

# Save the Children of War!

## Thoughts on Child Recruitment

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“I would like to give you a message. Please do your best to tell the world what is happening to us, the children. So that other children don’t have to pass through this violence.”<sup>1</sup>

In the last century, the number of civil fatalities has risen on an extremely large scale. Children belong to the most vulnerable human groups during an armed conflict. More than two million children died in the last decade as a direct result of war. On the other hand, those who survive bear the marks of hostilities for their entire life. There is a specific group of children affected by war, who are especially in danger of being harmed, children who, despite their will, have to take part in hostilities. They are mostly forced to join armed forces and then they have to face the brutal reality of war. The physical and psychological harms that they suffer can destroy all their hopes for a better future. War can be over, but this trauma can hardly be healed, and in this way reintegration of the children into their communities is difficult to realize. If there is no way back to the society, in many cases the only way remains to return to the armed groups. In this way, child recruitment can destroy the basis and future of a whole society.

The main focus of the present study is the legal aspect of the issue. A short introduction of the phenomenon and of the harsh circumstances that characterize the situation where children have to serve in irregular armed groups is followed by a summary of international legal norms that regulate child recruitment. The article also considers the issue of criminal responsibility of those who bear the greatest responsibility for child recruitment, with special consideration on the jurisdiction of the Special Court for Sierra Leone. Finally, it deals with the question how child soldiers shall be called to account for crimes committed by them during hostilities.

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<sup>1</sup> Amnesty International, “Child Soldiers”, <[web.amnesty.org/pages/childsoldiers-index-eng](http://web.amnesty.org/pages/childsoldiers-index-eng)> (25.02.2007).

## EXPERIENCES THAT A CHILD-SOLDIER HAS TO GO THROUGH

In most cases children are forced to take direct or indirect part in hostilities. There are specific characteristics of children which make them be main targets of forced recruitment. Children are cheap,<sup>2</sup> obedient and easy to engage into fearless killing. These characteristics determine the leaders of armed groups to choose children for improving their armed forces. The expression "forced recruitment" does not mean in all cases abduction or use of physical force, but also the threat of force or coercion. On the other hand, bad economic and social situation of a country can be a hotbed of child recruitment. These circumstances can lead to children joining armed forces voluntarily. Poverty is one of the main causes for young people to volunteer for becoming soldiers.

All the causes of "voluntarism", such as inadequate family situation, poverty and lack of education opportunities are factors which determine the decision of a child, and it is obvious that if there is only one available alternative for someone to take, this cannot be regarded as free choice. But when there is only one way to survive and this way is chosen, how can this situation be distinguished of forced and voluntary recruitment? There are legal rules which determine the elements of the distinction, but these are not appropriate enough.<sup>3</sup>

Children are mostly recruited to armed groups that are in shortage of succours or are in need of continuous reinforce of troops during their resistant actions against well-equipped regular armed forces. In these cases, children get into armed groups where they can live in extremely harsh circumstances, as all the soldiers serving in that group. The difference is that these difficulties and sufferings affect the personality of children at an early stage of their life in a very negative way that will stamp their development forever.

After the arrival in a military camp, there are different types of training ensured for recruits. Some groups provide really extensive training, in other cases a couple weeks long basic course is ensured, but the "on-the-job training" is often preferred as well, when the first training is actually the first battle to take part in.

The lectures during the training very often do not touch the subject of international humanitarian or human rights' law. Children involved in the conflict can find about the main principles of these fields of law if the relevant organizations (for instance, the International Committee of the Red Cross) are able to reach them and disseminate this kind of knowledge. Otherwise, as they have even less previous ideas than their adult mates, they can easily misunderstand these norms, like a child-soldier from Indonesia, who thought "human rights are like the right to

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<sup>2</sup> Most of them do not receive any salary or only a very small amount of money. For instance, it meant in East Timor 25,000 rupiah (about 3–4 US dollars) paid once when the child was recruited.

<sup>3</sup> Wider description on the conditions of voluntary recruitment can be found in the Chapter "Development of international legal rules on child recruitment" of this study.

defend one's homeland. Therefore, as a child of Indonesia, I am entitled to defend my country and my place of residence."<sup>4</sup>

Beyond the knowledge which the new-comers receive through training, the type of material equipment that is ensured for them has also a major importance. Regular armed forces are usually able to supply uniforms, meals and appropriate medical care, but irregular armed groups are less structured. In many cases they do not provide suitable clothing, basic hygiene items, and sometimes they do not ensure the necessary food portion. Some groups have a policy of differential treatment in this point of view: it can happen that smaller children receive smaller food ration.

