SCSL-2004-14-AR72(E).
(7383-7447).



SPECIAL COURT FOR SIERRA LEONE
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IN THE APPEALS CHAMBER



| | | |
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| Before: | Justice Emmanuel Ayoola, Presiding<br>Justice George Gelaga King<br>Justice Renate Winter<br>Justice Geoffrey Robertson | |
| Registrar: | Robin Vincent | |
| Date: | 31 May 2004 | |
| PROSECUTOR | Against | SAM HINGA NORMAN<br>(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
Luc Côté
Christopher Staker
Walter Marcus-Jones
Abdul Tejan-Cole

**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.
>
> 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
>
> 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:

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[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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[84] *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on Defence Motion on Jurisdiction, 10 August 1995, para. 70.
[85] Antonio Cassese, *International Criminal Law*, (Oxford University Press, 2003), p. 157.
[86] Daniel Augenstein, Ethnische Saüberungen in ehemaligen Jugoslawien - Rechtliche Aspekte, Seminar "Zwangsumsiedlungen, Deportationen und "ethische Saüberungen" im 20. Jahrhundert", Sommersemester 1997, p.18.
[87] 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.
[88] Ibid, p.18.
[89] 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.**

# SEPARATE OPINION OF JUSTICE GELAGA KING

1. I have had the privilege of reading the Decisions of both Justice Winter and Justice Robertson. While I agree with the reasoning of Justice Winter I would like to add a few words of my own.

2. The Defence in requesting this Court to declare that it has no jurisdiction to try the accused on Count 8 on the indictment submits that "the crime of child recruitment was not part of customary international law at the times relevant to the indictment."[1] Nowhere in the Motion has the Defence explained what it means by the phrase "at the times relevant to the indictment." The phrase itself is vague, imprecise and clearly lacks specificity. The obligation is on the applicant i.e. the Defence, who seeks the declaration, to detail and particularise in precise, unequivocal and unambiguous terms what exactly the Defence is requesting the Court to declare.

3. That obligation, in my judgement, must be discharged by the Defence if it is to have the relief sought, the more so as in this case where there is a serious controversy between the parties as to when the recruitment of children under the age of 15 years was criminalised. The Defence has failed to discharge that fundamental and unavoidable duty and obligation. Because of this failure and for this reason alone I am unable to grant the declaration requested. In coming to this conclusion I am not oblivious of the provision in Article 1 of the Statute of the Special Court that the Court shall "have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone law committed in the territory of Sierra Leone since 30 November 1996."

4. Let me take this opportunity to refer to the regional treaty of the African Charter on the Rights And Welfare of the Child promulgated in 1990.[2] Sierra Leone is a State Party to that treaty. It is most instructive to refer to two Articles of that treaty which I find pre-eminently relevant in

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[1] Defence Preliminary Motion, para. 3.
[2] OAU DOC.Cab/Leg/24.9/49 (1990).

the instant application. Their provisions speak clearly for themselves and need no construction or interpretation.

5. I refer first to Article 22: Armed Conflicts:

> 1. States Parties to this Charter shall undertake to respect and ensure respect of international humanitarian law applicable in armed conflicts which affect the child.
>
> 2. States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.
>
> 3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

6. It is perhaps, even more instructive to refer to the other Article, Article 2 which deals with the definition of a child. It states:

> Article 2: Definition of a child for the purposes of this charter, a child means every human being below the age of 18 years.

7. Finally, I will end up by referring to a passage in Justice Robertson's decision. He states, *inter alia:*

> the baggage train, as Shakespeare's *Henry V* reminds us, is not always a place of safety for children, and the Little Drummer Boy may be as much at risk as the 'powder monkey' on the *Les Miserables* barricades.[3]

With all due respect to my learned colleague, it is this type of egregious journalese the relevance of which I cannot fathom that has made it impossible for me to appreciate his reasoning.

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[3] Para 8 of Justice Robertson's Dissenting Opinion.

Done at Freetown this thirty-first day of May 2004

Justice George Gelaga King

[Seal of the Special Court for Sierra Leone]

# 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

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[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
>
> 4. The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: ...
>
> 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.
>
> 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:
>
> 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.
[7] *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

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[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,

[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.
[3] Ibid, para 128.

> criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals (id., at 445 to 447, 467). Where these conditions are met, individuals must be held criminally responsible...

I do not find these criteria fulfilled as of 1996 in relation to the prohibition on child enlistment. The *Tadic* decision draws attention to factors such as Security Council resolutions stating that individuals will be held criminally responsible; to the existence of specific criminal laws and the decisions of criminal courts; to statements by warring parties accepting the prohibition; to "the behaviour of belligerent states and governments and insurgents", and to General Assembly and European Union statements assuming criminality; to legal interpretations published by the international committee of the Red Cross and so forth. Such a corpus of authority in relation to the crime of child enlistment was notably lacking in 1996. Unlike the majority opinion, I cannot find in the material supplied by UNICEF satisfactory evidence that the majority of States had *explicitly* criminalised child enlistment prior to this time and certainly there has been no suggestion of any prosecution for such an offence under the national law of any State.

23. It is instructive to compare the somewhat prescient example provided by the Appeals Chamber in *Tadic*[33] of the evolution of the international crime of domestic deployment of chemical weapons against the civilian population, i.e. the criminalisation for the purposes of internal conflicts of conduct which had hitherto been criminal only in international conflicts. It was from the universally outraged reaction of States in 1988 to allegations that chemical weapons had been used by Iraq at Halebja and the denial by Iraq itself of those allegations that "there undisputedly emerged a general consensus in the international community on the

[33] Ibid, paras 120-124.

principle that the use of those weapons is also prohibited in internal armed conflicts."[34]

24. There may be similar flash points at which it can be said that a new crime emerges in international law through general acceptance by States. Such a point was in my view reached in relation to child enlistment in July 1998 with general acceptance of the offence as defined in Article 8 of the Rome Treaty. I do not find any such consensus at any earlier point.

The Child at War

24. Attention to the problem of child soldiers - of whom there are estimated to be 300,000 currently in Africa[35] - has been relatively recent. The use of children in conflict situations (e.g. to load naval cannons) was ended (like their use to sweep chimneys and to go down mines) as much by new technologies as by humanitarian sentiment. Children are a very recent subject of human rights law, omitted from the 18th Century declarations on the Rights of Man because they were then regarded as the property of their parents. The League of Nations, moved by the numbers of children orphaned in the First World War, issued a declaration in 1924 about the duties of governments to provide food, shelter and medical attention for poor children. The Universal Declaration of Human Rights says no more than that "motherhood and childhood are entitled to special care and assistance"[36]. The International Covenant on Civil and Political Rights vaguely gives protection to children as part of "the family" and affords them just one right - to acquire a nationality. In the course of the 1980s, national jurisdictions became aware of the case for "children's rights": there were powerful challenges to the approach that saw children as subject entirely to parental governance until their "age of majority". In *Gillick*, for example, the House of Lords accepted that

[34] Ibid, para. 124.
[35] Graça Machel: *The Impact of War on Children*, (UNICEF, 2001), p. 7.
[36] *Universal Declaration of Human Rights*, G.A. Res. 217A (III), 3 U.N. GAOR at 17, U.N. Doc. A/810 at 71 (1948), Article 25.

parental rights "dwindled" as teenage years advanced.[37] Eventually, in 1990, the Convention on the Rights of the Child[38] put these developments into a coherent code, requiring states to protect the interests of children and acknowledge age-appropriate rights. The developments in the rules for protecting children in war were at first treaty-based, as follows:

Geneva Convention IV, 1949

24. Children featured at the Nuremberg and Tokyo trials as victims - especially in the death camps - rather than as forcible recruits. Geneva Convention IV set out in Article 24 the generally agreed protective principle:

> 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.

This duty to protect children under fifteen from the effects of war was placed on parties to the conflict, and it is impossible to extrapolate from this general duty on states to protect vulnerable classes of civilians an international law crime against recruiting children for military purposes. Nonetheless, Article 24 set the scene for the development of a customary international law rule.

25. What can be said is that Geneva Convention IV identified "children under fifteen" as a class which required a special protection in war, along with other vulnerable categories identified by Article 14 - the sick and wounded, the aged, expectant mothers and mothers of children under seven. They were to be accommodated, if

[37] *Gillick v West Norfolk and Wisbech Area Health Authority*, [1986] AC 112, HL.
[38] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3.

possible, in "safety zones". Article 24, properly interpreted, applies only to those children who are orphaned or separated from parents, and not to all children under fifteen: the Article relates only to providing them with education, religion and shelter. Article 51, however, provides:

> 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.

