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List of Contributors

Re- Examination of the Decision of the Sierra Leone Special Court in Prosecutor v. Samuel Hinga Norman: What Lesson has it Impacted on Africa?

Abstract

The civil war in Sierra Leone erupted in March 1991 and lasted for more than a decade. It was among the most brutal and destructive of internal strifes. It displaced more than half of the population of Sierra Leone. Between 100,000 and 200,000 people were killed with more than 40,000 maimed during the conflict. The civil war witnessed heinous crimes which included, but not limited to, summary executions, rapes, sexual slavery, forced pregnancy, child abduction, use of child soldiers, use of drugs, trafficking in drugs and diamonds. At the request of the Government of Sierra Leone, the United Nations proposed the establishment of an International court for the prosecution of those most responsible for the commission of atrocities during the war in Sierra Leone. United Nations Security Council Resolution 1315, adopted on 14 August 2000, requested negotiations for the creation of a court vested with a limited jurisdiction to prosecute "crime against humanity, war crimes and other serious violations of international humanitarian law"[1] and to try those "persons who bear the greatest responsibility"[2]In this case, Chief Samuel Hinga Norman, was Charged together with Moinina Fofana and Allieu Kondewa on an indictment containing eight counts, the last of which alleged his command responsibility for a serious violation of international humanitarian law, namely: enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. He applied by preliminary motion to the Appeals Chamber of the Special Court, arguing that the Court had no jurisdiction to try him for crimes under Article 4 (c) of the Court's Statute. To do so would violate the principle of *nullum crimen sine lege* as no such crime existed at any times relevant to the indictment. The majority of the judges of the Appeals Chambers disagreed. They held that: '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'.[3] However, the Court emphasized that the prohibition of the recruitment and use of children to participate in hostilities was one of the 'fundamental guarantees' in Additional Protocol II, which was itself an expansion of Common Article 3 of the Geneva Conventions.

Introduction

The grave violations of human rights heightened the national and international pressure on the government of Sierra Leone to negotiate with Revolutionary United Front (RUF).

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[1] UN Security Council Resolution 1315, adopted on 14 August, 2000 available at http://www.specialcourt.org/documents/backgroundDocs/SCRes1315e.pdf (last visited on 6 Feb 2012).

[2] Agreement between the Un and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 1 available at http://www.un.org/Docs/sc/reports/2000/915e.pdf or http://www.specialcourt.org/documents/SpecialCourtAgreementFinal.pdf (lasted visited on 6 Feb 2012).

[3] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary General, UN Doc.S/2000/1234,Annex, para.53.

Consequently in July 1999, the government and RUF singed Lome Agreement.[4] The Agreement, among other things, granted amnesty to the rebels who were members of three factions fighting during the civil war, in respect of anything done by them in pursuit of their objectives as members of these organizations, up to the time of signing the agreement itself. This amnesty attracted both national and international criticism for it fully exempted the perpetrators of heinous crimes from any criminal prosecutions. Accordingly, the United Nations Security Council established the United Nations Peacekeeping Mission in Sierra Leone (hereinafter UNAMSIL) to guard the fragile peace in the country. At the request of the Government of Sierra Leone, the United Nations proposed the establishing an international court for prosecution of those most responsible for the commission of atrocities during the war in Sierra Leone. United Nations Security Council Resolution 1315, adopted on 14 August 2000, requested negotiations for the creation of a court to prosecute "crime against humanity, war crimes and other serious violations of international humanitarian law" and to try those "persons who bear the greatest responsibility" for these crimes. The Special Court for Sierra Leone has primacy over Sierra Leone national courts, and is independent from any government. The Special Court for Sierra Leone cannot impose death penalty which has not been abolished in Sierra Leone criminal law. This is in contrast with the previous experience of the International Criminal Tribunal for Yugoslavia and International Criminal Tribunal of Rwanda, the Special Court for Sierra Leone represents a new evolution of the international community. Consequent upon which this paper intends to examine lessons if any was learnt from that 'barbaric' experience in Africa.

Background Information of the Civil War in Sierra-Leone

The civil war in Sierra Leone erupted in March 1991 and lasted for more than a decade.[5] It was among the most brutal and destructive of internal strifes.[6] It displaced more than half of the population of Sierra Leone. Between 100,000 and 200,000 people were killed with more than 40,000 maimed during the conflict[7]. The civil war witnessed heinous crimes which included, but not limited to, summary executions, rapes, sexual slavery, forced pregnancy, child abduction, use of child soldiers, use of drugs, trafficking in drugs and diamonds[8].