Children in armed groups are used for a variety of purposes. Many children participate directly in hostilities, but they can equally serve as spies, messengers, porters, servants (also in a sexual way) or cooks. They can look for food, prepare bows and arrows, but also lay and clear landmines.

There are new weapons that are lightweight and easy to fire with, which are handled without problems by children. It is usual among irregular armed forces to send children on the battlefield as it is easy to manipulate them to become fanatic killers. Alcohol and drugs are frequently used for this purpose. Drugs are injected with unsterilised needles, which can easily lead to spreading of HIV or other blood transmitted diseases. On the other hand, children do not have a stable moral value-system yet, and it is much easier to manipulate them. Some of them feel that being a soldier, no matter what kind of methods are used, is a brave activity that strengthens their consciousness. Obviously, most of them face the moral problems of killing, like one of them from Papua New Guinea, who said "I felt sorry for them when I saw them dying. They too have sons and only war makes us enemies."<sup>5</sup>

Beyond the general tasks, girls are often used for sexual purposes in a higher number than boys. They can be abducted to be given to combatants who take them as their "wives". Sometimes they voluntarily join combatants in order to enjoy a certain protection from gang rape. This protection will last until the given combatant decides to change his "wife", because he is already tired of her or she is too ill to perform her tasks (after being often object of brutality by the "husband"). In this way, sexually transmitted diseases can quickly spread. Beyond this negative consequence, violent sex can cause further harms to the girls, like uterine problems, incapacity of living a normal sexual life in the future, unwanted pregnancies. These effects can later lead to the feeling of shame and the fear of being rejected by their community. Because of this fear, girls often choose to stay within the armed group or to become a prostitute.

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<sup>4</sup> UNICEF, "Adult Wars, Child Soldiers: Voices of Children Involved in Armed Conflict in the East Asia and Pacific Region", <[www.unicef.org/publications/files/pub\\_adultwars\\_en.pdf](http://www.unicef.org/publications/files/pub_adultwars_en.pdf)> (25.02.2007), p. 39.

<sup>5</sup> *Ibid.*, p. 55.

Fighting, lack of family and all the abuses which child-soldiers suffer, cause – beyond the physical damages – very serious psycho-social problems. In most of the cases, they have terrifying nightmares, lose control over their anger, feel isolation and loneliness that hinder their return back to their community. Reintegration is extremely difficult because of the way their personality has changed as a consequence of war. A common experience of former child-soldiers is the feeling of sudden anger, which they cannot control. This change is intuited by their community as well, and due to these prejudices, in numerous cases the community does not facilitate the child's reintegration. In this regard, reconciliation procedures can play a central role, involving the members and leaders of the community. We can thus say that prevention of child recruitment has a great significance which shall be ensured by proper legal regulation also by international legal prohibitive norms.

#### DEVELOPMENT OF INTERNATIONAL LEGAL RULES ON CHILD RECRUITMENT

The regulation on age limit of recruitment has a half century long past, from the Geneva Conventions in 1949 till the Optional Protocol to the Convention on the Rights of the Child in 2000, but a totally sufficient law still does not exist.

The Fourth Geneva Convention on the protection of civilian population in times of war contains provisions which are referred to with regard to the prevention of child recruitment. Rules on the establishment of safety zones serve also the aim of protecting children under 15 years from the effects of war, so, among others, the possible recruitment.<sup>6</sup> The special care that is required for children under 15 years who are orphaned or separated from their families, protects these extremely vulnerable children from joining armed forces.<sup>7</sup> On the other hand, it must be mentioned that prohibition of recruitment of these children appears in the Convention only in relation to occupying powers.<sup>8</sup> Beyond this weak point of the document, the age limit of 15 years is too low taking into account the interests of children.

The Minimum Age Convention adopted by the International Labour Organization in 1973 does not have any concrete provision on child recruitment, but its third article can be interpreted in a way that it applies also for this kind of "labour". According to this rule, every activity that "by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons" is prohibited in the case of persons under 18 years old.<sup>9</sup> To be a soldier and to take direct part in hostilities can hardly be held as a work

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<sup>6</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12.8.1949, in force 21.10.1950, 75 UNTS 287, Article 14.

<sup>7</sup> *Ibid.*, Article 24.

<sup>8</sup> *Ibid.*, Article 51.

<sup>9</sup> Convention concerning Minimum Age for Admission to Employment, Geneva, 26.6.1973, in force 19.6.1976, 1015 UNTS 297, Article 3(1).

outside this category. Nevertheless, this provision is too wide, so it cannot be regarded as a suitable norm against child enlistment.