This is a duty on the occupying power, and not on any other state or non-state actor: it is not enforceable and is not part of the "grave breaches" regime of the Geneva Convention. It relates to an abuse of power by a victorious army. Nonetheless, it can in retrospect be identified as the beginning of international concern about "voluntary" enlistment, which it accepts may be induced by "pressure and propaganda".

The Additional Protocols (1977)

26. In 1977 the two protocols to the Geneva Convention were promulgated.[39] Article 77(2) of Protocol 1 which relates to international conflicts requires

> 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 the armed forces.

[39] 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).

It is notable that this Protocol is directed only to parties to the conflict and relates to involving children in front-line hostilities ("taking a direct part"). Indeed, Article 77(3) accepts that there will be "exceptional cases" where children *will* take a direct part, and requires them to be treated, when captured, as protected civilians and not as prisoners of war. The duty to "take all feasible measures" means to do what is practicable in the circumstances - it does not imply a duty to legislate for a new crime.

27. Geneva Protocol II sets out rules that should apply in *internal* conflict. Article 4(3) required states to avoid both recruitment of children and their deployment in fighting, but recognised that they might be so deployed - in which event they deserve special treatment when captured:

> Article 4(3) Children should 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;
> >
> > d. The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured.

Article 4(3) spells out the duty to protect the welfare of children in the course of internecine conflict and civil war - they must be educated, stay with their families wherever possible, and those under fifteen must not be recruited for armed groups or front-line fighting. "Recruitment" is a term which implies some active soliciting of "recruits", i.e. to pressure or induce them to enlist: it is not synonymous with "enlistment".

Convention on Rights of Child - 1990

28. The Convention on the Rights of the Child was adopted in 1989 and entered into force in 1990. Article 38(2) places the duty on "*States Parties*" to take "all feasible measures", but limited to ensuring that children under fifteen "do not take a direct part in hostilities". Article 38(3) requires States Parties "to refrain from recruiting" any person under fifteen into the armed forces: this amounts to a negative obligation on governments to avoid such recruitment in their national armies, but is a far cry from imposing an international law obligation to prosecute and punish those who enlist child indictees into civil defence forces or militias. The duty does not apply by this Convention to armed groups and non-state actors, and states are left with a discretion as to whether to legislate so as to prohibit child recruitment. Although this Convention has attracted almost universal support, it has no enforcement mechanism and does not cast the duty in the form of a criminal prohibition.

African Charter, 1992

29. In 1990 the Organization of African Unity promulgated the African Charter on the Rights and Welfare of the Child.[40] Many commentators have overlooked this important Treaty, but not Judge Bankole Thompson, who (writing extra-judicially) hailed it as "a radical departure from African cultural traditionalism."[41] He said that it would ensure that "the 1990s will go down in history as a revolutionary decade for the human rights movement in Africa".[42] Article 22 of the Charter deals with armed conflicts insofar as they affect children. It first imposes on

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[40] *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.
[41] Bankole Thompson, *Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism*, 41 INT'L. & COMP. L.Q. (April 1992) 432, 433.
[42] Ibid, p. 432.

member states an obligation to "undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflict which affects the child". It then enjoins them to "ensure that no child takes a direct part in hostilities and refrain in particular from recruiting any child".

30. Judge Thompson is right to identify the African Charter as a significant step for this continent, but he accepts that it imposes an obligation only on member states of the OAU and he concludes with "a note of caution as to the Charter's ability to achieve its goals and aspirations".[43]

Developments until November 1996

31. I do not find any significant addition to these Conventions before November 1996. In 1996, ironically, the Government of Sierra Leone acknowledged in its report to the Committee on the Rights of the Child that there was no minimum age for recruitment of persons into the armed forces "except provision in the Geneva Convention that children below the age of fifteen years should not be *conscripted*[44] into the army"[45]. The Committee did not get around to answering Sierra Leone until five years later, when it suggested that the country should pass and enforce a law to prohibit the recruitment of children. This rather makes the point that, so far as local legislation was concerned, the applicant could not, back in 1996, have understood there to be any criminal law against enlisting children who volunteered to serve in militias. That is because Articles 24 and 51 of the Geneva Convention did not prohibit child enlistment other than by an "occupying power" and Additional Protocol II called upon States "to take all feasible measures" to stop child recruitment. It was the view of the Committee in 2000 that Sierra Leone had not taken any measures, feasible or not. The information supplied to us by

[43] Ibid, pp 433, 443-44.
[44] Emphasis added.
[45] The Initial Report of States Parties: Sierra Leone 1996 CRC/C/3/Add.43 para. 28.

