

Litigating Child Recruitment Before the Special Court for Sierra Leone

NOAH B. NOVOGRODSKY*

In May 2004, the Special Court for Sierra Leone issued a landmark decision finding that an individual may be held criminally responsible for the offense of recruiting¹ child soldiers into armed conflict. As a hybrid tribunal established by the United Nations and the Government of Sierra Leone to try those who “bear the greatest responsibility” for serious violations of international humanitarian law committed during the country’s civil war after November 1996, the Special Court is the first international criminal body to indict a person for the crime of recruiting and employing children in war. The decision in the case of Sam Hinga Norman now aligns this emerging doctrine of international humanitarian law with general international human rights protections, as

* Professor Noah Novogrodsky is the director of the University of Toronto Faculty of Law International Human Rights Clinic (IHRC). The attached brief was filed with the Special Court for Sierra Leone on November 4, 2003. Mora Johnson, Elyse Korman, Robin Reinertson, and David Wei of the IHRC drafted substantial parts of the brief and contributed to this article.

1. Recruitment is defined in Article 4 of the Statute of the Special Court for Sierra Leone as “[c]onscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities.” The implication of this Article is that a child under the age of fifteen cannot meaningfully consent to enlist or participate in armed conflict. See The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (2000), available at <http://www.un.org/Docs/sc/reports/2000/915e.pdf> [hereinafter Secretary-General’s Sierra Leone Report]. The Annex to the Secretary-General’s Sierra Leone Report contains the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (“Sierra Leone Special Court Agreement”) and the Enclosure contains the draft Statute for the Special Court for Sierra Leone (“Statute of the Special Court”). Statute of the Special Court of Sierra Leone, available at <http://www.sc-sl.org/scsl-statute.html>.

well as domestic criminal law, and begins to extend the protective cover of criminal law to the horrific and all-too-common practice of impressing children into armed service.²

Norman, who is among the first defendants to appear before the Special Court, is the former leader of the Civil Defence Forces, a pro-government militia group comprised predominantly of traditional hunters known as *Kamajors*. Norman is accused of a series of grave violations of international humanitarian law, including enlisting children under the age of fifteen into armed forces or groups and using them to participate actively in hostilities.³ In one of the early challenges to the Special Court's subject matter jurisdiction, Norman moved to dismiss the charges relating to child recruitment on the grounds that recruiting child soldiers was not a crime under customary international law at the times relevant to the indictment (between 1996 and 2001).⁴ Norman submitted that while international instruments, such as Additional Protocol II to the Geneva Conventions and the Convention on the Rights of the Child, may prohibit the recruitment of child soldiers, these instruments do not criminalize such activity. In addition, Norman argued that the criminalization of child recruitment as defined by the Rome Statute of the International Criminal Court does not amount to a codification of the crime in customary international law.⁵

In a 3-1 decision, the Special Court rejected Norman's preliminary motion.⁶ The Court held that the offence under Article 4(c) of its Statute, "Conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities ("child recruitment")" does not violate the international legal prohibition on retroactive criminal liability (*nullum crimen sine lege*). The Court found that the prohibition against recruiting child soldiers had crystallized into a crime under customary international law before November 1996 and that accordingly, individuals may be prosecuted for this offence at any time under the temporal jurisdiction of the Special Court.⁷ In dissent, Judge Robertson distinguished conscription from

2. For a more detailed case comment on *Prosecutor v. Sam Hinga Norman*, see Novogrodsky & Goldstein, *Small Steps: Prosecuting Child Soldiers—the Case of Sam Hinga Norman*, INTERRIGHTS BULL. (forthcoming Mar. 2006).

3. *Prosecutor v. Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa*, Case No. SCSL-03-14-I, Amended Indictment, Count 8, (Special Court for Sierra Leone Feb. 5, 2004).

4. *See Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E) (Special Court for Sierra Leone May, 31 2004) [hereinafter Norman Decision on Child Recruitment].

5. *Id.*

6. *Id.*

7. *Id.* In so deciding, the Court recalls the Nuremberg precedent through which:

enlistment, arguing that individual criminal responsibility did not attach to the offence of enlistment until the Rome Treaty of the International Criminal Court was adopted in July 1998. Accordingly, in Robertson's view, the indictment for enlistment before this date violates the principle of *nullem crimen sine lege*.⁸

The significance of the Special Court's ruling is difficult to overstate. At a time when child soldiers are routinely conscripted into military service in numerous countries⁹ and many non-governmental organizations (NGOs) have dedicated programs to stopping the use of child soldiers in armed conflict,¹⁰ the Court's decision creates the possibility of the first international conviction associated with the practice. For Sierra Leone, the Court's decision recognizes a horrific feature of the decade-long civil war; more than 10,000 children served as child soldiers in the country's three major armed forces, the Revolutionary United Front, the Armed Forces Revolutionary Council and the Civil Defence Forces.¹¹ Thousands

[t]he law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from general principles of justice applied by jurists, and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.

Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Nov. 14, 1945-Oct. 1 1946, 1 Official Documents 223 (1947), available at <http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm>.

8. See Norman Decision on Child Recruitment, *supra* note 4 (Robertson, J., dissenting).

9. See, e.g., COALITION TO STOP THE USE OF CHILD SOLDIERS, CHILD SOLDIER USE 2003: A BRIEFING FOR THE 4TH U.N. SECURITY COUNCIL OPEN DEBATE ON CHILDREN AND ARMED CONFLICT (2004), available at <http://hrw.org/reports/2004/childsoldiers0104/childsoldiers.pdf>.

10. For example, the Coalition to Stop the Use of Child Soldiers, which unites national, regional and international organizations and networks in Africa, Asia, Europe, Latin America and the Middle East and works to prevent the recruitment and use of children as soldiers, to secure their demobilization and to ensure their rehabilitation and reintegration into society. Its founding organizations are Amnesty International, Defence for Children International, Human Rights Watch, International Federation Terre des Hommes, International Save the Children Alliance, Jesuit Refugee Service, the Quaker United Nations Office-Geneva and World Vision International. The CSC also maintains links with UNICEF, the International Red Cross and Red Crescent Movement, and the Special Representative of the Secretary General for Children and Armed Conflict.

11. The Secretary-General, *Protection of Children Affected by Armed Conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, at 22, UN GAOR, 54th Sess., Annex, Agenda Item 112, U.N. Doc. A/54/430 (Oct. 1, 1999), available at [http://www.un.org/special-rep/children-armed-conflict/KeyDocuments/ Report/4-54-430English.html](http://www.un.org/special-rep/children-armed-conflict/KeyDocuments/Report/4-54-430English.html).

more were abducted and forced into sexual slavery, unwanted marriages and domestic servitude.¹² Countless children in Sierra Leone were killed; many who survived endured brutal conditions and have been severely damaged by their experiences.¹³

The recruitment of children is frequently accompanied by other grave domestic and international crimes, such as kidnapping, sexual assault and slavery,¹⁴ yet the endemic practice has only recently been condemned by international criminal law. As case law, the *Norman* interlocutory decision now joins a host of international treaties that prohibit the practice of recruiting child soldiers.¹⁵ The Special Court's invocation of customary international law norms prohibiting the use and recruitment of children in war will be instructive for future domestic courts and hybrid tribunals addressing the problem.¹⁶

The timing of the *Norman* decision is also fortuitous because the International Criminal Court's first state referral relates to crimes committed in Northern Uganda by the Lord's Resistance Army (LRA) and other fighting forces, many of which involve grave human rights abuses by and toward children.¹⁷ According to human rights reports, the LRA has institutionalized the practice of kidnapping children, turning victims into victimizers and permanently destroying the fabric of family

12. See Coalition to Stop the Use of Child Soldiers, *Sierra Leone: War-Related Sexual Abuse*, available at <http://www.childsoldiers.org/cs/childsoldiers.nsf/0/2796e9ec29e5c9f280256c8d003c97b1?OpenDocument>.

13. See HUMAN RIGHTS WATCH, *SIERRA LEONE, SOWING TERROR: ATROCITIES AGAINST CIVILIANS IN SIERRA LEONE* (1998), available at <http://www.hrw.org/reports98/sierra/>; see also AMNESTY INTERNATIONAL, *SIERRA LEONE: CHILDHOOD—A CASUALTY OF CONFLICT* at 11-14, (Aug. 31, 2000) (AI Index: AFR 51/069/2000), available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510692000ENGLISH/\\$File/AFR5106900.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510692000ENGLISH/$File/AFR5106900.pdf).

14. See, e.g., Criminal Procedure Act, 1965 (as amended) (Sierra Leone), available at <http://www.slcmp.org/TheCriminalProcedureAct,1965SierrLeone%20.htm>; Prevention of Cruelty to Children Ordinance, 1926 (Sierra Leone), available at <http://www.sc-sl.org/preventionofcrueltytochildren.html>; Malicious Damage Act, 1861 (Sierra Leone), available at <http://www.slcmp.org/documents.htm>.

15. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature Dec. 12, 1977, 1125 U.N.T.S. 609; Convention on the Rights of the Child, 1577 U.N.T.S. 3 (Nov. 20, 1989); Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (I.L.O. No. 182), June 17, 1999, 38 I.L.M. 1207 (1999); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, U.N. Doc. A/RES/54/263 (May 25, 2000).

16. See, e.g., Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

17. See Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), http://www.icc-cpi.int/pressrelease_details&id=16.html.

life.¹⁸ Article 8 subsections (2)(b)(xxvi) and (e)(vii) of the Rome Statute bring the crime of conscripting or enlisting children under fifteen within the subject matter jurisdiction of the International Criminal Court (ICC).¹⁹ The vehement condemnation of the practice in the Special Court's holding provides an authoritative interpretation of the crime at the time of the ICC Prosecutor's investigation. Incremental legal developments of this kind are welcomed and anticipated by Article 10 of the ICC statute, which states that: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."²⁰

Finally, the criminalization of child recruitment exemplifies several aspects of the development of humanitarian law norms. It mirrors the shift from negotiated reciprocal restraints on the methods of warfare to a norm that protects human dignity, and in particular, increases the scope of protections for civilians in times of armed conflict and civil strife. The evolution of this norm also sheds light on the increasing overlap and doctrinal cross-pollination between international humanitarian law and human rights law. This phenomenon stands to increase as humanitarian law expands to encompass internal wars and crimes committed outside armed conflicts. In the International Criminal Tribunal for the Former Yugoslavia's decision in *Kupreškić*,²¹ for example, the Chamber drew on human rights treaties to define "other inhumane acts" as the enumerated offence of a crime against humanity. Conversely, the crime of child recruitment now represents a full-fledged war crime founded on a host of human rights instruments.

18. See HUMAN RIGHTS WATCH, *STOLEN CHILDREN: ABDUCTION AND RECRUITMENT IN NORTHERN UGANDA*, (Vol. 15, No. 7(A)) (Mar. 2003), available at <http://hrw.org/reports/2003/uganda0303/uganda0403.pdf>; AMNESTY INTERNATIONAL, "BREAKING GOD'S COMMANDS": THE DESTRUCTION OF CHILDHOOD BY THE LORD'S RESISTANCE ARMY (Sept. 18, 1997) (AI Index: AFR 59/001/1997), available at <http://web.amnesty.org/library/Index/ENGAFR590011997?open&of=ENG-SDN>. See also International Criminal Court, *Background Information on the Situation in Uganda*, http://www.icc-cpi.int/library/press/pressreleases/Uganda_200401_EN.doc.

19. Thomas Lubanga Dyilo, the first suspect to be arrested and transferred to stand trial on war crimes at the I.C.C., is charged with the conscription of children in violation of Article 8(2) of the Rome Statute. Lubango is a political and military leader of the UPC (Union of Congolese Patriots). See ICC Press Release, First Arrest for the International Criminal Court (17 March 2006), at <http://www.icc-cpi.int/press/pressreleases/132.html>

20. Rome Statute of the International Criminal Court, *supra* note 15, art. 10.

21. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶¶ 547-66 (Jan. 14, 2000).

What follows is the Amicus Curiae Brief submitted to the Special Court for Sierra Leone by the University of Toronto Faculty of Law, International Human Rights Clinic.

The brief argues that:

- (1) the prohibition governing the recruitment and employment of children under the age of 15 for armed service is provided by Additional Protocol II to the Geneva Conventions, which Sierra Leone acceded to in 1986, and which expressly states that “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;”²²
- (2) the act of recruiting or using child soldiers constitutes a violation of customary international law. The custom is evidenced by the Convention on the Rights of the Child and Optional Protocol, the Geneva Conventions and Additional Protocols, and numerous regional instruments including the African Charter on Human and People’s Rights;
- (3) the prohibition on recruiting and employing children in armed service was an offense entailing individual criminal responsibility prior to 1996, and
- (4) accordingly, the principle of non-retroactivity has not been breached.

The brief also describes the maltreatment of children during Sierra Leone’s wars and canvasses the relevant law giving rise to individual criminal responsibility for humanitarian law violations. This brief is offered for substantive use by other international criminal tribunals and as a resource to future human rights advocates seeking to achieve accountability for violations of humanitarian treaties and custom.

22. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *supra* note 15, art. 4(3), available at <http://www.unhchr.ch/html/menu3/b/94.htm>.