

threat to our common endeavour of a different kind: the attempts by some to belittle our efforts at the international level. There are those who even maintain that international law does not exist — unless it suits their interest to invoke it in a particular situation.” To suggest that international law does not exist or is a threat to democracy “is an insult to all the many, past and present, who have contributed to the development of a rule-based international society,” he said, adding that this risks damaging all that the UN stands for. Nevertheless, Mr Corell affirmed, “with the founding of the United Nations, the course for the rule of law among nations was set. And if we stay this course, the prospects are favorable.”

Professor Hilary Charlesworth, in a speech to the National Press Club, Canberra, Australia, 29 October 2003:

“... [T]he United Nations and the system of international law it presides over is of crucial importance in the international community. It offers a method of testing the legitimacy of actions in the international arena that is distinct from the often short-term judgments of international politics. . . . [But] clearly, it did little to constrain the actions of the coalition of the willing. . . .

“The war in Iraq and its aftermath seem to suggest the revival of the pre-UN political order where force is the primary source of legitimation. These events undermine the idea that there is an international rule of law, where like cases are treated alike and where a system of justice restrains arbitrary action. . . . The fall of Saddam Hussein’s Iraq was presented by its supporters as a way to reduce the threat of terrorism. But it is clear that the invasion has encouraged a new generation of people without any form of power to resent the military might of the west.

“... I think that the war on Iraq and its aftermath has shaken the foundations of international law, but at the same time, it has underlined the real value of the international legal system. I don’t want to exaggerate the virtues of international law or claim that it is the answer to all geo-political problems. It has many blindspots. It is particularly inadequate in dealing with structural injustices. But perhaps the greatest asset of international law is its insistence (albeit hard to realise in many contexts) on a collective, rather than an individualised, unilateral notion of justice. It offers a set of standards against which we can measure international behaviour and call governments to account. The price of ignoring international law in the case of Iraq is that it will be much harder to invoke international legal standards when we want to restrain others. In my view, the way ahead for a country such as Australia is to work to strengthen international law. Given our close ties to the US . . . , we are in a good position to encourage it to resist the pull of unilateralism. We should, for example, pressure the US to ensure international law is observed in the treatment of all prisoners at Guantanamo Bay. We should work to persuade the US of the problems with undermining the new ICC with its BIA and SC resolutions exempting peace keepers from the Court’s jurisdiction. We should also support the calls of Kofi Annan for Security Council reform, for example through broadening its membership. The lasting lesson from the Iraq conflict will be, I think, that global political power and influence stems not from military might but from a genuine perceived commitment to the values of democracy, human rights and the rule of law.”

Richard Dicker is Director of the International Justice Program of Human Rights Watch and **Elise Keppler** is the program’s Counsel. This essay, prepared for the Human Rights Watch 2004 *World Report*, is reprinted by permission. Its historical review will be familiar to most *Minerva* readers, who may, however, find it useful review for presenting this topic to others. It also proposes, says HRW’s Yolanda Revilla, “a perspective of the road ahead in light of the successes and inevitable shortcomings of the recent past, as well as obstacles to further progress. The essay makes a sober assessment of the challenges facing the system of international justice today, analyzes and draws lessons from experience to date, and makes specific recommendations to maximize the effectiveness of existing institutions and chart a path forward.”

Beyond The Hague: The Challenges of International Justice

Richard Dicker & Elise Keppler

During the 1990s, the international community took unprecedented steps to limit the impunity all too often associated with mass slaughter, forced dislocation of ethnic groups, torture, and rape as a weapon of war. Along with two genocides and many other widespread crimes, the decade was marked by the creation of international criminal justice mechanisms and the application of universal jurisdiction to hold perpetrators of the most serious crimes to account. Due to inherent difficulties in rendering justice for these crimes, there have been failings, but the new approaches have nonetheless made great strides.

In the last few years, opposition to this nascent “system” of international justice has intensified and today the landscape is less hospitable to the types of advances that took place in the 1990s. In this context, those supporting efforts to hold the world’s worst abusers to account need to take a hard look at recent experiences to chart the path

forward. The victims who suffer these crimes, their families, and the people in whose names such crimes are committed deserve nothing less. In so doing, it is necessary to emphasize that although international justice mechanisms provide imperfect remedies, they are a vitally necessary alternative to impunity. This essay proposes a perspective of the road ahead in light of both the successes of the recent past and current obstacles to further progress.

A Developing System of International Justice

Soon after the end of the Cold War, with the horrors in the former Yugoslavia and Rwanda and the stark failures of national court systems freshly in mind, the United Nations, a number of governments, and many citizens groups and international nongovernmental organizations (NGOs) worked to create international criminal courts. The Security Council created two ad-hoc international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994, to try alleged perpetrators of genocide, war crimes, crimes against humanity, and other serious violations of international humanitarian law in those particular conflicts.

Affirming the viability of international criminal mechanisms after a 50-year hiatus, the tribunals held perpetrators of crimes in the former Yugoslavia and Rwanda accountable. Suspects were arrested and tried before these tribunals regardless of their official status, leading to the first indictment of a sitting head of state, namely Slobodan Milosevic by the ICTY, as well as the indictment of the former Prime Minister of Rwanda, Jean Kambanda, by the ICTR. The Rwandan & Yugoslav tribunals revitalized an international criminal jurisprudence that had not developed since the Nuremberg and Tokyo trials.

In response to shortcomings in their performance, described in more detail below, the ICTY and ICTR improved their practice over time. By 2002, between four and six trials were taking place each day in the

three courtrooms at the ICTY. Changes were also implemented to improve the functioning of the ICTR where major problems had persisted. In 2002, the capacity of the Rwandan tribunal increased when the Security Council amended the ICTR Statute to permit ad litem judges to serve in trial chambers. After a long delay, two senior posts in the ICTR Office of the Prosecutor were filled and a new president and vice-president were elected. In September 2003, the Security Council separated the ICTY and ICTR prosecutor posts and appointed a separate ICTR prosecutor.

The experience of the ad hoc tribunals revived an idea that first gained currency after World War II: the creation of a standing forum where justice can be rendered for the gravest crimes when national courts are unwilling or unable to do so (the “complementarity principle”). In 1998, more than 150 countries completed negotiations to establish the International Criminal Court (ICC), a permanent international court charged with prosecuting war crimes, crimes against humanity, and genocide in such circumstances. Reflecting the dynamism of efforts to limit impunity during this period, the necessary sixty states ratified the court’s treaty — known as the Rome Statute — to bring it into force in July 2002, less than four years after it had been opened for signature. The establishment of the ICC, a huge step forward for human rights, has the potential to focus international attention on impunity for the “most serious crimes of concern to the international community”, as noted in the preamble of the Rome Statute. The court has engendered great expectations.

