105 SCSL-2003-08-PT- (3298-3325) 3298

Case No. SCSL–2003–08–PT

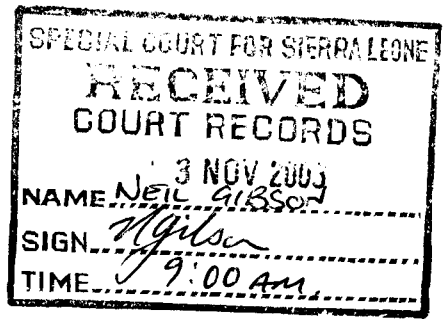
THE SPECIAL COURT FOR SIERRA LEONE

APPEAL CHAMBERS

Before: Judge Geoffrey Robertson (Presiding)
Judge Emmanuel O. Ayoola
Judge Gelga King
Judge Alhaji Hassan B. Jallow
Judge Renate Winter

Registrar: Robin Vincent

Date: 31 October 2003



The Prosecutor

v.

SAM HINGA NORMAN

FOURTH DEFENCE PRELIMINARY MOTION BASED ON LACK OF JURISDICTION (CHILD RECRUITMENT)

AMICUS CURIAE BRIEF OF UNIVERSITY OF TORONTO INTERNATIONAL HUMAN RIGHTS CLINIC AND INTERESTED INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS

TABLE OF CONTENTS

3300

STATEMENT OF FACTS

Warrior's honour was both a code of belonging and an ethic of responsibility. Whenever the art of war was practiced, warriors distinguished between combatants and noncombatants, legitimate and illegitimate targets, moral and immoral weaponry, civilized and barbarous usage in the treatment of prisoners and of the wounded....The struggle to make warriors obey the codes of honour is not a futile or hopeless task. Rules honoured more in the breach than in the observance are still worth having. There are human and inhuman warriors, just and unjust wars, forms of killings that are necessary and forms that dishonour us all.[1]

1. The civil war that was waged in Sierra Leone from 1991 to 2002 was notable not only for the scale and brutality of atrocities committed against civilians, but also for shattering the lives of a generation of Sierra Leonean children. Thousands of children under the age of 18, both boys and girls, served as child soldiers in Sierra Leone's internal armed conflict. Thousands more, while not directly deployed in combat, were forcibly joined to fighting forces.[2] Many of the children who were abducted for labour, including young girls who were raped and forced into sexual slavery, eventually became fighters with the rebel forces.[3] Some of these children were as young as five years-old.[4] After a visit to Sierra Leone in September 1999, the UN Special Representative reported that more than 10,000 children had served as child soldiers in the three main fighting groups, the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defence Forces (CDF).[5]

2. Children in Sierra Leone were recruited and trained as combatants by both the armed opposition and forces fighting in support of the government. Most of the children who fought with rebel forces were intentionally abducted from their homes and families by persons in positions of command responsibility and forced into service. Hundreds of children were forced to walk, shell-shocked, alongside strangers whom they had just seen massacre their family members.[6] Some of the children joined the forces out of desperation or disaffection, but remained because of fear, intimidation and terror. Still others were barred

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[1] Michael Ignatieff, *The Warrior's Honour: Ethnic War and the Modern Conscience.* (Toronto: Viking, 1998) at 117 and 161.

[2] *See* Unicef Canada, *Child Soldiers*, available at: <http://www.unicef.ca/eng/travail/demobolish.html#autres>. *See also* Amnesty International, *Sierra Leone: Childhood – A Casualty of Conflict,* 31 August 31 2000 (AI Index: AFR 51/069/2000) at 2, available at: <http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510692000ENGLISH/$File/AFR5106900.pdf> [hereinafter Amnesty International Report].

[3] U.S. Department of State, *Country Reports on Human Rights Practices 1999: Sierra Leone*, 25 February 2000, available at: <http://www.state.gov/www/global/human_rights/1999_hrp_report/sierrale.html> [hereinafter U.S. State Department Report 1999].

[4] Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Sierra Leone, 24/02/2000*, 23rd Sess., UN Doc. CRC/C/15/Add.116, (2000), available at: <http://www.hri.ca/fortherecord2000/documentation/tbodies/crc-c-15-add116.htm>.

[5] *Protection of children affected by armed conflict: Report of the Special Representative of the Secretary-General for Children and Armed Conflict.* UN GAOR, 54th Sess., Annex, Agenda Item 112, UN Doc. A/54/430 (1999) at 22, available at: <http://www.un.org/special-rep/children-armed-conflict/misc/1-1.pdf>.

[6] Human Rights Watch, *Getting Away With Murder, Mutilation, Rape: New Testimony from Sierra Leone*, July 1999, Vol.11 No 3(A), available at: <http://www.hrw.org/reports/1999/sierra/> [hereinafter Human Rights Watch, *Getting Away with Murder*].

from returning home because they were literally tattooed with the insignia of the fighting forces that pressed them into service. Many children tried to escape but were rejected by their families and communities due to their involvement with rebel forces.[7] In some cases, government forces summarily executed rebel child combatants whom they had captured; other children suffered horrific physical abuse while in detention. Human Rights Watch reports that some child soldiers were beaten to death after being caught by members of local communities.[8] In an interview with Amnesty International, "Peter", a 12 year-old former child combatant, recounted: "When I was killing, I felt like it wasn't me doing these things. I had to because the rebels threatened to kill me."[9] "Ibrahim", another former child combatant, told Amnesty International that he witnessed the death of Mamadu Kamara, aged 14, who was killed by the RUF because he refused to cut off the hand of someone from his own village.[10]

3. In October 2000, the UN Report of the Secretary-General on the establishment of a Special Court for Sierra Leone stated that "more than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, [and] reduced to slavery of all kinds."[11] They were forced, often under the influence of drugs and alcohol, to commit crimes that included mutilation, amputation, rape, burning, and killing. The victims often included the child soldiers' own families and communities. When child combatants refused to take drugs, such as marijuana, amphetamines, and cocaine, they were beaten and, in some cases, killed. When interviewed by Amnesty International in June 2000, 14 year-old "Sayo" recounted: "When I go to the battle fields, I smoke enough [cocaine]. That's why I become unafraid of everything. When you refuse to take drugs, it's called technical sabotage and you are killed."[12]

4. Young girls who were abducted and forcibly recruited were often forced into sexual slavery or "marriage" by military personnel. These girls were typically forced to participate in support activities such as cooking, looting, portering and sometimes combat. Rape of captured young girls was routine. In 2002, Physicians for Human Rights reported that 53 percent of displaced women and girls who had "face to face" contact with the RUF suffered some form of sexual violence, including gang rape, sexual slavery, forced marriage and molestation.[13] Human Rights Watch reported in January 2003 on women who were abducted by rebel forces:

> In thousands of cases, women and girls were abducted after being subjected to sexual violence. The rebels often killed family members who tried to protect their

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[7] U.S. State Department Report 1999.
[8] Human Rights Watch, *Getting Away with Murder.*
[9] Amnesty International Report at 4.
[10] *Ibid.*
[11] *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone,* UN SCOR, UN Doc. S/2000/915 (2000) at 7.
[12] Amnesty International Report at 6.
[13] The rate of abuse among other armed groups was six percent. *See* Coalition to Stop the Use of Child Soldiers, *Sierra Leone: War-Related Sexual Abuse*, available at: <http://www.child-soldiers.org/cs/childsoldiers.nsf/0/2796e9ec29e5c9f280256c8d003c97b1?OpenDocument>.

women and girls. Abducted women and girls described being "given" to a combatant who then took them as their "wives".[14]