The Additional Protocols to the 1949 Geneva Conventions brought positive changes in these rules. The relevant article of the First Additional Protocol determined 15 years as age limit for the prohibition of children's direct participation in hostilities, and it obliged the State parties to endeavour to give priority to those who are oldest between the ages of 15 and 18.<sup>10</sup> The birth of this concrete regulation was a great step toward suitable legal protection against child recruiters, but it was not strong enough. The expression of "direct" participation means that children can be involved in hostilities and activities on the battlefield such as gathering information, transmitting orders or transporting ammunition. The Second Additional Protocol includes provisions ensuring stronger protection in this respect. The age limit is 15 years in this Protocol too, but according to it, children under this age "shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".<sup>11</sup> This rule prohibited every form of participation in hostilities, and this serves the interests of children to a suitable wide extent. It must also be mentioned that this norm was applied already in non-international armed conflicts, which were not covered by any international treaty till that time.

In 1989, the Convention on the Rights of the Child (hereafter CRC) was adopted, which determined the notion of child as "persons below the age of 18 years". There is some inconsistency in the text of this document, as the age limit is 15 related to child soldiering. Actually, it repeats the ruling of the first Additional Protocol to the Geneva Conventions stating that:

1. 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.
2. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.<sup>12</sup>

Beyond repeating an already existing but not sufficient rule, it could also distract the attention from the stronger protection included in the 1977 Second Additional Protocol. From another point of view, this Convention has great significance, as its near-universal ratification (beyond state practice) indicates that the prohibition of

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<sup>10</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8.6.1977, in force 8.12.1978, 1125 UNTS 3, Article 77.

<sup>11</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8.6.1977, in force 7.12.1978, 1125 UNTS 609, Article 4(3)(c-d).

<sup>12</sup> Convention on the Rights of the Child, Geneva, 20.11.1989, in force 2.9.1990, 1577 UNTS 3, Article 38(2-3).

the recruitment and use of child-soldiers under the age of 15 has passed into customary international law.<sup>13</sup> This protection is even stronger ensured by the fact that there is no derogation clause in the CRC that could allow states to put some obligations “on hold” (for example, the prohibition of child soldiering) during situations of emergency.

The increase in the age limit was declared for the first time in the African Charter on the Rights and Welfare of the Child, in 1990. According to this regional treaty, a “child” means every person below the age of 18 years, and “States Parties ... shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child”.<sup>14</sup>

The adoption of the Rome Statute of the International Criminal Court in 1998 meant a great step in penalizing child recruitment. It declared that “conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities”<sup>15</sup> is a war crime, and falls under the jurisdiction of the ICC. Although it is debatable whether a norm of a customary character was codified in this provision, the legality of the future proceedings cannot be questioned on the ground of the principle of *nullum crimen sine lege* anymore.

In 1999, the International Labour Organization adopted its 182<sup>nd</sup> Convention on the Worst Forms of Child Labour. In this document, the age limit for the prohibition is of 18 years old, same as in the Minimum Age Convention mentioned earlier. The difference is that, in this treaty, the Organization declared expressly that forced or compulsory recruitment of children for armed conflict belongs to the worst forms of child labour, which are prohibited.<sup>16</sup>

The latest international legal document on the prohibition of child recruitment is the Optional Protocol to the CRC, which was adopted in 2000. The Protocol prohibits compulsory recruitment in every case of persons below the age of 18 years.<sup>17</sup> On the other hand, according to its text, children are protected only against the direct participation in hostilities, which does not cover tasks that can be carried out on the battlefield and do not mean fighting. In the case of rebel armed groups, the protection is much stronger, as it is prohibited for them to recruit or use persons under the age of 18 years in hostilities under any circumstances.<sup>18</sup> In contrast with this regulation, in case of armed forces of a state voluntary

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<sup>13</sup> Jean-Marie Henckaerts & Louise Doswald-Beck (eds), *Customary International Humanitarian Law* (2 vols, Cambridge University Press, 2005), vol. I, pp. 482–488.

<sup>14</sup> African Charter on the Rights and Welfare of the Child, 11.7.1990, in force 29.11.1999, OAU Doc. CAB/LEG/24.9/49 (1990), Articles 2 & 22.

<sup>15</sup> Rome Statute of the International Criminal Court, 17.7.1999, in force 1.7.2002, 2187 UNTS 90, Article 8(b)(xxvi).

<sup>16</sup> Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Geneva, 1.6.1999, in force 19.11.2000, 38 ILM 1207, Article 3(a).

<sup>17</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, Geneva, 25.5.2000, in force 12.2.2002, UN Doc. A/54/49 (2000), Article 2.

