

Imagine you Were a Judge of the Nuremberg Trials and you Were Sent to the ICC in 2020

Presentation for the Panel: Criminalization of War Crimes and Current International Humanitarian Law Approaches Drawn from the Nuremberg Principles

Conference: The Nuremberg Principles: The Contemporary Challenges

The premise of my presentation today is that the definition of war crimes in the Nuremberg Principles is a ‘mother’ definition, one that can lead to the criminalisation of further violations of international humanitarian law. After all, Principle VI(b) on war crimes starts with ‘[v]iolations of the laws or customs of war which include, but are not limited to’¹ and is followed by several examples of such crimes. In other words, to be war crimes, acts either fall explicitly in one of these listed categories or are similar enough to amount to war crimes. I believe that this list can adapt itself and easily embrace a new *Weltanschauung*. To demonstrate this, I pose a thought experiment.

Imagine being a judge at the Nuremberg trials. The war crimes you are judging relate mostly to the treatment of prisoners of war, the murder of civilians, the plunder of occupied territories, forced labour, human experimentation, deportation and so on. Now, imagine you are taking a travel machine and you arrive in 2020 and you are a judge at the International Criminal Court.² Unlike one of the previous speakers, Mr Benjamin Ferencz, you do not have the privilege to have seen the fantastic evolution of international criminal law. You also have your post-WWII *Weltanschauung*; you view the world and society in a certain way. The person in front of you to be tried is Dominic Ongwen. I know we have just talked about him in a previous panel but try to ignore that.

First, the man in front of you is from Uganda. You might be shocked though probably pleased to see that international criminal justice is now administered across the world and that the norms you have drafted are universally applied. After all, you are one of the inventors of the principle of individual criminal liability. Nowhere did you confine the application of the principle of individual criminal liability to the European continent or German nationals. No doubt, the Nuremberg trials did not look into the war crimes committed by the Allies despite the defendants attempting to use the *tu quoque* defence, but that does not mean that the principle of individual criminal liability was solely reserved for a particular set of individuals!

¹ Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950) Yearbook of the International Law Commission, Vol II, para 97, available at <http://www.nurembergacademy.org/fileadmin/media/pdf/The_Nuremberg_Principles_International_Law_Commission_7_1_1950.pdf>, 20 March 2023.

² Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), A/CONF.183/9.

Second, you look at the 2016 confirmation of charges against Ongwen³ and you are undoubtedly surprised.

You realise that the acts to be judged were committed in a non-international armed conflict. That is certainly new! Whilst war crimes perpetrated in a civil war had been prosecuted on the national level and the Lieber Code⁴ is a testament to the early codification of international humanitarian law in non-international armed conflict, the international community had never cast its eyes on crimes perpetrated in a non-international armed conflict. Yet, you should not be that surprised because Nuremberg was the beginning of the end of sovereignty as you knew it at the time. As the International Criminal Tribunal for the Former Yugoslavia⁵ reminded us in the 1995 Interlocutory Appeal on Jurisdiction '[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach'.⁶ That a person's dignity be attacked in an international or non-international armed conflict should not matter. You, the Nuremberg judge, would certainly agree with this statement.

Now, you look at the charges, and this will be the focus of my presentation, there is a long section of 20 pages called 'sexual and gender-based crimes', and another, shorter, one on 'conscripted and use in hostilities of children under the age of 15'. These are certainly not crimes you recognise but you would not feel uncomfortable with them because they fall within categories you are familiar with and, quite remarkably, the facts are not unknown to you.

Let us start with sexual and gender-based crimes. As a matter of fact, you, the Nuremberg judge would not be that surprised because both the French and Soviet prosecutors introduced evidence of rape at the Nuremberg trial.⁷ There was a great awareness of the sexual violence that Soviet, in fact Ukrainian, women had suffered at the hands of the German forces. Yet, the word rape does not occur a single time in the judgment. Crimes against women or crimes of a sexual nature were not deemed important and were often mischaracterised as private matters, unrelated to the armed conflict. You, the Nuremberg judge, would have to understand this change in mentality. Nowadays we understand that sexual violence in armed conflict is not a by-product of war, it is not anymore 'regarded as being no more than an inevitable consequence of war'.⁸ It is often 'a weapon of war'.⁹ The case of *Bemba* before the ICC illustrates the point. First, it acknowledged that sexual violence does not only affect women but also men. The ICC heard testimonies about men being raped, thereby emphasising that

³ ICC, *Situation in Uganda in the Case of the Prosecutor v Dominic Ongwen*, Decision on the Confirmation of Charges against Dominic Ongwen, Pre-Trial Chamber II, ICC-02/04-01/15, 23 March 2016.