Sierra Leone experienced several coups but in 1996 there was a democratic election which resulted in power being transferred to a democratic government led by Ahmed Tajan Kabbah[9]. The new elected President signed the Abidjan Peace Accord in Abidjan,

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[4] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, "Lome Agreement". 7 July, 1999 >http://www.c-r.org/our-work/accord/sierra-leone/lomeagreement.php (last visited on 6 Feb. 2012).

[5] K. Peters, Re-Examining Voluntarism: Youth Combatants in Sierra Leone, Institute of Security Studies, (2004), pp. 9-12 .

[6] The Special Court of Sierra Leone (2006) Challenging impunity: Bringing Justice to the People of Sierra Leone, Free Town: Special Court for Sierra Leone, p. 1.

[7] C. Schocken, 'The Special court for Sierra Leone: Overview and Recommendations' (2002) 20 Berkeley Journal of International Journal and Comparative law, p. 436. See also N.K.Stafford, 'A Model War Crimes Court: Sierra Leone (2003) 10 ILSA Journal of International and Comparative Law, pp. 117-127.

[8] Peters, n. 3 above, pp. 9-12.

[9] C. Schocken, *'The Special court for Sierra Leone: Overview and Recommendations'* (2002) 20 Berkeley Journal of International Journal and Comparative law, p. 438.

in November 1996.[10] The latter agreement did not last long partly due to the distrust that existed between the contracting parties as well as the poor implementation provisions of the Accord.[11] As a result, human rights violations continued, worsening the situation in the country. The grave violations of human rights heightened the national and international pressure on the government of Sierra Leone to negotiate with Revolutionary United Front (RUF).[12] Consequently in July 1999, the government and RUF singed Lome Agreement.[13] The Agreement, among other things, granted amnesty to the rebels who were members of three factions fighting during the civil war, in respect of anything done by them in pursuit of their objectives as members of their organization, up to the time of signing the agreement itself.[14] This amnesty attracted both national and international criticism for it fully exempted the perpetrators of heinous crimes from any criminal prosecutions.[15] Accordingly, the United Nations Security Council established the United Nations Peacekeeping Mission in Sierra Leone (hereinafter UNAMSIL) to guard the fragile peace in the country.

The Lome Agreement was not able to secure enduring peace as the RUF started to violate the agreement by launching attacks against the state institutions.[16] Human rights violations and war terror continued until President Ahmed Tajan Kabbah officially declared an end to the long civil war and the establishment of a fragile peace in 2002.[17] Grave crimes, massive in scale, had been committed in the civil war. The need to prosecute the ring leaders responsible for these crimes prompted the push to establish the Special Court for Sierra Leone only few months after the civil war was over. The Special Court for Sierra Leone is similar to the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda.[18]

The Special Court of Sierra Leone

At the request of the Government of Sierra Leone, the United Nations proposed the establishing an international court for prosecution of those most responsible for the

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[10] A Tejan-Cole, 'Painful peace: Amnesty under the Lome Peace Agreement in Sierra Leone' (1999) Law, Democracy and Development, 239.

[11] Ibid., p. 240

[12] Ibid.

[13] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, "Lome Agreement". 7 July, 1999 >http://www.c-r.org/our-work/accord/sierra-leone/lomeagreement.php (last visited on 6 feb. 2012).

[14] Ibid., article IX.

[15] C. Schuler, A wrenching Peace: Sierra Leone's 'See no Evil' pact, Christian Science Monitor, 15 September, 1999.

[16] A. Stewart and N. Thomas, Peace Process Deteriorates in Sierra Leone as Rebels Continue to Hold UN Peace Keepers Hostage, ABC News World News, 9 May, 2000.

[17] Sierra Leone Civil War < http://www.answers.com/topic/Sierra-Leone-civil-war> (Accessed and last visited on 6 Feb. 2012).

[18] C. Anthony, Historical and Political Background to the Conflict in Sierra Leone, in: Kai Ambos/ Mohammed Othman (eds) New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia. (2003), pp. 149-151. See also "Comparative Analysis of the Rights of a Child with reference to the Rights of Child Soldiers" Doctoral thesis of Anwo Joel Olasunkanmi (2008) University of Fort Hare, Alice, South Africahttp://www.findthatfile.com/.../download-documents-Anwo-thesis> (Accessed and last visited on 6 Feb. 2012).