While the ICC will face many obstacles in bringing justice, the most immediate threat to its effectiveness comes from the ideologically motivated hostility of the Bush administration. The US government’s campaign against the court, while both shameful and damaging, has nevertheless failed to derail the considerable momentum behind the ICC’s establishment.

In the brief period since the Rome Statute’s entry into force, the ICC has moved from an institution on paper to a permanent court staffed with highly qualified judges and an

experienced prosecutor and registrar. ICC officials familiar with the experience of the two ad hoc tribunals consciously drew on the lessons of those mechanisms to create a more efficient court. In July 2003, one month after taking office, the prosecutor announced he was following closely the situation in Ituri region of the Democratic Republic of Congo (DRC). Since there is incontrovertible evidence that the DRC currently lacks capacity to adjudicate cases involving serious human rights crimes, the situation there is precisely one of the scenarios the ICC was intended to address.

Over the past decade, several European states also began to meet their obligations to prosecute those found on their territory accused of atrocities. Using domestic universal jurisdiction laws in domestic courts, Switzerland, Denmark, Belgium, Germany and other states have tried such individuals far from the countries where the crimes were committed.

In October 1998, the United Kingdom arrested former President Augusto Pinochet on a Spanish warrant charging the former dictator with human rights crimes committed in Chile during his seventeen-year rule. As a result, four states, Belgium, France, Spain, and Switzerland, litigated the right of their courts to try Pinochet. The arrest of Pinochet sparked litigation before the United Kingdom’s highest court, the House of Lords, that resulted in the landmark decision that Pinochet, as a former head of state, could face prosecution for acts of torture in relation to crimes committed after 1988, when the United Kingdom became a party to the UN Convention against Torture.

A synergy developed between efforts to bring justice at the international level and access to national courts where the crimes occurred. There was a profoundly important “spillover” effect: national courts began to take on litigation of previously barred cases. The Pinochet litigation prompted an opening of the domestic courts in Chile to victims who had been denied access to remedies. In August 2003, trials of military officers responsible for gross violations of human rights during Argentina’s “dirty war” were reopened in

Buenos Aires. A Spanish judge prompted this development when he issued warrants for the extradition of forty-five former military officers and a civilian accused of torture and “disappearances” in Argentina so that they could stand trial in Spain.

The spillover effect has been particularly pronounced in countries that have undergone a thorough transition from authoritarian rule to democracy, such as in Chile and Argentina. But also in Chad, victims were emboldened by international efforts to indict former dictator Hissène Habré, leading them to bring cases before their national court against former Habré associates.

These different developments taken together have formed the components of a new, fragile, yet unprecedented, system of international justice consisting of ad hoc tribunals, the permanent ICC, and various other international mechanisms. These institutions promise an end to the impunity that perpetrators of some of the world’s worst crimes have long enjoyed.

A Changing Landscape

By 2001, steps to enhance international justice began to encounter broadening political opposition. Electoral changes on both sides of the Atlantic brought in political leaders less supportive of these courts. The Bush administration’s unilateralist policies were hostile to international institutions. The election of several new governments in Europe reduced the willingness of the European Union to stand up to such hostility. The attacks of September 11, 2001 further contributed to a shift away from support for international justice, with efforts to combat terrorism taking precedence over international law.

In May 2002, the Bush administration launched a worldwide campaign to undermine and marginalize the ICC. After repudiating the US signature of the Rome Statute, the Bush administration threatened to veto all UN peacekeeping operations unless Security Council members passed a resolution exempting citizens of non-ICC states parties involved in UN operations, such as the United States, from the reach

of the ICC. The Bush administration also played hardball to pressure individual ICC states parties to sign bilateral immunity agreements exempting US citizens — and foreign nationals working under contract with the US government — from ICC jurisdiction. These agreements put states parties in violation of their treaty obligations to the court. The actions of the United States — in effect threatening economically vulnerable states with sanctions for supporting the rule of law through the ICC — marked a perverse low point in US human rights policy.

Washington’s efforts to undermine the ICC coincided with a rising level of disenchantment among some powerful Security Council members towards the ad hoc tribunals it had created due to their cost and slow-moving procedures. As entirely new entities with only the Nuremberg and Tokyo tribunals as institutional precedents, the ad hoc tribunals for the former Yugoslavia and Rwanda, not surprisingly, had their share of difficulties. With Security Council members increasingly skeptical of the utility of the tribunals and concerned with rising costs, political and financial support waned. This culminated in pressure to adopt a “completion strategy” with a 2010 deadline regardless of whether this date allows the tribunals to fulfill their mandates.

Imposing increased political and financial constraints, the UN Security Council then made efforts to bring international expertise to bear on questions of justice in ways that were less politically controversial and costly. These factors prompted the emergence of a diverse “second generation” of international criminal justice mechanisms: “hybrid” national/international tribunals that utilized varying degrees of international involvement.

A UN International Commission of Inquiry on East Timor recommended that an international tribunal be created to try those responsible for atrocities committed by the Indonesian army and Timorese militias backed by Indonesia at the time of the vote for independence in 1999. However, Indonesia promised to prosecute individuals responsible for these crimes. As a result,

Secretary-General Kofi Annan did not endorse and the Security Council did not implement the Commission’s recommendation. In August 2001, an Ad Hoc Human Rights Court on East Timor was established in Indonesia. To try alleged perpetrators who remained in East Timor, the UN transitional administration appointed international judges to the newly created Dili District courts. Even after East Timorese independence on May 20, 2002, panels comprised of one East Timorese and two international judges, known as the Special Panels for Serious Crimes, adjudicate these cases.

The UN Mission in Kosovo took a similar approach to try serious crimes committed during the armed conflict in 1999. The ICTY lacked the resources and the mandate to act as the main venue to bring justice for these crimes. Although a justice system was reestablished in Kosovo following the conflict, underfunding, poor organization, and political manipulation plagued the newly ethnic-Albanian-dominated system. The new UN administration initially appointed a limited number of international judges to sit on panels with a majority of Kosovar judges without restrictions on the cases that these panels could adjudicate. Subsequently, the UN administration provided, pursuant to Regulation 2000/64, for panels comprised of at least two international judges and one Kosovar judge to adjudicate cases where “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice”. These panels are known as Regulation 64 Panels after the regulation that created them. They generally adjudicate cases involving serious crimes committed during the conflict. As discussed in the following section, the hybrid mechanisms in East Timor and Kosovo have faced serious difficulties in administering justice in such cases.

