DISSENTING OPINION OF JUSTICE ROBERTSON

1. The Applicant, Samuel Hinga Norman, is charged together with Moinina Fofana and Allieu Kondewa on an Indictment[1] containing eight counts, the last of which alleges his command responsibility for a serious violation of international humanitarian law, namely,

> At all times relevant to this indictment... Enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

He had been initially charged with "conscripting or enlisting" children[2], but the conscription allegation - which implies some use of force - has been abandoned. The temporal jurisdiction of this court to prosecute international crimes begins on 30th November 1996. The charge does not specify, as it should, the actual period after that at which the enlistment offence or its more serious alternative (*using* children in combat) is alleged to have been committed, other than by reference to "times relevant to this indictment". The duty to provide particulars of the change rests on the prosecution, and the defence cannot be criticized for seeking a declaration that "the crime of child recruitment was not part of customary international law at the time relevant to the indictment".

2. The crime of "enlisting children under the age of fifteen years into armed forces or groups", which I shall call for short "child enlistment" has never been prosecuted before in an international court nor, so far as I am aware, has it been the subject of prosecution under municipal law, although many states now have legislation which would permit such a charge. The Applicant argues that "child enlistment" is not a

[1] *Prosecutor v Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSl-2004-14-I, Indictment, 4 February 2004.
[2] *Prosecutor v Samuel Hinga Norman*, Case No. SCSL-2004-08-I, Indictment, 7 March 2003.

war crime; alternatively, that it became such only on the entry into force in mid-2002 of two important treaties - the *Rome Statute* which established the International Criminal Court ("ICC") and the *Optional Protocol to the Convention on the Rights of Child.* The Prosecution declines to pinpoint a date on which the offence crystallized in international criminal law: it argues that such point was in all events prior to 30th November 1996, and upon the correctness of that contention the fate of this application turns.

The Statute of the Special Court

3 That this Preliminary Motion raises a substantial and difficult issue is plain from our starting point, which must be the Statute of this Court as explicated by the Report of the UN Secretary-General[3] when laying it before the Security Council. Article 2 endows the Special Court with jurisdiction to punish crimes against humanity and Article 3 permits prosecution of those alleged to have committed or ordered serious violations of Common Article 3 of the Geneva Conventions and the Additional Protocol II (i.e. breaches of rules that restrain both internal and international conflicts). Article 4 reads:

> OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW
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> 4. The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: ...
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> c. Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.

[3] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, paras 15-18 and Enclosure.

This formula is in almost identical language to the prohibition in Article 8 of the Rome Treaty establishing the International Criminal Court. This Treaty was signed by 122 nations on 17th July 1998, and it came into force, after 60 of them ratified it, in July 2002. Article 8 makes it an offence, *inter alia*, to commit acts of

> Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.[4]

4 The first point to note is that Article 4(c) as eventually adopted by the Security Council is not the Article 4(c) offence proposed by the Secretary-General. His original draft, in his Report presented to the Security Council in October 2000, would have endowed the court with jurisdiction over:

> c. Abduction and forced recruitment of children under the age of fifteen years into armed forces or groups for the purpose of using them to participate actively in hostilities.[5]

This is a much more precise and certain definition of a narrower offence. It made the *actus reus* turn on the use of physical force or threats in order to recruit children and the *mens rea* element required an intention to involve them in potentially lethal operations. This was in my view a war crime by November 1996: indeed, it would have amounted to a most serious breach of Common Article 3 of the Geneva Convention. Why did the Secretary-General prefer this formulation to the wider definition in the Rome Statute? For the very good reason that he was unsure as to whether the Rome Statute formulation reflected the definition of a war crime

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[4] Rome Statute, UN Doc. A/CONF.183/9, 17 July 1998, in force 17 July 2002., Articles 8(b)(xxvi) and 8(e)(vii).

