

CHILDREN IN THE RANKS: THE RECRUITMENT AND USE OF CHILD SOLDIERS BY NON-STATE ARMED GROUPS AND THE LIMITS OF INTERNATIONAL ACCOUNTABILITY

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Abstract

Few practices of contemporary armed conflict trouble the conscience as much as the use of children to fight the wars of adults, and few are as closely associated with the conduct of non-State armed groups. This paper examines how international law has responded to the recruitment and use of child soldiers by such groups. It traces the prohibition from its treaty origins through its recognition as a war crime, and it argues that the decisive moment came not with the drafting of any treaty but with the first judgment of the International Criminal Court, which made the recruitment of children the centre of a completed prosecution. The paper then asks why, despite a prohibition that is now about as clear as international law ever becomes, children continue to be recruited; and it suggests that the answer lies less in any gap in the substantive law than in the familiar weakness of enforcement against actors who fight beyond the reach of the courts. It concludes that the prosecution of commanders, valuable as it is, must be combined with prevention, direct engagement of armed groups, and the patient work of reintegration if the law is to make a difference to the children it exists to protect.

Keywords: *child soldiers; non-State armed groups; international humanitarian law; war crimes; Lubanga; reintegration.*

1. Introduction

A photograph that circulated widely some years ago showed a boy of perhaps twelve, in a uniform several sizes too large for him, cradling a rifle that looked heavier than he was. The image was arresting not because it was rare but because it was not. Across the conflicts of the last three decades, in West Africa, in Central Africa, in South Asia and elsewhere, children have been taken from their homes and their schools and put to use as fighters, as porters, as spies, and as the sexual property of the men who command them. The practice is old, but its scale

in the modern internal conflict, and its concentration among the armed groups that now do so much of the world's fighting, have made it one of the defining humanitarian problems of the age.

International law has not been silent. A web of treaties forbids the recruitment and use of children, and the prohibition has hardened into a rule of customary law and into a war crime triable before international courts.¹¹⁸⁵ Yet children continue to be recruited, and the distance between the clarity of the law and the persistence of the conduct is the puzzle that this

¹¹⁸⁵Convention on the Rights of the Child, 1989, art. 38; Additional Protocol II to the Geneva Conventions, 1977, art. 4(3)(c).

paper sets out to examine. The argument, in brief, is that the substantive law is in reasonably good order, and that the difficulty lies elsewhere, in the enforcement of a prohibition against actors who are, by their nature, difficult to reach.

The paper proceeds in five steps. It begins with the substantive prohibition, examining the treaties that forbid the recruitment of children and the awkward question of the age below which protection is owed. It turns next to the criminalisation of the conduct, and to the jurisprudence, above all that of the Special Court for Sierra Leone and the International Criminal Court, in which the war crime has been given shape. It then considers the watershed represented by the Lubanga judgment, the first to be delivered by the permanent Court and the first to place the recruitment of children at the centre of a conviction. It asks, fourthly, why the conduct persists despite the law, and it locates the answer in the weakness of enforcement rather than in any defect of the rules. It closes with the argument that prosecution alone cannot solve the problem, and that the law must be supplemented by prevention, engagement and reintegration.

2. The Prohibition and the Problem of Age

The starting point is the body of treaty law that forbids the recruitment and use of children. The Convention on the Rights of the Child, adopted in 1989 and now almost universally ratified, requires States to take all feasible measures to ensure that children do not take a direct part in hostilities, and to refrain from recruiting those who have not attained the age of fifteen.¹¹⁸⁶ Additional Protocol II to the Geneva Conventions, which governs the higher-intensity internal conflict, contains a prohibition to the same effect, forbidding the recruitment of children under fifteen and their use in hostilities.¹¹⁸⁷ These

provisions establish a floor; the difficulty has always been whether the floor is set at the right level.

