Council debate on the situation in Liberia, all of 1996, provide further evidence of state practice and opinio juris within multilateral fora.

j) By August 1996 there was universal acceptance that child recruitment was a criminal offence. It was therefore an expression of existing customary international law when the war crime of child recruitment was included in the Rome Statute.

k) In 2000, the Optional Protocol to the CRC was adopted, its main purpose being to raise the age for the participation in hostilities and recruitment beyond the

established standards of the Additional Protocols and the CRC. It also reaffirmed the obligation of all states to criminalise the recruitment and use of child soldiers.

HEREBY DECIDES:

II. DISCUSSION

8. Under Article 4 of its Statute, the Special Court has the power to prosecute persons who committed serious violations of international humanitarian law including:

> c. Conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities ("child recruitment").

The original proposal put forward in the Secretary-General's Report on the establishment of the Special Court referred to the crime of "abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities"[12], reflecting some uncertainty as to the customary international law nature of the crime of conscripting or enlisting children as defined in the Rome Statute of the International Criminal Court[13] and mirrored in the Special Court Statute. The wording was modified following a proposal by the President of the Security Council to ensure that Article 4(c) conformed "to the statement of the law existing in 1996 and as currently accepted by the international community".[14] The question raised by the Preliminary Motion is whether the crime as defined in Article 4(c) of the Statute was recognised as a crime entailing individual criminal responsibility under customary international law at the time of the acts alleged in the indictments against the accused.

9. To answer the question before this Court, the first two sources of international law under Article 38(1) of the Statute of the International Court of Justice ("ICJ") have to be scrutinized:

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[12] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, paras 17-18 and Enclosure, Article 4(c).
[13] UN Doc. A/CONF.183/9, 17 July 1998, in force 17 July 2002.
[14] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, S/2000/1234, 22 December 2000, para.3.

> 1) international conventions, whether general or particular, establishing rules especially recognized by the contesting states
>
> 2) international custom, as evidence of a general practice accepted as law [...]

A. International Conventions

10. Given that the Defence does not dispute the fact that international humanitarian law is violated by the recruitment of children[15], it is not necessary to elaborate on this point in great detail. Nevertheless, the key words of the relevant international documents will be highlighted in order to set the stage for the analysis required by the issues raised in the Preliminary Motion. It should, in particular, be noted that Sierra Leone was already a State Party to the 1949 Geneva Conventions and the two Additional Protocols of 1977 prior to 1996.

1) Fourth Geneva Convention of 1949[16]

11. This Convention was ratified by Sierra Leone in 1965. As of 30 November 1996, 187 States were parties to the Geneva Conventions.[17] The pertinent provisions of the Conventions are as follows:

> Art. 14. In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, **children under fifteen,** expectant mothers and mothers of children under seven.
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> Art.24. The Parties to the conflict shall take the necessary measures **to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war,** are not left to their own resources, and that their maintenance, the exercise of their religion and their education are facilitated in all circumstances. Their education shall, as far as possible, be entrusted to persons of a similar cultural tradition.

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[15] Fofana - Reply to the Prosecution Response to the Motion, para.13. See Transcript of 5-6 November 2003, para.95.
[16] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 75 UNTS (1950).
[17] UNICEF Amicus Brief, para.22.

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

2) **Additional Protocols I and II of 1977**[18]

12. Both Additional Protocols were ratified by Sierra Leone in 1986. Attention should be drawn to the following provisions of Additional Protocol I:

> Article 77.-Protection of children
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> 2. The Parties to the conflict shall take all **feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.** In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.
>
> 3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
>
> 4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.

13. 137 States were parties to Additional Protocol II as of 30 November 1996.[19] Sierra Leone ratified Additional Protocol II on 21 October 1986.[20] The key provision is Article 4 entitled "fundamental guarantees" which provides in relevant part:

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[18] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 609 (entered into force 7 December 1978) ("Additional Protocol I"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 3 (entered into force 7 December 1977) ("Additional Protocol II").

