I. Submissions of the parties

[**Source**: Special Court for Sierra Leone, *Prosecutor v. Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction*, 31 May 2004, available on http://www.rscsl.org/]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

SPECIAL COURT FOR SIERRA LEONE

PROSECUTOR Against SAM HINGA NORMAN

DECISION ON PRELIMINARY MOTION BASED ON LACK OF JURISDICTION (CHILD RECRUITMENT)

[...]

THE APPEALS CHAMBER of the Special Court for Sierra Leone ("the Special Court");

SEIZED of the Defence Preliminary Motion Based on Lack of Jurisdiction: Child Recruitment, filed on 26 June 2003 ("Preliminary Motion") on behalf of Sam Hinga Norman ("Accused"); [...]

I. SUBMISSIONS OF THE PARTIES

A. Defence Preliminary Motion

1. The Defence raises the following points in its submissions:
    a. The Special Court has no jurisdiction to try the Accused for crimes under Article 4(c) of the Statute (as charged in Count 8 of the Indictment) prohibiting the recruitment of children under 15 "into

armed forces or groups or using them to participate actively in hostilities" since the crime of child recruitment was not part of customary international law at the times relevant to the Indictment.

b. Consequently, Article 4(c) of the Special Court Statute violates the principle of *nullum crimen sine lege*.
c. While Protocol II Additional to the Geneva Conventions of 1977 and the Convention of the Rights of the Child of 1990 may have created an obligation on the part of States to refrain from recruiting child soldiers, these instruments did not criminalize such activity.
d. The 1998 Rome Statute of the International Criminal Court criminalizes child recruitment but it does not codify customary international law.

The Defence applies for a declaration that the Court lacks jurisdiction to try the Accused on Count 8 of the Indictment against him.

B. Prosecution Response

1. The Prosecution submits as follows:
   a. The crime of child recruitment was part of customary international law at the relevant time. The Geneva Conventions established the protection of children under 15 as an undisputed norm of international humanitarian law. The number of states that made the practice of child recruitment illegal under their domestic law and the subsequent international conventions addressing child recruitment demonstrate the existence of this customary international norm.
   b. The ICC Statute codified existing customary international law.
   c. In any case, individual criminal responsibility can exist notwithstanding lack of treaty provisions specifically referring to criminal liability in accordance with the Tadic case [**See** ICTY, The Prosecutor v. Tadic]
   d. The principle of *nullum crimen sine lege* should not be rigidly applied to an act universally regarded as abhorrent. The question is whether it was foreseeable and accessible to a possible perpetrator that the conduct was punishable.

C. Defence Reply

1. The Defence submits in its Reply that if the Special Court accepts the Prosecution proposition that the prohibition on the recruitment of child soldiers has acquired the status of a crime under international law, the Court must pinpoint the moment at which this recruitment became a crime in order to determine over which acts the Court has jurisdiction. Furthermore, the Defence argues, a prohibition under international law does not necessarily entail criminal responsibility.

D. Prosecution Additional Submissions

1. The Prosecution argues further that:
   a. In international law, unlike in a national legal system, there is no Parliament with legislative power with respect to the world as a whole. Thus, there will never be a statute declaring conduct to be criminal under customary law as from a specified date. Criminal liability for child recruitment is a culmination of numerous factors which must all be considered together.
   b. As regards the principle of *nullum crimen sine lege*, the fact that an Accused could not foresee the creation of an international criminal tribunal is of no consequence, as long as it was foreseeable to

them that the underlying acts were punishable. The possible perpetrator did not need to know the specific description of the offence. The dictates of the public conscience are important in determining what constitutes a criminal act, and this will evolve over time.

c. Alternatively, individual criminal responsibility for child recruitment had become established by 30 April 1997, the date on which the "Capetown Principles" were adopted by the Symposium on the Prevention of Children into Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa, which provides that "those responsible for illegally recruiting children should be brought to justice".
d. Alternatively, individual criminal responsibility for child recruitment had become established by 29 June 1998, the date on which the President of the Security Council condemned the use of child soldiers and called on parties to comply with their obligations under international law and prosecute those responsible for grave breaches of international humanitarian law.
e. Alternatively, individual criminal responsibility for child recruitment had become established by 17 July 1998 when the ICC Statute was adopted. [...]