UNICEF from a global report published in 2001[46] actually states that the Sierra Leone position is that children can be recruited at "any age with consent" - apparently of parents and guardians - and refers to Section 16(2) of the Royal Sierra Leone Military Forces Act, 1961.

32. At any event, and notwithstanding all the valuable help from UNICEF and the other *amicus*, The University of Toronto International Human Rights Clinic, I cannot find that by 1996 the rule against enlistment of child soldiers had passed beyond a general rule of international humanitarian law. There was undoubtedly an obligation on states and on belligerent parties to avoid the enlistment of children, but if they did enlist children they were enjoined to keep them out of the firing line and if captured to treat them as "protected persons" rather than as prisoners of war. It does not seem to me to matter at all that the Rome Treaty was drafted in 1994: it did not obtain approval until July 1998, and in any event the final formulation of the "child enlistment" crime does not appear to have been suggested by Germany until December 1997. Professor William Schabas, one of the leading experts on the Rome Treaty, has no doubt that the "enlistment" crime in Article 8 was "new law". He explains that "The term "recruiting" appeared in an earlier draft, but was replaced by "conscripting or enlisting" to suggest something more passive, such as putting the name of a person on a list."[47] The learned authors of "*The Rome Statute of the International Criminal Court - A Commentary*", Messrs Cassese, Gaeta and Jones, point out that the crime was not contained in the original draft statute and goes beyond the 1977 Additional Protocols of the Geneva Convention.[48]

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[46] By The Coalition to Stop the Use of Child Soldiers see UNICEF Appendix, p11.
[47] W. Schabas, *An Introduction to the International Criminal Court*, (Cambridge, 2001), p. 50.
[48] A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court – A Commentary*, (Oxford, 2002), p. 416.

Discussion

33. So what had emerged, in customary international law, by the end of 1996 was an humanitarian rule that obliged states, and armed factions within states, to avoid enlisting under fifteens or involving them in hostilities, whether arising from international or internal conflict. What had not, however, evolved was an offence cognizable by international criminal law which permitted the trial and punishment of individuals accused of enlisting (i.e. accepting for military service) volunteers under the age of fifteen. It may be that in some states this would have constituted an offence against national law, but this fact cannot be determinative of the existence of an international law crime: theft, for example, is unlawful in every state of the world, but does not for that reason exist as a crime in international law. It is worth emphasizing that we are here concerned with a jurisdiction which is very special, by virtue of its power to override the sovereign rights of states to decide whether to prosecute their own nationals. Elevation of an offence to the category of an international crime means that individuals credibly accused of that crime will lose the protection of their national law and it may as well lose them such protections as international law would normally afford, such as diplomatic or head of state immunity. For that reason, international criminal law is reserved for the very worst abuses of power - for crimes which are "against humanity" because the very fact that fellow human beings conceive and commit them diminishes all members of the human race and not merely the nationals of the state where they are directed or permitted. That is why not all, or even most, breaches of international humanitarian law, i.e. offences committed in the course of armed conflict, are offences at international *criminal* law. Such crimes are limited to the breaches of the Geneva Convention which violate Common Article 3, and to other specified conduct which has been comprehensively and clearly identified as an international law crime: treaties or State practice or other methods of demonstrating the consensus of the international community that they are so

destructive of the dignity of humankind that individuals accused of committing them must be put on trial, if necessary in international courts.