The figure of fifteen, fixed in the Convention and the Protocol, was a compromise, and an uneasy one. It reflected what States were prepared to accept at the time rather than any considered judgment that a child of sixteen is fit for war. The discomfort with the lower threshold produced, in time, a movement to raise it, and that movement bore fruit in the Optional Protocol of 2000, which lifted the age to eighteen for the purposes that matter most. The Optional Protocol requires States to ensure that members of their own armed forces under eighteen do not take a direct part in hostilities, and, crucially for the present subject, it provides that armed groups should not, under any circumstances, recruit or use in hostilities persons under eighteen.¹¹⁸⁸ The African Charter on the Rights and Welfare of the Child went further still, fixing the threshold at eighteen and making no concession even to the child who claims to have enlisted willingly.¹¹⁸⁹

The question of voluntary enlistment deserves a word, for it is raised more often than it deserves to be. It is sometimes said that a boy who presents himself at the gate of an armed group, and asks to be taken in, has not been recruited in any objectionable sense, and that the law's concern with recruitment ought not to extend to him. The objection has a surface plausibility and very little substance. In the conditions in which armed groups operate, conditions of poverty, displacement, and the collapse of the ordinary structures of family and school, the line between the child who is taken and the child who comes is faint to the point of vanishing.¹¹⁹⁰ A boy who joins an armed group because it offers food, or protection, or the only future he can imagine, has not exercised the kind of free choice that the

¹¹⁸⁶Convention on the Rights of the Child, 1989, art. 1 (defining a child as every human being below the age of eighteen years) and art. 38(2)–(3).

¹¹⁸⁷Additional Protocol II, 1977, art. 4(3)(c), prohibiting the recruitment of children who have not attained the age of fifteen years and their use in hostilities.

¹¹⁸⁸Optional Protocol, 2000, art. 1 (States to ensure that members of their armed forces under eighteen do not take a direct part in hostilities) and art. 4

(armed groups should not, under any circumstances, recruit or use in hostilities persons under eighteen).

¹¹⁸⁹African Charter on the Rights and Welfare of the Child, 1990, art. 22(2), which fixes the threshold at eighteen and makes no concession to voluntary enlistment.

¹¹⁹⁰On the difficulty of distinguishing voluntary from coerced enlistment in conditions of poverty and conflict, see the literature on the social reality of child recruitment.

language of consent presupposes. The better instruments recognise this, and they decline to make the lawfulness of recruitment turn on a consent that the circumstances make illusory.

3. From Prohibition to Crime

A prohibition is one thing; a crime, for which an individual may be tried and punished, is another. The transformation of the prohibition on child recruitment into an international crime was the work of the 1990s and the early years of this century, and it was accomplished partly by treaty and partly by the courts. The Rome Statute of the International Criminal Court, adopted in 1998, listed the conscription, enlistment and use of children under fifteen as a war crime, in both international and non-international armed conflict.¹¹⁹¹ The inclusion was significant, for it meant that the prohibition, long stated in the language of the obligations of States, was now attached to the individual perpetrator, who could be tried for its violation.

But the Rome Statute speaks only for the future, and it speaks only for the Court it created. The question whether the recruitment of children was a crime under customary law, triable before other courts and in respect of conduct that preceded the Statute, fell to be decided by the Special Court for Sierra Leone. In the Norman case the Court held that it was, that by the time of the conduct charged the recruitment of children had become a crime entailing individual responsibility under customary international law.¹¹⁹² The holding was not free from controversy; one member of the Court doubted whether the criminal character of the conduct had crystallised as early as the majority supposed, and his caution is a useful reminder that the line between an emerging norm and a settled crime is not always easy to draw.¹¹⁹³ But

the majority view prevailed, and it has not since been seriously questioned.