F. Submissions of the Amici Curiae

University of Toronto International Human Rights Clinic and interested Human Rights Organisations

1. The University of Toronto International Human Rights Law Clinic sets out its arguments as follows:
    1. In invoking the principle *nullum crimen sine lege*, the Defence assumes a clear distinction between war crimes and violations of international humanitarian law, and that only the former may be prosecuted without violating this principle. This premise is false and the jurisprudence supports the ability to prosecute serious violations of international humanitarian law. [...]
    2. Since child recruitment can attract prosecution by violating laws against, for example, kidnapping, it is overly formalistic to characterise regulation of military recruitment as merely restricting recruitment rather than prohibiting or criminalizing it.
    3. International resolutions and instruments expressing outrage at the practice of child recruitment since 1996 demonstrate acceptance of the prohibition as binding.
    4. International humanitarian law permits the prosecution of individuals for the commission of serious violations of the laws of war, irrespective of whether or not they are expressly criminalized, and this is confirmed in international jurisprudence, state practice, and academic opinion.
    5. The prohibition on recruitment of children is contained in the "Fundamental Guarantees" of Additional Protocol II and the judgments of the International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR") provide compelling evidence that the violation was a pre-existing crime under customary international law.
    6. The principle of *nullum crimen sine lege* is meant to protect the innocent who in good faith believed their acts were lawful. The Accused could not reasonably have believed that his acts were lawful at the time they were committed and so cannot rely on *nullum crimen sine lege* in his defence.

UNICEF

1. UNICEF presents its submissions along the following lines:
    a. By 30 November 1996, customary international law had established the recruitment or use in hostilities of children under 15 as a criminal offence and this was the view of the Security Council

when the language of Article 4(c) of the Statute was proposed. While the first draft of the Special Court Statute referred to “abduction and forced recruitment of children under the age of fifteen”, the language in the final version was found by the members of the Security Council to conform to the statement of the law existing in 1996 as currently accepted by the international community. [...]

b. The prohibition of child recruitment which was included in the two Additional Protocols and the CRC has developed into a criminal offence. The ICTY Statute provides, and its jurisprudence confirms, that breaches of Additional Protocol, I [*sic*] lead to criminal sanctions and the ICTR status recognised that criminal liability attaches to serious violations of Additional Protocol II. The Trial Chamber in the ICTR case of Akayesu [**See** ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A.]] confirmed the view that in 1994 “serious violations” of the fundamental guarantees contained within Additional Protocol II to the Geneva Conventions were subject to criminal liability and child recruitment shares the same character as the violations listed therein. [...]

HEREBY DECIDES:

II. Discussion and III. Disposition

HEREBY DECIDES:

II. DISCUSSION

1. Under Article 4 of its Statute, the Special Court has the power to prosecute persons who committed serious violations of international humanitarian law including:
    a. Conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities (“child recruitment”).
    The original proposal put forward in the Secretary-General’s Report on the establishment of the Special Court referred to the crime of “abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities”, reflecting some uncertainty as to the customary international law nature of the crime of conscripting or enlisting children as defined in the Rome Statute of the International Criminal Court and mirrored in the Special Court Statute. The wording was modified following a proposal by the President of the Security Council to ensure that Article 4(c) conformed “to the statement of the law existing in 1996 and as currently accepted by the international community”. The question raised by the Preliminary Motion is whether the crime as defined in Article 4(c) of the Statute was recognised as a crime entailing individual criminal responsibility under customary international law at the time of the acts alleged in the indictments against the accused.
2. To answer the question before this Court, the first two sources of international law under Article 38(1) of the Statute of the International Court of Justice (“ICJ”) have to be scrutinized:
    1. international conventions, whether general or particular, establishing rules especially recognized by the contesting states
    2. international custom, as evidence of a general practice accepted as law [...]

A. International Conventions

1. Given that the Defence does not dispute the fact that international humanitarian law is violated by the

recruitment of children, it is not necessary to elaborate on this point in great detail. Nevertheless, the key words of the relevant international documents will be highlighted in order to set the stage for the analysis required by the issues raised in the Preliminary Motion. It should, in particular, be noted that Sierra Leone was already a State Party to the 1949 Geneva Conventions and the two Additional Protocols of 1977 prior to 1996.

