

# CHILDREN UNDER INTERNATIONAL CRIMINAL LAW

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## Introduction

I begin this paper by drawing on two realities, horrifying in their detail, and breathtaking in that they are sprung from true facts, not twisted fiction. The first is illustrated by the events that took place on a day in March 1999. On that day members of a Serbian paramilitary unit known as 'The Scorpions', rounded up inhabitants of the village of Podujevo, Kosovo. The villagers, mostly women and children, were taken to the courtyard of a local police station where they were shot. This was one of many massacres committed during the Kosovo conflict. Nineteen people were murdered, the youngest just two years old. Despite severe injuries, five children managed to survive, even if their parents did not. The survival, one appreciates, might itself have been a horror—the scars of such a day live on permanently in the mind and body of the orphaned child.<sup>1</sup>

The second reality is one that leaps into our mind's eye from the pages and pages documenting Africa's wars: the boy soldier in Sierra Leone or Rwanda, barely larger than his weapon, dulled by the opiate of war. Holden Roberto was the first to recognise how much it demoralises an enemy village to have its chief executed by a child. It is a despairing fact that there are currently around 300,000 such 'soldiers' serving in armed conflicts around the

world, photographs of children toting AK-47s becoming the stuff of NGO fundraising.<sup>2</sup>

What I wish to traverse here is not how this reality has come about. My aim is to focus on the means by which the law—more specifically international criminal law—might be called into service in the struggle against these atrocities. An international framework of laws exists to provide norms for the protection of children as victims from war, some of which are also aimed at protecting children from being recruited into armies as soldiers of war.

## International framework for the protection of children

The rights of children have not always featured very prominently in international law. Early international law declarations and treaties of the 18th century omitted children from their purview, not least because children were regarded as the property of their parents, and states had very little desire to impinge upon this relationship, let alone set standards of treatment.

The last century saw the signs of change. At least one motivation for that change has been the dramatic rise in child victims of war; a reality which has increasingly come to demand the world's attention. The League of Nations, already in 1924, moved by the num-

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bers orphaned in the Great War, adopted the Declaration of the Rights of the Child—the first sustained international effort focused on the rights of children, calling upon governments to provide food, shelter and medical attention to poor children. The declaration was nothing but inspirational, being very vague in its standards and containing no mechanisms for its enforcement. It was only with the rise of the international human rights movement, more especially under the aegis of the United Nations (UN) post-1945, that there has come a sustained effort to provide legal protection to children in armed conflicts.

*Protection for children as civilian victims of war*

This effort took some time to crystallise, and culminated eventually in the Convention on the Rights of the Child in 1989. This convention sets out various general protections for children, which are directly enforceable against states parties. It is the first binding universal treaty dedicated solely to the protection and promotion of children's rights. The treaty provides a detailed framework of principles and standards for treatment of the world's children. Unusually for a human rights instrument, it combines economic, social and cultural rights with civil and political rights, and consequently offers the fullest legal statement of children's rights to be found anywhere. It focuses both on the protection of individual children and on the creation of general conditions in which children's full potential can be recognised.

Particularly relevant protections in our context—which apply both in times of war and peace—include the right to essential care and assistance, the right of access to health, food and education, the prohibition of torture, abuse and neglect, the prohibition of the death penalty, and the need for the protection of children in situations of deprivation of liberty. Of especial importance are the additional protections that pertain specifically to the treatment of children during armed conflict:

- First, states undertake to ensure access to and the provision of humanitarian assistance to children during armed conflict.<sup>3</sup>

- Second, states must respect and ensure respect for the rules of international humanitarian law that are relevant to children. In this respect, states must “take all feasible measures to ensure protection and care of children who are affected by an armed conflict”.<sup>4</sup>
- Third, and harking back to the aspirations of the League of Nations Declaration of 1924, states are obliged to take all appropriate measures to promote the physical and psychological recovery and social reintegration of children following an armed conflict—this recovery and reintegration must take place in an environment that fosters the health, self-respect and dignity of the child.<sup>5</sup>

These protections under the Convention on the Rights of the Child—human rights protections—exist alongside various norms that protect children and that have arisen in the parallel field of humanitarian law. Humanitarian law is a body of rules that have come to govern armed conflicts, and symbolic of this body of law are the famous Geneva Conventions. The 1949 Geneva Conventions, more especially the Fourth Convention, sets out various standards which go to the protection of children, even if only by implication. These protections include general prohibitions on murder, torture and inhumane treatment during times of international armed conflict. Common Article 3 to the Geneva Conventions ensures that these general protections inure to children in an internal armed conflict. In cases of an international armed conflict, the Fourth Convention specifically details the following protections:

Article 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 territories, hospital and safety zones and localities so organised as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.