The Sierra Leone Court went on, in its later judgments, to apply the crime to the facts of a conflict in which the recruitment of children had been pervasive, and in which the armed groups had filled their ranks with the boys and girls they abducted from the villages they overran.¹¹⁹⁴ The factual record those judgments established, and the parallel record compiled by the country's Truth and Reconciliation Commission, gave the abstract prohibition a terrible concreteness, and they fixed the recruitment of children in the public mind as among the signature crimes of the modern armed group.¹¹⁹⁵

It is worth dwelling, for a moment, on what that record actually contained, because the abstractions of the law can dull the mind to the reality they describe. The children recruited in Sierra Leone were not, for the most part, willing adolescent volunteers of the kind the lawyers' debates about consent might lead one to imagine. They were small children, some of them no more than seven or eight, taken from villages that the armed groups had attacked, often after being made to witness, or even to take part in, the killing of their own families, so that the bonds that might have drawn them home were deliberately severed. They were drugged, beaten into obedience, and sent to fight; the girls among them were, in addition, distributed among the fighters as so-called wives. A prohibition framed in the cool language of recruitment and use is the law's way of naming this; but the naming should not be allowed to obscure the thing named, and the courts that tried these cases were right to insist, in their findings of fact, on setting out what the recruitment of children actually meant for the children concerned.

¹¹⁹¹Rome Statute, 1998, art. 8(2)(b)(xxvi) (international armed conflict) and art. 8(2)(e)(vii) (non-international armed conflict).

¹¹⁹²Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Special Court for Sierra Leone (31 May 2004).

¹¹⁹³Ibid., separate and partly dissenting opinion of Justice Robertson, doubting that individual criminal responsibility for the offence was settled as early as the indictment alleged.

¹¹⁹⁴Prosecutor v. Brima, Kamara and Kanu (AFRC), Case No. SCSL-04-16-T, Judgment, Special Court for Sierra Leone (20 June 2007).

¹¹⁹⁵On the patterns of recruitment by armed groups, see the findings of the Truth and Reconciliation Commission of Sierra Leone, Witness to Truth (Freetown, 2004).

4. The Lubanga Watershed

If a single moment can be said to mark the coming of age of the law against child recruitment, it is the judgment of the International Criminal Court in the case of Thomas Lubanga Dyilo, delivered in March 2012.¹¹⁹⁶ The judgment was the first the permanent Court had ever delivered, and the charges on which it was founded concerned nothing but the recruitment of children: the conscription and enlistment of children under fifteen into an armed group in the Ituri region of the Democratic Republic of the Congo, and their use to participate actively in hostilities. That the Court should have chosen, for its inaugural prosecution, a case built entirely on this crime was itself a statement of the importance the international community had come to attach to it.

The judgment repays study for the care with which it distinguished the three forms of the conduct the Statute prohibits. Conscription is the compulsory taking of a child into the group; enlistment is the acceptance of a child who comes, whether willingly or not; and use is the deployment of the child to take an active part in the fighting. The Court treated conscription and enlistment as distinct ways of committing a single offence, the one forcible and the other not, and it made clear that the absence of compulsion is no defence, so that the commander who accepts the child who presents himself is as guilty as the commander who seizes the child who does not.¹¹⁹⁷

On the meaning of active participation the Court took a broad view, and rightly so. The child who fires a weapon plainly participates; but so, the Court held, does the child who scouts, who carries supplies to the front, who guards a military objective, or who serves at the headquarters of the commander, for each of

these exposes the child to the risks of the conflict and makes him a part of the machinery of war.¹¹⁹⁸ The breadth of the test matters, for the armed group does not use most of its child recruits as front-line fighters; it uses them as porters, as lookouts, as servants, and, in the case of the girls, very often as the sexual property of the fighters. A narrow test, confined to the child who bears arms, would have left the great majority of child recruits outside the protection of the law.