[5] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, para. 17.

either by 1996 or even by the time of his Report (October 2000). As that Report explains,[6]

> 17. [...] in 1998 the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But 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 responsibility of the accused.
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> 18. Owing to the doubtful customary nature of the ICC's statutory crime which criminalizes the conscription or enlistment of children under the age of fifteen, whether forced or "voluntary", the crime which is included in Article 4(c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes and administrative act of putting ones name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are:
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> a. Abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under Article 3 of the Geneva Conventions;
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> b. Forced recruitment in the most general sense - administrative formalities, obviously, notwithstanding; and
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> c. Transformation of the child into, and its use as, among other degrading uses, a "child combatant".

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[6] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, paras 17-18.

5. The Secretary-General's Report accurately identifies the conduct which by November 1996 had become the war crime of forcibly recruiting children under fifteen for use in combat. But notwithstanding the Secretary-General's reasoned position, the offence defined in 4(c) was quite crucially changed, to the different crime of *conscripting* or *enlisting* children, or *using them in hostilities*. This crime of child recruitment, as it was finally formulated in 4(c) of the Statute, may be committed in three quite different ways:

a. by *conscripting* children (which implies compulsion, albeit in some cases through force of law),

b. by *enlisting* them (which merely means accepting and enrolling them when they volunteer), or

c. by *using* them to participate actively in hostilities (i.e. taking the more serious step, having conscripted or enlisted them, of putting their lives directly at risk in combat).

These are, in effect, three different crimes, and are treated as such by some states which have implemented the Rome Treaty in their domestic law (see the example of Australia, paragraph 41 below). Since b) makes it a crime merely to enroll a child who volunteers for military service, it extends liability in a considerable and unprecedented way. The Prosecution would need only to prove that the defendant knew that the person or persons he enlisted in an armed force was under 15 at the time. The change came as a result of an intervention by the President of the Security Council, Mr Sergey Lavrov, in December 2000. He "modified" Article 4(c) "so as to conform to the statement of the law existing in 1996 and as currently accepted by the international community".[7] He provided no actual "statement of

[7] 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.

the law existing in 1996", nor any authority for the proposition that the law in 1996 criminalised individuals who enlisted child volunteers, as distinct from forcibly conscripting them or using them to participate actively in hostilities – i.e. directing them to engage in combat.

6. It might strike some as odd that the state of international law in 1996 in respect to criminalisation of child enlistment was doubtful to the UN Secretary-General in October 2000 but was very clear to the President of the Security Council only two months later. If it was not clear to the Secretary-General and his legal advisers that international law had by 1996 criminalized the enlistment of child soldiers, could it really have been any clearer to Chief Hinga Norman or any other defendant at that time, embattled in Sierra Leone? If international criminal law shares the basic principle of common law crime, namely that punishment must not be inflicted for conduct that was not clearly criminal at the time it was committed, then the Prosecution has an obvious difficulty in proceeding with an "enlistment" charge that does not specifically allege the use of some kind of force or pressure. If international criminal law adopts the common law principle that in cases of real doubt as to the existence or definition of a criminal offence, the benefit of that doubt must be given to the defendant, then this would appear to be such a case.

"Child Soldiers"

7. It should go without saying that the question of whether and when particular conduct becomes criminal must be carefully separated from the question of whether it *should* be or have been criminalized. This Court has been made aware of literature detailing the appalling impact of war on children in Africa, and especially in Sierra Leone where more than 10,000 children under the age of fifteen are said to have served in the armies of the main warring factions. Many were killed or wounded and others were forced or induced to kill and maim - their victims including members of their own community and even their own families. The

consequences for these children are reportedly traumatic - they continue to suffer reprisals from communities they were ordered to attack, and exhibit behavioural problems and psychological difficulties related to the horrors in which they have been involved by the direction of adults in positions of command responsibility.[8] Adults in such positions could be charged with crimes of abduction or conscription, or using children in combat, but that does not exhaust the ways in which children may be induced to risk their lives in war. As Graça Machel points out, "Children become soldiers in a variety of ways. Some are conscripted, others press-ganged or kidnapped, still others join armed groups because they are convinced it is a way to protect their families... Children have been dragooned into government-aligned paramilitary groups, militia or civil defence forces".[9]