Article 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 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.

In 1977 the Geneva Conventions were updated by two Additional Protocols. Protocol I, which regulates international armed conflicts, stipulates, for example, that “children shall be the object of special respect and shall be protected against any form of indecent assault”.<sup>6</sup> Parties to the conflict are moreover obliged to provide children with “the care and aid they require, whether because of their age or for any other reason”.<sup>7</sup> Protocol II guarantees protections during times of internal, or non-international, armed conflict. In respect of children, it provides in express terms that children must be provided with the care and aid they require, including education and family reunion.<sup>8</sup>

*Protection against recruitment or participation of children as child soldiers*

So much for children as victims of war. A recent development, and one which is an unwelcome scourge, is the involvement of children as combatants during times of armed conflict. While such children are also ‘victims’ of war, they might be usefully classified separately as combatant victims as opposed to the civilian category of child victims discussed above.

While the scale of the child soldier problem has reached crisis proportions in recent times, international humanitarian law has attempted to provide protection for such children for well over 50 years. The Fourth Geneva Convention, for instance, in Article 51 provides that the occupying power may not compel protected persons to serve in its armed or auxiliary forces—children being included in the category of protected persons under that convention. Standards specific to children came later with the Additional

Protocols of 1977. Additional Protocol I applicable to international armed conflicts provides as follows in Article 77:

**Protection of children**

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.

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 hands 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.

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 . . . .

Additional Protocol II sets out the following standards in respect of non-international armed conflicts in 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.

I mentioned earlier the Convention on the Rights of the Child. That convention reiterates and furthers the humanitarian laws regarding child recruitment. Aside from, as pointed out, obliging states parties to “respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child,”<sup>9</sup> the following specific demands are made of states that are party to the convention by Article 38 of the convention:

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.

States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.

In response to problem of child soldiers, the UN General Assembly took steps at the end of the last century to strengthen this convention so as ensure deeper protection for children who participate in armed hostilities. It did so by adopting the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. It entered into force on 12 February 2002 and has 115 signatories, and has been ratified by 70 states. The Optional Protocol lays down two important principles which serve to protect children. The first is to raise the age limit for compulsory recruitment and direct participation in armed hostilities to 18, and requires states parties to lift the minimum age for voluntary enlistment to 16. The second and more strident protection is to prohibit insurgent armed groups "under any circumstances" from recruiting persons under 18 years or using them in hostilities.

### **Enforcement through international criminal law**

This then serves as a background to what I would like to focus on in some detail, namely, the role of international criminal law, and more particularly the International Criminal Court (ICC), regarding the enforcement of children's rights. The protections described above have unfortunately been observed by states more in their breach than in their observance. One consequence of this failure is the appointment by the UN in 1993 of Graça Machel to study the adverse effects of armed conflict on children. Three years later Machel presented her report to the General Assembly.<sup>10</sup> In that report, she noted with despair that the international community has consistently watched while children's rights are flagrantly attacked and has done little to defend them. In her words:

It is unforgivable that children are assaulted, violated, murdered and yet

our conscience is not revolted nor our sense of dignity challenged. This represents a fundamental crisis of our civilisation.<sup>11</sup>

Machel accordingly called on governments, international organisations and every element of civil society to take seriously the impact of armed conflict on children.<sup>12</sup> The UN response was to appoint a Special Representative for Children and Armed Conflict, Olara Otunuu, whose job was and remains to act as a public advocate on behalf of children whose right and welfare have been and continue to be violated in armed conflict.<sup>13</sup> Otunuu has warned that while the last 50 years have seen the nations of the world develop and ratify an impressive array of international human rights and humanitarian instruments, "the value of these provisions is limited to the extent to which they are applied". The world's children know only too well that Otunuu is correct when he states: "Words on paper cannot save children in peril."

One means by which the international community can be seen to take these warnings seriously is by the development of a body of rules known as international criminal law, and by the creation of an international criminal court to enforce that law.

The Statute of the International Criminal Court was adopted on 17 July 1998 by an overwhelming majority of the states attending the Rome Conference; a conference specifically organised to secure agreement on a treaty for the establishment of a permanent international criminal tribunal.

After five weeks of intense negotiations, 120 countries voted to adopt the treaty. Only seven countries voted against it (including the rather strange bedfellows of China, Israel, Iraq, and the United States) and 21 abstained. The treaty would come into force upon 60 ratifications. The magic number was reached by April of 2002.