> Women and girls were also forcibly conscripted into the rebel fighting forces. The RUF established military training camps for women. During active fighting, female combatants were sent into battle after the men and the Small Boys Units (SBUs)...Female combatants had more power than female civilians: combatants, including female combatants, who had received military training, had substantial power to do whatever they wanted to civilians. Within the rebel forces, however, women still held much lower status: female combatants were assigned "husbands".
>
> Forcibly conscripted female combatants were in many ways as vulnerable as civilian abductees, and may have decided to stay with their rebel "husbands" for the same reasons as their civilian counterparts i.e. shame, lack of alternative options, and economic dependence on their "husbands".[15]

5. Children were specifically recruited because rebel and government commanders considered them to be compliant and believed them to be aggressive fighters. In the process, the victims became victimizers. During the rebel incursion into Freetown in January 1999, over 2,000 civilians were killed, attackers severed the limbs of more than 500 people, and sexual violence and rape were systematically committed against women and girls. Amnesty International estimated that ten per cent of rebel combatants in that incursion were children.[16] In 1999, Human Rights Watch reported that "[c]hild combatants armed with pistols, rifles, and machetes actively participated in killings and massacres, severed the arms of other children, and beat and humiliated men old enough to be their grandfathers."[17] Likewise, in an interview with Amnesty International on June 20, 2000, "Komba", who was 12 years-old when he was captured by the RUF in 1997, and was among the rebel forces which attacked Freetown in January 1999, recounted:

> My legs were cut with blades and cocaine was rubbed in the wounds. Afterwards, I felt like a big person. I saw the other people like chickens and rats. I wanted to kill them.[18]

6. Though feared for their ruthlessness and brutality, child soldiers were subjected to a process of physical and psychological abuse and duress that exacted a devastating toll on their physical and mental integrity. Amnesty International reports that casualty rates were higher among children due to their inexperience, fearlessness, and lack of training. Child soldiers also suffered disproportionately from the general rigours of military life, and were particularly vulnerable to disease and malnutrition.[19] Human Rights Watch reports that child

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[14] Human Rights Watch, *"We'll Kill You If You Cry": Sexual Violence in the Sierra Leone Conflict,* Janurary 2003, Vol. 15, No. 1(A) at p. 42, available at: <http://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf>.
[15] *Ibid.* at p. 45.
[16] Amnesty International Report at 10.
[17] Human Rights Watch, *Getting Away with Murder.*
[18] Amnesty International Report at 7.
[19] *Ibid.* at 3.

soldiers, many of whom were placed at the front line and forced to commit atrocities against their own communities, have experienced a profound sense of culpability as well as trauma.[20] Child soldiers who have been released or escaped and who have been disarmed and demobilized are often aggressive and violent, and exhibit various behavioural problems, such as nightmares, alienation, outbursts of anger and an inability to interact socially.[21] In a report published in January 2000, *Médecins sans Frontières* stated that:

> The psychological impact of actually witnessing horrific events imposes a serious psychological stress. Deliberately or not, witnessing at least once events such as torture, execution, (attempted) amputations, people being burnt in their houses and public rape often results in traumatic stress or even post-traumatic stress disorder.[22]

7. It is also clear that even after the cessation of hostilities the suffering of children continued. While efforts by child protection agencies to trace the families of former child soldiers have met with some success, reuniting these children with their families has been extremely difficult. In some cases, the parents of former child soldiers have been displaced or killed. In other cases, former child soldiers do not even remember their own names and have no recollection of their families. In 2001, the United States State Department reported that many families and communities of former child soldiers continued to reject the children due to their perceived involvement in rebel atrocities. Even today, many families did not want to assume responsibility for their children, some of whom were psychologically and emotionally incapable of rejoining their families.[23] In an interview with Amnesty International, a 16 year-old former child soldier said: "I don't want to go back to my village because I burnt all the houses there. I don't know what the people would do, but they'd harm me. I don't think I'll ever be accepted in my village."[24]

8. Former child soldiers, who continue to suffer even now that the conflict has ended, have described how they were intimidated, threatened, and brutally beaten; how they participated in the killing of their friends and families; how they were involved in the killing and mutilation of civilians; and how they risked being beaten or killed if they refused to carry out these acts. The crimes that these children were forced to commit, at once turned them into the perpetrators and victims of horrific human rights abuses that the Special Court exists to address.

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[20] Human Rights Watch, *Sierra Leone: Sowing Terror,* July 1998, Vol. 10, No. 3 (A), available at: <http://www.hrw.org/reports98/sierra/Sier988.htm#TopOfPage>.
[21] Amnesty International Report at 11.
[22] Médecins Sans Frontières (Holland), *Assessing Trauma in Sierra Leone*, 11 January 2000, in Amnesty International Report at 11.
[23] *See* U.S. Department of State, *Country Reports on Human Rights Practices 2001: Sierra Leone*, 4 March 2002, available at: <http://www.state.gov/g/drl/rls/hrrpt/2001/af/8402.htm>.
[24] Amnesty International Report at 12.

ARGUMENT

9. **Invoking the principle of *nullum crimen sine lege* to challenge Article 4(c) of the Court's statute assumes that there is a bright-line distinction between war crimes and violations of international humanitarian law, and that only the former may be prosecuted without violating the principle of *nullum crimen sine lege*. This premise is false; there is a long and distinguished jurisprudence of prosecutions for serious violations of international humanitarian law.**

This brief addresses three questions: 1) the illegality of recruiting child soldiers into armed conflict; 2) the application of penal sanctions in international humanitarian law; and 3) the proper application of the principle of *nullum crimen sine lege*. Part I of our argument will establish that the recruitment of children into armed conflict is and was unquestionably a violation of international humanitarian law at the time the alleged offences took place. Part II will explain when international law permits prosecution of violations of international humanitarian law irrespective of whether penal sanctions are attached. *Amici* conclude that such prosecutions are permitted by law when the international humanitarian law violations are of serious gravity, when they offend the basic dignity of human beings, and when there is a sufficient international consensus that perpetrators must bear individual responsibility. We conclude that the recruitment of children into armed combat was a war crime under customary law throughout the temporal jurisdiction of the Court, not only because the alleged offences were egregious and shock the conscience of all of humankind, but particularly because there is determinative evidence that a segment of *Additional Protocol II* which contains the prohibition on recruitment ("Fundamental Guarantees") had attained the character of war crimes under customary law. Part III of this brief demonstrates that the doctrine of *nullum crimen sine lege* cannot be raised since it only prevents prosecution when an accused reasonably believes that his conduct is lawful at the time it was committed.

I.

THE RECRUITMENT OF CHILDREN UNDER 15 WAS PROHIBITED UNDER BOTH CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW

A. The recruitment of children was prohibited in Sierra Leone under conventional international law.

10. The protection of civilians, especially children, in the conduct of war and armed conflicts is the central tenant of international humanitarian law. The *Geneva Conventions* of 1949 and the two *Additional Protocols* of 1977 establish minimum standards that States and armed parties must adhere to in internal armed conflicts. Their purpose is the protection of civilians, and the treatment of the wounded, the sick, the shipwrecked, prisoners of war, and others.

11. Article 3 common to all four *Geneva Conventions*, which Sierra Leone succeeded to on 10 June 1965,[25] applies explicitly to internal armed conflicts. It requires that each party to a conflict ensure the safety of persons taking no active part in hostilities, including civilians, members of the armed forces who have laid down their arms, the wounded and the sick. At a minimum, parties to armed conflicts are prohibited from hostage taking, "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment."

12. *Additional Protocol II*,[26] to which Sierra Leone acceded on 21 October 1986,[27] extended protection for civilians in the context of internal armed conflicts and specifically defined the scope of special protection applicable to children. Article 4 creates "Fundamental Guarantees" that reiterate the protections in common Article 3:

> 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
>
> 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
> (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> (b) Collective punishments;
> (c) Taking of hostages;
> (d) Acts of terrorism;
> (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> (f) Slavery and the slave trade in all their forms;
> (g) Pillage;
> (h) Threats to commit any of the foregoing acts.
>
> 3. Children shall be provided with the care and aid they require, and in particular:
> (a) They shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

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[25] International Committee of the Red Cross (ICRC), *States Party to the Geneva Conventions and their Additional Protocols*, available at: <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList444/77EA1BDEE20B4CCDC1256B6600595596#a2> [hereinafter ICRC, *States Party to the Geneva Conventions and their Additional Protocols*].