<sup>18</sup> *Ibid.*, Article 4.

recruitment between the age of 15 and 18 is permitted. The Protocol declares several safeguards regarding to volunteering of these persons:

- (a) Such recruitment is genuinely voluntary;
- (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service.<sup>19</sup>

In practice, any claim that young persons under 18 years have volunteered for armed forces should be treated with scepticism. The "genuinely voluntary" will can be questioned if we think about the circumstances in which children are recruited in most of the conflicts. Is the child, who sees no other alternative beyond joining to the military, really willing to fight? Does the girl, who tries to escape from her abusive family, really want to take part in hostilities? It is extremely difficult to distinguish between voluntary will and unavoidable compulsion. Beyond this, according to a survey made by the Quaker United Nations Office, Geneva and the ILO, in a very small number of cases the children recruited "voluntarily" have had an explicit prior parental consent with regard to their joining.<sup>20</sup> There are problems also with the fourth criterion, as in numerous developing countries affected by armed conflicts a suitable birth registration system does not exist.<sup>21</sup> In this way, it is difficult to receive reliable proof about age.

Although there was more than a half decade at disposal for developing the legal rules related to the prohibition of child recruitment, and many positive achievements were reached, the international legal norms applicable recently are still not sufficient enough. Stronger protection could be ensured by the prohibition of recruitment or use of children under the age of 18 years in hostilities under any circumstances, no matter if it is about rebel groups or national armed forces.

#### QUESTION OF INDIVIDUAL CRIMINAL RESPONSIBILITY ILLUSTRATED BY THE EXAMPLE OF SIERRA LEONE

The example of Sierra Leone is suitable for introducing the legally relevant aspects of individual criminal responsibility, because in this country three kind of possible alternatives were envisaged, whose institution could be the forum of procedures in cases of child-recruiters and with regard to the child-soldiers. The second reason for dealing with this country is because the 1999 Lomé Accord was the first peace

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<sup>19</sup> *Ibid.*, Article 3.

<sup>20</sup> Rachel Brett, "Adolescents volunteering for armed forces or armed groups", <[www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5WNJFX/\\$File/IRRC\\_852.Brett.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5WNJFX/$File/IRRC_852.Brett.pdf)> (25.2.2007), p. 864.

<sup>21</sup> Daniel Helle, "Optional Protocol on the involvement of children in armed conflict to the Convention on the Rights of the Child", *International Review of the Red Cross* (2000), No. 840, 1099–1106.

agreement which paid special attention to the issue of child-soldiers.<sup>22</sup> Beside this fact, it must be mentioned that the Appeals Chamber of the Special Court for Sierra Leone took a decision in 2004, which is unique but also debatable, emphasizing that child-recruiters must be called to account under any circumstances.

### *Persons who bear the greatest responsibility*

During the eleven years of civil war in Sierra Leone more than 10,000 children served as soldiers in the three main fighting groups: the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC) and the Civil Defence Forces (CDF).<sup>23</sup> The people who are responsible for this large number of crimes committed against children must be called to account in an efficient but also in a proper legal way. With intensive co-operation and help of the United Nations, the Special Court for Sierra Leone was established in 2002 to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian and Sierra Leonean law. According to the Statute of this judicial body of mixed (national and international) character "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities"<sup>24</sup> falls under the jurisdiction of the Special Court.

Thirteen persons (such as Charles Taylor, former Liberian President or one of the main RUF leaders, Foday Sankoh) associated with the RUF, AFRC or CDF were indicted on charges of serious violations of humanitarian law. All of them were accused of recruiting children.

Regarding to the individual criminal responsibility for this specific crime the Defence Counsel of an accused, Sam Hinga Norman raised an objection. The Rome Statute of the International Criminal Court was the first international legal document which declared individual criminal responsibility in case of child-recruitment. Provisions of the Rome Statute apply only for crimes committed after its entry into force, 1 July 2002. In the opinion of the Defence Counsel, as the concrete crimes were committed before this date, and as the Rome Statute did not

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<sup>22</sup> Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front, Lomé, 7.7.1999, <[www.sc-sl.org/lomeaccord.html](http://www.sc-sl.org/lomeaccord.html)> (25.2.2007), Article XXX — Child Combatants:

"The Government shall accord particular attention to the issue of child soldiers. It shall, accordingly, mobilize resources, both within the country and from the International Community, and especially through the Office of the UN Special Representative for Children in Armed Conflict, UNICEF and other agencies, to address the special needs of these children in the existing disarmament, demobilization and reintegration processes."