[19] UNICEF Amicus Brief, para.22.

[20] Available at www.child-soldiers.org and annexed to the UNICEF Amicus Brief.

Article 4.-**Fundamental guarantees**

3. Children shall be provided with the care and aid they require, and in particular:

(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**

3) Convention on the Rights of the Child of 1989[21]

14. The Convention entered into force on 2 September 1990 and was on the same day ratified by the Government of Sierra Leone. In 1996, all but six states existing at the time had ratified the Convention.[22] The CRC recognizes the protection of children in international humanitarian law and also requires States Parties to ensure respect for these rules by taking appropriate and feasible measures.

15. On feasible measures:

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.

16. On general obligations of states:

[21] Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3.
[22] Available at www.child-soldiers.org and annexed to the UNICEF Amicus Brief.

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.

B. Customary International law

17. Prior to November 1996, the prohibition on child recruitment had also crystallised as customary international law. The formation of custom requires both state practice and a sense of pre-existing obligation (opinio iuris). "An articulated sense of obligation, without implementing usage, is nothing more than rhetoric. Conversely, state practice, without opinio iuris, is just habit."[23]

18. As regards state practice, the list of states having legislation[24] concerning recruitment or voluntary enlistment clearly shows that almost all states prohibit (and have done so for a long time) the recruitment of children under the age of 15. Since 185 states, including Sierra Leone, were parties to the Geneva Conventions prior to 1996, it follows that the provisions of those conventions were widely recognised as customary international law. Similarly, 133 states, including Sierra Leone, ratified Additional Protocol II before 1995. Due to the high number of States Parties one can conclude that many of the provisions of Additional Protocol II, including the fundamental guarantees, were widely accepted as customary international law by 1996. Even though Additional Protocol II addresses internal conflicts, the ICTY Appeals Chamber held in *Prosecutor v Tadić* that "it does not matter whether the 'serious violation' has occurred within the context of an international or an internal armed conflict".[25] This means that children are protected by the fundamental guarantees, regardless of whether there is an international or internal conflict taking place.

19. Furthermore, as already mentioned, all but six states had ratified the Convention on the Rights of the Child by 1996. This huge acceptance, the highest acceptance of all international conventions, clearly shows that the provisions of the CRC became

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[23] Edward T. Swaine, *Rational Custom*, Duke Law Journal, 559, 567-68 (December 2002).
[24] Available at www.child-soldiers.org and annexed to the UNICEF Amicus Brief.
[25] *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, ("*Tadić* Jurisdiction Decision"), para.94.

international customary law almost at the time of the entry into force of the Convention.

20. The widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the CRC provides compelling evidence that the conventional norm entered customary international law well before 1996. The fact that there was not a single reservation to lower the legal obligation under Article 38 of the CRC underlines this, especially if one takes into consideration the fact that Article 38 is one of the very few conventional provisions which can claim universal acceptance.

21. The **African Charter on the Rights and Welfare of the Child**[26], adopted the same year as the CRC came into force, reiterates with almost the same wording the prohibition of child recruitment:

> Article 22(2): Armed Conflicts
>
> 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.

22. As stated in the Toronto Amicus Brief, and indicated in the 1996 Machel Report, it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.[27] Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws.[28] It has also been pointed out that non-state entities are bound by necessity by the rules embodied in international humanitarian law instruments, that they are "responsible for the conduct of their members"[29] and may be "held so responsible by opposing parties or by the outside world".[30] Therefore all parties to the conflict in Sierra Leone were bound by the

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[26] *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), adopted 11 July 1990, entered into force 29 November 1999.
[27] Toronto Amicus Brief, para.13.
[28] Jean-Marie Henckaerts, *Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law* in Relevance of International Humanitarian Law to Non-state Actors, Proceedings of the Brugge Colloquium, 25-26 October 2002.
[29] See F. Kalsoven and L. Zegveld, *Constraints on the Waging of War, An Introduction to International Humanitatian Law*, (International Committee of the Red Cross, March 2001), p. 75.
[30] Ibid.

prohibition of child recruitment that exists in international humanitarian law.[31]

23. Furthermore, it should be mentioned that since the mid-1980s, states as well as non-state entities started to commit themselves to preventing the use of child soldiers and to ending the use of already recruited soldiers.[32]

24. The central question which must now be considered is whether the prohibition on child recruitment also entailed individual criminal responsibility at the time of the crimes alleged in the indictments.