In 2002, taking a different “hybrid” approach, the United Nations signed an agreement with the government of Sierra Leone to create the Special Court for Sierra Leone. The Special Court was mandated to bring to justice those “most responsible” for atrocities committed during the country’s internal armed conflict. Like

the two ad hoc international tribunals, the Special Court has its own statute and rules of procedure. It does not operate as part of the national courts of Sierra Leone. Unlike the Rwandan and Yugoslav tribunals, the court is situated in Sierra Leone, has jurisdiction over some crimes under Sierra Leonean law, and has judicial panels composed of international and Sierra Leonean judges. The court is expected to try between fifteen and twenty alleged perpetrators of the horrific crimes of the conflict.

Due to Herculean efforts by the staff of the Registry and Office of the Prosecutor, the Special Court was established in war-ravaged Freetown, Sierra Leone, in the space of a few months in 2002 and 2003. To date, the prosecutor has issued nine indictments. While the Special Court aroused great expectations, including strong support from the United States due to its low cost and enhanced national character, it too has encountered disenchantment among some Security Council members and the UN Secretariat. These attitudes congealed as the cost of the court's operations began to rise beyond initial budget projections. The reservations took a qualitative leap when the prosecutor unsealed an indictment against former Liberian President Charles Taylor while the latter was attending peace talks in Ghana in June 2003. The appropriateness of unsealing the indictment during peace talks generated considerable objections, although no one denies that Taylor's long awaited departure took place soon thereafter. At this writing, the Special Court was facing serious budgetary problems due to the voluntary nature of its financial support.

In Cambodia, efforts to create a stand-alone "hybrid" court to bring members of the Khmer Rouge to justice have been less successful. The United States, France, Japan, and others pressured the United Nations to conclude an agreement with Cambodia to establish a Khmer Rouge Tribunal that lacked fundamental protections to ensure that the tribunal would be independent and impartial. The proposed tribunal would have a majority of Cambodian judges and a minority of international judges, working alongside Cambodian and international co-prosecutors. Cambodia's

judiciary has been widely condemned by the UN and many of its member states for lack of independence, low levels of competence, and corruption. There are serious concerns about this mechanism.

There are other post-conflict situations where the permanent members of the Security Council have yet to address impunity. These include Afghanistan, Liberia, Côte d'Ivoire, as well as the Democratic Republic of the Congo.

In Afghanistan, a national human rights commission, rather than an international commission of inquiry, was given the task of addressing past abuses committed during two decades of war despite its very limited capacity. This was largely due to resistance by the newly established Afghan government, the US government, and the UN Assistance Mission in Afghanistan to a serious accountability process that might upset the political transition. To date, the national human rights commission has not made meaningful progress to address past crimes, a result of inadequate training, resources, and equipment, and threats against commission members.

The accountability process in Iraq marks another missed opportunity for the international community. The Iraqi Governing Council drafted a law to establish a domestic war crimes tribunal to prosecute the former Iraqi leadership for crimes including genocide, crimes against humanity, war crimes, torture, "disappearances", and summary & arbitrary executions committed during Ba'ath Party rule. The US has backed such an "Iraqi-led" tribunal to try these crimes and many Iraqis have expressed support for this approach. However, Iraqi jurists have not had experience in complex criminal trials applying international standards. In the face of very limited UN involvement in post-war Iraq, the Security Council, for its part, even shied away from a proposal to establish an expert group comprised of Iraqi and international experts to assess how to best bring justice for Iraq. There is real concern that the projected trials could end up as highly politicized proceedings, undercutting the fairness and legitimacy of the process. In the last several years, although some states

continued to meet their obligation to prosecute the most serious international crimes through their national courts, the application of universal jurisdiction laws also has been scaled back somewhat. While there are a number of pending cases involving mid-level officials before national courts in Europe, there has been no increase in prosecutions of senior officials.

In the so-called Yerodia case of February 2002, the International Court of Justice (ICJ) held that a sitting foreign minister was immune from prosecution in another country's court system regardless of the seriousness of the crimes with which he was charged. Although the ICJ noted that such officials would not be immune to prosecution before international criminal courts where these courts have jurisdiction, its decision went against recent trends to deny immunity for serious human rights crimes.

In 2003, Belgium was forced to revise its universal jurisdiction law in response to intense economic and diplomatic threats by the Bush administration. This included the Bush administration raising the possibility of moving NATO headquarters elsewhere unless Belgium capitulated to its demands. The Belgian law had a particularly expansive reach: the absence of a jurisdictional "presence" requirement in the law together with a provision allowing private individuals, known as "parties civiles", to file complaints directly with an investigating judge resulted in the indiscriminate filing of a spate of cases against high profile officials from around the world. This attracted enormous media attention and opposition even though the investigative judge had the power to, and undoubtedly would have, ultimately dismissed any patently unfounded complaints. The revised law restricts the reach of universal jurisdiction to cases where either the accused or victim has ties to Belgium, making it similar to or more restrictive than the laws of most countries that recognize universal jurisdiction.

A Way Forward

The backlash against the developing international justice system, while dismaying, is hardly surprising given the extent to

which the significant advances of the past decade have begun to constrain the prerogatives of abusive state officials. The challenge now is to work effectively in a more difficult international environment while many national courts remain unable and unwilling to prosecute the most serious human rights crimes. The gains engendered by international justice institutions need to be preserved and the international system strengthened until many more national courts assume their front-line role in combating impunity.

We see three critical steps: make a sober assessment of the challenges facing international justice today; analyze and draw lessons from experience to date; and take strategic, measured steps forward. This essay concludes with separate descriptions of each of these steps, including specific recommendations on how to implement them to maximize the effectiveness of existing institutions.

Assessing the Challenges Facing International Justice Today

The system of international justice has made several singular advances. At the same time, as described below, the ad hoc international tribunals have not been as effective or as efficient as envisioned. The achievements of the courts in Kosovo and East Timor have been similarly mixed. Grasping the combination of the inherent institutional limitations and the objective difficulties to international justice is crucial in evaluating the performance of these tribunals and continuing efforts to more fully assure justice for atrocities.

Prosecuting senior officials for serious human rights crimes where there are a large number of victims is a complex and expensive process regardless of whether the cases are tried before national or international courts. These prosecutions tend to involve massive amounts of evidence that must be analyzed and classified by crime scene, type of crime, and alleged perpetrator. Such cases require a sophisticated prosecution strategy. Trials must comply with international human rights standards to ensure their legitimacy and credibility. Ensuring the fairness of these trials — in-

cluding their compliance with human rights standards — often results in a slow process.

Cases brought before international criminal tribunals or in national courts (based on universal jurisdiction) are often tried far away from the crime scene and thus are less accessible to victims and those in whose name the crimes were committed. These trials sometimes lack the visibility in the country where the crimes occurred that a local trial would have. The state where the crimes occurred, whose government may include accused war criminals or their confederates, may oppose the prosecutions, resisting cooperation and making it difficult to obtain custody of the defendants or obtain evidence. Gathering evidence for crimes that occurred hundreds or thousands of miles away makes it more difficult to meet the level of proof required for a conviction and for the accused to develop a comprehensive defense. Another downside to distance includes a lack of familiarity with the cultural and historical context in which the crimes occurred. The need for translation services also slows the pace of trials and makes them more costly.