To date, the Rome Statute has been signed by 139 states and 94 states have ratified it. It is notable that within just four years the treaty has achieved the 60 required ratifications, far sooner than was generally expected. The

statute entered into force on 1 July 2002, at which time the court's jurisdiction over genocide, war crimes and crimes against humanity took effect. The judges for the court were chosen last year in February, and were sworn in on 11 March 2003 at the inaugural session of the court in The Hague. The prosecutor has been chosen—the highly respected Argentine lawyer Luis Moreno-Ocampo—and the court is expected to hear its first case soon.

The importance of the court for the purpose of our discussion should be clear. Through the ICC individual accountability is set in place for those who violate the norms protecting children during times of hostilities. That is done through criminalising various forms of behaviour detrimental to children. In respect of crimes aimed against children as civilian victims of war, the court will have jurisdiction over a range of offences. In the first place, children obviously stand to gain alongside other civilians from the statute's prohibition of crimes against humanity, war crimes and genocide. A number of such prohibitions, although not specifically directed at children, may be of particular relevance. These include the crimes of sexual violence (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or other forms of sexual violence of comparable gravity),<sup>14</sup> whether committed as a crime against humanity or as a war crime, the use of starvation as a method of warfare, the genocidal act of preventing births,<sup>15</sup> and the war crime of intentionally directing attacks against schools and other educational facilities.<sup>16</sup> Aside from these general prohibitions, the Rome Statute also targets the 'child-specific' crime which we have come to associate with ethnic cleansing. Article 6 of the statute provides in this respect that the forcible transfer of children belonging to a national, ethnic, racial or religious group A, to another group B, with the intention of destroying, in whole or in part, group A, is an act which amounts to genocide.

Turning to the problem of child soldiers, the Rome Statute sets out specific prohibitions in this regard. Article 8 (regarding war crimes) includes the crime of child recruit-

ment in international armed conflict<sup>17</sup> and internal armed conflict.<sup>18</sup>

#### Article 8

##### War crimes

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.

For the purpose of this Statute, "war crimes" means:

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

This provision is based on the provisions in favour of children contained in Additional Protocol I to the Geneva Conventions, in particular, Article 77(2), which requires states to "refrain from recruiting them into their armed forces" and requires parties to ensure "that children who have not attained the age of 15 years do not take part in hostilities". The Rome Statute thus sets out two offences relating to child soldiers. Aside from prohibiting the "conscripting" or "enlistment" of children, the statute also outlaws "using children to participate" in hostilities.

### **Accountability in action—international criminal courts**

The Rome Statute is the most recent and most optimistic feature of an infant system of international criminal accountability. As yet there has not been a prosecution before the ICC. At this stage in the court's history it has been up to speculators and prophets to predict how the court will function generally, let alone to predict how it will fare regarding the prosecution of crimes relating to children.

That said, however, there are encouraging developments of late in the field of international criminal law, which hint at a healthy future. One such development is in respect of child soldiers. In the realm of child-law until very recently there had not been a prosecution of an individual for recruitment of child-soldiers, either before an international court, or

in a domestic legal system. Indeed, we are on the cusp of history. On 31 May 2004, the Special Court for Sierra Leone in *Prosecutor v Sam Hinga Norman*<sup>19</sup> handed down the first ever judgement regarding recruitment of child soldiers. The wheels of international criminal justice have been set in motion regarding child-specific crimes, and we now have a good example of what such a prosecution might entail before the ICC.

That the Sierra Leone Tribunal was seized with this type of case will come as no surprise. The conflict in Sierra Leone has been marked by the use of children as soldiers. It is estimated that around 10,000 children under the age of 15 have served in the armies of the main warring factions.<sup>20</sup> Many were killed or wounded and others have been forced or induced to kill and maim; their victims included members of their own community and even their own families. The effect of this horror is understandably traumatic. Children continue to suffer reprisals from communities they were ordered to attack, and they exhibit, not surprisingly, behavioural problems and psychological difficulties related to the crimes they have been involved in under the direction of adults in positions of command responsibility.<sup>21</sup> Sam Hinga Norman was such an adult. He was eventually arrested and charged under the statute of the Special Court for Sierra Leone. This tribunal is the result of an agreement between the UN and Sierra Leone to try "those who bear the greatest responsibility" for crimes against humanity and disrupting the peace process.<sup>22</sup> A special court that has been established pursuant to Security Council Resolution 1315, bears many similarities with the ad hoc tribunals created by the Security Council to deal with the atrocities committed in the former Yugoslavia and Rwanda.<sup>23</sup> The court is a hybrid, staffed by local and international personnel, and has an international prosecutor.<sup>24</sup> It was brought into existence in 2000 and its temporal jurisdiction to prosecute international crimes under its statute stretches back to crimes committed from 30 November 1996.<sup>25</sup>

The significance of the case against Sam Hinga Norman cannot be underestimated.