[26] *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 June 1977, (entry into force 7 December 1978) [hereinafter *Additional Protocol II*].

[27] ICRC, *States Party to the Geneva Conventions and their Additional Protocols*.

(b) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
(c) Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
(d) The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;
(e) Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being. [emphasis added]

13. While only states may become party to international treaties such as the *Geneva Conventions* and the *Additional Protocols*, it is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law.[28] Thus, all parties to the civil war in Sierra Leone were bound by the prohibition on the recruitment of children into armed conflict that exists in international humanitarian law.

14. The *Convention on the Rights of the Child,*[29] which entered into force 2 September 1990, *inter alia,* recognizes the protection of children in international humanitarian law and further requires States Parties to ensure respect for those rules. Article 38 provides:

    1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
    2. 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.
    3. 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.
    4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible

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[28] As matter of logic, the provisions of common Article 3 and *Additional Protocol II,* which both apply to all parties in non-international armed conflicts, are only intelligible if they apply to State and non-state parties. See e.g. Kalshoven and Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Geneva: ICRC, 2001) at 74-75; the *Case concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), Merits,* ICJ Reports, 1986, 112, at para. 219ff and 256 [hereinafter *Nicaragua Case*] in which the Court considered whether the actions of the *contras* were consistent with international humanitarian law, particularly common Article 3 of the *Geneva Conventions*; SC Res. 764, UN SCOR, UN Doc. S/Res/764 (1992) in which the Security Council reaffirmed that all parties to the conflict in the Former Yugoslavia were bound to comply with international humanitarian law; SC Res. 1261, UN SCOR UN Doc. S/Res/1261 (1999), SC Res. 1314, UN SCOR UN Doc. S/Res/1314 (2000), and SC Res. 1460, UN SCOR UN Doc. S/Res/1460 (2003) in which the Security Council urged "all parties" to comply with their obligations under international humanitarian law.

[29] *Convention on the Rights of the Child,* 20 November 1989, U.N.T.S. Vol. 1577, p. 3, (adopted by GA Res. 44/25, UN GAOR, Annex, UN Doc. A/Res/44/25 (1989), entered into force 2 September 1990) [hereinafter *CRC*].

measures to ensure protection and care of children who are affected by an armed conflict.

15. Sierra Leone ratified the *Convention on the Rights of the Child* on 18 June 1990,[30] binding itself to the obligations listed above, including a commitment to take "all feasible measures" to ensure that children under the age of fifteen are not recruited into armed conflict and to ensure respect for the international humanitarian law embodied in the four *Geneva Conventions* and their two *Additional Protocols*.

16. In sum, the prohibition on the recruitment of child soldiers under fifteen was directly binding on all parties to the armed conflict in Sierra Leone as of 30 November 1996, as Sierra Leone is a High Contracting Party to the *Geneva Conventions* of 1949 and *Additional Protocol II* of 1977, as well as the *Convention on the Rights of the Child*.

B. The recruitment of children under 15 was prohibited at customary international law.

17. The prohibition on the recruitment of children into armed conflict was also well-established in customary international law prior to 30 November 1996. Recognition of the prohibition was both widespread and virtually universal in international treaties, state practice, and other international resolutions and instruments.

International conventions as evidence of custom

18. Custom is a binding source of international law when a general practice among states is recognized as obligatory.[31] Custom[32] does not have to be universal or uniform, only substantially consistent and general,[33] otherwise it would be impossible to establish a custom and any inconsistency would un-make the custom rather than violate it.

19. The fourth *Geneva Convention*,[34] singles out children for special protection in times of war, additional to that accorded to civilians and non-combatants. Article 14 provides for the establishment of "safety zones and localities ... to protect from the effects of war, wounded, sick and aged persons, *children under fifteen*, expectant mothers and mothers of children under seven." Article 17 provides for agreements for the removal of "wounded, sick, infirm, and aged persons, *children* and maternity cases ..." from besieged or encircled areas. Article 24 explicitly provides that "Parties to the conflict shall take the necessary measures to ensure that *children under fifteen*, who are orphaned or are separated from their families as a result

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[30] *United Nations Treaty Collection: Multilateral Treaties Deposited with the Secretary-General*, Convention on the Rights of the Child, available at: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp> [hereinafter Treaty United Nations Treaty Collection, Status of CRC].

[31] *North Sea Continental Shelf Cases, Merits*, (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] I.C.J. Reports 3 [hereinafter *North Sea Continental Shelf Cases*].

[32] The existence of custom is reflected in state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. I. Brownlie, *Principles of Public International Law*, 5th ed., Oxford: Clarendon Press, 1998, 4-7.

[33] *The Steamship Lotus* (*France v. Turkey*), (1927), P.C.I.J. Ser. A, No. 1.

[34] *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 August 1949 [hereinafter *Fourth Geneva Convention*].

of the war ..." are protected and provided for, which may include evacuation to a neutral country for the duration of the conflict. [emphasis added] The recruitment of children under fifteen into armed conflict thus violates the special protections for children accorded in the *Geneva Conventions*.

20. Article 3 common to the Geneva Conventions applies to internal armed conflicts. Article 3(1) requires, *inter alia*, that parties to the conflict treat civilians "humanely". It specifically prohibits any violence to life or person, mutilation, cruel treatment and torture, and outrages upon personal dignity, including humiliating and degrading treatment. The actions of individuals who recruit child soldiers into armed conflict violate these protections. Additionally, article 3(2) indicates that "[t]he Parties to the conflict should further endeavour to bring into force, by means of special agreements, *all or part of the other provisions of the present Convention*." This provision demonstrates that parties should observe the other, more specific protections for civilians and children contained in the *Geneva Conventions*.

21. As of June 3, 2003, 191 countries had become parties to the *Geneva Conventions*; 185 of those States were parties as of December 31, 1995,[35] including Sierra Leone. The *Geneva Conventions* are widely recognized as customary international law.[36]

22. Article 4 of *Additional Protocol II* (1977) explicitly prohibits the recruitment of children under fifteen into armed conflict. Currently, 156 States are party to *Additional Protocol II* and 133 of those States were party prior to December 31, 1995,[37] including Sierra Leone and a cross-section of states representative of different political, economic and legal systems.[38]

23. The prohibition on the recruitment of children under 15 into armed conflict was reiterated in the *Convention on the Rights of the Child* (CRC), which came into force in 1990. Article 38 of the CRC requires that States Parties not only "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces," but also "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."

24. There are 192 States Parties to the *Convention on the Rights of the Child*, including Sierra Leone.[39] Parties to the convention are bound by the prohibition on the recruitment of children, both because of the terms of the treaty and because of the customary status of the norms it embodies. It is the most widely-ratified human rights treaty. Significantly, not one of the signatories or parties to the CRC registered a reservation regarding the prohibition on

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[35] ICRC, *States Party to the Geneva Conventions and their Additional Protocols*.
[36] See for example the judgment of the International Court of Justice in the *Nicaragua Case* at para. 215; *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN SCOR, UN Doc. S/25704 (1993) at para. 35 declaring that "[t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims ..."
[37] ICRC *States Party to the Geneva Conventions and their Additional Protocols*.
[38] *North Sea Continental Shelf Cases*.
[39] United Nations Treaty Collection, Status of CRC. Note that according to Article 18 of the *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N.T.S. vol. 1155, p. 331, (entered into force 27 January 1980), signatories to a treaty are obliged to refrain from any act that would be contrary to the object or purpose of the treaty.

recruitment of child soldiers. To the contrary, nine counties explicitly deposited declarations deploring that the prohibition was only limited to children under fifteen years; in their opinion, a prohibition of the recruitment of children under eighteen years would have been preferable.[40] Even the United States, one of two countries to have signed but not ratified the Convention, has recognized the CRC as a codification of customary international law.[41]

25. The prohibition on the recruitment of children into armed conflict has also been articulated in the *African Charter on the Rights and Welfare of the Child*,[42] adopted by the Organization of African Unity in 1990. Article 22(1) of the Charter requires that States Parties "undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child." Article 22(2) provides that States Parties "shall take all necessary measures to ensure that no child shall take direct part in hostilities and refrain in particular from recruiting any child." The Charter defines a "child" as everyone under the age of eighteen years.