34. For a specific offence - here, the non-forcible enlistment for military service of under fifteen volunteers - to be exhibited in the chamber of horrors that displays international law crimes, there must, as I have argued above, be proof of general agreement among states to impose individual responsibility, at least for those bearing the greatest responsibility for such recruitment. There must be general agreement to a formulation of the offence which satisfies the basic standards for any serious crime, namely a clear statement of the conduct which is prohibited and a satisfactory requirement for the proof of *mens rea* - i.e. a guilty intent to commit the crime. The existence of the crime must be a fact that is reasonably accessible. I do not find these conditions satisfied, as at November 1996, in the source material provided by the Prosecutor or the *amici*. Geneva Convention IV, the 1977 Protocols, the Convention on the Rights of the Child and the African Charter are, even when taken together, insufficient. What they demonstrate is a growing predisposition in the international community to support a new offence of non-forcible recruitment of children, at least for front-line fighting. What they do not prove is that there was a universal or at least general consensus that individual responsibility had already been imposed in international law. It follows that the Secretary-General was correct to doubt whether a crime of "conscripting or enlisting" child soldiers had come into existence by 30th November 1996.

35. Indeed, it was from about this time that the work of Graça Machel (who first reported on this subject to the United Nations in 1996) and the notable campaigning by NGOs led by UNICEF, Amnesty International, Human Rights Watch and No Peace Without Justice, took wing. What they were campaigning for, of course, was the introduction into international criminal law of a crime of child enlistment - and their campaign would not have been necessary in the years

that followed 1996 if that crime had already crystallized in the arsenal of international criminal law.

35. The first point at which that can be said to have happened was 17th July 1998, the conclusion of the five week diplomatic conference in Rome which established the Statute of the International Criminal Court. On that day the delegates from 122 nations affirmed by their signature

> That the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation.[49]

37. Article 8 of the Rome Treaty defined the "war crimes" which fell within this category: they were defined to include

> 8(2)(a): Grave breaches of the Geneva Conventions of 1949.
> 8(2)(b): Other serious violations of the laws and customs applicable in international armed conflict, including
> (xxvi) Conscripting or enlisting children under the age of fifteen years under the national armed forces or using them to participate actively in hostilities
> 8(c): In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 1949.
> 8(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely...

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

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

38. The Rome Statute was a landmark in international criminal law - so far as children are concerned, participation in hostilities was for the first time spelled out as an international crime in every kind of serious armed conflict. The Statute as a whole was approved by 122 states. True, 27 states abstained and 7 voted against it, but the conference records do not reveal that any abstention or opposition was based on or even referred to this particular provision relating to child recruitment. In the course of discussions, a few states - the US in particular - took the position that "it did not reflect customary international law and was more a human rights provision than a criminal law provision."[50] That, in my view, was correct - until the Rome Treaty itself, the rule against child recruitment *was* a human rights principle and an obligation upon states, but did not entail individual criminal liability in international law. It did so for the first time when the Treaty was concluded and approved on 17th July 1998.

39. It is to diminish the achievement of the Rome Treaty and its preparatory work to argue that Article 8 was merely a consolidation of existing customary law. The prohibition of child recruitment was one article in respect of which the Treaty produced a new offence, or perhaps more accurately, elevated what had hitherto been a "non grave" rule of international humanitarian law into a war crime punishable, like grave breaches, by international criminal courts. July 17th, 1998 deserves to be remembered as a red-letter day in the development of international legal protection for children against being embroiled, or embroiling themselves, in warfare.

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[50] "Crimes Within the Jurisdiction of the Court", Herman von Hebel and Darrel Robinson in *The International Criminal Court: Making of the Rome Statute*, ed. Roy Lee; Chapter II at pp. 117-18.

40. I do not think, for all the above reasons, that it is possible to fix the crystallization point of the crime of child enlistment at any earlier stage, although I do recognise the force of the argument that July 1998 was the beginning and not the end of this process, which concluded four years later when sufficient ratifications (that of sixty states) were received to bring the Rome Treaty into force. Nonetheless, state practice immediately after July 1998 demonstrates that the Rome Treaty was accepted by states as a turning point in the criminalisation of child recruitment. For example, UNICEF could only cite five states which had a specific criminal law against child recruitment prior to July 1998.[51] However,

> In the wake of the adoption of the Rome Statute of the ICC, many more states have criminalized the recruitment of children under the age of fifteen by ratification of the Statute, and in many cases by altering their own legislation accordingly through implementing legislation of the ICC Statute.[52]