Aside from confirming more generally the international community's concern for the crime of recruiting children into the heart of darkness, the court's judgement indicates that the crime of recruiting child soldiers is now part of customary international law.

Article 4 of the Statute for the Special Court provides that the court has the power to prosecute persons who committed serious violations of international humanitarian law, including "[c]onscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities". In other words, for crimes committed after 30 November 1996, the date on which the court's jurisdiction bites, Article 4 provides the court with jurisdiction over the crime of 'child-recruitment'. Norman was charged with child-recruitment alleged to have been committed after 30 November 1996, but his lawyers raised an important argument of principle. That argument was that the crime of 'child-enlistment' only became a crime in customary international law with the passing of the Rome Statute of the ICC and the Optional Protocol to the Convention on the Rights of the Child. The defence argument was that there was not enough state practice prior to these two treaties to confirm a rule of international law obliging the punishment of child-recruitment. In a nutshell, said the defence, the act of child-recruitment, even if morally abhorrent to reasonable people the world over now and before 30 November 1996, was not a war crime at the time that Samuel Norman was alleged to have committed it. That is because his crime was committed in the period after 30 November 1996 *but before* the existence of the Rome Statute and the Optional Protocol to the Convention on the Rights of the Child. One does not need to be an expert lawyer to appreciate the line of attack taken by Norman's defence team. Their argument was simple: the UN when it created the Sierra Leone Tribunal in 2000 and gave it jurisdiction by way of Article 4 over the crime of child recruitment, had in fact got ahead of itself. That is because, so the argument went, the crime detailed in Article 4 only became a crime much later, and the UN ought not to

have criminalised it in the Statute of the Sierra Leone Tribunal, but ought instead to have limited the court's jurisdiction to crimes like murder, rape and so on which were clearly crimes against humanity in international law. So, said the defence, because international criminal law contains a basic principle that punishment must not be inflicted for conduct that was not clearly criminal at the time it was committed—expressed in the quaint Latin adage of *nullem crimen sine lege*—Chief Hinga Norman cannot properly be prosecuted for the crime of child recruitment when it was not clear to the chief that such activity was criminalised at the time he was embattled in Sierra Leone.

What did the court find? The court trawled through all the conventions that were discussed earlier in this paper—such as the Geneva Conventions and the Convention on the Rights of the Child—concentrating on those provisions that set out the norms regarding child recruitment. It found, contrary to the assertions by Sam Norman's lawyers, that already prior to 1996, the act of recruiting child soldiers was a war crime outlawed under international humanitarian law. Accordingly, to the court, the Rome Statute and the Optional Protocol of the Convention on the Rights of the Child were doing little more than codifying and effectively implementing the existing customary norm which criminalised child-recruitment. The court's conclusion was expressed thus:

... 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.<sup>26</sup>

The case is therefore a public, and international, demonstration of disgust at the recruitment of child soldiers through the means of international criminal law. It also prefigures the work of the ICC, and the prosecution of those who recruit child-soldiers and use them to participate in hostilities under the Rome

Statute of ICC. Of course the Rome Statute is not retrospective. Its jurisdiction extends only to those crimes that were committed after 1 July 2002 when its statute became operative. What the *Hinga* judgement confirms is that certainly by that date the world had accepted that, aside from the terms of the Rome Statute itself, recruitment of child soldiers was criminalised as a war crime under customary international law. The *Hinga* judgement of the Sierra Leone Court symbolises the beginning of a trend. That trend is to take seriously the issue of crimes concerning children, and to prosecute those responsible for such violations, both to exact retribution from the offender, as well as to send a message of deterrence to others. In January this year the ICC announced that it was ready to investigate its first case. The details have not been disclosed in any great measure, but the Prosecutor's Office has confirmed that it will involve the prosecution of Ugandan rebel leaders of the Lords' Resistance Army who have kidnapped thousands of children as soldiers or sex slaves.<sup>27</sup> The ICC's first case is thus as good an indication as any that the trend begun by the *Hinga* judgement is one that is likely to continue.

That brings me now to a related topic; one which will surely exercise the minds of all the psychologists, criminologists and sociologists in years to come. The problem is this: how does the law deal with the crimes committed by children participants in times of armed conflict?

In many national jurisdictions, children are exempt from criminal liability for their acts because they are regarded as *doli incapax*—incapable of forming a criminal intent. The age limit for criminal responsibility varies widely between domestic states.