26. In 1998, the *Rome Statute of the International Criminal Court*[43] recognized that "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" is a war crime falling within the Court's jurisdiction.[44] The *Rome Statute* was adopted by 122 States; currently there are 139 signatories and 92 parties to the *Rome Statute*.[45]

27. A prohibition on the forced or compulsory recruitment of children under 18 is also found in the ILO *Worst Forms of Child Labour Convention* (No. 182), adopted in 1999.[46] Article 1 of the Convention obliges every State party to take immediate and effective measures to prohibit and eliminate the worst forms of child labour. The Convention defines children as persons under the age of eighteen and defines the worst forms of child labour as, *inter alia*, "forced or compulsory recruitment for use of children in armed conflict."[47]

28. Most recently, the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*,[48] which was unanimously adopted by the U.N. General Assembly in 2000, prohibits the recruitment of children under eighteen years, raising

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[40] United Nations Treaty Collection, Status of CRC. The nine states are Andorra, Argentina, Austria, Columbia, Ecuador, Germany, Netherlands, Spain, and Uruguay.

[41] "Although the U.S. has not ratified the Convention on the Rights of the Child, ... [t]he U.S. State Department considers the Convention a declaration of customary law based on the Vienna Convention on the Law of Treaties ..." in *United States v. Michael Domingues, Merits, Concurring Opinion of Commissioner Helio Bicudo*, Case 12.285, IACHR Report No. 62/02, 22 October 2002, at para. 20, available at: <http://www.cidh.oas.org/annualrep/2002eng/USA.12285a.htm>.

[42] (1990) OAU Doc. CAB/LEG/24.9/49 (entered into force 29 November 1999).

[43] 17 July 1998, U.N. Doc. A/CONF.183/9 (entered into force 1 July 2002) [hereinafter *Rome Statute*].

[44] Article 8(e)(vii) of the *Rome Statute*.

[45] *United Nations Treaty Collection: Multilateral Treaties Deposited with the Secretary-General*, Rome Statute for the International Criminal Court, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp.> [hereinafter United National Treaty Collection, Status of Rome Statute].

[46] *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, No. 182, 17 June 1999 (entered into force 19 November 2000).

[47] Articles 2 and 3, *ibid.*

[48] 25 May 2000, U.N. Doc. A/54/RES/263 (entered into force 12 February 2002) [hereinafter *Optional Protocol to the CRC*].

the minimum age for recruitment from fifteen[49] to eighteen for States Parties. The preamble "condemn[ed] with the gravest concern the recruitment, training and use within and across national borders of children in hostilities by armed groups distinct from the armed forces of a State ..." Additionally, it "recall[ed] the obligation of each party to an armed conflict to abide by the provisions of international humanitarian law." Currently, there are 115 signatories and 64 parties to the *Optional Protocol to the CRC*.[50]

State Practice as evidence of custom

29. Almost all states with military forces prohibit the recruitment of children under fifteen years, and most states require that recruits, whether voluntary or conscripted, be a minimum of 18 years old. According to data from *Child Soldiers Global Report*, 2001 published by the Coalition to Stop the Use of Child Soldiers,[51] at least 108 States expressly prohibit voluntary and/or compulsory recruitment of children under the age of fifteen, although most require recruits to be at least 18. Additionally, many of the states that allow recruitment of those under eighteen prohibit their participation in a conflict until they reach the age of eighteen.[52] Overwhelmingly, even states without domestic legislation prohibiting the recruitment of children have refrained from recruiting children as a matter of practice.[53]

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[49] Customary international law already prohibits recruitment of children under fifteen.

[50] *United Nations Treaty Collection: Multilateral Treaties Deposited with the Secretary-General,* Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty21.asp>.

[51] Available at: < http://www.child-soldiers.org/cs/childsoldiers.nsf/Report/Global%20Report%202001/%20GLOBAL%20REPORT%20CONTENTS?OpenDocument> [*Child Soldiers Global Report*].

[52] Albania (18), Algeria (19), Angola (17), Argentina (19), Armenia (18), Austria (voluntary recruits accepted at 17 but prohibited from direct participation until 18), Azerbaijan (18), Bangladesh (16), Barbados (18; parental consent required if under 18), Belarus (direct participation of under 18s prohibited by law), Belgium (16/18), Bolivia (18), Bosnia and Herzegovina (17), Brazil (17/19), Bulgaria (18), Burkina Faso (18/20), Burundi (18), Cameroon (18; parental consent required if younger than 21), Canada (16 but under 18s prevented from being deployed operationally), Chad (18/20), China (18), Comoros (18), Congo (18), Cote d'Ivoire (18½), Croatia (16), Cuba (16), Cyprus (17/18), Czech Republic (18), Denmark (18), Dominican Republic (18), Ecuador (18), Egypt (18), El Salvador (16/18), Estonia (17/18), Ethiopia (18), Fiji (18), Finland (18), France (16/18), Gabon (18), Georgia (18), Germany (17 but cannot participate in hostilities until 18), Ghana (18), Greece (16), Guatamala (18), Guinea-Bissau (18), Honduras (18), Hungary (18), Iran (16), Iraq (15/19), Ireland (17), Israel (17/18), Japan (youth cadets allowed from 15/16 but under 18s cannot be deployed), Jordan (17/18), Republic of Korea (17), Kuwait (18), Laos (15), Latvia (18/19), Libya (18; can volunteer from 14 but not deployed), Lithuania (18), Luxembourg (17), Malawi (18), Mali (18), Mauritania (16), Mexico (16/17), Mongolia (18), Morocco (18), Mozambique (18), Namibia (18), Nepal (18), Netherlands (16 but cannot be deployed before reach age 18), New Zealand (16½), Nicaragua (17), Nigeria (18), Norway (17 but prohibited from combatant status until 18), Pakistan (16 but prevented from involvement in combat until 18), Paraguay (18), Peru (18), Philippines (18), Poland (17/18), Portugal (18/21), Qatar (18), Romania (20), Russian Federation (18), Rwanda (16), Senegal (18), Singapore (16½/18), Slovakia (16/18), Slovenia (17/19), South Africa (17 but not deployed before reach 18), Spain (16/20), Sri Lanka (18), Swaziland (18), Sweden (18/19), Switzerland (17/20), Syria (conscription at 19 but no information on minimum age for voluntary recruitment), Tanzania (15), TFYR Macedonia (17), Thailand (18), Tunisia (18/20), Turkey (19), Turkmenistan (18), Ukraine (18), United Kingdom (16), United States of America (17/18), Uruguay (18), Venezuela (18), Vietnam (18), and Zimbabwe (18).

[53] There are no indications of children under the age of eighteen in the government armed forces in Bahrain, Belize, Benin, Botswana, Chad, Equatorial Guinea, Gambia, Guinea, Kenya, Malaysia, Malta, Moldova, Oman, Panama, Zambia.