<sup>23</sup> Office of the Special Representative of the Secretary-General for Children and Armed Conflict, "Sierra Leone", <[www.un.org/special-rep/children-armed-conflict/English/SierraLeone.html](http://www.un.org/special-rep/children-armed-conflict/English/SierraLeone.html)> (25.2.2007).

<sup>24</sup> Statute of the Special Court for Sierra Leone, 16.1.2002, in force 12.4.2002, 2178 UNTS 138, Article 4(c).



codify customary international law, the accused cannot be called to account for this crime. Otherwise, the principle of *nullum crimen sine lege* would be violated.<sup>25</sup>

The Prosecution Response was based on the fact that the crime of child-recruitment was part of customary international law at the relevant time, as it is proved by the number of states, which carried on steady practice of punishing this offence in accordance of their domestic law.<sup>26</sup> The University of Toronto International Human Rights Clinic and interested Human Rights Organizations added their argument to this statement, that the principle of *nullum crimen sine lege* should protect the innocent who in good faith believed that their acts were lawful.<sup>27</sup> In this case, it was obvious that this situation did not exist. The UNICEF expressed its agreement with these arguments referring also to the already functioning practice of the ICTY and ICTR that recognized that criminal responsibility attaches to serious violations of Additional Protocol I or II to the 1949 Geneva Conventions.<sup>28</sup> Sierra Leone ratified these Protocols in 1986, which occurred before the date relevant to the concrete case. The Appeals Chamber held all the prosecution arguments well-founded and decided that the Special Court has the power to prosecute persons who committed the crime of child-recruitment.<sup>29</sup>

Life and healthy development of children is an extremely important value to protect by international law, and prohibition and prevention of child-recruitment must be ensured in an efficient way. Criminalization of enlistment of children achieved by the adoption of the Rome Statute was a progressive measure, but still the arguments of the Appeals Chamber of the Special Court are a bit precarious. The analysis of Justice Robertson, that was presented in his dissenting opinion to the decision of the Appeals Chamber, is especially worth to examine in this regard.

The main focus of his opinion is related to the question whether the individual criminal responsibility for this crime was part of international customary law. The decision of the Chamber is that it was part, but only fragile arguments sustain this view. It can be admitted that the prohibition of child-recruitment became a customary rule but it is not so apparent related to individual criminal responsibility. As at the relevant time there was not any exact treaty provision that called child-recruitment a “war crime which must be punished”, and if the customary character cannot be proved, then the defence motion emphasizing the possible violation of the principle *nullum crimen sine lege* shall be considered once again by the examiners of the decision.

The judicial body referred to the test established by the ICTY examining whether a violation of international humanitarian law can be subject to its

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<sup>25</sup> *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-04-14-AR72(E), Special Court for Sierra Leone, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31.5.2004, para. 1.

<sup>26</sup> *Ibid.*, para. 2(a).

<sup>27</sup> *Ibid.*, para. 6(g).

<sup>28</sup> *Ibid.*, para. 7(h).

<sup>29</sup> *Ibid.*, para. 8.

prosecution. The requirements which must be met after the decision of the Tribunal adopted in the *Tadić* case are the following:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature of, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>30</sup>

The fulfilment of the first three conditions is beyond question, considering the legal instruments applicable related to child-recruitment and introduced by the present study. The fourth criterion is the critical one in this case. It is not enough to refer to the jurisdiction of the ICTY and ICTR, and even less appropriate to mention the Rome Statute. Besides, the examples for state practice demonstrated by the judges cannot be considered as unquestionable proofs for the existence of customary law.<sup>31</sup> There are numerous states world-wide that incorporated war crime in their domestic criminal law, but the common element in these state practices is the admission of grave breaches of the Geneva Conventions and Additional Protocols as war crimes.<sup>32</sup> Although these treaties regulated the question of child soldiers to some extent, but their recruitment cannot be found among grave breaches of humanitarian law. Although it would be proper to interpret inhuman treatment in a broad sense, and in this case it could include also child-recruitment, criminal responsibility needs nevertheless much more concrete provisions drafted in a much clearer way, so that *nullum crimen sine lege* can be respected during the criminal proceeding.

At this point I draw the attention again on the dissenting opinion of Justice Robertson. He mentioned the original proposal of the Secretary-General for the Article 4(c) of the Statute of the Special Court, which created the offence of conscripting or enlisting children under fifteen years into armed forces. In the opinion of Justice Robertson, the Secretary-General had a good reason for proposing a different text for this article, which was not supported in the end by the Security Council, who preferred the text of the relevant article of the Rome Statute. This original version mentioned abduction and forced recruitment as possible elements of this offence and avoided to follow the definition of the ICC Statute. The reason for that was that Justice Robertson was not sure whether an already existing

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<sup>30</sup> *Prosecutor v. Dusko Tadić*, Case No. IT-94-I-A, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2.10.1995, para. 94.