C. Nullum Crimen Sine Lege, Nullum Crimen Sine Poena

25. It is the duty of this Chamber to ensure that the principle of non-retroactivity is not breached. As essential elements of all legal systems, the fundamental principle *nullum crimen sine lege* and the ancient principle *nullum crimen sine poena*, need to be considered. In the ICTY case of *Prosecutor v Hadžihasanović*, it was observed that "In interpreting the principle *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance."[33] In other words it must be "foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable".[34] As has been shown in the previous sections, child recruitment was a violation of conventional and customary international humanitarian law by 1996. But can it also be stated that the prohibited act was criminalised and punishable under international or national law to an extent which would show customary practice?

26. In the ICTY case of *Prosecutor v. Tadić*, the test for determining whether a violation of humanitarian law is subject to prosecution and punishment is set out thus:

> The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3 [of the ICTY Statute]:
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> (i) the violation must constitute an infringement of a rule of international

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[31] Toronto Amicus Brief, para.13.
[32] UNICEF Amicus Brief, para.49.
[33] *Prosecutor v Hadžihasanović, Alagić and Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 November 2002, para.62.
[34] Ibid.

humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[35]

1. International Humanitarian Law

27. With respect to points i) and ii), it follows from the discussion above, where the requirements have been addressed exhaustively, that in this regard the test is satisfied.

2. Rule Protecting Important Values

28. Regarding point iii), all the conventions listed above deal with the protection of children and it has been shown that this is one of the fundamental guarantees articulated in Additional Protocol II. The Special Court Statute, just like the ICTR Statute before it, draws on Part II of Additional Protocol II entitled "Humane Treatment" and its fundamental guarantees, as well as Common Article 3 to the Geneva Conventions in specifying the crimes falling within its jurisdiction.[36] "All the fundamental guarantees share a similar character. In recognising them as fundamental, the international community set a benchmark for the minimum standards for the conduct of armed conflict."[37] Common Article 3 requires humane treatment and specifically addresses humiliating and degrading treatment. This includes the treatment of child soldiers in the course of their recruitment. Article 3(2) specifies further that the parties "should further endeavour to bring into force [...] all or part of the other provisions of the present convention", thus including the specific protection for children under the Geneva Conventions as stated above.[38]

29. Furthermore, the UN Security Council condemned as early as 1996 the "inhumane and

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[35] *Tadić* Jurisdiction Decision, para.94.

[36] UNICEF Amicus Brief, para.64.
[37] UNICEF Amicus Brief, para.65.
[38] Toronto Amicus Brief, paras 20 and 21.

abhorrent practice"[39] of recruiting, training and deploying children for combat. It follows that the protection of children is regarded as an important value. As can be verified in numerous reports of various human rights organizations, the practice of child recruitment bears the most atrocious consequences for the children.[40]

3. Individual Criminal Responsibility

30. Regarding point iv), the Defence refers to the Secretary-General's statement that "while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognised as a war crime entailing the individual criminal responsibility of the accused."[41] The ICTY Appeals Chamber upheld the legality of prosecuting violations of the laws and customs of war, including violations of Common Article 3 and the Additional Protocols in the *Tadić* case in 1995.[42] In creating the ICTR Statute, the Security Council explicitly recognized for the first time that serious violations of fundamental guarantees lead to individual criminal liability[43] and this was confirmed later on by decisions and judgments of the ICTR. In its Judgment in the *Akayesu* case, the ICTR Trial Chamber, relying on the *Tadić* test, confirmed that a breach of a rule protecting important values was a "serious violation" entailing criminal responsibility.[44] The Trial Chamber noted that Article 4 of the ICTR Statute was derived from Common Article 3 (containing fundamental prohibitions as a humanitarian minimum of protection for war victims) and Additional Protocol II, "which equally outlines 'Fundamental Guarantees'".[45] The Chamber concluded that "it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds".[46] Similarly, under the ICTY Statute adopted in 1993, a person acting in breach of Additional Protocol I to the Geneva Conventions may face criminal sanctions, and this has been confirmed in ICTY jurisprudence.[47]