commission of atrocities during the war in Sierra Leone. United Nations Security Council Resolution 1315, adopted on 14 August 2000, requested negotiations for the creation of a court to prosecute "crime against humanity, war crimes and other serious violations of international humanitarian law"[19] and to try those "persons who bear the greatest responsibility"[20] for these crimes. The Special Court for Sierra Leone has primacy over Sierra Leone national courts, and is independent from any government. The Special Court for Sierra Leone cannot impose death penalty which has not been abolished in Sierra Leone criminal law. In contrast with the previous experience of the International Criminal Tribunal for Yugoslavia and International Criminal Tribunal of Rwanda, the Special Court for Sierra Leone represents a new evolution of the international community on how to approach justice in post-conflict societies on several respects:

(i).The Special Court is not an international tribunal to the extent that it was not created by a resolution from the Security Council, but by a *negotiated Agreement* between the United Nations and the Security Council;
(ii).It is a Hybrid Juridical Institution with jurisdiction over acts committed in violation of international law as well as certain crimes under sierra Leonean law.[21]
(iii).The Court was established with a limited jurisdiction to try "those who bear the greatest responsibility", a distinction that was not contained in the ICTY and ICTR Statutes. However, it should be noted that both tribunals have also experienced institutional limitations.[22]
(iv).Unlike both United Nations tribunals, the Special Court for Sierra Leone budget is funded through voluntary contribution.
(v).The Special Court for Sierra Leone is based on an Agreement between the United Nations and Sierra Leone. Unlike the ICTY and the ICTR, the Special Court for Sierra Leone cannot assert primacy over national courts of other states, thus limiting the Court's capacity in terms of extradition.
(vi).After Charles Taylor's indictment by the Special Court for Sierra Leone, many questions have been raised on the credibility and the capacity of Special Court to handle its mandate and the high goals it has given itself.

To be fair, the Special Court for Sierra Leone has proven already some of this critic wrong.[23] However, it has also raised some concerns, for instance in the case of the indictment of Charles Taylor and the opportunity of such a move during the Liberian peace talks held in Accra (Ghana). The negotiated nature of the Agreement creating the Special Court for Sierra Leone is reflected on numerous aspect of the Court as for

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[19] UN Security Council Resolution 1315, adopted on 14 August, 2000 available at http://www.specialcourt.org/documents/BackgroundDocs/SCRes1315e.pdf (last visited on 6 Feb 2012).

[20] Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Article 1 available at http://www.un.org/Docs/sc/reports/2000/915e.pdf or http://www.specialcourt.org/documents/SpecialCourtAgreementFinal.pdf (last visited on 6 Feb 2012).

[21] See Statute of the Special Court of Sierra Leone. Available at http://www.sc-sl.org/scsl-statute.html (last visited on 6 Feb 2012).

[22] See ICTY proceedings factsheet at: http://www.un.org/icty/glance/procfact-e.htm; see also ICTY factsheets at: http://www.ictr.org/ENGLISH/factsheets/index.htm. (last visited on 6 Feb 2012).

[23] For instance regarding the Special Court of Sierra Leone relations with the TRC.92.

instance in its composition. Indeed the Special Court for Sierra Leone is composed of international and Sierra Leoneans
staff, prosecutors and judges.[24] The recent nomination of Special Court for Sierra Leone Appeal Judge Hassan Jallow (of Gambia) as the new Chief Prosecutor for the International Criminal Tribunal of Rwanda further indicates both the role of African judges in post-conflict justice jurisdiction in Africa, as well
as the Special Court for Sierra Leone influence on international justice dynamics.[25]

Jurisdiction of the Special Court for Sierra Leone

While the jurisdiction of the Special Court for Sierra Leone seems to be opening some new possibilities for post-conflict countries to set up international (mixed) tribunals, many questions on the outcome of this new type of jurisdiction to address the legacy of war crimes remain unanswered. The Special Court for Sierra Leone is to try 'those who bear the greatest responsibility' for the worst offenses committed since November 30, 1996. Since the war has been going on from 1991, this choice to start the Court mandate in 1996 was decided so that the Court would not be overburdened. It is to be noted that neither the Special Court for Sierra Leone Statute nor the Agreement between the UN and the Government of Sierra Leone address the question of the Court's life span, though concordant declarations from Special Court for Sierra Leone officials have publicized a time-frame of three years.

The Court has jurisdiction over acts committed in violation of international humanitarian law such as crimes against humanity, war crimes as well as other serious violations of international law, namely, attacks against peacekeepers and conscription of children under age fifteen. Moreover, the Special Court for Sierra Leone's jurisdiction comprises certain crimes under Sierra Leonean law like abuse of girls younger than fourteen and wanton destruction of property.[26] While the Lomé Agreement offers amnesty to former combatants, excepting the case of violations of International Humanitarian Law and the given crimes under Sierra Leonean law, the Prosecutor of the Special Court for Sierra Leone, David Crane, has challenged this agreement. However, due to the Special Court for Sierra Leone limited capacity, if only financial, such an option appears rather unlikely.