⁴ General Orders No. 100: Instructions for the Government of the Armies of the United States in the Field (Lieber Code), 24 April 1863, available at <<https://ihl-databases.icrc.org/assets/treaties/110-IHL-L-Code-EN.pdf>>, 20 March 2023.

⁵ United Nations Security Council, Resolution 827 (1993), UN Doc S/RES/827 (1993), 25 May 1993; Statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) 1993, 32 ILM 1159 (1993), available at <https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>, 20 March 2023.

⁶ ICTY, *Prosecutor v Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, IT-94-1, 2 October 1995.

⁷ RJ Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34(3) *Case Western Reserve Journal of International Law* 277, 279.

⁸ *ibid* 279.

⁹ See background information in L Smith-Spark, 'How Did Rape Become a Weapon of War?', *BBC News*, 8 December 2004, available at <<http://news.bbc.co.uk/1/hi/4078677.stm>>, 20 March 2023.

sexual violence is a gender-neutral crime. The Court noted that such crimes were committed ‘without regard for age, gender or social status’.¹⁰ Second, the Court discussed in great depth the long-term effects of the rapes; not only did it mention the various psychological and physical consequences of these crimes but also the social impact and legacy they had.¹¹ And third, the Court set out the various reasons why sexual violence is committed.¹² Clearly, the rapes were/are not a private matter.

You, the Nuremberg judge, would be even more surprised by the rich jurisprudence stemming from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Entire cases in fact focused on sexual violence. Remember the *Kunarac and others* case, known as the *Foca* trial,¹³ that dealt with Bosniak women kept in detention centres and repeatedly raped, some even sold. Various forms of sexual violence have been successfully prosecuted, ranging from forcing a woman to do gymnastics naked¹⁴ to sexual slavery. The ICC Statute specifically refers to ‘rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence’ as a grave breach of the Geneva Conventions¹⁵ or a serious violation of Common Article 3 to the Geneva Conventions¹⁶.

Sexual violence is now an established war crime. We have come a long way but not so much because the Nuremberg principles would not have allowed you, the Nuremberg judge, to prosecute such crimes but simply because at that time you, and the society, did not want to see these acts as international crimes. In other words, it was only your *Weltanschauung* and your lack of understanding of the crime, that prevented you, the Nuremberg judge, to condemn sexual violence.

The second charge, that of conscription and use in hostilities of children under the age of 15 years would surprise you, the Nuremberg judge. You are however not unfamiliar with the act. After all, there was a Waffen-SS division called ‘Hitlerjugend’ drawn from the youth organisation of the Nazi party composed of children aged 14 to 18. Later, as manpower was being depleted owing to military losses, 12-year-old Hitler Youth members were drafted into the ranks of this division. Yet, this act was never presented by the prosecution, notably because at the time recruiting and using children in an armed conflict was not a crime.

In fact, it took a long time to become one. It was not until the negotiations of the Additional Protocols to the Geneva Conventions in the mid-1970s that the phenomenon of child soldiers drew the attention of States. The ICRC had first-hand experience of seeing ‘the harrowing spectacle of boys, who have barely left childhood behind them, brandishing rifles and machine-guns and ready to shoot indiscriminately at anything that moves’, thus expressing that participation in hostilities ‘should come

¹⁰ ICC, *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo*, Decision on Sentence Pursuant to Article 76 of the Statute, Trial Chamber III, ICC-01/05-01/08, 21 June 2016, para 44.

¹¹ *Ibid* paras 36-39.

¹² *Ibid* para 47.

¹³ ICTY, *Prosecutor v Dragoljub Kunarac et al*, Judgment, Trial Chamber II, IT-96-23-T and IT-96-23/1-T, 22 February 2001.

¹⁴ ICTR, *Prosecutor v Jean-Paul Akayesu*, Judgment, Chamber I, ICTR-96-4-T, 2 September 1998, para 688.

¹⁵ Art 8(2)(b)(xxii) ICC Statute (n 5).

¹⁶ Art 8(2)(d)(vi) ICC Statute (n 5).

to an end.¹⁷ Yet, States were neither ready for a complete ban nor willing to undertake unconditional obligations.¹⁸ Whereas Additional Protocol II to the Geneva Conventions that pertains to non-international armed conflict bans the recruitment and participation of children in armed hostilities,¹⁹ Additional Protocol I technically allows for their participation in hostilities, provided it is not in direct form²⁰ and the official Commentary acknowledges that voluntary recruitment is not prohibited though the ICRC clearly disapproves of this weakness in terminology.²¹ Pressure mounted to change this. Disappointingly, the United Nations Convention on the Rights of the Child repeated language similar to the one used under the relevant IHL instruments.²²

Two key developments prompting a radical change in mainstream perceptions of child soldiering were, first, the emergence and the subsequent proliferation of so-called ‘new wars’ and, second, the ‘human-rightisation’ of the child soldier phenomenon. Most importantly, the first comprehensive report on the plight of children in armed conflict penned by Graça Machel²³ led to a discourse in which ‘child soldiering is an unambiguous violation of universal children’s rights.’²⁴ From then on, it was through international human rights law that the agenda against child soldiering was driven. The adoption of the Optional Protocol on the Involvement of Children in Armed Conflict²⁵ made some progress in that regard though it is not entirely satisfactory either.