31. The Committee on the Rights of the Child, the international monitoring body for the

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[39] Security Council Resolution S/RES/1071 (1996), 30 August 1996 para. 9.
[40] This is true both at the stage of recruitment and at the time of release, and also for the remainder of the child's life.
[41] Fofana – Reply to the Prosecution Response to the Motion, para.19, referring to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, S/2000/915, para.17.
[42] *Tadić* Jurisdiction Decision, paras 86-93.
[43] Statute of the International Criminal Tribunal for Rwanda, S/RES/935 (1994), 1 July 1994 (as amended), Article 4.
[44] *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, paras 616-17.
[45] Ibid, para.616.
[46] Ibid.
[47] See *Tadić* Jurisdiction Decision.

implementation of the CRC, showed exactly this understanding while issuing its recommendations to Uganda in 1997.[48] The Committee recommended that: "awareness of the duty to fully respect the rules of international humanitarian law, in the spirit of article 38 of the Convention, *inter alia* with regard to children, should be made known to the parties to the armed conflict in the northern part of the State Party's territory, and that **violations of the rules of international humanitarian law entail responsibility being attributed to the perpetrators.**"[49]

32. In 1998 the Rome Statute for the International Criminal Court was adopted. It entered into force on 1 July 2002. Article 8 includes the crime of child recruitment in international armed conflict[50] and internal armed conflict[51], the elements of which are elaborated in the Elements of Crimes adopted in 2000[52]:

> 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:
>
> [...]
>
> (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: [...]
>
> xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

33. The Defence, noting the concerns of the United States, argues that the Rome Statute

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[48] See UNICEF Amicus Brief, para.34.

[49] Concluding observations of the Committee on the Rights of the Child: Uganda, 21 October 1997 upon submission of the Report in 1996, CRC/C/15/Add.80.

[50] Article 8(2)(b)(xxvi).

[51] Article 8(2)(e)(vii).

[52] UN Doc. PCNICC/2000/1/Add.2(2000). Elements of 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.
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.

created new legislation.[53] This argument fails for the following reasons: first, the first draft of the Rome Statute was produced as early as 1994 referring generally to war crimes;[54] second, in the first session of the Preparatory Committee it was proposed that the ICC should have the power to prosecute serious violations of Common Article 3 and Additional Protocol II;[55] third, discussion continued during 1996 and 1997 when Germany proposed the inclusion of child recruitment under the age of fifteen as a crime "within the established framework of international law";[56] and finally, it was the German proposal to include "conscripting or enlisting children under the age of fifteen years [...]" that was accepted in the final draft of the Statute. With regard to the United States, an authoritative report of the proceedings of the Rome Conference states "the United States in particular took the view that [child recruitment] did not reflect international customary law, and was more a human rights provision than a criminal law provision. However, the majority felt strongly that the inclusion was justified by the near-universal acceptance of the norm, the violation of which warranted the most fundamental disapprobation."[57] The question whether or not the United States could be said to have persistently objected to the formation of the customary norm is irrelevant to its status as such a norm.[58] The discussion during the preparation of the Rome Statute focused on the codification and effective implementation of the existing customary norm rather than the formation of a new one.

34. Building on the principles set out in the earlier Conventions, the 1999 ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, provided:

> Article 1
>
> Each Member which ratifies this Convention shall take **immediate and effective measures** to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

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[53] Preliminary Motion, para.9.