<sup>31</sup> *Prosecutor v. Sam Hinga Norman*, *supra nota* 25, paras 30–51.

<sup>32</sup> Henckaerts & Doswald-Beck (eds), *Customary International Humanitarian Law*, *supra nota* 13, Vol. II, p. 3857.

customary rule was codified in the Article 8 of the Rome Statute.<sup>33</sup> Justice Robertson also emphasized the dilemma: "If it was not clear to the Secretary-General and his legal advisers that international law had by 1996 criminalized the enlistment of child soldiers, could it really have been any clearer to Chief Hinga Norman or any other defendant at that time, embattled in Sierra Leone?"<sup>34</sup> This apparently simple question can be the real test of the problem whether the Court had jurisdiction related to child-recruitment without the violation of the principle of *nullum crimen sine lege*. The great value of the life of children cannot be debated, and the commission of recruitment of children is therefore extremely outrageous but especially in these cases it is important to apply all the legal principles in the course of criminal proceeding so that the judgement will not be adopted out of anger. Therefore, criminalization of child-recruitment by the Rome Statute is a great achievement in the development of international rules on child soldiers, which ensures today the adoption of judicial decisions in case of this crime without raising such dilemmas.

### *Perpetrator or victim?*

During their service within armed groups, child-soldiers also commit war crimes and grave breaches of IHL. Nevertheless, their case is different than the one of the adults. Mostly they are manipulated, forced to commit crimes. It is why the Statute of the Special Court declared that it has no jurisdiction over any person who was under the age of 15 years at the time of the commission of the crime. Special rules apply for persons between the age of 15 and 18 years at the relevant time. In their cases, the Court has the power to prosecute, but has to take into account the main aim of their reintegration in the community. Special measures can be ordered for them by the Court, such as community service orders, counselling, correctional, educational and vocational training programmes, approved schools, etc.<sup>35</sup> Where appropriate, in the case of juvenile offenders<sup>36</sup> the Statute recommends rather the truth and reconciliation mechanisms. This was a necessary way for the solution of the problem, because the system of juvenile justice does not work sufficiently in Sierra Leone.

Under domestic law, in Sierra Leone the age of criminal responsibility is 10 years old, which is too low, taking into consideration the international standards. The Children and Young Persons Act of Sierra Leone does not prohibit the imposition of life imprisonment on a juvenile, and the domestic courts often use this punishment in case of young offenders. The other weak point of the system is that persons between the age of 14 and 17 years old can be sent to an adult prison. Detained juveniles who wait for their trials are not always tried as quickly as they

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<sup>33</sup> *Prosecutor v. Sam Hinga Norman, surpa nota 25*, Dissenting Opinion of Justice Robertson, para. 4.

<sup>34</sup> *Ibid.*, para. 6.

<sup>35</sup> Statute of the Special Court for Sierra Leone, *supra nota 24*, Article 7.

<sup>36</sup> *Ibid.*, Article 15(5).

should be. Because of this delay, they must spend much more time detained than legally they should. The magistrates working at juvenile courts do not receive specialist training on children's rights and issues of juvenile justice. Beyond this lack of special knowledge required to a fair trial, in most cases juveniles are not represented in court and do not receive legal advice when they are arrested and during their detention in police cells.<sup>37</sup>

With all of these circumstances, the function of authorities for juvenile justice seriously violates international standards included in the Convention of the Rights of Child and the UN Standard Minimum Rules for the Administration of Juvenile Justice. The latter document includes general and also more specific rules, and norms from both categories are violated by the system in Sierra Leone. According to the "Beijing Rules", young people "require particular care and assistance with regard to physical, mental and social development". In order to reach this aim, professional training and refresher courses shall be ensured for all the personnel dealing with juvenile cases.<sup>38</sup> The Sierra Leonean juvenile justice system does not correspond with the Beijing Rules. It is yet to be underlined that the Beijing rules contain one provision that encourages states to prefer diversion against criminal proceeding if it is possible.<sup>39</sup> The Commentary of this article emphasises that, in many cases, non-intervention is the best solution, and recommends redirection of young offenders to community support services instead of criminal process, in order to avoid the negative effects of such a proceeding (for instance the stigma of conviction and sentence).