41. In other words, there was no common state practice of explicitly criminalizing child recruitment prior to the Rome Treaty, and it was in the process of ratification of that Treaty that many states introduced municipal laws to reflect it. A good example is provided by Australia, which in response to its ratification passed the International Criminal Court (Consequential Amendments) Act 2002 Number 42 (Cth). This Consequential Amendments Act operated to amend the Criminal Code Act 1995 (Cth) to make the offences in the Rome Statute, for the first time, offences under Australian Commonwealth law. It is interesting to note that Section 268.68 of the Criminal Code Act creates (as, I think, does Article 4(c) of the SCSL Statute) three separate offences: 1) of *using*; 2) of *conscripting* and 3) of *enlisting* children in the course of armed conflict. The crime of *using* children for active participation in hostilities carries the heaviest sentence (of seventeen years),

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[51] Columbia, Argentina, Spain, Ireland and Norway, see UNICEF Amicus Brief, para. 47.
[52] UNICEF Amicus Brief, para. 48.

the crime of *conscripting* children into an armed force carries fifteen years whilst the crime of *enlisting* children carries a maximum sentence of only ten years. In my view, international crimes should be confined to offences so serious that they should carry a maximum penalty of at least fifteen years imprisonment: if states like Australia regard the offence of non-forcible enlistment of children as worth at most ten years imprisonment, I am surprised that they support it as an offence in international law at all. Should it be charged against a defendant who persuaded young children of the virtue of becoming suicide-bombers, a maximum penalty of ten years would seem inadequate.

42. The material helpfully provided to the Court by UNICEF shows that a major contribution to the campaign for incrimination was the ground-breaking study on "The Impact of Armed Conflict on Children" prepared by Ms Graça Machel for the United Nations. Ms Machel was not appointed by the Secretary-General until September 1994 and did not present her study until October 1996. It was indeed "a driving force in consolidating strong political will among states to take appropriate action"[53] but that action was not taken in 1996, it was taken in July 1998. In August 1996 there was a debate in the UN Security Council over the situation in Liberia. The delegate from Italy stated that "words alone do not suffice to condemn this heinous behaviour. This behaviour must be stopped immediately, by every means the international community has available, including that of writing some provision, the framework of what will soon become the International Criminal Court, in order to bring to justice the perpetrators of such intolerable acts."[54] These sentiments were supported by a number of other states including the United States whose delegate stated:

> Who can forget the photographs of child soldiers brandishing assault weapons? Who can imagine the psychological scars that will be left with

[53] UNICEF Amicus Brief, para. 69.
[54] Italy, Statement before the UN Security Council, UN Doc S/PV.3694, 30 August 1996, p. 6.

these children for years to come? The Council is determined that this abhorrent practice shall not continue.[55]

The Security Council duly condemned the practice of "recruiting, training and deploying children for combat" and requested the Secretary-General to report on "this inhumane and abhorrent practice". What is instructive about this debate, in August 1996, just before the temporal jurisdiction of this court commences, was that no delegate articulated the view of his or her State that the "abhorrent practice" was *already* a crime in international law. Ms Machel's report on the impact of armed conflict on children was not presented to the General Assembly and the Security Council until October 1996 and was not discussed until December of that year. It was endorsed, but the endorsement of a report by the United Nations cannot transform a recommendation in that report into a rule of international criminal law. Nor does a report from a UN subcommittee - in this case, the Committee on the Rights of the Child - which warned in October 1997 that in respect to abduction of children for fighting in Uganda, "violation of the rules of international humanitarian law entail responsibility attributed to perpetrators."[56] The majority opinion sets some store by this report, but a) it comes after November 1996 and b) it does not specifically refer to child *enlistment*.