[54] Report of the International Law Commission on the work of its forty-sixth session, UN General Assembly Doc. A/49/355, 1 September 1994. Summary of the Proceedings of the Preparatory Committee during the period 25 March-12 April 1996, Annex I: Definition of Crimes.

[55] UNICEF Amicus Brief, para.86.

[56] Working Group on Definitions and elements of Crimes, *Reference Paper on War Crimes submitted by Germany*, 12 December 1997.

[57] Herman Von Hebel and Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in R. Lee (ed), *The International Criminal Court: The Making of the Rome Statute*, chapter 2, pp. 117-18.

[58] Notably, the United States, despite not having ratified the CRC, has recognized the Convention as a codification of customary international law. See Toronto Amicus Brief para.24 and note 41.

Article 2

For the purposes of this Convention, **the term "child" shall apply to all persons under the age of 18.**

Article 3

For the purposes of this Convention, the term "the worst forms of child labour" comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, **including forced or compulsory recruitment of children for use in armed conflict.**

It is clear that by the time Article 2 of this Convention was formulated, the debate had moved on from the question whether the recruitment of children under the age of 15 was prohibited or indeed criminalized, and the focus had shifted to the next step in the development of international law, namely the raising of the standard to include all children under the age of 18. This led finally to the wording of Article 4 of the Optional Protocol II to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.[59]

35. The CRC Optional Protocol II was signed on 25 May 2000 and came into force on 12 February 2002. It has 115 signatories and has been ratified by 70 states. The relevant Article for our purposes is Article 4 which states:

> 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.**

36. The Defence argues that the first mention of the criminalization of child recruitment occurs in Article 4(2) of the CRC Optional Protocol II.[60] Contrary to this argument, the Article in fact demonstrates that the aim at this stage was to raise the standard of the

[59] UN Doc. A/54/RES/263, 25 May 2000, entered into force 12 February 2002 ("CRC Optional Protocol II").
[60] Preliminary Motion, para. 7.

prohibition of child recruitment from age 15 to 18, proceeding from the assumption that the conduct was already criminalized at the time in question.

37. The Appeals Chamber in *Prosecutor v. Dusko Tadić*, making reference to the Nuremberg Tribunal, outlined the following factors establishing individual criminal responsibility under international law:

> the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals.[61]

The Appeals Chamber in *Tadić* went on to state that where these conditions are met, individuals must be held criminally responsible, because, as the Nuremberg Tribunal concluded:

> [c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[62]

38. A norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law. What, indeed, would be the meaning of a customary rule if it only became applicable upon its incorporation into an international instrument such as the Rome Treaty? Furthermore, it is not necessary for the *individual criminal responsibility* of the accused to be explicitly stated in a convention for the provisions of the convention to entail individual criminal responsbility under customary international law.[63] As Judge Meron in his capacity as professor has pointed out, "it has not been seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offences, even when there is no accompanying provision for the establishment of the jurisdiction of particular courts or scale of penalties".[64]

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[61] *Tadić* Jurisdiction Decision, para.128.
[62] The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, (1950) at 447.
[63] See Prosecutor v. *Tadić*, Case No. IT-94-1, Decision on Defence Motion on Jurisdiction, 10 August 1995, para. 70.
[64] Theodor Meron, *International Criminalization of Internal Atrocities*, (1995) 89 AJIL 554, p. 562.

39. The prohibition of child recruitment constitutes a fundamental guarantee and although it is not enumerated in the ICTR and ICTY Statutes, it shares the same character and is of the same gravity as the violations that are explicitly listed in those Statutes. The fact that the ICTY and ICTR have prosecuted violations of Additional Protocol II provides further evidence of the criminality of child recruitment before 1996.

40. The criminal law principle of specificity provides that criminal rules must detail specifically both the objective elements of the crime and the requisite *mens rea* with the aim of ensuring that all those who may fall under the prohibitions of the law know in advance precisely which behaviour is allowed and which conduct is instead proscribed.[65] Both the Elements of Crimes[66] formulated in connection with the Rome Statute and the legislation of a large proportion of the world community specified the elements of the crime.