International criminal tribunals, as global institutions, also face their own unique institutional challenges. Bringing together judges, prosecutors, and other court personnel from different backgrounds and legal cultures creates obstacles to efficient trials. Reconciling the civil and common law traditions to establish and implement rules of procedure and evidence is time-consuming and costly.

The Yugoslav and Rwandan tribunals are illustrative of some of these problems. After approximately seven years of work, the ICTR has completed only fifteen trials. This is due to a variety of factors including an overly ambitious prosecution strategy that pursued too many suspects; poor coordination between investigators and prosecutors; and failure to fill some long vacant posts. The slow pace of trials has resulted in unusually long pre-trial detentions that raise human rights concerns. Although significantly more efficient, cases at the ICTY have also progressed slowly, in some part due to indictments overloaded

with numerous counts. The cost of the tribunals has been extraordinarily high, reaching \$100 million dollars a year.

At the ICTR, there have also been ongoing problems with witness and victim protection. Witnesses and victims have described being treated with a lack of sensitivity due in part to lack of communication with victims and witnesses and inadequate follow-up. Major indicted war criminals of both tribunals remain at-large due to a failure of cooperation & assistance by the states where they are located and other states with the capacity to arrest them.

The national component of the hybrid mechanisms offers the potential advantage that the trials will leave a more lasting legacy in the countries where the crimes occurred. In theory, the existence of national staff working alongside internationals with expertise in adjudicating complex criminal trials could over time enhance the capacity of national courts. The proximity of the court to the site of the crimes could make the trials more accessible to victims and those in whose name the crimes were committed. However, the local component of these mechanisms also presents particular challenges. Security risks may be increased, local staff hired to work on these cases may be linked to past abuses, thereby re-traumatizing victims and witnesses, and national staff may be subject to political interference or lack the expertise to ensure that cases are tried fairly and effectively.

The work of the hybrid mechanisms in East Timor and Kosovo up to this point has been far from ideal. Representing “justice on the cheap”, they have been seriously underfunded by the international community. In both situations, cases have progressed slowly and the administration of justice has suffered from a range of problems including: lack of qualified staff to investigate, prosecute, and adjudicate cases; arbitrary or lengthy pre-trial detention and ineffective defense counsel; lack of effective translation services and support staff; and allegations of political interference or intimidation.

As the Special Court for Sierra Leone has yet to begin trials, it is too soon to evalu-

ate its success as an accountability model. However, it appears so far to be operating efficiently.

In establishing the Yugoslav and Rwandan tribunals, the international community faced specific challenges that resulted from their *sui generis* nature. The only models from which they had to work were the Nuremberg and Tokyo tribunals, courts conducted by the victors of World War II, fifty years ago, and in which trials and sentences were quickly carried out. While not absent, fair trial safeguards in these prosecutions would probably not pass muster under today's standards. Most strikingly, there was no right to appeal. The establishment of the Yugoslav and Rwandan tribunals thus occurred without any pre-existing adequate model and high start-up costs could have been expected.

Objective institutional problems have also been aggravated by a tendency to misunderstand the immediate impact of the Nuremberg trials. The short-term effect of Nuremberg has, unfortunately, been inflated over the years. At the time the trials were conducted, they were enormously controversial among Germans. While illuminating to the international audience, the German people initially dismissed the proceedings as political show trials. The International Military Tribunal (IMT) that conducted the Nuremberg trials did not significantly enable Germans to come to grips with the horrific crimes that were committed by the Nazi government. This reckoning only occurred decades later when a new generation began to ask questions about individual responsibility during the Third Reich. At that time, the IMT's record provided an invaluable and incontrovertible reference point of past crimes. Nevertheless, conventional wisdom about the Nuremberg trials is that they quickly enabled the population of Germany to confront what had happened under the Nazi Party. This idealized view has led to unrealistic expectations for war crimes trials. We need to better calibrate our expectations given the experience of the last half a century.

The international community, moreover, is only beginning to reap the benefits of its

investment in the Yugoslav and Rwandan tribunals. It has drawn on the lessons of the two tribunals in establishing the ICC and hybrid mechanisms, and can also be expected to benefit from this experience in structuring future justice mechanisms.

Learning from Experience

National courts are not about to become uniformly capable or willing to bring justice for atrocities in the immediate future. This is particularly true in post-conflict situations where justice systems have been either partially or completely destroyed. As a result, international justice will remain a crucial last resort that must continue to be fortified against efforts to undermine it.

The achievements and failings of the ICTY & ICTR need to be thoroughly assessed. While it may be unrealistic to expect that full-scale ad hoc international tribunals will be created in the current environment, the lessons of these tribunals can help inform other efforts, including the development of hybrid justice mechanisms. Similarly, the record of existing hybrid mechanisms must be evaluated so that the benefits of national participation can be fully realized while better achieving fair and effective trials. The effects of differences between existing hybrid courts, including the extent to which they operate more as national courts (the Regulation 64 Panels in Kosovo) or as international courts (the Special Court for Sierra Leone) should receive particular scrutiny. Hybrid mechanisms should not be established simply because they are an inexpensive alternative if an international mechanism would be more appropriate.

In addition, we need to evaluate situations in which international mechanisms are rejected notwithstanding serious concerns about national capacity and willingness to pursue justice, as in Indonesia for crimes in East Timor and as is likely to be the case in Iraq. The consequences of failing to address impunity at all, as appears likely in Afghanistan, must also be documented. Such efforts will help build support for international justice.

More countries should be encouraged to adopt and implement universal jurisdiction

laws. This could be accomplished as part of their adoption of ICC implementing legislation. Politicized use of universal jurisdiction against high-profile figures, however, will only weaken the credibility of international justice efforts and should be avoided. In general, prosecutors and investigating judges should initiate cases against lower-rank defendants found on their territories. This will allow the jurisprudence and practice to be built from the bottom up. This could lead over time to the successful application of extra-territorial jurisdiction against more prominent figures. However, where a strong legal basis exists, cases against more prominent figures must also be pursued.

The United Nations must play a more central and systematic role in post-conflict situations. Although the UN has often been pivotal in forging the international response to serious human rights crimes in such settings, the "justice gap" in countries such as Liberia, the Democratic Republic of Congo, and Côte d'Ivoire underscores the need for more systematic UN efforts. Over the last decade, the Security Council, the secretary-general, and the General Assembly have convened several commissions of experts to assess evidence of serious human rights crimes and recommend appropriate mechanisms. Such commissions were created for the former Yugoslavia, Rwanda, East Timor, and Cambodia. The UN Secretariat should create a permanent post or entity charged with analyzing the work of such commissions, identifying successes and failures, and advising future commissions. Creation of such commissions should become a regular part of the Security Council's response to post-conflict situations.