8. I accept that "voluntary" enlistment is not as benign as it sounds. Children who "volunteer" may do so from poverty (so as to obtain army pay) or out of fear - to obtain some protection in a raging conflict. They may do so as the result of psychological or ideological inducement or indoctrination to fight for a particular cult or cause, or to achieve posthumous glory as a "martyr". Any organization which affords the opportunity to wield an AK47 will have a certain allure to the young. The result will be to put at serious risk a life that has scarcely begun to be lived. It follows that although *forcible* recruitment of children for actual fighting remains among the worst of war crimes, the lesser "enlistment" offence of accepting child volunteers into armies nonetheless can have equally serious consequences for them, if they are put at risk in combat.

9. There may be a distinction in this respect: forcible recruitment is always wrong, but enlistment of child volunteers might be excused if they are accepted into the force only for non-combatant tasks, behind the front-lines. Indeed, at the preparatory

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[8] See e.g. Human Rights Watch, *Getting Away with Murder, Mutilation, Rape: New Testimony from Sierra Leone*, July 1999; US Department of State, *Country Reports on Human Rights Practices*, 1999: Sierra Leone, 25 February 2000; Amnesty International, *Sierra Leone: Childhood - A Casualty of Conflict*, 31 August 2000.
[9] Graça Machel: *The Impact of War on Children*, (UNICEF, 2001), pp. 8-9.

conference before the Rome Treaty, it was agreed that the crime of using children in hostilities would "not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use as domestic staff" [10]. This distinction is somewhat dubious - the baggage train, as Shakespeare's *Henry V* reminds us, is not always a place of safety for children[11]. Besides which, children enlisted for duties "unrelated to hostilities" may be all too willing to help on the front-line, dying on the barricades like the "powder monkey" Gavroche in Victor Hugo's *Les Misérables*. The enlistment of children of fourteen years and below to kill and risk being killed in conflicts not of their making was abhorrent to all reasonable persons in 1996 and is abhorrent to them today. But abhorrence alone does not make that conduct a crime in international law.

10. So when did child enlistment - as distinct from forcible recruitment of children or subsequently using them in combat - become a war crime? That depends, as we shall see, first on identifying a stage - or at least a process - by which prohibition of child enlistment became a rule of international law binding only on states (i.e. on their governments) and with which they were meant to comply (although nothing could be done if they declined). Then, at the second stage, on further identifying a subsequent turning point at which that rule - a so-called "norm" of international law - metamorphosed into a *criminal* law for the breach of which individuals might be punished, if convicted by international courts. Before identifying and applying the appropriate tests - and the second stage test is contentious - let me explain why this second-stage process is necessary, even - indeed, especially - in relation to conduct which is generally viewed as abhorrent.

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[10] Report of ICC Preparatory Committee, A/CONF/183/2/ Add.1, 14 April 1998.

[11] In Act 4, Scene 7, the French attack on the boys in the baggage train was "expressly against the law of arms", according to Captain Fluellan. See Theodor Meron, "Shakespeare's Henry V and the Law of War", in *War Crimes Law Comes of Age*, (Oxford 1998), p52.

No Punishment Without Law

11. In a democracy it is easy to tell when certain conduct becomes a crime: parliament passes a law against it and that law comes into force on a date identified in the Statute itself. In semi or non-democratic states, the ruler or ruling body will usually issue a decree with such a date, or time that date from the promulgation or gazettal of the new crime. As well, in common law countries, there is usually a customary body of judge-made criminal law, capable of development and refinement in later times but not of creation anew. What restrains the judges from creating new crimes is the overriding principle of legality, expressed invariably in Latin, *nullem crimen sine lege* - conduct, however awful, is not unlawful unless there is a criminal law against it in force at the time it was committed. As Article 15 of the International Covenant on Civil and Political Rights[12] puts it,

> 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.