41. Article 38 of the CRC states that States Parties have to take "all feasible measures" to ensure that children under 15 do not take part in hostilities and Article 4 urges them to "undertake all appropriate legislative [...] measures" for the implementation of the CRC. As all "feasible measures" and "appropriate legislation" are at the disposal of states to prevent child recruitment, it would seem that these also include criminal sanctions as measures of enforcement. As it has aptly been stated: "Words on paper cannot save children in peril."[67]

42. In the instant case, further support for the finding that the *nullum crimen* principle has not been breached is found in the national legislation of states which includes criminal sanctions as a measure of enforcement.

43. The Defence submitted during the oral hearing that there is not a single country in the world that has criminalized the practice of recruiting child soldiers and that child recruitment was not only not a war crime but it was doubtful whether the provisions of

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[65] Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), p. 145.
[66] UN Doc. PCNICC/2000/1/Add.2(2000).
[67] During the 57th session of the Commission of Human Rights, The Special Representative of the Secretary General, Mr. Olara A. Otunnu addressed the Assembly with regard to the Graça Machel Report. He said: "Over the past 50 years, the nations of the world have developed and ratified an impressive series of international human rights and humanitarian instruments. [...] However, the value of these provisions is limited to the extent to which they are applied." *Rights of the Child, Children in Armed Conflict*, Interim Report of the Special Representative of the Secretary-General, Mr. Olara A. Otunnu, submitted to the Economic and Social Council pursuant to General Assembly Resolution 52/107, E/CN.4/1998/119, 12 March 1998, paras 14-15.

the CRC protected child soldiers.[68] A simple reading of Article 38 of the CRC disposes of the latter argument. Concerning the former argument, it is clearly wrong. An abundance of states criminalized child recruitment in the aftermath of the Rome Statute, as for example Australia. In response to its ratification of the Rome Statute, Australia passed the *International Criminal Court (Consequential Amendments) Act*[69]. Its purpose was to make the offences in the Rome Statute offences under Commonwealth law. Section 268.68(1) creates the offence of using, conscripting and enlisting children in the course of an international armed conflict and sets out the elements of the crime and the applicable terms of imprisonment. Section 268.88 contains similar provisions relating to conflict that is not an international armed conflict.

44. By 2001, and in most cases prior to the Rome Statute, 108 states explicitly prohibited child recruitment, one example dating back to 1902,[70] and a further 15 states that do not have specific legislation did not show any indication of using child soldiers.[71] The list of states in the 2001 Child Soldiers Global Report[72] clearly shows that states with quite different legal systems - civil law, common law, Islamic law – share the same view on the topic.

45. It is sufficient to mention a few examples of national legislation criminalizing child recruitment prior to 1996 in order to further demonstrate that the *nullum crimen* principle is upheld. As set out in the UNICEF Amicus Brief[73], Ireland's Geneva Convention Act provides that any "minor breach" of the Geneva conventions [...], as well as any "contravention" of Additional Protocol II, are punishable offences.[74] The operative Code of Military justice of Argentina states that breaches of treaty provisions providing for special protection of children are war crimes.[75] Norway's Military Penal Code states that [...] anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in [...] the Geneva

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[68] The Defence asserted that "the offence does not appear in the criminal calendar of any national state, there is not a single country in the world that makes this a crime". See Transcript of 5-6 November 2003, paras 284 and 338 (referring to G. Goodwin-Gill and I. Cohen, *Child Soldiers* (Oxford University Press, 1994).

[69] *International Criminal Court (Consequential Amendments) Act*, 2002 No. 42 (Cth).

[70] Norway, Military Penal Code as amended (1902), para.108.

[71] See Child Soldiers Global Report 2001, published by the coalition to stop the Use of Child Soldiers. Available at www.child-soldiers.org and annexed to the UNICEF Amicus Brief.

[72] Ibid.

[73] UNICEF Amicus Brief, para.47.

[74] Ireland,*Geneva Conventions* Act as amended (1962), Section 4(1) and (4).