30. Even in those rare cases where children under fifteen have been recruited into participating in armed conflict, the practice is in violation of clear domestic laws or regulations prohibiting such recruitment.[54] Incidents of child recruitment are almost exclusively the work of rebel forces and are generally perpetrated by groups who also commit other widespread and egregious violations of international law.[55]

31. Although the domestic legislation and regulations among States restricts or prohibits voluntary and/or compulsory recruitment of children into government armed forces rather than expressly criminalizing it, it would be sophistry to suggest that this state practice cannot support a customary prohibition on the recruitment of children. The reality is that in the vast majority of states, the government is the only party that can lawfully operate armed forces and recruit individuals into such forces. Non-government parties that recruit children for use in armed conflict do so in contravention of the state's authority and their activities are deemed illegal. Perhaps more importantly, where groups forcibly recruit children, the conduct can attract criminal prosecution through penal laws against abduction, kidnapping, and similar offences. It would be overly formalistic, as well as inconsistent with international humanitarian obligations, to characterize domestic regulation of military recruitment as merely restricting recruitment rather than prohibiting or criminalizing recruitment of children under fifteen.

32. Additionally, in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*,[56] the International Court of Justice essentially declared that the *Geneva Conventions* were customary law without an examination of the *opinio juris* and State practice relating to the *Geneva Conventions*. As Vincent Chetail has described the judgment:

> The court seemed to consider that the intrinsically humanitarian character of the Geneva Conventions dispensed it from any explicit discussion of the process by which treaty obligations reflect or become customary obligations.[57]

33. Insofar as the prohibition on the recruitment of child soldiers found in *Additional Protocol II* and the *Convention on the Rights of the Child* is of an intrinsically humanitarian character akin to that of the *Geneva Conventions*, evidence of domestic state practice need not even be shown to demonstrate the existence of a binding norm in customary law.

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[54] E.g. Angola, Bolivia, Burundi, Chad, Congo, Ethiopia & Eritrea, Iraq, Paraguay, Peru, Rwanda, and the Former Yugoslavia.

[55] Prominent examples include rebel groups in Liberia in the 1990s and the Lord's Resistance Army. These rebel groups are also infamous for other shocking and widespread atrocities committed against civilians.

[56] *Nicaragua Case*. In the judgment, rather than considering the effect of the United States' reservation to the four *Geneva Conventions*, the Court found that "the conduct of the United States may be judged according to the fundamental general principles of humanitarian law" and "in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression of such principles", at para. 218.

[57] Vincent Chetail, "The Contribution of the International Court of Justice to International Humanitarian Law," IRRC (June 2003) Vol. 85, No. 850, 235, at 245 [hereinafter Chetail].

International resolutions and instruments evidencing sufficient opinio juris

34. In addition to treaty obligations and the entrenched custom, the language used in the international community to express outrage and condemnation against the practice of recruiting child soldiers is unequivocal and demonstrates acceptance among states of the binding nature of the prohibition.

35. Among the plethora of pronouncements by the international community, the Security Council as early as 1996 condemned "in the strongest possible terms" the recruitment of children into armed combat and "demand[ed] that the warring parties immediately cease this inhumane and abhorrent activity."[58] In early 1998, the Council included the recruitment of children in Resolution 1231, which condemned "atrocities" committed in Sierra Leone, and held that perpetrators of such violations should be brought to justice.[59]

36. In Resolution 1261 (1999), the Security Council strongly "condemned" the targeting of children in situations of armed conflict, including the recruitment and use of children in armed conflict and recognized that such recruitment was in violation of international law.[60] It expressed "grave concern at the harmful and widespread impact of armed conflict on children and the long-term consequences this has for durable peace, security and development" and called upon all parties to comply strictly with their obligations under international law.[61] Security Council Resolution 1314 (2000) "reaffirm[ed] its strong condemnation of the deliberate targeting of children in situations of armed conflict ..." and again "urg[ed] all parties to armed conflict to respect fully international law applicable to the rights and protection of children in armed conflict ..."[62] The Security Council explicitly invoked the international humanitarian protection of children in the *Geneva Conventions*, the *Additional Protocols*, the United Nations *Convention on the Rights of the Child* and the *Optional Protocol* thereto.[63] Resolution 1379 (2001) of the Security Council similarly urged compliance with international law applicable to children in armed conflict, particularly the *Geneva Conventions*, *Additional Protocols*, *Convention on the Rights of the Child* and *Optional Protocol*.[64] Security Council Resolution 1460 (2003) noted that the recruitment of children under fifteen had been classified as a war crime and again urged parties to comply with international law regarding children in armed conflict and called upon those parties who are recruiting or using children *in violation* of international law to immediately halt such activities.[65] Indeed, the Security Council's call to bring the perpetrators to justice reflects the

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[58] UN SC Res. 1071, UN SCOR, UN Doc. S/RES/1071 (1996) "Condemns the practice of some factions of recruiting, training, and deploying children for combat" and Security Council Resolution
[59] UN SC Res. 1231 of 11 March 1998, UN SCOR, UN Doc. S/RES/1231 (1999), Operative Paragraph 3: "Condemns the atrocities perpetrated by the rebels on the civilian population of Sierra Leone, including in particular those committed against women and children, deplores all violations of human rights and international humanitarian law which have occurred in Sierra Leone...including the recruitment of children as soldiers, and urges the appropriate authorities to investigate all allegations of such violations with a view to bringing the perpetrators to justice."
[60] UN SC Res. 1261, UN SCOR, UN Doc. S/RES/1261 (1999) at paras. 2 and 13.
[61] *Ibid.*, paras. 1 and 3.
[62] UN SC Res. 1314, UN SCOR, UN Doc. S/RES/1314 (2000), paras. 1 and 3.
[63] *Ibid.*, para. 3.
[64] SC Res 1379, UN SCOR, UN Doc. S/RES/1379 (2001).
[65] SC Res 1460, UN SCOR, UN Doc S/RES/1460 (2003).

criminal nature of the acts and the international community's resolve to prosecute the worst offenders as gross human rights abusers operating outside the bounds of law.

37. At a minimum, the constant condemnation of the recruitment and use of children under fifteen in armed conflict by the Security Council and its repeated denunciation of such conduct as violating international law effectively demonstrates the general acceptance by UN Member States of the existence of a norm binding on all States and non-States Parties prohibiting the recruitment and use of children in armed conflict.

38. This view is echoed in the many declarations by regional organizations condemning the recruitment and use of child soldiers, including the declaration adopted at the Latin American and Caribbean Conference on the Use of Children as Soldiers in Montevideo, July 1999; Organization of African Unity Resolution 1659 on the plight of African children in situations of armed conflicts, July 1996; the *Decision on the African Conference on the Use of Children as Soldiers*, endorsed by the Organization of African Unity Assembly of Heads of State and Government, July 1999; the *Declaration by the Nordic Foreign Ministers Against the Use of Child Soldiers*, 29 August 1999; the *European Parliament Resolution on the 10th Anniversary of the UN Convention on the Rights of the Child*, 20 November 1999; the Organization of American States Resolution 1667, 7 June 1999; the *Organization of American States Summit Declaration on Children and Armed Conflict*, Resolution 1709, 5 June 2000; and the Inter-American Commission *Recommendation for Eradicating the Recruitment of Children and their Participation in Armed Conflicts*, 13 April 2000.[66]

The customary prohibition on recruitment of children under 15 was established prior to 30 November 1996.

39. On the basis of the widespread, unequivocal acceptance of the norm in *Additional Protocol II* and the *Convention on the Rights of the Child* in the international community, as well as the extensive supporting state practice, *amici* submit that the prohibition on the recruitment of children under fifteen most certainly entered customary international law prior to 30 November 1996.

40. Subsequent events only reinforce the codification of the customary prohibition on child recruitment. These further demonstrations include additional international conventions prohibiting recruitment of children, such as the *Rome Statute* and the *Optional Protocol to the CRC*[67] and the numerous international declarations strongly condemning the practice.[68]

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[66] All declarations available at: < http://www.child-soldiers.org/cs/childsoldiers.nsf/DocumentTheme?OpenView&Start=1&Count=30&Expand=8#8>.