42. The United Nations General Assembly, in its resolution on the rights of the child in December 1998, specifically recognises the contribution of the Rome Statute of the International Criminal Court as the key document making possible the ending of impunity for conscription of child soldiers.[57] Similarly, the Latin American and Caribbean Conference on the use of child soldiers in July 1999 welcomed the adoption of the Rome Statute "which confirms conscripting or enlisting children as

[55] United States, Statement before the UN Security Council, UN Doc S/PV.3694, 30 August 1996, p. 15.
[56] Concluding Observations of the Committee on the Rights of the Child: Uganda, 21 October 1997, CRC/C/15/Add.80, para. 34.
[57] A/RES/53/128, The Rights of the Child, 9 December 1998.

a war crime".[58] Both these conference resolutions can be read as assuming that the war crime of enlisting child soldiers crystallized with the Rome Treaty of July 1998 and not before. In May 2000 the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict was adopted by the General Assembly.[59] To this date, 115 countries have signed it although only 70 have ratified. It confirms the criminality of enlisting children under fifteen for military service in armed conflicts, and seeks to raise that age to eighteen. However, it does not indicate that the criminality in international law is capable of arising *prior* to the Rome Treaty.

43. That Optional Protocol in its preamble notes:

> the adoption of the Rome Statute of the ICC, in particular, the inclusion there as a war crime, of conscripting of enlisting children under the age of fifteen years or using them to participate actively in hostilities in both international and non-international armed conflicts.

This seems to me to recognise that the Rome Treaty has changed the position, and transformed what was previously a norm of international law into a rule of international criminal law, entailing punishment for individual perpetrators.

44. As Graça Machel herself writes, in "The Impact of War on Children" published in 2001,

> The Rome Statute establishing the International Criminal Court, overwhelmingly approved in July 1998, makes it an international war crime for children to be conscripted or enlisted into armed forces or groups - or otherwise used in hostilities. Although it sets the minimum age for recruitment at fifteen, the Rome Statute, now in the ratification

[58] Preamble to the *Montevideo Declaration on the Use of Children as Soldiers*, 9 July 1999.
[59] UN Doc. A/54/RES/263, 25 May 2000, entered into force 12 February 2002.

process, is nonetheless an important step towards the enforcement of international law forbidding children's participation in hostilities.

Conclusion

45. The above analysis convinces me that it would breach the *nullen crimen* rule to impute the necessary intention to create an international law crime of child enlistment to states until 122 of them signed the Rome Treaty. From that point, it seems to me it was tolerably clear to any competent lawyer that a prosecution would be "on the cards" for anyone who enlisted children to fight for one party or another in an ongoing conflict, whether internal or international. It is not of course *necessary* that a norm should be embodied in a Treaty before it becomes a rule of international criminal law, but in the case of child enlistment the Rome Treaty provides a *sufficient* mandate - certainly no previous development will suffice. It serves as the precise point from which liability can be reckoned and charged against defendants in this court. It did, of course, take four years before the necessary number of ratifications were received to bring the treaty into force. But the normative status of the rule applicable to States prior to 1998, the overwhelming acceptance by states in the Rome Treaty of its penal application to individuals and the consequent predictability of prosecution from that point onwards, persuades me that the date of the Treaty provides the right starting point.

46. There are many countries today where young adolescents are trained with live ammunition to defend the nation or the nation's leader. What the international crime most seriously targets is the use of children to "actively participate" in hostilities - putting at risk the lives of those who have scarcely begun to lead them. "Conscription" connotes the use of some compulsion, and although "enlistment" may not need the press gang or the hype of the recruiting officer, it must nevertheless involve knowledge that those enlisted are in fact under fifteen and that they may be trained for or thrown into front-line combat rather than used for

service tasks away from the combat zones. There may be a defence of necessity, which could justify desperate measures when a family or community is under murderous and unlawful attack, but the scope of any such defence must be left to the Trial Chamber to determine, if so requested.

47. I differ with diffidence from my colleagues, but I have no doubt that the crime of non-forcible enlistment did not enter international criminal law until the Rome Treaty in July 1998. That it exists for all present and future conflicts is declared for the first time by the judgments in this Court today. The modern campaign against child soldiers is often attributed to the behaviour of Holden Roberto in Angola, who recognised how much it demoralizes an enemy village to have its chief headman executed by a child. More recently, we have had allegations about children being indoctrinated to become suicide bombers - surely the worst example of child soldier initiation. By the judgments today, we declare that international criminal law can deal with these abhorrent actions. But so far as this applicant is concerned, I would grant a declaration to the effect that he must not be prosecuted for an offence of enlistment, under Article 4(c) of the Statute, that is alleged to have been committed before the end of July 1998.

Done at Freetown this thirty-first day of May 2004

Justice Robertson

[Seal of the Special Court for Sierra Leone]