1) Fourth Geneva Convention of 1949

1. This Convention was ratified by Sierra Leone in 1965. As of 30 November 1996, 187 States were parties to the Geneva Conventions. The pertinent provisions of the Conventions are as follows: [**See** Arts 14, 24 and 51, **available on** http://www.icrc.org/ihl] [...]

2) Additional Protocols I and II of 1977

1. Both Additional Protocols were ratified by Sierra Leone in 1986. Attention should be drawn to the following provisions of Additional Protocol I: [**See** Arts 77(2), (3) and (4) **available on** http://www.icrc.org/ihl]
2. 137 States were parties to Additional Protocol II as of 30 November 1996. Sierra Leone ratified Additional Protocol II on 21 October 1986. The key provision is Article 4 entitled “fundamental guarantees” which provide in relevant part: [**See** Art. 4(3)(c) **available on** http://www.icrc.org/ihl] [...]

3) Convention on the Rights of the Child of 1989

1. The Convention entered into force on 2 September 1990 and was on the same day ratified by the Government of Sierra Leone. In 1996, all but six states existing at the time had ratified the Convention. The CRC recognizes the protection of children in international humanitarian law and also requires States Parties to ensure respect for these rules by taking appropriate and feasible measures.
2. On feasible measures:

Article 38

[**See** *supra* Chapter 8.II.2.c. special protection of children, **Quotation**]

1. On general obligations of States

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

B. Customary International Law

1. Prior to November 1996, the prohibition on child recruitment had also crystallized as customary international law. The formation of custom requires both state practice and a sense of pre-existing obligation (*opinio iuris*). “An articulated sense of obligation, without implementing usage, is nothing more than rhetoric. Conversely, state practice, without opinion [*sic*] *iuris*, is just habit.”
2. As regards state practice, the list of states having legislation concerning recruitment or voluntary enlistment clearly shows that almost all states prohibit (and have done so for a long time) the recruitment of children under the age of 15. Since 185 states, including Sierra Leone, were parties to the Geneva Conventions prior to 1996, it follows that the provisions of those conventions were widely recognized as customary international law. Similarly, 133 states, including Sierra Leone, ratified Additional Protocol II before 1995. Due to the high number of States Parties one can conclude that many of the provisions of Additional Protocol II, including the fundamental guarantees, were widely accepted as customary international law by 1996. Even though Additional Protocol II addresses internal conflicts, the ICTY Appeals Chamber held in Prosecutor v Tadic that “it does not matter whether the ‘serious violations’ has [sic] occurred within the context of an international or an internal armed conflict”. This means that children are protected by the fundamental guarantees, regardless of whether there is an international or internal conflict taking place.
3. Furthermore, as already mentioned, all but six states had ratified the Convention on the Rights of the Child by 1996. This huge acceptance, the highest acceptance of all international conventions, clearly shows that the provisions of the CRC became international customary law almost at the time of the entry into force of the Convention.
4. The widespread recognition and acceptance of the norm prohibiting child recruitment in Additional Protocol II and the CRC provides compelling evidence that the conventional norm entered customary international law well before 1996. The fact that there was not a single reservation to lower the legal obligation under Article 38 of the CRC underlines this, especially if one takes into consideration the fact that Article 38 is one of the very few conventional provisions which can claim universal acceptance.
5. **The African Charter on the Rights and Welfare of the Child**, adopted the same year as the CRC came into force, reiterates with almost the same wording the prohibition of child recruitment:

Article 22(2): Armed Conflicts

2. States Parties to the present Charter shall take necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.

1. As stated in the Toronto Amicus Brief, and indicated in the 1996 Machel Report, it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws. It has also been pointed out that non-state entities are bound by necessity by the rules embodied in international humanitarian law instruments, that they are “responsible for the conduct of their members” and may be “held so responsible by opposing parties or by the outside world”. Therefore all parties to the conflict in Sierra Leone were bound by the prohibition of child recruitment that exists in international humanitarian law.
2. Furthermore, it should be mentioned that since the mid-1980s, states as well as non-state identities

started to commit themselves to preventing the use of child soldiers and to ending the use of already recruited soldiers.

3. The central question which must now be considered is whether the prohibition on child recruitment also entailed individual criminal responsibility at the time of the crimes alleged in the indictments.