Recognition of Child Recruitment as a Crime under International Criminal Law

The Special Court for Sierra Leone is the first international tribunal to have tried the crime of child recruitment and also the first to have developed a new international criminal law with regard to the recruitment of child soldiers.[27] Samuel Hinga Norman of the 'Civil Defence Forces' (CDF) stood trial before the Special Court for Sierra Leone for

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[24] Appointments to Sierra Leone Special Court. Further information on the given judges is available at http://www.un.org/News/Press/docs/2002/sga813.doc.htm (last visited on 6 Feb 2012).

[25] See the nomination of former Special Court of Sierra Leone appeal judge Hassan Jallow (Gambia) as the new ICTR Chief Prosecutor on August 29th, 2003 is available at http://news.bbc.co.uk/2/hi/africa/3190833.stm. (last visited on 6 Feb. 2012).

[26] See the nomination of former Special Court of Sierra Leone appeal judge Hassan Jallow (Gambia) as the new ICTR Chief Prosecutor on August 29th, 2003 is available at http://news.bbc.co.uk/2/hi/africa/3190833.stm. (last visited on 6 Feb. 2012).

[27] A Smith 'Child Recruitment and the Special Court for Sierra Leone' (2004) 2 *Journal of International Criminal* Justice, p. 1141.

recruiting child soldiers during the Sierra Leone civil war[28]. A preliminary motion was filed before the Court on his behalf objecting to the charge against the use of child soldiers. The objection was based on the argument that child recruitment was not a crime under customary international law in 1996 when the Special Court for Sierra Leone's temporary jurisdiction started. It was argued that child recruitment has become a crime only since the adoption of the 1998 Rome Statute for the International Criminal Court. Thus, this indictment would breach the principle of non-retroactivity. But the Appeals Chamber held that the recruitment of children under the age of 15 years was a crime under international law in 1996[29]. In reaching its decisions the Court noted that various international instruments to which Sierra Leone is party such as the 1949 Geneva Conventions and their two Additional Protocols of 1977, the Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child, all of which have prohibited the recruitment of child soldiers long before 1996[30]. The widespread recognition and acceptance of the prohibition of child soldiers in the aforementioned international instruments indicate that child recruitment had already crystallized as a crime under customary international law[31]. Therefore, the Court held that the recruitment of children was already a crime by the time of the adoption of the Rome Statute[32]. As a result, the 1998 Rome Statute only codified and ensured that the customary law norm be implemented at the national level. For these reasons, the preliminary motion was dismissed and the Court added a new dimension to the body of international criminal law888. Given the prevalence of the use of children in armed conflict in African states, this charge is likely to be brought again in future cases before the International Criminal Court or similar international criminal fora in Africa.

Special Court decision in *Prosecutor v. Samuel Hinga Norman*

The Applicant, Chief Samuel Hinga Norman, was charged together with Moinina Fofana and Allieu Kondewa on an indictment containing eight counts, the last of which alleged his command responsibility for a serious violation of international humanitarian law, namely: enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities. He applied by preliminary motion to the Appeals Chamber of the Special Court, arguing that the Court had no jurisdiction to try him for crimes under Article 4(c) of the Court's Statute. To do so would violate the principle of *nullum crimen sine lege* as no such crime existed at any times relevant to the indictment. The majority of the judges of the Appeals Chamber disagreed. They held that: '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

[28] Appeals Chamber, *Prosecutor v Norman*, " Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)" 31 May 2004.Available at http://socrates.berkeley.edu/~warcrime/SLReports/004.pdf (last visited on 6 Feb. 2012).

[29] Summary of decision on Preliminary Motion (Child Recruitment), *Prosecutor V. Sam Hinga Norman, Case Number* SCSL-2003-14-AR72 (E) < http://www.sc-sl.org/summary-childsoldiers.html (accessed and last visited on 6 May, 2007). Or http://www.sc-sl.org/CDF-decisions.html (last visited on 6 Feb. 2012).

[30] Article 77(2), Additional Protocol I; Article 4, Additional Protocol II; Article 38 of CRC and Art 22 of ACRWC. Available at https://www.up.ac.za/dspace/bitstream/2263/1236/1/tsegay_tn_1.pdf (last visited on 6Feb. 2012).

[31] Summary of decision on Preliminary Motion (Child Recruitment), *Prosecutor V. Sam Hinga Norman, Case Number* SCSL-2003-14-AR72 (E). Available at: http://www.sc-sl.org/CDF-decisions.html (last visited on 6 Feb. 2012).