[75] Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new article 876(4) in *the Code of Military Justice*, as amended (1951).

Conventions [...] [and in] the two additional protocols to these Conventions [...] is liable to imprisonment.[76]

46. More specifically in relation to the principle *nullum crimen sine poena*, before 1996 three different approaches by states to the issue of punishment of child recruitment under national law can be distinguished.

47. First, as already described, certain states from various legal systems have criminalized the recruitment of children under 15 in their national legislation. Second, the vast majority of states lay down the prohibition of child recruitment in military law. However, sanctions can be found in the provisions of criminal law as for example in Austria[77] and Germany[78] or in administrative legislation, criminalizing any breaches of law by civil servants. Examples of the latter include Afghanistan[79] and Turkey.[80] Legislation of the third group of states simply makes it impossible for an individual to recruit children, as the military administration imposes strict controls through an obligatory cadet schooling, as for example in England,[81] Mauritania[82] and Switzerland[83]. In these states, provisions for punishment are unnecessary as it is impossible for the crime to be committed.

48. Even though a punishment is not prescribed, individual criminal responsibility may

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[76] Norway, *Military Penal code* as amended (1902), para.108.

[77] Austrian legislation sets the minimum age for recruitment at 18 in *Wehrgesetz 2001*, BGBl. I Nr. 146/2001 as amended in BGBl. I Nr. 137/2003 and provides for criminal sanctions in *Strafgesetzbuch*, BGBl. Nr. 60/1974 in Articles 27 and 302.

[78] German legislation sets the minimum age for compulsory recruitment at 18 in *Wehrpflichtgesetz*, 15 December 1995 (as amended), para.1 and provides for a sanction in *Wehrstrafgesetz*, 24 May 1974, para. 32.

[79] *Decree S. No*[79] 20, Article 1, states that "The Afghan citizen volunteer to join the National Army should [...] be aged between 22-28 years." Art. 110 *Penal Law for Crimes of Civil Servants and Crimes against Public Welfare and Security*, 1976 states that "An official who deliberately registers a minor as an adult or vice-versa on his nationality card, court records or similar documents shall be punishable [...]"

[80] Article 2 of the *The Military Service Law* (Amended 20 November 1935 – 2248/Article 1) states that "The military age shall be according to the age of every male as recorded in his main civil registration [...] starting on the first day of January in the year in which he becomes twenty [...]. The *Turkish Penal Code* (Amended 12 June 1979 – 2248/Article19) states in Article 240 that "a civil servant who has abused his/her office for any reason whatsoever other than the circumstances specified in the law shall be imprisoned for one year to three years [...] He/she shall also be disqualified from the civil service temporarily or permanently."

[81] According to the *Education (School Leaving Date) Order* 1997, made under the *Education Act 1996*, section 8(4), a child may not legally leave school until the last Friday in June of the school year during which they reach the age 16. According to *HM Armed forces Enquiry Questionnaire*, AFCO Form 2, January 2000, Armed forces do not recruit those under the age of 16 and the recruitment process, including selection, medical examination and obtaining parental consent may only begin at 15 years and nine months. Rachel Harvey, *Child soldiers in the UK: Analysis of recruitment and deployment practices of under-18s and the* CRC (June 2002), p13, note 73.

[82] *Loi No. 62 132 sur le recrutement de l'armée.* Articles 7 and 9, 29 June 1962.

[83] Loi fédérale sur l'armée et l'administration militaire, Article 131, 3 February 1995.

follow.[84] Professor Cassese has stated that:

> It is common knowledge that in many States, particularly in those of civil law tradition, it is considered necessary to lay down in law a tariff relating to sentences for each crime [...] This principle is not applicable at the international level, where these tariffs do not exist. Indeed States have not yet agreed upon a scale of penalties, due to widely differing views about the gravity of the various crimes, the seriousness of guilt for each criminal offence and the consequent harshness of punishment. It follows that courts enjoy much greater judicial discretion in punishing persons found guilty of international crimes.[85]

However, Article 24 of the ICTY Statute provides some guidance in the matter as it refers to the general practice regarding prison sentences. The point of reference is thus not a concrete tariff but quite generally the practice of prison sentences.[86] The penalities foreseen in national legislation specify prison sentences for breaching the prohibition on the recruitment of children under the age of fifteen.