C. *Nullum Crimen Sine Lege, Nullum Crimen Sine Poena*

1. It is the duty of this Chamber to ensure that the principle of non-retroactivity is not breached. As essential elements of all legal systems, the fundamental principle *nullum crimen sine lege* and the ancient principle *nullum crimen sine poena*, need to be considered. In the ICTY case of *Prosecutor v Hadzihasanovic*, it was observed that "In interpreting the principle *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The Emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance." In other words it must be "foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable". As has been shown in the previous sections, child recruitment was a violation of conventional and customary international humanitarian law by 1996. But can it also be stated that the prohibited act was criminalised and punishable under international or national law to an extent which would show customary practice?
2. In the ICTY case of *Prosecutor v. Tadic*, the test for determining whether a violation of humanitarian law is subject to prosecution and punishment is set out thus:

The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3 [of the ICTY Statute];

1. i. the violation must constitute an infringement of a rule of international humanitarian law;
   ii. the rule must be customary in nature or, 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.

1. International Humanitarian Law

1. With respect to points i) and ii), it follows from the discussion above, where the requirements have been addressed exhaustively, that in this regard the test is satisfied.

2. Rule Protecting Important Values

1. Regarding point iii), all the conventions listed above deal with the protection of children and it has been shown that this is one of the fundamental guarantees articulated in Additional Protocol II. The Special Court Statute, just like the ICTR Statute before it, draws on Part II of Additional Protocol II entitled "Humane Treatment" and its fundamental guarantees, as well as Common Article 3 to the Geneva Conventions in specifying the crimes falling within its jurisdiction. "All the fundamental guarantees share a similar character. In recogninsing [sic] them as fundamental, the international community set a

benchmark for the minimum standards for the conduct of armed conflict." Common Article 3 requires humane treatment and specifically addresses humiliating and degrading treatment. This includes the treatment of child soldiers in the course of their recruitment. Article 3(2) specifies further that the parties "should further endeavour to bring into force [...] all or part of the other provisions of the present convention", thus including the specific protection for children under the Geneva Conventions as stated above. [...]

3. Individual Criminal Responsibility

1. Regarding point iv), the Defence refers to the Secretary-General's statement that "while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused." The ICTY Appeals Chamber upheld the legality of prosecuting violations of the laws and customs of war, including violations of Common Article 3 and the Additional Protocols in the *Tadic* case in 1995. [...]
2. In 1998 the Rome Statute for the International Criminal Court was adopted. It entered into force on 1 July 2002. Article 8 includes the crime of child recruitment in international armed conflict [50] and internal armed conflict [...] [51]
3. Building on the principles set out in the earlier Conventions, the 1999 ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, provided:

Article 1

Each member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2

For the purposes of this Convention, the term "child" shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term "the worst forms of child labour" comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, **including forced or compulsory recruitment of children for use in armed conflict**.

It is clear that by the time Article 2 of this Convention was formulated, the debate had moved on from the question whether the recruitment of children under the age of 15 was prohibited or indeed criminalized, and the focus had shifted to the net [sic] step in the development of international law, namely the raising of the standard to include all children under the age of 18. This led finally to the wording of Article 4 of the Optional