[32] Ibid., para 4

frame relevant to the indictments'.[33] The Court considered that prior to November 1996; the prohibition on child recruitment has crystallized as customary international law on the grounds of the wide ratification of the Geneva Conventions, Additional Protocol II and the Convention on the Rights of the Child and the lack of reservations made by the States to Article 38 of the CRC.[34] The Court adopted the ICTY's conclusion in *Tadic* case that it was necessary to show that the violation must constitute an infringement of a rule of international humanitarian law which must be 'serious', and entail the individual criminal responsibility of the person breaching the rule.[35] However, the Court emphasized that the prohibition of the recruitment and use of children to participate in hostilities was one of the 'fundamental guarantees' in Additional Protocol II, which was itself an expansion of Common Article 3 of the Geneva Conventions. The Court also made reference to a 1996 Security Council resolution on the situation in Liberia,[36] which condemned the 'inhuman and abhorrent' practice of recruiting, training and deploying children for combat.[37] Thus the Court seems to have elided the second and third criteria, purporting to adopt the conclusions of the ICTR in *Akayesu*[38] that a breach of a rule protecting important values was a 'serious violation' entailing individual responsibility. Moreover, considering Article 4(2) of the Optional Protocol, which requires states parties to take all feasible measures to prevent the recruitment and use in hostilities of children by armed groups, 'including the adoption of legal measures necessary to prohibit and criminalize such practices', the Court argued that the provision demonstrated that 'the aim at this stage was to raise the standard of the prohibition of child recruitment from age 15 to age 18 years, proceeding from the assumption that the conduct was already criminalized at the time in question'. The Court concluded this stage of its decision by stating that:

> 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 the same gravity as the violations that are explicitly listed in those statutes. The fact that the ICTY and the ICTR have prosecuted violations of Additional Protocol II provides further evidence of the criminality of child recruitment before 1996 [39]

The Court again considered that the wording of Article 38 and 4 of the CRC included criminal sanctions as means of enforcement.[40] It found that a few states had criminalized child recruitment prior to 1996.[41] The Court also considered it significant that other states had prohibited child recruitment in military law, had done so indirectly by criminalizing any breaches of law by civil servants generally, or had made it impossible for individuals

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[33] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex, para.53.

[34] Ibid., paras 17-20.

[35] "It might be thought that the second criterion was jurisdictional rather than substantive". Matthew Happold, Child Soldiers in International Law, Manchester University Press, 2005, p.1 29.

[36] SC Res. 1071 of 30 August 1996 on the Situation in Liberia. Available at: http://www.un.org/Docs/sc/committees/Liberia/6262e.html (last visited on 6 Feb. 2012).

[37] Ibid., para 29.

[38] The *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Decision of 2 September 1998, para. 582 . Available at:< http://www.icc-rialcompetition.org/cms/images/.../48Prosecution.pdf> (last visited on 2 Feb. 2012).

[39] Ibid., para 39.

[40] Ibid., para 41.

[41] Ibid., para 45.

to recruit children.[42] It concluded that 'the period during which the majority of states criminalized the prohibited behaviour was the period between 1994 and 1996'.[43] Thus the Applicant's motion was accordingly dismissed. However, Justice Robertson, in his dissenting opinion, took a very different line. He considered that the more narrowly drawn offence in the Secretary-General's draft Statute was a war crime by November 1996, as it amounted to a most serious breach of Common Article 3.[44]900 However, Article 4(c), as adopted, was in a different form, and could be committed in three different ways:

> (i) by conscripting children (which implies compulsion, albeit in some cases through force of law); (ii) by enlisting them (which merely means accepting and enrolling them when they volunteer); or
> (iii) 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). Offence number (ii) extended liability considerably, as the prosecution would need only to show that the defendant knew that the person he enlisted was under 15 at the time. Justice Robertson commented that:

It might strike some as odd that the state of international law in 1996 in respect to criminalization of child enlistment was doubtful to the UN Secretary-General in October 2000 but 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 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 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..[45] Following the language of Security Council resolution 1071 relied upon by the majority, Justice Robertson agreed that the enlistment of under-15 years old was 'abhorrent' but stressed that abhorrence alone did not make conduct a crime in international law.[46] Justice Robertson emphasized that showing that child enlistment as distinct from the forcible recruitment of children or their subsequent use in combat was a war crime required not only showing that child enlistment was prohibited as a matter of international law but also that the rule had 'metamorphosed' into a rule of criminal law for breach of which individuals might be punished.[47] He laid particular stress on the *nullum crimen sine lege* principle, which he considered should be interpreted strictly.[48] Justice Robertson, as did the majority, referred to the *Tadic* case. However, he relied on a passage from the decision of the Appeals Chamber, rather than from that of the Trial Chamber, which stated that:

> "The Nuremberg Tribunal considered a number of factors relevant to its conclusion that the authors of particular prohibitions incur individual reasonability: the clear and unequivocal recognition of

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[42] Ibid., para 47.
[43] Ibid., para 51
[44] Dissenting Opinion of Justice Robertson, at para. 4.
[45] Ibid., para 6.
[46] Dissenting Opinion of Justice Robertson, at para. 9.
[47] Ibid.
[48] Matthew Happold, Child Soldiers in International Law, Manchester University Press, 2005, p. 23.