In these cases, an optimal solution can be the truth and reconciliation process, which can be a forum for former child-soldiers to clarify before their community what they committed and why, so that they can get a chance to reconcile with the society and return to it. The Act of the *Truth and Reconciliation Commission* (TRC) was adopted one year after the Lomé Peace Agreement in 2000. It declared that, during its functioning, the TRC must give special attention to the experiences of children within the armed conflict.<sup>40</sup> Until 2004 when it stopped operating, one of the key themes of the Commission's work was the issue of children affected by war. It followed the Recommendations made by the expert group meeting in June 2001.<sup>41</sup> The TRC treated child perpetrators primarily as victims and gave special attention to girls and gender-based violence. In the case of children, it primarily took the form of giving confidential statement and ensured the support of

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<sup>37</sup> Rachel Harvey, "Juvenile Justice in Sierra Leone: An Analysis of Legislation and Practice" (2000), <[www.essex.ac.uk/armedcon/story\\_id/000013.htm](http://www.essex.ac.uk/armedcon/story_id/000013.htm)> (25.2.2007).

<sup>38</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice, "The Beijing Rules", UN Doc. A/40/53 (1985), Article 22.

<sup>39</sup> *Ibid.*, Article 11.

<sup>40</sup> The Truth and Reconciliation Commission Act 2000, <[www.sierra-leone.org/trcact2000.html](http://www.sierra-leone.org/trcact2000.html)> (25.2.2007), Article 6(2)(b).

<sup>41</sup> UNICEF, Innocenti Research Centre & No Peace without Justice, "International Criminal Justice and Children" (2002), p. 132.

psychosocial workers and the presence of parents. The TRC staff included experts on issues affecting children. The Commission used also traditional ceremonies, which could be a symbolic gesture that the child is accepted back in the community. For example, in northern Sierra Leone, village members washed the soles of children's feet and their mothers then drank the water.<sup>42</sup> At the end of its function, the TRC published also a child version of its Final Report, written with the assistance of children to facilitate the better understanding of the Report.<sup>43</sup>

Although the TRC collected approximately 8,000 statements from victims and perpetrators of human rights abuses, including many child-soldiers, its fact-finding work was not enough to carry out reintegration process to an entirely wide extent. The UN Mission in Sierra Leone (UNAMSIL) estimated that the majority of the approximately 7,000 child combatants, who had been demobilized, were reunited with their families, and some 3,000 were absorbed into a community education program by UNICEF. On the other hand, one of the weak points of the process was that the DDR Program failed to address the needs of thousands of abducted girls. Little funding was ensured for this aim and despite the sexual abuse that most of the girls had suffered, suitable counselling was not provided. In general, Sierra Leone had insufficient capacity to ensure psycho-social assistance to thousands of children who suffered psychological trauma. UNICEF began a new program in 2003 to assist women and girls.<sup>44</sup>

Child demobilization programs did not include former fighters who were abducted and recruited as children, but after eleven years of war were demobilized as adults. Beyond this failure, the repatriation and reintegration of approximately 500 former combatants in Cote d'Ivoire and 3,000 in Liberia was not made possible either. In 2003 some 2,000 to 3,000 former child-soldiers between the age of 10 and 15 years old were reported to be working as illicit diamond miners in extremely harsh conditions.<sup>45</sup> Numerous programs carried out by NGOs, community based organizations and government agencies targeted the use of children in mining, but in this way only 218 children, including 78 former child-soldiers were removed from mines by March 2004.<sup>46</sup>

Beyond the difficulties related to reintegration programs, prevention of re-recruitment of children is also not ensured. This problem could be solved by giving alternatives for children to build their personal future. In this respect, family ties, appropriate education system and vocational training play an extremely significant

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<sup>42</sup> *Ibid.*, p. 135.

<sup>43</sup> Special Court for Sierra Leone, Overview of the Sierra Leone Truth and Reconciliation Commission Report (2004), <[www.nuigalway.ie/human\\_rights/Docs/Publications/Sierra%20Leone%20Report/SL.TRC.Overview.pdf](http://www.nuigalway.ie/human_rights/Docs/Publications/Sierra%20Leone%20Report/SL.TRC.Overview.pdf)> (25.2.2007).

<sup>44</sup> Coalition to Stop the Use of Child Soldiers, "Child Soldiers Global Report 2004: Sierra Leone", <[www.child-soldiers.org/document\\_get.php?id=795](http://www.child-soldiers.org/document_get.php?id=795)> (25.2.2007).

<sup>45</sup> Human Rights Watch, "Child Soldier Use 2003: A Briefing for the 4th UN Security Council Open Debate on Children and Armed Conflict", <[www.hrw.org/reports/2004/childsoldiers0104/childsoldiers.pdf](http://www.hrw.org/reports/2004/childsoldiers0104/childsoldiers.pdf)> (25.2.2007), p. 37.