[67] See also e.g. *African Charter on the Rights and Welfare of the Child* and ILO *Worst Forms of Child Labour Convention* (No. 182).

[68] See text accompanying note 41.

II.

CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

41. The recruitment of children under fifteen is a norm of a criminal nature, entailing individual criminal responsibility. International humanitarian obligations, such as those in the *Geneva Conventions* and *Additional Protocol II* are of a different nature than international human rights obligations,[69] and may attract individual criminal responsibility even where penal consequences are not expressly provided for in the relevant conventions.

A. International humanitarian law clearly permits the prosecution of individuals for the commission of serious violations of the laws of war, irrespective of whether they are expressly criminalized. This has been confirmed by national and international courts, state practice, legal scholars and United Nations organs.

42. The Hague Conventions of 1899 and 1907 on the laws and customs of war did not make any provision for the prosecution of individuals who breached the Conventions.[70] Nonetheless, prior to the Nuremberg Tribunal, trials of such persons were routinely conducted by national tribunals applying customary international law, the Conventions or in the case of their own personnel, the national military or criminal code.[71]

43. The International Military Tribunal at Nuremberg prosecuted violations of the Hague and Geneva Conventions[72] of 1907 and 1929, respectively, despite the absence of express criminal sanction. Article 6(b) of the *Nuremberg Charter* provided the Tribunal with the jurisdiction to prosecute

> *WAR CRIMES*: *namely, violations of the laws or customs of war.* Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity. [emphasis added][73]

44. Professors Ratner and Abrams make the following observation about Article 6(b) of the *Nuremberg Charter*:

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[69] See discussion in Chetail at 238-41.
[70] See particularly Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 and Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 [hereinafter "Hague Conventions"]. Available at http://www.icrc.org/
[71] L.C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., (Manchester: Juris Publishing, 2000) [hereinafter "Green"]at 35.
[72] *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field,* Geneva, 27 July 1929 and *Convention relative to the Treatment of Prisoners of War,* Geneva, 27 July 1929. Available at http://www.icrc.org/
[73] *Charter of the International Military Tribunal at Nuremberg*, August 8, 1945.

> Although the Charter relied upon existing law under the Hague and Geneva Conventions, it served the important purpose of affirming individual culpability for violations of the laws or customs of war...other post-war trials built upon the trial of the major criminals. These included the trials under Control Council Law No. 10 as well as those in individual European states. Judges routinely cited Hague and Geneva law to support their views regarding illegal conduct.[74]

45. Violations of treaties and customs of war give rise to individual criminal responsibility from the requirement of States Parties to enforce treaties and punish those who commit listed offences.[75] As is frequently quoted from a Nuremberg Judgment, "That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized....Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[76]

46. The 1949 *Geneva Conventions* introduced the concept of "grave breaches," however, they do not preclude the prosecution of non-grave breaches of the *Conventions* or the *Additional Protocols* as war crimes. Like the Hague Conventions, many of their provisions are prosecutable according to the practice of states, national and international courts and *opinio juris*.

47. Professor Leslie Green observes that whether or not an offence is classified as a "grave breach," certain violations of the *Geneva Conventions* of 1949 qualify as prosecutable war crimes.[77]

48. Professor Meron also confirms that "the introduction of the system of grave breaches cannot alter the possibility that the other breaches may be considered war crimes under the customary law of war."[78]

49. Many countries have domestic statutes which permit the prosecution of war crimes even if the relevant treaty being implemented does not require penalization of such acts. For

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[74] Steven J. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law; Beyond the Nuremberg Legacy,* 2nd ed. (Oxford: Oxford University Press, 2001) [hereinafter "Ratner and Abrams"] at 81-82. Allied Control Council Law No. 10 authorized courts to prosecute, inter alia, "(b) *War Crimes.* Atrocities or offences against persons or property constituting *violations of the laws or customs of war*, including, but not limited to, murder, ill treatment or deportation to slave labour or any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity" [emphasis added].

[75] Theodor Meron, "International Criminalization of Internal Atrocities" (1995) 89 Am. J. Int'l Law 554 [hereinafter "Meron"] at 562.

[76] *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg,* 14 November 1945 – 1 October 1946, 1 Official Documents 223 (1947).

[77] Green at 45-46.

[78] Meron at 564.

example, Belgian, Spanish, Swedish and US war crimes statutes cover acts beyond grave breaches, including violations of *Additional Protocol II.*[79]

50. Military manuals also support this view. For example, the U.S. Department of Army Field Manual 27-10 (1956) notes that "The term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."[80]

B. Where certain requirements are met, international humanitarian law prohibitions attract individual criminal responsibility.

51. Professor Meron notes, "Whether international law creates individual criminal responsibility [for prohibited conduct] depends on such considerations as whether the prohibitory norm in question, which may be conventional or customary, is directed to individuals, states, groups or other authorities, and/or to all of these. The extent to which the prohibition is addressed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community are all relevant factors in determining the criminality of the various acts."[81]

52. Professors Ratner and Abrams describe the elevation of offences in recent years from prohibitions to crimes under customary international law and conclude: "the most basic offences against human dignity do incur individual responsibility."[82]

53. Finally, Professor Bassiouni observes that international crimes either have a "transnational" element or one of two "international" elements: 1) "a threat to the peace and security of mankind" or "a significant international interest", or 2) "shocking" or "egregious" conduct tested by "commonly shared values of the world community."[83]

54. The ICTY Appeals Chamber in *Prosecutor v. Tadic* held that an offence is subject to prosecution where the following conditions are met:

> (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. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and

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[79] Law of 16 June 1993, 2 Codes Belges (Bruylant), at 240/5 (62d Supp. 1996); Codigo Penal (1995), arts 607-14 (Spain), Swedish Penal Code 1986, ch. 22 § 11 (National Council for Crimes Prevention Sweden trans., 1986). The U.S. statute, 18 U.S.C. § 2441 (1998 Supp. IV), will cover violations of Protocol II when the U.S. becomes a party to it. Qtd in Ratner & Abrams at 179.

[80] Qtd. in Jordan J. Paust et al., *International Criminal Law; Cases and Materials,* 2nd ed. (Durham, North Carolina: Carolina Academic Press, 2000) [hereinafter "Paust"]at 32.

[81] Meron at 562.

[82] Ratner and Abrams at 94.

[83] Paust at 19.

the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[84]

55. The Appeals Chamber relied primarily on Security Council resolutions and debates as well as field manuals to demonstrate *opinio juris* that *Additional Protocol II* and common Article 3 were prosecutable violations. It also stressed that actual state practice in the field of war was important, but that "official pronouncements of states, military manuals and judicial decisions" are of particular importance in determining state practice and *opinio juris.*[85]

C. The ICTY and ICTR have jurisdiction to prosecute violations of "Fundamental Guarantees" contained in *Additional Protocol II.*

The ICTY has jurisdiction over and prosecuted violations of Additional Protocol II and Common Article 3.

56. The International Criminal Tribunal for the Former Yugoslavia ("ICTY") was created by the Security Council and given jurisdiction to prosecute offenders for violations of international humanitarian law that were not expressly criminalized in their treaty form.[86] The Statute of the ICTY provides that "[t]he International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law..."[87] Article 3 provides that the ICTY "shall have the power to prosecute persons violating the laws or customs of war" and includes a non-exhaustive list of crimes taken from the early Hague and Geneva law.