12. It must be acknowledged that like most absolute principles, *nullem crimen* can be highly inconvenient - especially in relation to conduct which is abhorrent or grotesque, but which parliament has not thought to legislate against. Every law student can point to cases where judges have been tempted to circumvent the *nullem crimen* principle to criminalise conduct which they regard as seriously anti-social or immoral, but which had not been outlawed by legislation or by established categories of common-law crimes. This temptation must be firmly resisted by international law judges, with no legislature to correct or improve upon them and with a subject - international criminal law - which came into effective operation as

[12] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6546 (1966) (entered into force 23 March 1976).

recently as the judgement at Nuremberg in 1946. Here, the Prosecution asserts with some insouciance that

> the principle of nullem crimen sine lege is not in any case applied rigidly, particularly where the acts in question are universally regarded as abhorrent and deeply shock the conscience of humanity.[13]

On the contrary, it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that a defendant is not convicted out of disgust rather than evidence, or of a non-existent crime. *Nullem crimen* may not be a household phrase, but it serves as some protection against the lynch mob.

13. The principle of legality, sometimes expressed as the rule against retroactivity, requires that the defendant must at the time of committing the acts alleged to amount to a crime have been in a position to know, or at least readily to establish, that those acts may entail penal consequences. Ignorance of the law is no defence, so long as that law is capable of reasonable ascertainment. The fact that his conduct would shock or even appall decent people is not enough to make it unlawful in the absence of a prohibition. The requisite clarity will not necessarily be found in there having been previous successful prosecutions in respect of similar conduct, since there has to be a first prosecution for every crime and we are in the early stages of international criminal law enforcement. Nor is it necessary, at the time of commission, for there to be in existence an international court with the power to punish it, or any foresight that such a court will necessarily be established. In every case, the question is whether the defendant, at the time of conduct which was not clearly outlawed by national law in the place of its commission, could have ascertained through competent legal advice that it was contrary to international criminal law. That could certainly be said on 1 July 2002, the date of ratification of

[13] Prosecution Response, para. 17.

the ICC Statute, which in terms makes it an offence to commit acts of "*conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities*". That is too late for any indictment in this court, and the applicant puts the Prosecution to proof that the offence thus defined came into existence in or by 1996.

14. The Prosecution relies on some academic commentaries which unacceptably weaken the *nulla crimen* principle, for example by suggesting that it does not apply with full force to abhorrent conduct. On the contrary, as I have sought to explain in paragraphs 10-11 above, it is a fundamental principle of criminal law. There are some European Court of Human Rights decisions which suggest that the rule is primarily a safe-guard against arbitrary conduct by government.[14] But it is much more than that. It is the very basis of the rule of law, because it impels governments (in the case of national law) and the international community (in the case of international criminal law) to take positive action against abhorrent behaviour, or else that behaviour will go unpunished. It thus provides the rationale for legislation and for treaties and Conventions – i.e. for a system of justice rather than an administrative elimination of wrongdoers by command of those in power. It is the reason why we are ruled by law and not by police.

15. Professor Cassese explains in his textbook on *International Criminal Law* how the *nulla crimen* doctrine of strict legality, originating in Article 39 of Magna Carta has replaced the "substantive justice" doctrine initially adopted by international law.[15] He poses the question:

> A logical and necessary corollary of the doctrine of strict legality is that criminal rules may not cover acts or conduct undertaken prior to the adoption of such rules. Otherwise the executive power, or the judiciary,

[14] E.g. *SW v UK*, ECHR, Series A, vol. 335-B, 22 November 1995.
[15] A. Cassese, *International Criminal Law*, (Oxford, 2003), pp. 142-43.