Taking Strategic Steps Forward

The ICC will only realize its potential with the concerted assistance of states, intergovernmental organizations, and NGOs. States parties need to strengthen and defend the integrity of the ICC statute. They should find ways to diffuse attacks on the court by the Bush administration, and continue to provide additional financial and diplomatic support for the court. States parties must also adopt strong legislation imple-

menting the provisions of the Rome Statute into national law.

There likely will be intense scrutiny of the ICC's performance in the first cases it adjudicates. It will be difficult work to do well and there will be shortcomings. However, the ICC should make every effort to conduct the most fair, impartial, effective, and efficient trials possible so that the court gains legitimacy and credibility.

Even if the ICC achieves its full potential, it realistically will not be able to address all situations in which national courts are unwilling or unable to prosecute perpetrators. Among other factors, there are temporal and other jurisdictional limitations on what cases the ICC can hear. The ICC's jurisdiction is also restricted to cases in which the state where the crimes occurred is a party to the Rome Statute, the state of the nationality of the accused is a party to the Rome Statute, or the Security Council refers the situation. Even where these requirements are satisfied, the ICC will be able to prosecute only a small percentage of the highest-level alleged perpetrators. Cases of mid-level perpetrators and cases where there are numerous perpetrators bearing significant responsibility, as in many post-conflict situations, are unlikely to be fully addressed by the ICC.

In light of the constraints on the ICC and other international justice mechanisms, efforts to strengthen weak but politically willing national courts are all the more important. The ICC's operations must leverage the complementarity provisions of the Rome Statute to create a synergy between its work and prosecutions for serious human rights crimes by national courts. The ICC should strive to focus international attention on situations where serious human rights have occurred, both where it is

pursuing cases and not pursuing cases. Where it is pursuing cases, such attention could help garner support to enhance the capacity of national courts to prosecute mid-level and lower-level perpetrators effectively and in accordance with fair trial standards. Where it is unable to pursue cases involving serious crimes due to jurisdictional limitations or some other obstacle, such attention could help garner support to enhance the capacity of national courts to prosecute the highest-level perpetrators. This will maximize the ICC's catalytic effect on international support for fair and effective prosecutions at the national level.

Hybrid mechanisms, universal jurisdiction, and other solutions will be essential to fill justice gaps where the ICC and national courts are unable to address serious crimes. The international community should apply the lessons learned from existing hybrid mechanisms to develop new models that are able to bring justice more fairly, effectively, and efficiently. Universal jurisdiction should be applied where appropriate.

The work of the ICTY and ICTR should effectively draw on the lessons of experience to date to complete their work. Given the emphasis the Security Council has placed on a completion strategy for these tribunals to cease operations by 2010, states and intergovernmental organizations should work assiduously to arrest key suspects and prosecute them. The tribunals should continue to amend their rules and improve courtroom management to increase efficiency and effectiveness. Some cases are likely to be referred back to the national courts of the former Yugoslavia and Rwanda as part of the completion strategy. The lessons of the tribunals should be used to increase the capacity of the national

courts to adjudicate these cases fairly and effectively by conditioning referral on national courts' compliance with international fair trial and human rights standards.

Conclusion

The development of a system of international justice to limit impunity for serious human rights crimes has struck at outmoded notions of national sovereignty and the absolute prerogative of states. It would have been unrealistic to expect that progress would occur in a straight line. To address today's more difficult environment, recent achievements must be secured and the system must be refined so that perpetrators of the most serious crimes are increasingly held to account.

“Killing innocents to save innocents is an unacceptable moral choice.

In a world in which the pre-emptive use of force must be countenanced it is imperative to develop alternatives to that choice. One of those alternatives should be to identify the individuals responsible for endangering their people and the world and bring them to justice. . . . [S]urely such a use of force, collectively sanctioned [by the Security Council], is both morally and legally more acceptable than the killing of hundreds or thousands of civilians whose only crime is to be ruled by a tyrant.”

-**Anne-Marie Slaughter**, dean of Princeton's Woodrow Wilson School of Public and International Affairs, “Pre-emptive justice”, *International Herald Tribune*, 20 November 2003

African Refugee Lands Job with UN Court

Diana Bellettieri

Originally published
30 October 2004.
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When junior officers in the Sierra Leone army overthrew the elected government in May 1997, Gloria Atiba-Davies was at the top of the junta's revenge list.

A year earlier, Atiba-Davies had prosecuted the junta's leader, Maj. Johnny Paul Koroma, for leading an earlier coup attempt. After he came to power, Koroma attempted to kidnap Atiba-Davies three times before reducing her house in Freetown, the capital, to ashes. Luckily, Atiba-Davies had already fled the country.

"I'm just thankful that I got out at the time I did," said Atiba-Davies, 49, from her home in Yonkers. "I have absolutely no doubt in my mind that I would have been gone a long time ago. That's what used to bring tears to my eyes. Just the thought of what they would have done to me."

It's been more than seven years since Atiba-Davies strolled through the mountains and relaxed on the warm beaches of her beloved Sierra Leone. She said her anger for being forced into exile has been transformed into a longing for justice.

To that end, Atiba-Davies leaves Yonkers today for the Netherlands, where she will perform criminal investigations for the International Criminal Court in The Hague. She will primarily handle cases from Uganda.

The ICC was established in 1998 by the United Nations to ensure that the worst international crimes, such as genocide, did not go unpunished. The court does not replace national courts, and will prosecute cases only if a state is unwilling or unable to do so itself. Ninety-seven countries have joined the ICC, 27 in Africa.

Born and raised in the port city of Freetown, Atiba-Davies was taught to value education from an early age. She attended Christian missionary schools through high school, then traveled to the University of London to receive her bachelor of law degree at the age of 21. She returned to Freetown two weeks after passing England's bar examination in 1981. Atiba-Davies quickly excelled as a criminal prosecutor. By 1997, she headed Sierra Leone's Department of Public Prosecution and was named principal state counsel, the highest rank for a civil servant. It was in this high-profile position that Atiba-Davies prosecuted Koroma and eight other military officers for treason beginning in 1996. The case, however, was never completed.

On May 25, 1997, the Armed Forces Revolutionary Council joined with the Revolutionary United Front to topple the government of President Ahmad Tejan Kabbah and open the central prison. All nine military officers on trial rose to positions of power. Atiba-Davies was officially wanted by the state. Fatefully, she had traveled to Sweden to represent her country at a law conference five days before the coup.