International criminal law has not overcome this problem. The drafters of the Statute for the Special Court for Sierra Leone, for example, faced perhaps their most difficult ethical question in deciding on how to deal with the atrocities committed by child soldiers. Many of the worst mutilations were committed by aggressive and violent 16- and 17-year olds, and the populace demanded that

they be punished. It is reported that Kofi Annan took the forgiving line of most NGOs, namely, that these youths were in fact victims of war themselves, and that they should not be made accountable for their criminal acts.<sup>28</sup> The treaty between the UN and Sierra Leone which establishes the tribunal reaches something of a compromise, albeit an uneasy one: soldiers under the age of 15 at the time of their crime will not be prosecuted, while those who are between 15 and 18 will be prosecuted but not go to jail if convicted.<sup>29</sup>

The Rome Statute of the ICC, however, sets a different standard. After a great deal of debate and lobbying by child rights advocates, the drafters of the ICC Statute decided that the court should not have jurisdiction over persons under the age of 18 years at the time of the alleged commission of the offence.<sup>30</sup>

Perhaps the exclusion of child perpetrators from the jurisdiction of the ICC is an important victory for those who believe that international judicial mechanisms are not best suited for prosecuting young persons. Certainly the exclusion lends credence to the idea that such children are essentially victims and, therefore, should be treated as such by the international criminal justice system.

However, the Sierra Leone experience points in the other direction. Some appalling atrocities have been committed by these young soldiers, and the problem may well be—as Geoffrey Robertson has suggested<sup>31</sup>—less the challenge of taking the boy out of the war than the war out of the boy. Perhaps their age should mitigate penalty rather than excuse their crime. It may be regrettable, on this view, that 16- or 17-year-olds, who may well be lawfully recruited into armies without consequence under the Rome Statute (remember, it is only a crime to enlist persons under 15 for an active part in hostilities), should be immune from prosecution.

## Conclusion

In this paper I have attempted to outline the norms that exist, both under human rights law and humanitarian law, in respect of children who are caught up, whether as civilians or

combatants, in armed conflict. These norms, it is correct to say, are worthless if they remain simply written on paper. Action must translate norms into meaningful protections for children. One manner in which this might be done is through international criminal prosecution. We can now look towards the ICC for such action. The ICC is part of a continuum; a process that was catalysed in Nuremburg and one which does justice to the world public's demand that there be no impunity for international crimes that tear at the very fabric of our humanity. Crimes against children tear perhaps more than any others. We can but hope that international criminal law, practiced by international tribunals such as the ICC, is one of many meaningful measures by which it can be shown that children's rights are worth more than just the paper they are written on.

## Notes

1. Recounted in Stuart Beresford, *Children's issues: Protecting the most vulnerable child witnesses and the International Criminal Court*, 14, in Irina Kebrau, *Eyes on the ICC*, published by the Independent Student Coalition for the International Criminal Court, 2004.
2. See G Robertson, *Crimes against humanity: The struggle for global justice*, 2002, p 217.
3. Article 27(3).
4. Article 38(4).
5. Article 39.
6. Article 77.
7. Article 77(1).
8. Article 4(3).
9. Article 38(1).
10. G Machel, *Impact of armed conflict on children: Report of the Expert of the Secretary-General, submitted pursuant to General Assembly Resolution 48/157, UN Doc A/51/306, 26 August 1996* (hereinafter the "Machel Report").
11. *Ibid*, para. 317.
12. *Ibid*, 316 and 317.
13. See J Vachachira, *Report 2002: Implementation of the Optional Protocol to the Rights of the Child on the Involvement of Children in Armed Conflict*, 18, *NYL School Journal of Human Rights*, p 543.
14. Rome Statute, Articles 7(1)(g) and 8(2)(b)(xxii) and (e)(vi).
15. Rome Statute, Article 6(d).
16. Rome Statute, Article 8(b)(ix).
17. Rome Statute, Article 8(2)(b)(xxvi).
18. Rome Statute, Article 8(2)(e)(vii).
19. *Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)*, 31 May 2004,

- Case No, SCSL-2004-14-AR72(E).
20. See the judgement (dissenting) of Judge Robertson in *Prosecutor v Sam Hinga Norman*, para. 7.
21. Ibid, para. 7.
22. See Robertson, op cit, pp 468-469.
- 23 Ibid.
- 24 Ibid.
- 25 Ibid.
- 26 Para. 52, per the judgement of Justice Ayoola, concurred in by Justice King (Justice Robertson dissenting).
- 27 See UN Wire, First International Criminal Court case targets Uganda's rebels, 30 January 2004.
- 28 Robertson, op cit, p 469.
- 29 Ibid.
- 30 Rome Statute, Article 26.
- 31 Robertson, op cit, p 217.