57. The legality of prosecuting the laws and customs of war, as well as violations of and common Article 3, was upheld by the Appeals Chamber. The ICTY Appeals Chamber found in *Prosecutor v. Tadic* that Article 3 of the ICTY Statute must be interpreted to encompass **all** violations of international humanitarian law not explicitly included under other articles. The Chamber concluded that the laws and customs of war include violations of common Article 3 and the two *Additional Protocols.*[88] The Appeals Chamber also held that violations of humanitarian law in an internal conflict could be prosecuted under Article 3 of the Statute because the Security Council had intended to criminalize such offences, and because customary law recognized individual criminal responsibility for violations of some of the rules applicable to internal conflicts.[89]

58. This position reflects the view of Professor Meron who wrote in 1995 prior to the release of *Tadic*:

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[84] *Prosecutor v. Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY Appeals Chamber, 2 October 1995 [hereinafter *Tadic*]at para. 94.
[85] *Tadic* at para 99.
[86] S.C. Resolution 827, UN SCOR, UN Doc S/Res/827 (1993).
[87] Article 1 of the Statute of the ICTY, annexed to S.C. Res. 827, *ibid.*
[88] *Tadic* at paras 86-93.
[89] *Tadic* at paras 94-136.

> ... common Article 3 and Protocol II impose important prohibitions on the behaviour of participants in noninternational armed conflicts, be they government, other authorities and groups, or *individuals*. The fact that these proscribed acts are considered nongrave rather than grave breaches concerns questions of discretionary versus obligatory prosecution or extradition, and for some commentators, universal jurisdiction, *but not criminality*. [emphasis added][90]

59. Subsequent to *Tadic*, the ICTY has convicted many defendants for crimes contained in the "Fundamental Guarantees" of *Protocol II*, including rape, torture, cruel treatment and outrages on personal dignity.[91] It is worth noting here that the prohibition on recruiting children in *Additional Protocol II* is found in "Article 4: Fundamental Guarantees", the very same article as the crimes which were prosecuted at the ICTY, providing strong evidence of its criminality in customary law as of 1995.

The ICTR has jurisdiction to prosecute violations of international humanitarian law, including "Fundamental Guarantees" of Additional Protocol II.

60. The International Criminal Tribunal for Rwanda ("ICTR") was created by the Security Council to prosecute "[p]ersons Responsible for Genocide and Other Serious Violations of International Humanitarian Law...."[92] Article 4 of the Statute of the ICTR expressly provides that the Tribunal shall have the power to prosecute violations of Article 3 common to the *Geneva Conventions* and of *Additional Protocol II*. Article 4 also includes a list of offences taken from these two instruments but provides that "[t]hese violations shall include, but not be limited to" the enumerated list.

61. The fact that the Security Council included violations of common Article 3 and *Additional Protocol II* in the ICTR Statute suggests that states on the Security Council which voted in favour of the statute believe that individual criminal responsibility attaches to a significant number of prohibitions in international humanitarian law.[93]

62. The legality of these provisions as criminal offences has been upheld repeatedly by the Tribunal. The judgments of the ICTR, in *Prosecutor v. Akayesu,*[94] *Prosecutor v. Musema*[95] and *Prosecutor v. Rutaganda*[96] affirmed that the "Fundamental Guarantees" of *Additional Protocol II* were beyond a doubt pre-existing crimes under customary law. As the Court held in *Akayesu*:

> It should be noted, moreover, that Article 4 of the ICTR Statute states that, "The International Tribunal for Rwanda shall have the power to prosecute persons committing

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[90] Meron at 566.
[91] *Prosecutor v. Furundzija* (Judgement, Trial Chamber II, December 10, 1998) (rape and torture), *Prosecutor v. Kupreskic* (Judgment, Trial Chamber II, January 14, 2000) (murder and cruel treatment), *Prosecutor v. Aleksovski* (Judgment, Trial Chamber I, June 25, 1999) (outrages on personal dignity) [hereinafter *Aleksovski*], *Prosecutor v. Tadic* (Judgment, Trial Chamber II, May 7, 1997) (cruel treatment).
[92] Preamble of the Statute of the ICTR, annex of S.C. Resolution 955. U.N. Doc S/Res/955 (1994).
[93] See Ratner and Abrams at 90-91.
[94] *Prosecutor v. Akayesu*, (Judgment), 2 September 1998, ICTR-96-4-T [hereinafter *Akayesu*].
[95] *Prosecutor v. Musema* (Judgement and Sentence) 27 September 2000, ICTR-96-13-A.
[96] *Prosecutor v. Rutaganda*, (Judgement and Sentence) 6 December 1999, ICTR-96-3), para 90.

> or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977". The Chamber understands the phrase "serious violation" to mean "a breach of a rule protecting important values [which] must involve grave consequences for the victim", in line with the above-mentioned Appeals Chamber Decision in *Tadic* , paragraph 94. The list of serious violations which is provided in Article 4 of the Statute is taken from Common Article 3 - which contains fundamental prohibitions as a humanitarian minimum of protection for war victims - *and Article 4 of Additional Protocol II, which equally outlines "Fundamental Guarantees". The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law.* In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds [emphasis added].[97]

63. Like the ICTY, the ICTR has adopted Professor Meron's understanding of *Additional Protocol II*. Prior to the issuance of *Akayesu*, he wrote that "[r]espect for the fundamental guarantees of Protocol II does involve individual conduct and, obviously, is a matter of 'fundamental concern.' An international criminal tribunal could thus apply the provisions of Protocol II as criminal law."[98]

64. *Amici* note that the prohibition on recruitment of children is contained in the "Fundamental Guarantees" of *Additional Protocol II*. The ICTY and ICTR judgments, as well as scholarly opinion, provide compelling evidence that the violation was a pre-existing crime under customary international law.

D. Recruitment of children under 15 is a crime under international law.

65. **Conventional law, state practice, *opinio juris*, declarations by the international community and judgments by the ICTY and ICTR demonstrate that the recruitment of children under 15 is a sufficiently serious violation of international humanitarian law that it incurs individual criminal responsibility. *Amici* urge the Court to find that the recruitment and enlistment of children into armed combat was a crime at all times under the temporal jurisdiction of the Special Court.**

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[97] *Akayesu* at para 616.
[98] Meron at 560.

III.

THE PRINCIPLE OF *NULLUM CRIMEN SINE LEGE* IS INAPPLICABLE IN THIS CASE.

A. The principle of *nullum crimen sine lege.*

The purpose of* nullum crimen sine lege *is to protect citizens from the arbitrary and excessive use of state power. [99]

66. *Nullum crimen sine lege* means "no crime without law." *Nullum crimen* is a fundamental principle of international criminal law and most domestic criminal systems. It is codified in international law in Art. 15 of the *International Covenant of Civil and Political Rights* ("ICCPR"), Art. 7 of the *European Convention on Human Rights* ("ECHR") and Art. 11(2) of the *Universal Declaration of Human Rights* ("UDHR"). Sierra Leone acceded to the ICCPR on 23 November 1996.[100]

67. Art. 15 of the ICCPR,[101] which is virtually identical to Art. 7 of the ECHR,[102] states:

> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for imposition of a lighter penalty, the offender shall benefit thereby.
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

68. The underlying rationale of *nullum crimen* is to protect citizens against arbitrary prosecution, conviction, and punishment by the state.[103] *Amici* submit that *nullum crimen sine lege* is

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[99] Antonio Cassese, *International Criminal Law*, (Oxford: Oxford University Press, 2003) [hereinafter "Cassese"] at 141.

[100] Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the PrincipalInternational Human Rights Treaties*, 10 October 2003, available at: < http://www.unhchr.ch/pdf/report.pdf>.

[101] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, art. 15 (entry into force 23 March 1976).

[102] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 [ECHR].

Article 7 of the ECHR states:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

meant to protect the innocent who in good faith believed that their acts were lawful at the time of their commission, not to shield those accused of serious violations of international humanitarian law.

When an accused could not have reasonably believed that his acts were lawful at the time they were committed, the accused cannot rely on* nullum crimen sine lege *in his defence.

69. *Amici* submit that when an accused could not have reasonably believed that his acts were lawful or could reasonably foresee prosecution for his acts at the time they were committed, the accused cannot rely on *nullum crimen sine lege* in his defence.