Protocol II to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

1. The CRC Optional Protocol II was signed on 25 May 2000 and came into force on 12 February 2002. It has 115 signatories and has been ratified by 70 states. The relevant Article for our purposes is Article 4 which states:
    1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons **under the age of 18 years**.
    2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary **to prohibit and criminalize such practices**. [...]
2. A norm need not be expressly stated in an international convention for it to crystallize as a crime under customary international law. What, indeed, would be the meaning of a customary rule if it only became applicable upon its incorporation into an international instrument such as the Rome Treaty? Furthermore, it is not necessary for the *individual criminal responsibility* of the accused to be explicitly stated in a convention for the provisions of the convention to entail individual criminal responsibility under customary international law. As Judge Meron in his capacity as professor has pointed out, “it has not been seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offences, even when there is not accompanying provision for the establishment of the jurisdiction of particular courts or scale of penalties”.
3. The prohibition of child recruitment constitutes a fundamental guarantee and although it is not enumerated in the ICTR and ICTY Statutes, it shares the same character and is of the same gravity as the violations that are explicitly listed in those Statutes. The fact that the ICTY and ICTR have prosecuted violations of Additional Protocol II provides further evidence of the criminality of child recruitment before 1996. [...]
4. By 2001, and in most cases prior to the Rome Statute, 108 states explicitly prohibited child recruitment, one example dating back to 1902, and a further 15 states that do not have specific legislation did not show any indication of using child soldiers. The list of states in the 2001 Child Soldiers Global Report clearly shows that states with quite different legal systems – civil law, common law, Islamic law – share the same view on the topic.
5. It is sufficient to mention a few examples of national legislation criminalizing child recruitment prior to 1996 in order to further demonstrate that the *nullum crimen* principle is upheld. [...]
6. More specifically in relation to the principle *nullum crimen sine poena*, before 1996 three different approaches by states to the issue of punishment of child recruitment under national law can be distinguished.
7. First, as already described, certain states from a [*sic*] various legal systems have criminalized the recruitment of children under 15 in their national legislation. Second, the vast majority of states lay down the prohibition of child recruitment in military law. [...]
8. When considering the formation of customary international law, “the number of states taking part in a practice is a more important criterion [...] than the duration of the practice.” It should further be noted that “the number of states needed to create a rule of customary law varies according to the amount of practice which conflicts with the rule and that [even] a practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule.
9. Customary law, as its name indicates, derives from custom. Custom takes time to develop. It is thus impossible and even contrary to the concept of customary law to determine a given event, day or date

upon which it can be stated with certainty that a norm has crystallized. One can nevertheless say that during a certain period the conscience of leaders and populations started to note a given problem. In the case of recruiting child soldiers this happened during the mid-1980s. One can further determine a period where customary law begins to develop, which in the current case began with the acceptance of key international instruments between 1990 and 1994. Finally, one can determine the period during which the majority of states criminalized the prohibited behaviour, which in this case, as demonstrated, was the period between 1994 and 1996. It took a further six years for the recruitment of children between the age of 15 and 18 to be included in treaty law as individually punishable behaviour. The development process concerning the recruitment of child soldiers, taking into account the definition of children as persons under the age of 18, culminated in the codification of the matter in the CRC Optional Protocol II.

10. The overwhelming majority of states, as shown above, did not practise recruitment of children under 15 according to their national laws and many had, whether through criminal or administrative law, criminalized such behaviour prior to 1996. The fact that child recruitment still occurs and is thus illegally practised does not detract from the validity of the customary norm. It cannot be said that there is a contrary practice with a corresponding opinion [*sic*] *iuris* as states consider themselves to be under a legal obligation not to practise child recruitment.

4. Good Faith

1. The rejection of the use of child soldiers by the international community was widespread by 1994. In addition, by the time of the 1996 Graça Machel Report, it was no longer possible to claim to be acting in good faith while recruiting child soldiers contrary to the suggestion of the Defence during the oral Hearing). Specifically **concerning Sierra Leone, the Government acknowledged in its 1996 Report to the Committee of the Rights of the Child** that there was no minimum age for conscripting into armed forces “except the provision in the Geneva Convention that children below the age of 15 years should not be conscripted into the army.” This shows that 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.
2. Child recruitment was criminalized before it was explicitly set out as a criminal prohibition in treaty law and certainly by November 1996, the starting point of the time frame relevant to the indictments. As set out above, the principle of legality and the principle of specificity are both upheld.

III. DISPOSITION

1. For all the above-mentioned reasons the Preliminary Motion is dismissed. [...]

Footnotes

- [50] Article 8(2)(b)(xxvi) [**See** The International Criminal Court]
- [51] Article 8(2)(e)(vii)

Dissenting opinion of Justice Robertson

[...]