49. When considering the formation of customary international law, "the number of states taking part in a practice is a more important criterion [...] than the duration of the practice."[87] It should further be noted that "the number of states needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule and that [even] a practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule."[88]

50. Customary law, as its name indicates, derives from custom. Custom takes time to develop. It is thus impossible and even contrary to the concept of customary law to determine a given event, day or date upon which it can be stated with certainty that a norm has crystallised.[89] One can nevertheless say that during a certain period the conscience of leaders and populations started to note a given problem. In the case of recruiting child soldiers this happened during the mid-1980s. One can further

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[14] *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Defence Motion on Jurisdiction, 10 August 1995, para. 70.
[15] Antonio Cassese, *International Criminal Law*, (Oxford University Press, 2003), p. 157.
[16] Daniel Augenstein, Ethnische Saüberungen in ehemaligen Jugoslawien - Rechtliche Aspekte, Seminar "Zwangsumsiedlungen, Deportationen und "ethische Saüberungen" im 20. Jahrhundert", Sommersemester 1997, p.18.
[17] Michael Akehurst, *Custom As a Source of International Law*, The British Year Book of International Law 1974-1975 (Oxford at the Clarendon Press, 1977), p.16.
[18] Ibid, p.18.
[19] Contrary to the Defence Reply, para.13.

determine a period where customary law begins to develop, which in the current case began with the acceptance of key international instruments between 1990 and 1994. Finally, one can determine the period during which the majority of states criminalized the prohibited behaviour, which in this case, as demonstrated, was the period between 1994 and 1996. It took a further six years for the recruitment of children between the ages of 15 and 18 to be included in treaty law as individually punishable behaviour. The development process concerning the recruitment of child soldiers, taking into account the definition of children as persons under the age of 18, culminated in the codification of the matter in the CRC Optional Protocol II.

51. The overwhelming majority of states, as shown above, did not practise recruitment of children under 15 according to their national laws and many had, whether through criminal or administrative law, criminalized such behaviour prior to 1996. The fact that child recruitment still occurs and is thus illegally practised does not detract from the validity of the customary norm. It cannot be said that there is a contrary practice with a corresponding opinio iuris as states clearly consider themselves to be under a legal obligation not to practise child recruitment.

4. Good Faith

52. The rejection of the use of child soldiers by the international community was widespread by 1994. In addition, by the time of the 1996 Graça Machel Report, it was no longer possible to claim to be acting in good faith while recruiting child soldiers (contrary to the suggestion of the Defence during the oral hearing).[90] Specifically **concerning Sierra Leone, the Government acknowledged in its 1996 Report to the Committee of the Rights of the Child** that there was no minimum age for conscripting into armed forces "except the provision in the Geneva Convention that children below the age of 15 years should not be conscripted into the army."[91] This shows that the Government of Sierra Leone was well aware already in 1996 that children below the age of 15 should not be recruited. 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.[92]

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[90] Counsel stated: "I would not say please do, but you can do it, it is not a crime under international law. As long as they [are] not members of warring factions you can do it...". See Transcript of 5-6 November 2003, para.384.
[91] The Initial Report of States Parties: Sierra Leone 1996 CRC/C/3/Add.43 para.28.
[92] Toronto Amicus Brief, para.69.

53. 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.

III. DISPOSITION

54. For all the above-mentioned reasons the Preliminary Motion is dismissed.

Done at Freetown this thirty-first day of May 2004

Justice Ayoola
Presiding

Justice King

Justice Winter

[Seal of the Special Court for Sierra Leone]

Justice King appends a Separate Opinion to this Decision.

Justice Robertson appends a Dissenting Opinion to this Decision.