<sup>46</sup> Child Soldiers Global Report 2004, *supra nota* 44.

role. Appropriate support and guidance with regard to their responsibilities for children under their care were not provided for the parents and families, and children were not always accepted back into their families and communities.<sup>47</sup> On the other hand, the education system also represented a big problem. A drastic fall in the number of existing primary schools occurred, and the remaining schools concentrate in main towns, which excludes the rural population from attending them. UNICEF made efforts to support the education system by providing desk and bench sets, teaching and learning materials and in-service teacher training. Today, about 50 per cent of the primary schools are functioning, although often in inadequate conditions.<sup>48</sup> Among the positive tendencies, we must mention that the State made a significant progress in disseminating the principles and provisions of the CRC, although further training is needed for professionals, such as law officials, teachers and health workers.<sup>49</sup> The example of Sierra Leone shows that child recruitment is an extremely complex issue. The development of the legal regime alone is not enough, but the solution requires the co-operation of governments, international and non-governmental organizations and every affected actor for destroying all the roots of the problem.

#### RECENT EFFORTS FOR REPRESSION AND PREVENTION OF CHILD RECRUITMENT

For the repression of child recruitment more monitoring mechanisms were established in the last decades. In the framework of the controlling system of implementation of the Convention on the Rights of the Child and its Optional Protocol, each State Party is required to submit an initial report to the Committee on the Rights of the Child within two years of the entry into force of the Optional Protocol. Thereafter, the States are obliged to submit follow-up reports. In these reports, States should provide information about the measures taken to implement the Optional Protocol or any difficulties and special circumstances related to the implementation. After the Committee examines the reports, it publishes its concerns and recommendations in "Concluding Observations". Beyond these documents the Committee also publishes "General Comments", giving a general guidance on implementation of the Optional Protocol. Besides the reports of the States, the Committee also collects information from other sources, such as civil society and non-governmental organizations, UN agencies, other intergovernmental organizations and academic institutions.<sup>50</sup>

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<sup>47</sup> Concluding observations of the Committee on the Rights of the Child: Sierra Leone, 28.1.2000, CRC/C15/Add.116, Article 48.

<sup>48</sup> UNICEF, "At a glance: Sierra Leone – The big picture", <[www.unicef.org/infobycountry/sierraleone.html](http://www.unicef.org/infobycountry/sierraleone.html)> (25.2.2007).

<sup>49</sup> Concluding observations, *supra nota* 47, Articles 20–21.

<sup>50</sup> UNICEF, "Guide to the Optional Protocol on the Involvement of Children in Armed Conflict" (2003), <[www.unicef.org/publications/files/option\\_protocol\\_conflict.pdf](http://www.unicef.org/publications/files/option_protocol_conflict.pdf)> (25.2.2007), pp. 36–37.

The other relevant monitoring system, which must be mentioned, is the one established by the UN Security Council in July 2005 pursuant to the 1612 (2005) Security Council Resolution. This mechanism requires from all members of the Council to co-ordinate a report-collecting system and review the reports related to the situation on child recruitment. It is operating in co-operation with national governments and relevant UN and civil society actors. and also monitors the function of non-State armed groups. After the collection and review of the reports, recommendations on possible measures to promote the protection of children affected by armed conflict are formulated to the Council<sup>51</sup>. Its most recent focus is on the situations of Burundi, Côte d'Ivoire, the Democratic Republic of Congo, Somalia and Sudan. In June 2006, the Secretary-General submitted to the Working Group a first country-specific report about the situation in the Democratic Republic of Congo<sup>52</sup> and the second one about Sudan. On the basis of the former report, the Working Group gave its recommendations to the Security Council in September 2006.

Positive achievements such as visibility of the problem, global awareness and advocacy on children and armed conflict issues have greatly increased. The protection of war-affected children has been placed on the international peace-and-security agenda.

Nevertheless, atrocities against children and use of them in armed conflict still occur to a large extent. In 12 different countries (such as the formerly mentioned countries affected by the SC Working Group's function and beyond them Chad, Colombia, Myanmar, Nepal, Philippines, Sri Lanka and Uganda) child-soldier issues remain part of the gross violations of human rights. Despite all the achievements in the field of law, international criminal jurisdiction and the efforts made by international and non-governmental organizations, child soldiering remains a globally challenging problem to solve.

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<sup>51</sup> SC Res. 1612, 26.6.2005, Articles 2 & 8.

<sup>52</sup> Report of the Secretary-General on children and armed conflict in the Democratic Republic of Congo, S/2006/389, 13.6.2006.