> the rules of warfare in international law and state practice indicating an intention to criminalise the prohibition, including statements by government officials and international organizations as well as punishment of violations by national courts and military tribunals. Where these conditions are met, individuals must be held criminally responsible" [49]

Justice Robertson did not consider these criteria required in 1996 in relation to the prohibition on child enlistment. The material supplied by UNICEF in its *amicus* brief upon which the majority had relied did not evidence that the majority of states had explicitly criminalized child enlistment prior to November 1996, and there had been no suggestion of any prosecution for such an offence having taken place under the national law of any state.[50] Thus Justice Robertson concluded that:

> What had emerged, in customary international law, by the end of1996 was a humanitarian rule that obliged states, and armed factions within states, to avoid enlisting under 15 years or involving them in hostilities, whether arising from international or internal armed conflict. What had not, however, evolved was an offence recognizable 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 15 years. It may be that in some states this would have constituted an offence against national law, but this cannot be determinative of the existence of an international law crime[51].

However, Justice Robertson's conclusions cannot be said to be entirely convincing either. Although, following the Secretary-General, he stated that he considered the conscription of children under 15 years of age and their use to participate actively in hostilities to have been war crimes at all relevant times, he did not explain why. It will be recalled that the Secretary-General's report stated that the abduction of children violated Common Article 3, while their transformation into 'child combatants' amounted to degrading treatment. The problem is, however, that Common Article *3* does not specifically prohibit such conduct, nor is there any evidence additional to that adduced in the majority opinion to suggest that states had criminalized it prior to 1996. Applying Justice Robertson's own standards, one might consider that no case can be made that any recruitment or use of children to participate in hostilities was a war crime prior to the adoption of the Rome Statute.

The Recruitment of Children as a War Crime in Contemporary International law

All the judges in this case of *Prosecutor v. Norman* agreed that the recruitment of use of children under 15 years to participate actively in hostilities was a war crime in contemporary international law. It seems there is no reason to doubt this conclusion of the judgment. Although not made explicit in the President of the Security Council's letter to the Secretary-General, it seems that the Council considered the recruitment of under-15 years or their use to participate actively in hostilities to be a customary crime regardless of the nature of the conflict during which it was committed (the Sierra Leone conflict was an internal armed conflict). States Parties are now incorporating the provision into their domestic criminal law in compliance with their obligations as parties to the Rome Statue.

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[49] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, p. 520, para. 128. Para. 23 of the dissenting judgment.

[50] Ibid, para. 23.

[51] Ibid. para. 33.

[52] The elements of the war crime of using, conscripting or enlisting children under Article 8(2) (b) (xxvi) of the Rome Statute and which were adopted by consensus states are that:

> Firstly, the perpetrator conscripted or enlisted one or more Persons into the national armed forces or used one or more persons to participate actively in hostilities; Secondly, such person or persons were under the age of 15 years; Thirdly, the perpetrator knew or should have known that Such person or persons were under the age of 15 years; Fourthly, the conduct took place in the context of and was associated with an international armed conflict; Lastly, the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

The elements of the war crime of using, conscripting or enlisting children under Article 8(2)(e)(vii) into an armed conflict of non-international character are similar to those enumerated above. Although the two provisions are almost identical, a number of additional comments can be made. Article 77(2) of Additional Protocol I and Article 38 of the CRC prohibit all recruitment of children less than 15 years. The Rome Statute only criminalizes such conduct if the perpetrator knew or should have known that the persons recruited were under 15 years of age. Apparently, at the Preparatory Commission for the ICC, some states argued that there should be no mental element to the crime.[53] If a person recruited children under 15 years of age, she/he would be guilty of the offence regardless of whether she/he had any reason to know or suspect what their ages were. This position was justified on the basis that it was for recruiters to satisfy themselves that recruits were not underage. On the other hand, it was argued that such an approach was inconsistent with Article 67(1) (i) of the Rome Statute, which provides that an accused before the ICC has the right not to be imposed on him/her any reversal of the burden of proof or any onus of rebuttal.[54]910 Strictly speaking, this counter-argument missed the point, as making an offence a crime of strict liability does neither of those things. However, Article 30(1) of the Statue provides that:

'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with knowledge and intent'.