Nevertheless, from an international criminal law perspective, we had to wait for the Special Court for Sierra Leone in the *Norman* case to ascertain that the prohibition of recruitment and use of children in active hostilities had become a crime entailing individual criminal liability from 1996 onwards.²⁶ Many cases followed. In fact, all cases dealt with by the Special Court for Sierra Leone included the charges of conscripting or enlisting children under the age of 15 or using them to participate actively in hostilities.²⁷ The Rome Statute was the first legal instrument to codify the crimes of recruiting and

¹⁷ Y Sandoz, C Swinarski and B Zimmermann (eds), *Commentary on the Additional Protocols to the Geneva Conventions* (ICRC 1987) para 3183.

¹⁸ *Ibid*, para 3184.

¹⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII) 1977, 1125 UNTS 609, Art 4.

²⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API) 1977, 1125 UNTS 3, Art 77.

²¹ Sandoz *et al* (n 17) para 3184.

²² United Nations General Assembly, Resolution 44/25: Convention on the Rights of the Child (UNCRC) (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, Article 38.

²³ G Machel, *Study of the Impact of Armed Conflict on Children*, UN Doc A/51/306, 26 August 1996.

²⁴ Ah Ah-Jung Lee, *Understanding and Addressing the Phenomenon of “Child Soldiers”: The Gap Between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People’s Military Recruitment*, Refugee Studies Centre, Working Paper Series No. 52, January 2009, 3.

²⁵ United Nations General Assembly, Resolution 54/263, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), UN Doc A/54/RES/263, 16 March 2001.

²⁶ SCSL, *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Appeals Chamber, SCSL-2004-14-AR72(E), 31 May 2004, para 53.

²⁷ SCSL, *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Judgment, Trial Chamber II, SCSL-2004-16-T, 20 June 2007; SCSL, *Prosecutor v Charles Ghankay Taylor*, Judgment, Trial Chamber II, SCSL-03-01-T, 18 May 2012; SCSL, *Prosecutor v Moinina Fofana and Allieu Kondewa*, Appeals Chamber, SCSL-04-14-A, 28 May 2008; SCSL, *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Judgement, Trial Chamber I, SCSL-04-15-T, 2 March 2009.

using children in hostilities.²⁸ It clearly spells out that recruitment and use are considered war crimes and the very first case dealt with by the ICC, that against Lubanga, was entirely focused on this crime.²⁹

Again, this is a crime that you, the Nuremberg judge, could have been prosecuted on the basis of the Nuremberg principles as ill-treatment. I grant you the caveat that it is not the ill-treatment of civilians in or of occupied territories but remember that the list in Principle VI(b) is illustrative ('but are not limited to') and so this crime could fall within the definition. There was no prosecution because you, the Nuremberg judge but also the society of the time, did not consider the recruitment and use of children in hostilities as problematic. Again, it was your *Weltanschauung* and your lack of understanding of the crime, that prevented you from condemning such acts.

There is no doubt that the way we look at the world has undoubtedly changed and so has our conception of war crimes. In his Dissenting Opinion in the *Norman* case Justice Robertson reminds us that 'international criminal law is reserved for the very worst abuses of power'³⁰ and not every breach of international humanitarian law is an offence under international criminal law. We need to demonstrate 'the consensus of the international community that they are so destructive of the dignity of humankind that individuals accused of committing them must be put on trial, if necessary in international courts.'³¹ Now the consensus is that sexual violence and the recruitment and use of children in hostilities are 'so destructive of the dignity of humankind' that they are crimes under international criminal law.

²⁸ SCSL, *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Appeals Chamber, Dissenting Opinion of Justice Robertson, SCSL-2004-14-AR72(E), 31 May 2004, para 38; See also I Topa, 'Prohibition of Child Soldiering – International Legislation and Prosecution of Perpetrators' (2007) 3(1) *Hanse Law Review* 105, 113.

²⁹ ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo*, Judgment, Trial Chamber, ICC-01/04-01/06, 14 March 2012.

³⁰ SCSL *Norman* Dissenting Opinion (n 28), para 33.

³¹ *Ibidem*.