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Customary International Law and the Recruitment of Child Soldiers

Replies and Comments

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Focus

Prosecutor v. Norman,
SCSL-2004-14-AR72(E)

Decision on Preliminary
Motion based on Lack of
Jurisdiction (Child
Recruitment), 31 May
2004.

Article 4 (C) SCSL Statute:

"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 15 years into
armed forces or groups
or using them to
participate actively in
hostilities."**

The struggle to abolish the abhorrent practice of child soldiers' deployment has seen important developments over the last decade. Legal efforts in this struggle have come to a height by way of a recent decision of the Appeals Chamber of the Special Court for Sierra Leone (SCSL). Article 4(C) of the SCSL Statute provides for the power to prosecute persons who conscripted or enlisted children under the age of 15 years into armed forces or groups or used them to participate actively in hostilities. This provision was literally taken from Article 8(2)(e)(vii) of the ICC Statute. An earlier draft of the SCSL Statute referred to "abduction and forced recruitment of children under the age of fifteen", emphasising the need of a forcible conduct of recruiting children. This language was substituted by the wording "conscripting or enlisting" following a proposal by the President of the Security Council. As this wording was first introduced in the ICC Statute in 1998 and as the SCSL has jurisdiction from November 1996 onwards the Appeals Chamber judges had to decide on the customary nature of this crime of child recruitment.

In a preliminary motion, which was directly decided by the Appeals Chamber pursuant to Rule 72(E) of the SCSL Rules, the defendant and former Minister of Interior Affairs *Sam H. Norman* argued, *inter alia*, that the crime of child recruitment was not part of customary international law at the time applicable to his charges, as even the incorporation of the crime of child recruitment into the Rome Statute did not codify customary international law.

The Appeals Chamber first established which international conventions prohibit the recruitment of children, explicitly naming Articles 14 and 24 of GC IV, Article 77 AP I, Article 4 AP II, and Article 38 of the Convention of the Rights of Child. The Appeals Chamber further observed that prior to 1996 the prohibition of child recruitment had crystallised as customary international law and stated that this custom represented the common standard of behaviour within the international community, so that even armed groups hostile to a particular government needed to abide these laws. The Appeals Chamber then turned to the more controversial issue of *nullum crimen sine lege*, discussing whether the conduct of the crime at the time of its commission was punishable under international law. Here the Judges applied the *Tadic* jurisdiction decision's four-pronged test in order to establish whether child recruitment as a violation of humanitarian law was subject to prosecution and punishment. The fourth element of this test, whether the violation of the rule must entail, under customary or conventional law, the individual responsibility of the person breaching the rule, was the essential question of the motion raised by the accused. Even the Secretary-General in his report to the Security Council stated 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 recognized as a war crime entailing the individual responsibility of the accused." In this regard the Appeals Chamber adopted an opinion of *Meron* stating that "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 particular courts or scale of penalties." Moreover the Appeals Chamber argued that the prosecution of violations of Additional Protocol II by the ICTY and ICTR was evidence of the criminality of child recruitment before 1996. Concerning the element of State practice the Appeals Chamber asserted that 108 States explicitly prohibited child recruitment in 2001, and in most cases before the ICC creation in 1998. It cited numerous examples of States having such laws within their national legislation as military or administrative laws. Having established the two core elements of customary international law – *opinion iuris* and State practice – the Appeals Chamber reiterated that the fact that child recruitment still occurs and is practiced in armed conflict does not detract from the validity of the customary norm.

The Appeals Chamber does not precisely distinguish between forcible conduct of child recruitment, such as abduction and forced recruitment and the non forcible conduct of child enlistment. Such a distinction would have been important as the accused *Norman* is explicitly charged with the crime of "child enlistment". This deficiency in the Appeals Chamber reasoning was noted by *Judge Robertson*, who appended a dissenting opinion to the majority decision and argued that international criminal law did not criminalise "enlisting" of child soldiers prior to the Rome Statute in 1998. Child enlistment lacks the use of force and may be described as a more passive or administrative act, such as putting a name on a list. *Judge Robertson* does not see any proof in any international convention named by the majority decision that before 1998 criminalised such a conduct, as these bodies only refer to the forcible recruitment of child soldiers. Further he did not find any proof of an established State practice prior to the ICC Statute.

However, the dispute as to the range of the conduct of the crime, whether customary international law only criminalises a forcible conduct of child soldier recruitment or even the non forcible conduct of enlisting seems to be quibbling, as such a conduct poses a potential threat to children to be used as soldiers soon after. Due to such a potential danger the wording of recruitment in international conventions, as Additional Protocol II, has to be interpreted broadly as they intend to protect children as extensively as possible. Further such a practice could still be prosecuted as complicity if the enlisted children were later used in combat. Even though the SCSL only has jurisdiction for the crimes committed in Sierra Leone, the Appeals Chamber decision has broader implications and sends a powerful message to perpetrators of these abhorrent practices in other armed conflicts.

Responsibility

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