Discussion

1. So what had emerged, in customary international law, by the end of 1996 was an humanitarian rule that obliged states, and armed factions within states, to avoid enlisting under fifteens or involving them in hostilities, whether arising from international or internal conflict. What had not, however, evolved was an offence cognizable by international criminal law which permitted the trial and punishment of individuals accused of enlisting (i.e. accepting for military service) volunteers under the age of fifteen. It may be that in some states this would have constituted an offence against national law, but this fact cannot be determinative of the existence of an international law crime: theft, for example, is unlawful in every state of the world, but does not for that reason exist as a crime in international law. It is worth emphasizing that we are here concerned with a jurisdiction which is very special, by virtue of its power to override the sovereign rights of states to decide whether to prosecute their own nationals. Elevation of an offence to the category of an international crime means that individuals credibly accused of that crime will lose the protections as international law would normally afford, such as diplomatic or head of state immunity. For that reason, international criminal law is reserved for the very worst abuses of power – for crimes which are "against humanity" because the very fact that fellow human beings conceive and commit them diminishes all members of the human race and not merely the nationals of the state where they are directed or permitted. That is why not all, or even most, breaches of international humanitarian law, i.e. offences committed in the course of armed conflict, are offences at international criminal law. Such crimes are limited to the breaches of the Geneva Convention which violate Common Article 3, and to other specified conduct which has been comprehensively and clearly identified as an international law crime: treaties or State practice or other methods of demonstrating the consensus of the international community that they are so destructive of the dignity of humankind that individuals accused of committing them must be put on trial, if necessary in international courts.
2. For a specific offence – here, the non-forcible enlistment for military service of under fifteen volunteers – to be exhibited in the chamber of horrors that displays international law crimes, there must, as I have argued above, be proof of general agreement among states to impose individual responsibility, at least for those bearing the greatest responsibility for such recruitment. There must be general agreement to a formulation of the offence which satisfies the basic standards for any serious crime, namely a clear statement of the conduct which is prohibited and a satisfactory requirement for the proof of *mens rea* – i.e. a guilty intent to commit the crime. The existence of the crime must be a fact that is reasonably accessible. I do not find these conditions satisfied, as at November 1996, in the source material provided by the Prosecutor or the *amici*. Geneva Convention IV, the 1977 Protocols, the Convention on the Rights of the Child and the African Charter are, even when taken together, insufficient. What they demonstrate is a growing predisposition in the international community to support a new offence of non-forcible recruitment of children, at least for front-line fighting. What they do not prove is that there was a universal or at least general consensus that individual responsibility had already been imposed in international law. [...]
3. Indeed, it was from about this time that the work of Graça Machel (who first reported on this subject to the United Nations in 1996) and the notable campaigning by NGOs led by UNICEF, Amnesty International, Human Rights Watch and No Peace Without Justice, took wing. What they were campaigning for, of course, was the introduction into international criminal law of a crime of child

enlistment – and their campaign would not have been necessary in the years that followed 1996 if that crime had already crystallized in the arsenal of international criminal law.

4. The first point at which that can be said to have happened was 17th July 1998, the conclusion of the five week diplomatic conference in Rome which established the Statute of the International Criminal Court. [...]
5. The Rome Statute was a landmark in international criminal law – so far as children are concerned, participation in hostilities was for the first time spelled out as an international crime in every kind of serious armed conflict. The Statute as a whole was approved by 122 states. True, 27 states abstained and 7 voted against it, but the conference records do not reveal that any abstention or opposition was based on or even referred to this particular provision relating to child recruitment. In the course of discussions, a few states – the US in particular – took the position that "it did not reflect customary international law and was more a human rights provision than a criminal provision." That, in my view, was correct – until the Rome Treaty itself, the rule against child recruitment was a human rights principle and an obligation upon states, but did not entail individual criminal liability in international law. It did so for the first time when the Treaty was concluded and approved on 17 July 1998. [...]
6. I do not think, for all the above reasons, that it is possible to fix the crystallization point of the crime of child enlistment at any earlier stage, although I do recognize the force of the argument that July 1998 was the beginning and not the end of this process, which concluded four years later when sufficient ratifications (that of sixty states) were received to bring the Rome Treaty into force. Nonetheless, state practice immediately after July 1998 demonstrates that the Rome treaty was accepted by states as a turning point in the criminalization of child recruitment. [...]
7. In other words, there was no common state practice of explicitly criminalizing child recruitment prior to the Rome Treaty, and it was in the process of ratification of that Treaty that many states introduced municipal laws to reflect it. [...]