> could arbitrarily punish persons for actions that were legally allowed when they were carried out. By contrast, the ineluctable corollary of the doctrine of substantive justice is that, for the purpose of defending society against new and unexpected forms of criminality, one may go so far as to prosecute and punish conduct that was legal when taken. These two approaches lead to contrary conclusion. The question is: which approach has been adopted in international law?[16]

The question must be answered firmly in favour of the doctrine of strict legality. A general rule prohibiting the retroactive application of criminal law has evolved after being laid down repeatedly in human rights treaties: see for example Article 7 of the European Convention of Human Rights;[17] Article 15 of the UN Covenant on Civil and Political Rights;[18] Article 9 of the Inter-American Convention on Human Rights[19] and Article 7(2) of the African Charter of Human and People's Rights.[20] It is to be found in the Geneva Conventions (see Article 99 of Convention III[21], Article 67 of Convention IV[22] and Article 75(4)(c) of the first Protocol,[23] all relating to criminal trials. It is set out in Article 22(1) of the Statute of the ICC.[24] In the case of the Special Court for Sierra Leone, it was spelled out very plainly in paragraph 12 of the Secretary-General's Report:

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[6] Ibid, p.147.

[17] *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 222.

[18] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16 at 52, U.N. Doc. A/6546 (1966) (entered into force 23 March 1976).

[19] *Inter-American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System 25, Doc. No. OEA/Ser.L.V./II.82 doc. 6 rev. 1 (1992).

[20] *African Charter on Human and Peoples' Rights*, adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5.

[21] Geneva Convention (III) Relative to the Treatment of the Prisoners of War, 12 August 1949, 75 U.N.T.S. 135 (1950).

[22] *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS (1950).

[23] *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").

[24] *Rome Statute of the International Criminal Court*, July 17, 1998, UN Doc. A/CONF.183/9* (1998).

> In recognition of the principle of legality, in particular nullem crimen sine lege, and the prohibition on retroactive criminal legislation, the international crimes enumerated are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

16. Professor Cassese concludes that "the principle of non-retroactivity of criminal rules is now solidly embodied in international law. It follows that courts may only apply substantive criminal rules that existed at the time of commission of the alleged crime".[25] There is room for judicial development, but he lays down three rules for such development:

1. It must be in keeping with the rules of criminal liability defining the essence of the offence.

2. It must conform with the fundamental principles of international criminal law.

3. The particular development must be reasonably foreseeable by the defendant.[26]

17. This tripartite test is designed define the limits of judicial "development" of existing legal rules. It is relevant to, but not the same process as, the second stage identified at paragraph 9 above, namely of determining whether and when a rule of customary international law binding on states has developed or changed so as to entail criminal consequences for individuals - as the Secretary-General puts it (see paragraph 4 above), "Whether it is customarily recognised as a war crime entailing

[25] A. Cassese, *International Criminal Law*, (Oxford, 2003) p. 149.
[26] Ibid, p. 152.

the individual responsibility of the accused."[27] In this context, for an international court to recognise the creation of a new criminal offence without infringing the *nullum crimen* principle, I would formulate the test as follows:

i. The elements of the offence must be clear and in accordance with fundamental principles of criminal liability;

ii. That the conduct could amount to an offence in international criminal law must have been capable of reasonable ascertainment at the time of commission;

iii. There must be evidence (or at least inference) of general agreement by the international community that breach of the customary law rule would or would now, entail international criminal liability for individual perpetrators, in addition to the normative obligation on States to prohibit the conduct in question under their domestic law.