The Lubanga judgment was followed by the first reparations order in the Court's history, an order directed at the harm done to the children the group had recruited.¹¹⁹⁹ And the Court returned to the subject some years later in the Ntaganda case, arising from the same Congolese conflict, in which it took the further step of holding that the children recruited by an armed group are protected against sexual violence committed by the members of their own group, closing a gap that an earlier and narrower reading of the law had seemed to leave open.¹²⁰⁰ Taken together, these judgments amount to a substantial and coherent body of law, and they leave little doubt that the recruitment of children is, today, among the most clearly established of the war crimes that the leaders of armed groups may be made to answer for.

5. Why the Conduct Persists

Here, then, is the puzzle. The prohibition is clear, the crime is established, and the leaders of at least some of the groups that recruit children have been tried and convicted. And yet the practice continues, year after year, in conflict after conflict. The reports of the international bodies that monitor the conduct of armed groups record, with depressing regularity, that children are still being taken, still being armed, and still being sent to fight. What explains the gap between the law and the conduct?

¹¹⁹⁶Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (14 March 2012).

¹¹⁹⁷Lubanga, *supra*, Judgment (14 March 2012), paras. 911–915, distinguishing conscription, enlistment and use.

¹¹⁹⁸*Ibid.*, paras. 628–630, on the meaning of active participation in hostilities.

¹¹⁹⁹Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision establishing the principles and procedures to be applied to reparations (7 August 2012).

¹²⁰⁰Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment (8 July 2019), paras. 1121–1123, holding that children associated with an armed group are protected against sexual violence committed by members of the same group.

It is tempting to look for the answer in some defect of the substantive law, and there are those who argue that the threshold should be raised, or the definitions tightened, or the prohibition extended. But this, I think, mistakes the nature of the problem. The substantive law is about as good as it is likely to get; the difficulty lies in its enforcement. The armed group that recruits children is, almost by definition, an actor that has set itself against the established order and that operates beyond the effective reach of the courts. Its leaders are rarely apprehended; when they are, it is usually long after the event and as a by-product of some larger political settlement; and the prospect of an eventual trial before a distant court, years hence and contingent on a capture that may never come, weighs lightly against the immediate military advantage that the recruitment of children is thought to confer.

There is, moreover, a brutal logic to the recruitment of children that the law must reckon with. Children are abundant, they are cheap, they are obedient, and they can be made to do things that adults will not. A commander who calculates in these terms is not deterred by a prohibition he does not expect to be enforced against him. The law's failure, if it is a failure, is therefore not a failure of statement but a failure of consequence: it says clearly enough what must not be done, but it cannot, in the conditions of the internal conflict, make the saying stick.

A particular word is owed to the girls, whose experience of recruitment has too often been treated as a footnote to the experience of the boys. The girl taken by an armed group is rarely taken to fight, or not only to fight; she is taken to cook, to carry, and, very frequently, to serve as the sexual property of a fighter or a commander, in the relationship that the euphemism of the time called marriage. For a long time the law struggled to see this clearly. A narrow understanding of what it meant to use a child in hostilities threatened to leave the girl who was kept as a domestic and sexual servant outside the protection of the prohibition altogether, on the footing that she was not, in any military

sense, a participant. The broad reading of active participation adopted in Lubanga went some way to closing this gap, and the holding in Ntaganda, that a child is protected against sexual violence even at the hands of her own group, went further. But the episode is a reminder that a law drafted with the boy soldier in mind may not, without conscious effort, reach the girl whose servitude takes a different form, and that the protection of children against recruitment must attend to the full range of the uses to which recruited children are put.

This diagnosis matters, because it points towards the kind of response that is likely to help. If the problem were a defect of the substantive law, the remedy would be to amend the law. But the problem is one of enforcement and of incentive, and the remedy must therefore address enforcement and incentive: it must find ways of reaching the armed group that the criminal trial cannot reach, and of altering the calculation that makes the recruitment of children seem worthwhile.

6. Beyond Prosecution

The prosecution of those who recruit children is necessary, and nothing in what follows is meant to diminish it. The trials at the Special Court for Sierra Leone and the International Criminal Court have established the law, vindicated the victims, and put on record, for all to see, that the recruitment of children is a crime for which even the most senior commander may be made to answer. But prosecution reaches only a handful of the most prominent offenders, and only after the harm has been done. If the law is to protect children rather than merely to punish, after the event, a few of those who have harmed them, it must do more.