Article 30(3) states that for the purpose of the Article '"knowledge" means awareness that a circumstance exists, so the prosecutor must prove that the accused was aware of that the relevant circumstances existed. However, there was general agreement at the Preparatory Commission for the ICC that such a stringent test should not apply.[55] This is uncalled for knowing that Article 77(2) of Additional Protocol I and Article 38 of the CRC require the taking of 'all feasible measures' to prevent children under 15 taking a direct part in hostilities. However, adolescents develop physically at different rates and the systems for the recording of births are rudimentary and ineffective in many countries, not least those embroiled in conflict. The drafting adopted avoids penalizing persons who recruited children whom they genuinely considered to be over 15 years of age and who

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[52] Matthew Happold, Child Soldiers in International Law, Manchester University Press, 2005, p132.
[53] K. Dormann. 'Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary. Cambridge University Press, 2003, p. 375.
[54] Ibid.
[55] Ibid.

took reasonable measures to confirm their belief, while requiring good faith efforts from recruiters in order to ensure that those recruited are not underage.

The Recruitment and Use of Child Soldiers as the Crime of Enslavement

Though prior to 1998, aside from being a violation of the laws and customs of war, the recruitment and use of child soldiers was an international crime - at least in some circumstances. The Secretary-General's draft of the Statute of the Sierra Leone Special Court listed the 'abduction and forced recruitment of children under the age of 15 years old into armed forces or groups for the purpose of using them to participate actively in hostilities' as a serious violation of international humanitarian law. The wording of the provision suggests that what was objectionable was not the recruitment of children under 15 *per se* but their recruitment by forcible or coercive means and their use for a particular degrading purpose.

Holding a person in slavery or servitude or subjecting him or her to forced or compulsory labour is contrary to international law. It is prohibited in a number of treaties[56] and under customary international law.[57] The Fourth Geneva Convention prohibits the employment of interned protected persons as forced labourers,[58] and, while other protected persons can be compelled to work, the circumstances in which this can be done are severely limited, with guarantees in respect of wages, hours of work and working conditions.[59] In the Charter of the International Military Tribunal 'deportation to slave labour' was listed as one of the war crimes as within the Tribunal's jurisdiction, while 'enslavement' was included within the list of crimes against humanity. Enslavement was also listed as a crime against humanity in Control Council Law No. 10, and is a crime within the jurisdiction of the ICTY, the ICTR, the ICC and the Special Court for Sierra Leone. According to the *travaux preparatoires* of the International Covenant on Civil and Political Rights, slavery has a limited and technical meaning, implying the destruction of ones juridical personality. It is primarily a legal category. Servitude, on the other hand, is a more general idea, encompassing all possible forms of humankind's domination over human beings.[60] Tribunals ruling on charges of enslavement have taken the wider view, looking to the factual situation to determine whether the crime has been committed. Cases after the Second World War included forced or compulsory labour under enslavement as a crime against humanity.[61]

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[56] Slavery Convention, 60 LNTS 253 (1926); Convention Concerning Forced or Compulsory Labour, 39 UNTS 55 (1930); Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, 266 UNTS 3 (1956); European Convention on Human Rights, ETS No. 5 (1950); International Covenant on Civil and Political Rights, 999 UNTS 171 (1966), American Convention on Human Rights; African Convention on Human and Peoples' Rights: AP II, Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex.

[57] See Barcelona Traction case (Belgium v. Spain), ICJ Reports (1970) 3, at p. 32; and American Law Institute, Restatement of the Law\. The Third, the Foreign Relations Law of the United Slates (1987), Vol. 2, para. 702.

[58] Article 95, Geneva Convention IV, 1949.

[59] Articles 40 (concerning the treatment of aliens in the territory of a party to the conflict) and 51 (concerning the treatment of protected persons in occupied territories), Geneva Convention 1V, 1949.

[60] Marc J. Bossuyt, Guide to the '*Travaux Preparatoires*' of the International Covenant on Civil and Political Rights, Dordrecht: Martinus Nijhof. 1987. p. 167.

[61] See the cases cited in *Prosecutor* v. *Kunarac and others.* Case No. IT-96-23-T and IT-96-23/I-T, judgment of the Trial Chamber, 22 February 2001, paras. 523-7. Available at http://midia.pgr.mpf.gov.br/pfdc/corte_penal/Kunarac%20et%20al%20IT-96-23%20%20IT-96-23-1%2022-Feb-2001.pdf (last visited on 6 Feb. 2012).