Conclusion

1. The above analysis convinces me that it would breach the *nullen crimen* rule to impute the necessary intention to create an international law crime of child enlistment to states until 122 of them signed the Rome Treaty. From that point, it seems to me it was tolerably clear to any competent lawyer that a prosecution would be "on the cards" for anyone who enlisted children to fight for one party or another in an ongoing conflict, whether internal or international. It is not of course *necessary* that a norm should be embodied in a Treaty before it becomes a rule of international law, but in the case of child enlistment the Rome Treaty provides a *sufficient* mandate – certainly no previous development will suffice. [...]
2. There are many countries today where young adolescents are trained with live ammunition to defend the nation or the nation's leader. What the international crime most seriously targets is the use of children to "actively participate" in hostilities – putting at risk the lives of those who have scarcely begun to lead them. "Conscription" connotes the use of some compulsion, and although "enlistment" may not need the press gang or the hype of the recruiting officer, it must nevertheless involve knowledge that those enlisted are in fact under fifteen and that they may be trained for or thrown into front-line combat rather than used for service tasks away from the combat zones. There may be a defence of necessity, which could justify desperate measures when a family or community is under murderous and unlawful attack, but the scope of any such defence must be left to the Trial Chamber to determine, if so requested.

3. I differ with diffidence from my colleagues, but I have no doubt that the crime of non-forcible enlistment did not enter international criminal law until the Rome Treaty in July 1998. That it exists for all present and future conflicts is declared for the first time by the judgments in this Court today. The modern campaign against child soldiers is often attributed to the behaviour of Holden Roberto in Angola, who recognized how much it demoralizes an enemy village to have its chief headman executed by a child. More recently, we have had allegations about children being indoctrinated to become suicide bombers – surely the worst example of child soldier initiation. By the judgments today, we declare that international criminal law can deal with these abhorrent actions. But so far as this applicant is concerned, I would grant a declaration to the effect that he must not be prosecuted for an offence of enlistment, under Article 4(c) of the Statute, that is alleged to have been committed before the end of July 1998.

Done at Freetown this thirty-first day of May 2004.

Justice Robertson

Discussion

1. a. How are children protected by IHL? (GC IV, Arts 14, 17, 23-24, 38, 50, 76, 82, 89, 94 and 132; P I, Arts 70 and 77-78; P II, Art. 4 (3))
   b. What does the IHL of international and non-international armed conflicts say specifically about recruitment and participation in hostilities? (P I, Art. 77(2)(3); P II, Art. 4(3)(c)(d); ICC Statute, Arts 8(2)(b)(xxvi) and 8(2)(e)(vii))
2. a. Is the prohibition on recruiting children under 15 into armed forces or using them to participate actively in hostilities, as mentioned in Art. 4(c) of the Statute, a customary rule of international law? What does the ICRC study on customary IHL say about this rule? [**See** ICRC, Customary International Humanitarian Law [Rules 136 and 137]]
   b. What kind of practice does the Court refer to in concluding that the recruitment of children under 15 is prohibited by customary international law? Can customary IHL be derived from abstract acts by States such as diplomatic statements, undertakings and declarations? By belligerents? By non-belligerents? By both? What if the actual behaviour of the belligerents is incompatible with their statements? With the statements of other States?
   c. Would it have been possible to include this crime in the Statute of the Special Court if it were not of a customary nature? If Sierra Leone were not bound by the said rule?
   d. Do you agree with the Defence when it says that the Rome Statute of the ICC does not codify customary international law? Is it important in this specific case, taking into account that the government of Sierra Leone signed (1998) and ratified (2000) the Statute? Did this Statute codify existing customary international law or was it only the starting point for new customary rules (as stated by Justice Robertson with regard to the very rule concerned in this case)?
3. a. What do you think of Justice Robertson's dissenting opinion which states that the criminalization of the recruitment and direct participation in hostilities of children under 15 was not part of customary international law before the adoption of the Rome Statute in July 1998?
   b. Does the Court consider that customary international law criminalized, at the time in question, the recruitment of children under 15? If yes, on what kind of practice does the Court base its conclusion?

c. Do you agree with the University of Toronto's (and with the Court's own) statement that serious violations of the laws of war do not need to be expressly criminalized in order to be prosecuted?
d. Do you think it is possible to raise the *nullum crimen sine lege* argument in the case of a person who committed an act knowing that it was a violation of IHL, but presuming that it was not explicitly criminalized? What are the objective and definition of the principle of *nullum crimen sine lege*?