Three further lines of effort deserve emphasis. The first is prevention through the direct engagement of armed groups. The experience of the organisations that work with such groups, securing from them undertakings to refrain from recruiting children and monitoring their compliance, suggests that even groups beyond the reach of the courts can sometimes be

brought to change their conduct, whether from a desire for legitimacy or in response to sustained pressure.¹²⁰¹ Such engagement is uncertain, and it is no substitute for the prohibition; but it operates where the prohibition cannot, in the present and on the ground, rather than years hence and in a courtroom.

The second is the obligation of States to prevent recruitment within their territory, an obligation that the Optional Protocol imposes and that is too often neglected.¹²⁰² Much child recruitment could be prevented by measures well short of the criminal law: by the protection of the camps for the displaced, in which armed groups find a ready supply of recruits; by the keeping open of schools, which give children an alternative to the armed group; and by the registration of births, without which the age of a child, and therefore the unlawfulness of his recruitment, cannot be established. These are unglamorous measures, but they are likely to do more, in the aggregate, than any number of prosecutions.

The third is the reintegration of the children who have been recruited. A child released or escaped from an armed group is not thereby restored to the life he left; he carries the marks of what he has done and what has been done to him, and without help he is apt to drift back into the only life he now knows.¹²⁰³ The programmes that disarm, demobilise and reintegrate former child soldiers are the part of the response that looks to the child rather than to the offender, and they are, for that reason, the part most easily starved of funds and attention. The Paris Principles, which set out the international community's best understanding of how children associated with armed groups should be treated, place prevention, release and reintegration at the centre, and they deserve to be taken more seriously than they have been.¹²⁰⁴

7. Conclusion

The recruitment and use of children by non-State armed groups is forbidden by treaty, prohibited by custom, and punishable as a war crime; on the law as it stands, there is little more to be said, and little more that needs to be said. The achievement of the last three decades, from the Convention on the Rights of the Child through the Optional Protocol to the judgments in Norman, Lubanga and Ntaganda, has been to put beyond argument that the practice is unlawful and that those who engage in it may be made to answer. That is no small achievement, and it should not be undervalued.

But the law's work is not done when the prohibition is clear and the crime established. The children continue to be recruited, and they will continue to be recruited so long as the armed group finds it advantageous and expects to escape the consequences. The task that remains is not to refine the prohibition, which is refined enough, but to close the distance between the prohibition and the conduct, and that is a task for prevention, for engagement, and for reintegration as much as for prosecution.¹²⁰⁵ The boy in the oversized uniform, cradling the rifle that is heavier than he is, is not protected by the clarity of the rule that forbids his recruitment. He is protected, if at all, by the measures that keep him out of the ranks in the first place and that bring him back when he has been taken. To those measures, and not only to the prosecution of the men who recruited him, the law and its institutions must now turn their attention.

References

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- Additional Protocol II to the Geneva Conventions of 12 August 1949, relating to the Protection

¹²⁰¹On the deeds of commitment administered by Geneva Call, by which armed groups undertake to refrain from recruiting children, see the published reports of that organisation.

¹²⁰²Optional Protocol, 2000, art. 4(2), requiring States to take all feasible measures to prevent recruitment by armed groups, including legislation to prohibit and criminalise it.

¹²⁰³On disarmament, demobilisation and reintegration programmes for former child soldiers, see the comparative literature on post-conflict reintegration.

¹²⁰⁴Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups (2007), which adopt a broad definition of a child associated with an armed group and emphasise prevention, release and reintegration.

¹²⁰⁵On the limits of criminal prosecution as a response to child recruitment, and the case for combining it with preventive and reintegrative measures, see the policy literature on children and armed conflict.

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