"I have never been back to Sierra Leone since I left with one piece of luggage in May of '97," she said. "It was never my intention to leave."

Atiba-Davies' entire life remained in Freetown, including her two sons. Only 12 and 11 years old during the coup, the boys fled with a family friend to Guinea, Sierra Leone's northern neighbor. They then traveled farther north to The Gambia, where a former Sierra Leonean judge had opened her home to refugees. The boys lived in this cramped but safe shelter with more than 40 other refugees for 18 months.

During that time, Atiba-Davies filed for asylum in England. Through the process, Atiba-Davies was introduced to officers from England's Ministry of Defense. They were interested in what she knew about the Armed Forces Revolutionary Council, and at one point surprised Atiba-Davies in the West Ferry eatery where she worked with giant maps of Sierra Leone and Freetown. They asked her to identify locations that were safe to land ships and aircraft. About two weeks later, in February 1998, Britain assisted the Nigerian-led Economic Community of West African States Cease-Fire Monitoring Group with military operations to remove the AFRC government and reinstate Kabbah. "It was the right thing to do," Atiba-Davies said. "They had to get those rebels out of there."

By January 1999, however, the rebels again attacked and captured Freetown. They are accused of recruiting child fighters, keeping girls as sex slaves and mutilating civilians. The Central Intelligence Agency estimates that tens of thousands were killed and more than 2 million displaced during the fighting from 1991 to 2002. This was more than a third of the population.

"This of course had incredibly destabilizing and long-term effects on family and

social structures," said John Metzler, professor of African studies at Michigan State University. "People's livelihoods were turned upside down."

Distraught from watching her country crumble under the strains of constant violence, Atiba-Davies returned to Africa in February 1999. She pulled her passport from asylum consideration in England and flew to The Gambia, where she and her boys began a new life. All she could do was laugh as she described the joy of being reunited with her sons. "You just couldn't imagine," she said.

In 2000, Lutheran Family and Community Services in the United States began a refugee and immigration program for Sierra Leoneans with relatives in America. Atiba-Davies had several relatives in America, including her mother, sister and daughter. After interviews and background checks, Atiba-Davies and her sons received refugee status in the United States. They moved to Yonkers and have lived there since.

During the next four years, Atiba-Davies struggled to support her family. She considered taking the New York bar examination, but proof of her law degree had been burned with her house in Freetown, and

her university had destroyed all transcripts prior to 1990 when it transferred records to computers. That meant she would have to repeat law school, which was out of the question. After drifting through various administrative jobs, she decided she would become a paralegal.

Destiny, however, held a different path for Atiba-Davies. She was offered the position at the ICC last month. The job involves preparing evidence, gathering witnesses and reviewing testimony.

"I'm very proud of Gloria," said Amela Muftarevic, Atiba-Davies' case manager at Lutheran Family and Community Services in Manhattan. "I know that she will not be helping just one person; many people will benefit from the work she will do."

Atiba-Davies said she hopes her work will foster peace.

"I hope that this court will be a deterrence for warlords and heads of states who think they can do anything with impunity," she said. "If it's a deterrence, I can see the world becoming a more peaceful place."

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Juvenile Justice and Child Soldiering: Trends, Dilemmas, Challenges

Christina Clark

"We must not close our eyes to the fact that child soldiers are both victims and perpetrators. They sometimes carry out the most barbaric acts of violence. But no matter what the child is guilty of, the main responsibility lies with us, the adults. There is simply no excuse, no acceptable argument for arming children."

Archbishop Desmond Tutu¹

I. INTRODUCTION

Accountability issues related to child soldiering present challenges to child protection and reconciliation of war-torn communities. Impunity for child recruiters fuels the use of child soldiers, in violation of international law. Moreover, in the absence of appropri-

ate judicial and reconciliation processes for child soldiers accused of crimes, these children often are denied their rights, suffer psychosocial effects and/or face challenges as they attempt to reintegrate into communities. This paper is intended as a first step in promoting increased awareness and understanding of criminal justice and accountability issues facing child soldiers, and proposals for possible approaches to ensure appropriate juvenile justice processes.

The following discussion uses the broad definition of child soldiers offered in the Cape Town Principles and Best Practices (1997): “any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and those accompanying such groups, other than purely as family members. It includes girls recruited for sexual purposes and forced marriage. It does not, therefore, only refer to a child who is carrying or has carried arms.”² In this approach the determining factor is the definition of the child — namely any person under 18 years of age, in accordance with the Convention on the Rights of the Child. Within the age limit, the role parameters of the Cape Town definition is purposefully broad; by not excluding non-combatants of any kind, it aims to ensure that demobilisation and rehabilitation processes do not exclude any children who are attached to, or members of, armed forces or groups.

Similarly, this paper broadly defines juvenile justice, going beyond the narrow understanding of the treatment of girls and boys under the age of 18 in conflict with the law, to a wider analysis of why children face these situations in the first place. In other words, the definition will include the protection of children accused of crimes as well as prevention of such behaviour.³ This more expansive view of juvenile justice is particularly important in the context of child soldiering, as growing international consensus points to the illegality and immorality of recruiting and using children as soldiers.

II. LEGAL STANDARDS

International law prohibiting child recruitment

The prohibition on all recruitment of children under the age of 15 into both armed forces and armed groups has by now acquired a customary international law status.⁴ It is therefore binding on all armed forces and armed groups regardless of whether the State is a party to specific international treaties, or even if there is no State. The Rome Statute of the International Criminal Court (ICC) defines the recruitment and use in hostilities of children under the age of 15 by any armed force or armed group, in both international and non-international armed conflicts, as a war crime (Art. 8(2)(b)(xxvi) & (e)(vii)).

There is increasing international consensus on the prohibition of conscription or forced recruitment of children under 18. This higher standard is embodied in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OP-CRC-CAC), International Labour Organisation Convention 182, and the African Charter on the Rights and Welfare of the Child.

Criminal law relating to child soldiers⁵

International law has not yet directly addressed the issue of whether child soldiers should face prosecution for crimes. The OP-CRC-CAC contains no specific provisions on whether child soldiers should be prosecuted, nor on what is an appropriate age of criminal responsibility. The ICC does not have jurisdiction to prosecute persons below the age of 18 (Article 26).

To date, no minor has been brought before the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, although their Statutes do not preclude this possibility. The Statute of the Special Court in Sierra Leone has specified that accused persons who were between the ages of 15 and 18 at the time of commission of crimes may be prosecuted. However, the Prosecutor has publicly stated on numerous occasions that he will not prosecute under-18s.⁶

In the absence of international precedent and clear legal directives, the discussion of accountability for child soldiers accused of crimes centers around two main issues: i) whether child soldiers should be excluded from criminal responsibility due to lack of mental and moral development, the effects of drugs and alcohol, and/or situations of duress; ii) the extent to which criminal liability should be attributed exclusively to commanders under the doctrine of superior orders.⁷

Criminal responsibility

Criminal law generally states that to be held responsible for a crime, especially for serious offences, there must be proof of intent to commit the crime, and awareness of the possible consequences of the act.