70. In *Prosecutor v. Delalic*, the ICTY interpreted s. 15 of the ICCPR as follows:

> The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. *The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.*[104] [emphasis added]

71. Professor Meron supports this view that "the principle *nullum crimen* is designed to protect a person only from being punished for an act that he or she reasonably believed to be lawful when committed." He also stresses that a defendant cannot invoke *nullum crimen sine lege* when an offence is already prohibited under international and national law.[105]

72. This is consistent with Professor Greenwood's view that *nullum crimen sine lege* does not apply when conduct is universally regarded as wrongful and there is doubt only as to whether it constitutes a crime.[106]

Nullum crimen sine lege *cannot be invoked when prosecution was reasonably foreseeable.*

73. Jurisprudence of the European Court of Human Rights has interpreted *nullum crimen sine lege*, as permitting criminal prosecution when an accused can reasonably foresee the development of criminal liability.

74. *Nullum crimen sine lege* requires accessibility and foreseeability.[107] In *S. W. v. United Kingdom*, the European Court of Human Rights stated that *nullum crimen sine lege* "implies qualitative requirements, notably those of accessibility and foreseeability."[108] The Court continued by stating that:

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[103] *S. W. v. The United Kingdom*, European Court of Human Rights, judgment of 22 November 1995 (application number 20166/92) [hereinafter *S. W.*] at ¶34, ¶44.
[104] *Prosecutor v. Delalic et al.* (Judgment, ICTY Trial Chamber II, November 16, 1998), IT-96-21-T at ¶313.
[105] Meron at 566.
[106] Christopher Greenwood, "International Humanitarian Law and the *Tadic* Case" (1996) 7 E.J.I.L. 265 at 287.
[107] *G. v. France*, European Court of Human Rights, judgment of 27 September 1995 (application number 15312/89) at ¶23, ¶25
[108] *S. W.* at ¶35.

> There will always be a need for elucidation of doubtful points and adaptation to changing circumstances. Art. 7…cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.[109]

75. In *S.W.*, the Court ruled that recognition that husbands are not immune to prosecution for rape of their wives "had become a reasonably foreseeable development of the law."[110] The abandonment of marital immunity was also "in conformity…with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and freedom."[111]

76. These principles were restated in *Cantoni v. France*.[112] The European Court of Human Rights again used accessibility and foreseeability to determine whether a violation of *nullum crimen sine lege* occurred.[113] Again, the Court reaffirmed that:

> This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7, provided that it proves to be sufficiently clear in the large majority of cases. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice.[114]

77. In *Streletz, Kessler and Krenz v. Germany* and *K.-H. W. v. Germany* the European Court reaffirmed this interpretation of *nullum crimen sine lege*. The Court concluded that its task was to determine "whether [the accused's] act, at the time when it was committed, constituted an offence defined with sufficient accessibility or foreseeability by the law of the GDR or international law."[115]

78. In *Prosecutor v. Aleksovski*, the ICTY Appeals Chamber stated that *nullum crimen sine lege* "does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime."[116]

79. In Professor Cassese's view, the jurisprudence of the European Court of Human Rights shows not only that the interpretation and clarification of existing international law is

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[109] *S. W.* at ¶36.
[110] *S. W.* at ¶43.
[111] *S. W.* at ¶44.
[112] *Cantoni v. France*, European Court of Human Rights, judgment of 15 November 1996 (application number 17862/91) [hereinafter *Cantoni*].
[113] *Cantoni* at ¶26.
[114] *Cantoni* at ¶32.
[115] *Streletz, Kessler and Krenz v. Germany*, European Court of Human Rights, judgment of 14 February 2001 (application numbers 34044/96, 35532/97, 44801/98) at ¶46.
[116] *Prosecutor v. Aleksovski* (Judgment and Sentence, ICTY Appeals Chamber, March 24, 2000) at ¶127.

allowed, but that adaptation is also allowed "to cover conduct previously not clearly considered as criminal" under certain circumstances.[117]

B. The defence cannot rely on *nullum crimen sine lege* to challenge the Court's jurisdiction to prosecute under Art. 4(c) of the Statute.

80. *Amici* submit that the defence cannot rely on *nullum crimen sine lege* because the recruitment of children was a crime at all times under the Court's temporal jurisdiction.

81. *Amici* submit that even if the recruitment of child soldiers is not construed as a crime, the defence cannot rely on *nullum crimen sine lege* because the recruitment of child soldiers was not a lawful act. As set out in Part I of this submission, there was a clear, irrefutable prohibition established in conventional and customary international law prior to 30 November 1996.

82. Lastly, given that the recruitment of children violates the fundamental duty to protect civilians in armed conflict; given its universal repugnance and condemnation by the international community; and given the criminality of violations of "Fundamental Guarantees" of *Additional Protocol II* in jurisprudence of the ICTY and ICTR; *amici* submit that in any case, invocation of the principle *nullum crimen sine lege* is inappropriate because prosecution was reasonably foreseeable.

[117] Cassese at 152.

CONCLUSION

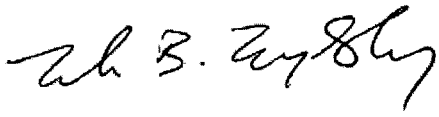
In Part I, *amici* have argued that the recruitment of children under fifteen is and was unquestionably a violation of international humanitarian law under conventional and customary law as of 30 November 1996. Recruiting children into armed combat grievously offends the longstanding and universal principle requiring belligerents to protect civilians in armed conflict, and in particular, vulnerable groups including children under fifteen. Indeed, the fundamental principle of the protection of civilians in armed conflict is the raison d'être of *Geneva Convention (IV)*. Specifically, the practice of recruiting children under the age of fifteen is expressly prohibited in the "Fundamental Guarantees" of *Additional Protocol II* and by the *Convention on the Rights of the Child.* In light of the number of states that are parties to the treaties, evidencing widespread support from states with diverse political, economic, social and political conditions, the provisions of both of these treaties have entered the body of customary law. More specifically, the prohibition on child recruitment in international conventions, domestic State practice, and the constant condemnation of the recruitment of children by the Security Council and regional state organizations demonstrate that the recruitment of children into armed conflict is a violation of international humanitarian law.

Amici have argued in Part II that international law permits prosecutions of violations of international humanitarian law of the kind considered here irrespective of whether penal sanctions are attached. We conclude that such prosecutions are permitted by law when the international humanitarian law violations are of serious gravity, when they offend the basic dignity of human beings, and when there is a sufficient international consensus that perpetrators must bear individual responsibility. *Amici* argue that the recruitment of children is considered to be an egregious practice by the international community with grave consequences for children, and as such is universally condemned. Most importantly, the jurisprudence of the ICTY and ICTR upholds the criminal prosecution for violations of the "Fundamental Guarantees" of *Additional Protocol II*, which includes the prohibition on child recruitment. For these reasons, *amici* conclude that the prohibition on the recruitment of children had attained the character of a war crime under customary law prior to 30 November 1996.

Lastly, *amici* turn their attention to the principle of *nullum crimen sine lege*. According to the jurisprudence of the European Court of Human Rights, the ICTY, and scholarly articles, *nullum crimen sine lege* cannot be relied upon by a defendant who could not have reasonably believed that his conduct was lawful at the time of commission. Indeed, a defendant cannot invoke *nullum crimen* when an offence is criminalized, or clearly prohibited in the case of international humanitarian law. *Amici* therefore conclude that the doctrine cannot be invoked either as a defence against the crime of recruiting children into armed combat or as a challenge to the Court's jurisdiction to prosecute for offences under Article 4(c) of its Statute.

Dated: October 31, 2003,

Respectfully,



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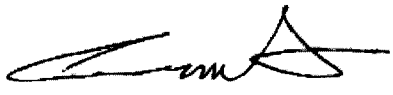

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