Customary International Law

18. International law is not found in statutes passed by parliament and its rules do not date from any official gazettes. It is a set of principles binding on states, pulling itself up by its own bootstraps mainly through an accretion of state practice. The point at which a rule becomes part of customary international law depends upon creative interplay between a number of factors. Everyone agrees upon the identification of those factors: they are authoritatively enumerated in Article 38(1) of the Statute of the International Court of Justice, which enjoins court to apply, in deciding interstate disputes,

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[27] *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, para. 17.

a. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

b. International custom, as evidence of a general practice accepted as law;

c. The general principles of law recognised by civilized nations;

d. Subsidiary means for determining rules of law, judicial decisions and the teaching of the most highly qualified publicists of the various nations.

19. The classic example of the interplay of these factors is the decision in the *Paquete Habana*[28]. This Cuban fishing boat had been destroyed by the US Navy and its exemption from capture as a prize of war was described as "an ancient usage among civilized nations, beginning centuries ago, and *gradually ripening into* a [settled] rule of law"[29]. This "ripening" process was assisted by treaties, decisions of prize courts and the opinions of text-book writers. But what mattered most was the exemption that had been made over the centuries by most states (originally as a matter of mercy rather than law) and was now the invariable practice of law-abiding states. I prefer to avoid the "ripening" metaphor (given that rotting follows ripeness) but there will for all rules of customary international law have been a process of evolution (which may be comparatively short) before that rule may be said to be generally recognised by states as a "norm" to which their conduct should conform.

20. That process crystallizes the international law rules that are binding on states. But they do not bind individuals, unless the state legislates or adopts them by decree or ratification into municipal criminal law. In order to become a criminal prohibition, enforceable in that sphere of international law which is served by international criminal courts, the "norm" must satisfy the further, second-stage test, identified at paragraph 17 above. It must have the requisite qualities for a serious criminal prohibition: the elements of the offence must be tolerably clear and must

[28] *The Paquete Habana* (1900), 175 US 677.
[29] Ibid, p. 686 (emphasis added).

include the mental element of a guilty intention. Its existence, as an international law crime, must be capable of reasonable ascertainment, which means (as an alternative formulation) that prosecution for the conduct must have been foreseeable as a realistic possibility. Most significantly, it must be clear that the overwhelming preponderance of states, courts, conventions, jurists and so forth relied upon to crystallize the international law "norm" intended - or now intend - this rule to have penal consequences for individuals brought before international courts, whether or not such a court presently exists with jurisdiction over them. In this case we must be satisfied, after an examination of the sources claimed for the customary norm prohibiting child enlistment, that by 1996 it was intended by the international community to be a criminal law prohibition for the breach of which individuals should be arrested and punished.

21. The Prosecution has relied on a passage from *Prosecutor v Tadic*[30] to define the test for the stage at which an existing norm of international law, i.e. a rule binding on states, takes on the additional power of a criminal prohibition, by which individuals may be prosecuted. But this passage does not seek to address the *nullum crimen* position: it was advanced in a different context, namely to identify the conditions which had to be fulfilled before a prosecution could be brought under Article 3 of the ICTY Statute, which provided jurisdiction to prosecute persons "violating the laws or customs of war". Article 3 has no equivalent in the Statute of this Court. Nevertheless, since the majority decision in this case adopts the passage, I set it out below:

> 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):

[30] *Prosecutor v Dusko Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, passage no. .

i. The violation must constitute an infringement of a rule of international humanitarian law;

ii. The rule must be customary in nature or, if it belongs to treaty law, the required conditions 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.[31]

Requirement iv) begs the very question that we have to decide in this case. It may be accepted that the alleged offence of child enlistment infringes a rule of international humanitarian law (i) and that the violation would be "serious" (iii). Let us assume that by 1996 it had accreted sufficient state practice to be regarded as "customary in nature" (iii). The final question reflected in iv), namely how do we tell whether rule violation entails individual criminal responsibility, becomes the crucial question - and the passage from *Tadic* provides in my opinion no assistance in answering it.

22. Where *Tadic* does assist is later in the Appeals Chamber decision[32], where it is noted that

> The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual responsibility: the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to

[3] Ibid, para.94.
[31] Ibid, para 128.