In the recent case before the ICTY, *Prosecutor* v. *Kunarac, Kovac and Vukovic,*[62] Kunarac and Kovac were charged with enslavement as a crime against humanity under Article 5(c) of the Tribunal's Statute in respect of acts committed during the period 1992-1993. Accordingly, the Trial Chamber had to determine the customary international law content of the offence at the relevant time. It held that: 'at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person'.[63] The *actus reus* of the offence was the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* was the intentional exercise of such powers.[64] This definition can be seen as including instances of slavery, servitude, and forced and compulsory labour.

The Appeals Chamber agreed that whether a particular phenomenon is a form of enslavement depends on the operation of the factors identified by the Trial Chamber.[65] It also considered that the Trial Chamber's definition of the crime of enslavement reflected customary international law at the time the alleged crimes were committed.[66] Child soldiers have been subject to treatment within the definition of enslavement. However, conscription for military service, at least of adults, is generally viewed as lawful. Although individuals have a right not to be subjected to slavery or servitude, or be required to perform forced or compulsory labour, an exception is usually made for service of a military character.[67] Children under 15 are immune from conscription. Strength is added to this argument by the provisions of ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. The Convention defined 'the worst forms of child labour' as including: '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.[68]

However, the draft Statute also included enslavement *per se* as a crime against humanity within the jurisdiction of the Special Court.[69] This can be explained as the result of a concern that a particular form of behaviour characteristic of the conflict in Sierra Leone be specifically criminalized in the Statute. On the other hand, the inclusion of enslavement as a crime against humanity and the forced or compulsory recruitment of children for use in armed conflict as a war crime could also be seen as reflecting some confusion about how to categorize the offence.[70] For behaviour to amount to a war crime

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[62]Ibid.

[63]Ibid., para. 539.

[64]Ibid., para. 540.

[65] Judgment of the Appeals Chamber, 12 June 2002, para. 119.

[66] Ibid., para. 124.

[67]See Article 4(3) (b), European Convention on Human Rights, ETS No. 5 and Article 6(3) (b), American Convention on Human Rights (1970) 9 ILM 673.

[68]Article 3(a), ILO Convention 182.

[69]The provision also appears in the adopted Statute as Article 2(e). See also "Comparative Analysis of the Rights of a Child with reference to the Rights of Child Soldiers" Doctoral thesis of Anwo Joel Olasunkanmi (2008) University of Fort Hare, Alice, South Africa<http://www.findthatfile.com/.../download-documents-Anwo-thesis> (Accessed and last visited on 6 Feb. 2012).

[70]It will be recalled that the Secretary-General appears to have considered that child abduction was a

it must have taken place during an armed conflict and there must be a link between the armed conflict and the commission of a crime. Crimes against humanity, by contrast, can be committed in times of peace as well as in war, but they must be part of a widespread or systematic attack against the civilian population.

Conclusion

There are two offences related to the recruitment of children into armed forces and groups and their use to participate in hostilities. First, it is a war crime to conscript or enlist children under the age of 15 into armed forces or groups or use them to participate actively in hostilities. Second, the abduction and forced recruitment of children under the age of 15 years into armed forces or groups also amount to crime against humanity of enslavement. Thus, the abduction and use of children for war-related activities and sexual purposes, amounts to enslavement even if they are not formally enrolled into an armed force or group or used to actively participate in hostilities. Both offences are crimes under customary international law. Though, conscription or enlistment of children under the age of 15 into armed forces or groups or their use to participate actively in hostilities have just recently become a crime under customary law with the judgment of Special Court for Sierra Leone in *Norman's case*. Conclusively, war crime of enlisting children under the age of 15 years old into armed forces and groups or using them to participate in hostilities can be committed in both international and non-international armed conflicts. But, an armed conflict must be in existence at the time the offence was committed and there must be a nexus between the conflict and the commission of the crime. This latter requirement is not particularly onerous. The offence is committed if only a child under 15 years of age is recruited or used to participate actively in hostilities. To prove the crime against humanity of enslavement there is no requirement of the existence of armed conflict; it only have to be shown that the offence was part of a widespread or systematic attack against the civilian population.[71]

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breach of Common Article 3 of the 1949 Geneva Conventions. Happold, n. 50 above, p. 139.

[71]Ibid., p. 140 See also the trial and conviction of former President Charles Taylor of Liberia < http://www.pbs.org/newshour/bb/world/jan-june12/liberia2_04-26.html> (Accessed and last visited on 2 May 2012).