Age is a factor in criminal responsibility since only those who are old enough to understand and appreciate the significance of their behaviour may be held accountable. However, international law does not specify an age below which children cannot incur criminal responsibility for their acts. The CRC recommends the age of eighteen, but only binds State Parties to establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law” (Article 40(3)(a)).

Intoxication has also been identified as a state that may exclude criminal responsibility, under certain circumstances.⁸ This defence applies in those cases where intoxication was involuntary, and destroys the person’s capacity to appreciate the unlawfulness of the acts, or to control his/her conduct. These conditions may apply to child soldiers who are plied with drugs and alcohol to make them fearless in battle.

Criminal responsibility may also be excluded in cases where an alleged crime is deemed to have been caused by duress resulting from a threat of death or imminent serious bodily harm.⁹ Due to the nature of the conflicts in which child soldiers are most often used, it will be clear in many cases that children were not acting voluntarily, and therefore may not be criminally responsible. In cases where they were

threatened or coerced into committing acts, they might be able to assert a defence of duress, or have duress taken into account in mitigation of punishment.¹⁰

Superior orders and prescription of law

Another question related to the level of responsibility for child soldiers accused of crimes is the degree to which they are individually culpable, or whether liability should be attributed to those who gave the commands. Normally, the fact that a crime has been committed pursuant to an order of a government or superior will not relieve that person of criminal responsibility unless: the person was under a legal obligation to obey orders, the person did not know that the order was unlawful, and the order was not manifestly unlawful.¹¹

In cases where child soldiers have been indoctrinated to carry out orders without question, these conditions may hold. However, there may be situations in which the person who controls the child soldiers is a child soldier him/herself. These child commanders may commit atrocities willingly and without coercion, and/or force other children to commit such acts.

International standards for juvenile justice

The discussion above seems to indicate that only under certain circumstances will child soldiers be held criminally responsible for crimes committed while serving in armed forces and groups. For those who are held accountable under international or national law, international standards of juvenile justice apply.

The three key international instruments of juvenile justice are the UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules)¹², the UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 (JDL)¹³, and the Convention on the Rights of the Child 1989 (CRC). The main protections afforded by these juvenile justice standards include:

* Due process: Children have the right to benefit from a fair trial (Article 40(2) of the CRC);

* Privacy: Prosecution of children must take place in private (CRC, Article 40(2)(vii));

* Appropriate setting: States should, “whenever appropriate or desirable”, seek measures without resorting to judicial proceedings (CRC, Article 40(3));

* Participation: At every stage in which children come into contact with the juvenile justice system, space should be created for expression of their opinion (CRC, Articles 12 and 40);

* Deprivation of liberty: Children should only be incarcerated as a last resort and for the shortest possible time, and separated from adults (CRC, Article 37);

* Corporal punishment: Children should not be subject to “torture or cruel, inhuman or degrading treatment or punishment”¹⁴; the death penalty is also prohibited¹⁵;

* “Best interests of the child”: Although this principle is not defined, it is a key consideration that guides the interpretation of juvenile justice standards.¹⁶

These standards ensure that children are not only accorded the same protections as adults (such as a fair trial), but also benefit from additional protections in accordance with their level of development (such as incarceration as a last resort and shortest possible time, separately from adults).

III. PROSECUTION AND RECONCILIATION

National justice processes for child soldiers accused of crimes

Unfortunately, international juvenile justice standards are not always applied in practice. With respect to child soldiers, particular concerns should be raised regarding military law, special legislation, captured or demobilised child soldiers and post-conflict situations.¹⁷

Military law

Children recruited into armed forces or attending schools run by, or under the control of, the armed forces are often subject

to military law, punishment and discipline. In many cases, provisions of military law, and the applicable procedures, penalties and safeguards for children are not always reviewed to ensure their compatibility with juvenile justice standards. Issues of concern include the nature of trial procedures, the safeguards applicable to juveniles, and the nature of punishment, including the death penalty. In the Democratic Republic of Congo, for example, child soldiers have faced closed & unfair trials, with no legal representation and harsh punishments.¹⁸

Special legislation

In the face of international disturbances, internal strife, or internal armed conflict, governments often introduce or activate special legislation (such as emergency legislation, national security or state security laws, martial law, counter-terrorism legislation) designed to provide greater powers to the police or security forces. In such circumstances, states tend to lower the age of criminal responsibility; therefore, particular attention should be focused on ensuring protection of child suspects under such laws. In India, for example, boys and girls suspected of being supporters or future members of armed groups have been subjected to emergency measures, resulting in “disappearances”, arbitrary detention, torture and summary killings.¹⁹ In September 2000, the UN Committee on the Rights of the Child recommended that all states “review emergency and/or national legislation to ensure that it provides appropriate safeguards to protect the rights of children and prevent violence against them”.²⁰

Captured or demobilised child soldiers

Under international humanitarian law, children captured in an international armed conflict have prisoner of war status and should be given privileged treatment.²¹ Children captured in internal armed conflicts do not benefit from prisoner of war status, but are still protected by Article 3 of the Geneva Conventions and Article 4(3) of Protocol II.²²

However, in situations of ongoing conflict, captured or demobilised child soldiers of-

ten are viewed as the “enemy”, treated with severity, and denied their rights. In Colombia, for example, child soldiers from the Revolutionary Armed Forces of Colombia (FARC) have, in the past, been incorporated into the government armed forces, detained in military institutions, or held as criminals in juvenile offenders’ homes, where they face serious risk.²³

Post-conflict

In many war-torn societies, fundamental judicial weaknesses may hinder implementation of juvenile justice standards, even where domestic legislation has been passed to reflect international commitments. For example, in Rwanda, thousands of children suspected of participation in the 1994 genocide were kept in detention for years, awaiting the administration of justice.²⁴ Some of these children were under the age of 14 (the minimum age of criminal responsibility under national law) when the alleged crimes took place. Most were incarcerated with adults in terrible conditions.

The many ways in which child soldiers are denied juvenile justice protections demonstrate that more must be done to ensure implementation of international standards into domestic legislation and practice, including the prevention of child recruitment in the first place.

Child Soldiers and Societal Reconciliation

In addition to formal judicial proceedings at international and national levels, child soldiers may also be involved in parallel semi-formal or informal processes intended to bring societal reconciliation. These include truth and reconciliation commissions, traditional justice mechanisms, and cleansing ceremonies. Such processes recognise the collective nature of trauma and guilt carried by communities of which child soldiers are a part.²⁵ Formal and informal processes should not be viewed as mutually exclusive; rather, a holistic approach must be taken to recognize children’s participation in conflict and promote their positive roles in peace-building and reconciliation.

Since demobilisation, demilitarisation and reintegration (DDR) programmes often serve as a transitional point between child soldiers and their communities, they can be instrumental in promoting an integrated approach to justice and reconciliation. Child protection agencies working with demobilised child soldiers may monitor and promote action by communities and authorities in accordance with juvenile justice standards. They also provide skills and psychosocial support, which can facilitate reintegration and reconciliation.

IV RECOMMENDATIONS

As Graça Machel noted in her 1996 study, juvenile justice for former child soldiers involves “the complexity of balancing culpability, a community’s sense of justice and the best interests of the child”.²⁶ From the above discussion, the following general recommendations may be drawn:

Greater effort should be focused on prevention of child soldiering

Ending a culture of impunity for those who commit crimes against children depends on ensuring that the gravity of their acts is given adequate attention. Concerted data collection and joint advocacy can help to expose violations of international law and bring to account those who are responsible for illegal recruitment and use of child soldiers.

Child soldiers should be viewed primarily as victims of armed conflict

It is a violation of international law to recruit children under the age of 15. This means that the primary responsibility for the use of children as soldiers lies with the adults who recruit them. Children must not be prosecuted simply for participation in armed conflict. Child soldiers who are captured, are demobilised, or surrender should be treated in accordance with international humanitarian law.

In cases where it is in the interests of justice and the child to prosecute child soldiers, international juvenile justice standards must be respected

Criminal processes should be adapted to the needs and level of understanding of children. Children should be held in detention as a last resort, and for the shortest possible time. They must be detained in appropriate conditions, away from adult prisoners and segregated by sex. No child should ever be sentenced to the death penalty, corporal punishment or any other cruel, inhuman or degrading treatment.

Efforts should be made to ensure meaningful and appropriate child participation in justice and reconciliation processes

This requires careful reflection on the ways in which children have been involved in, and impacted by, conflict. The best interest of the child should be the guiding principle in discussions on the participation of children in formal and informal judicial processes. Innovative solutions may be required to encourage participation, while minimising risks of security and community stigmatisation. Participation should be accompanied by psychosocial support.

Efforts to reintegrate children into communities should take into account juvenile justice and reconciliation processes, both formal and traditional, underway

Child protection agencies implementing DDR programmes must be aware of international standards of juvenile justice and seek to promote these in communities where child soldiers will be reintegrated. This may involve public education for communities and psychosocial healing for child soldiers coming to terms with issues of guilt and accountability. A holistic approach integrating different levels of accountability and reconciliation should be promoted.

Child soldiers often are caught in a cycle of human rights abuse, in which they may be both victims and perpetrators. Illegally recruited, denied their rights, and often obliged to commit abuses, child soldiers must have access to appropriate mechanisms for coming to terms with their experiences. Justice in such circumstances must encompass prosecution of those who recruit and use child soldiers, accountabil-

ity for those who failed to prevent such practices, recognition of the guilt and accountability that child soldiers carry, and reconciliation within communities.

NOTES:

¹ Quoted in Youth Advocate Program International, "Child Soldiers: Youth who Participate in Armed Conflict", 1999.

² The definition of 'soldier' should not be equated with the term 'combatant'. The latter is more specifically used in international humanitarian law, often in contrast to 'civilians' who have different rights to protection during armed conflicts. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict does not specifically define 'child soldiers'; rather, it establishes the parameters within which children — defined as any one under the age of 18 — can or can not be used in government or non-state armed forces.

³ See Partnership for Global Good Practice, "International Standards for the Administration of Juvenile Justice and Examples of Good Practice", February 2002.

⁴ See, for example, Draft Statute of the Special Court for Sierra Leone, Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 17.

⁵ This section draws substantially from David Spivack, *Child soldiers accused of atrocities: Ensuring transitional juvenile justice*, unpublished MA thesis, King's College, University of London, 2002.

⁶ See: Special Court for Sierra Leone Press Releases, December 2002.

⁷ For an extensive legal discussion, see: Matthew Happold, "Excluding Children from Refugee Status: Child Soldiers and Article 1F of the Refugee Convention," *American University International Law Review*, Vol. 17 No. 6.

⁸ See Article 31, para 1(b), Rome Statute of the ICC.

⁹ See Article 31, para 1(d), Rome Statute of the ICC.

¹⁰ Amnesty International, "Child Soldiers: Criminals or victims?", December 2000. AI Index: IOR 50/02/00.

¹¹ See Article 33, para 1, Rome Statute of the ICC.

¹² UN Resolution 40/33 (1985).

¹³ UN Resolution 45/113 (1990).

¹⁴ CRC, Article 37 (a); Article 3, common to the four Geneva Conventions.

¹⁵ Article 68 paragraph 4, IVth Geneva Convention; Article 77 paragraph 5 Additional Protocol I, Article 6 paragraph 4, Additional Protocol II.

¹⁶ Article 3(1) of the CRC.

¹⁷ For a detailed discussion, see: Rachel Brett, "Juvenile Justice, Counter-terrorism and Children," *Disarmament Forum*, Vol. 3 (2002).

¹⁸ Child Soldiers Coalition, Action Appeal: Child Soldiers on Trial in the DRC, *Child Soldiers Newsletter*, Issue 3, March 2002; IRIN, "UN Rapporteur Concerned about Military Trial of 80", 5 September 2001.

¹⁹ Information obtained from Child Soldiers Coalition workshop in India, 2002.

²⁰ Committee on the Rights of the Child, *Report on the twenty-fifth session*, CRC/C/100 on 14 November 2000.

²¹ Third Geneva Convention, Article 4(a)(1); Protocol I, article 77(2)).

²² For an in-depth analysis of child prisoners of war, see: Maria Teresa Dutli, "Captured Child Combatants," *International Review of the Red Cross* no. 278 (October 1990), p. 421-434.

²³ See Child Soldiers Coalition, *1379 Report*, 41-42.

²⁴ It should be noted that some organisations working in the Rwandan context do not consider all children who

participated in the genocide as "child soldiers". Regardless of definitional debates, the experiences of young *genocidaires* are illustrative, given similarities in accountability issues for child soldiers participating in generalised violence.

²⁵ See, for example: Alcinda Honwana, "Stealing the Past, Facing the Future," *Accord: Mozambique*, 1999; Michael Wessels and Carlinda Monteiro, "Culture, Healing and post-conflict reconstruction: A community-based approach to assisting war-affected children."

²⁶ Graça Machel, *United Nations Study on the Impact of Armed Conflict on Children*, 1996.



UNICEF photo