

SEARCHING FOR THE ELUSIVE ‘DISCIPLINED LIMITS’ TO THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

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ABSTRACT

*Using as a case study the decision of the Special Court for Sierra Leone (“SCSL”) in Prosecutor v. Sam Hinga Norman¹ concerning the international criminality of the recruitment and use of child soldiers, this paper introduces and discusses some new questions to assist in establishing the “disciplined limits”² to the tense relationship between the progressive development of international criminal law and the international human right of an accused to be free from retrospective criminal prohibition, expressed in the legal maxim *nullum crimen sine lege*. The first question is, in assessing foreseeability of criminal punishment, what standard of review should be applied to the hypothetical lawyer advising the accused at the material time. This paper submits that a standard of perfection, as arguably applied by the SCSL in Prosecutor v. Norman, neither reflects generally accepted professional disciplinary standards nor the realities of the practice of law. The second question is the extent to which *ex post facto* legal authority may be relied on by a court to establish foreseeability without violating the requirement in international human rights law³ that criminal law be accessible to the accused at the material time. This paper critiques such reliance in Prosecutor v. Norman and the legal authority for⁴ and against.⁵ Finally, given that Norman was enlisted by the British Army in 1954 at the age of fourteen and that the recruitment and use of child soldiers were permitted with parental or guardian consent by the domestic law of Sierra Leone at the material time, there may be a reasonable possibility that Norman did not appreciate the “manifest criminality”⁶ of these acts. This possibility raises the questions of the standard of proof required to establish foreseeability and the relationship between *nullum crimen sine lege* and the defense of mistake of law.*

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¹(*Jurisdiction Child Recruitment*) SCSL-2004-12-AR72 (E)(31 May 2004)(“*Prosecutor v. Norman*”)

²*Prosecutor v. Hadzihasanovic, et al. (Jurisdiction)* IT-01-47-AR72, Partially Dissenting Opinion of Judge Shahabuddeen (16 July 2003) [9].

³E.g. *S.W. v. The United Kingdom (Judgment)*, European Court of Human Rights (application number 20166/92) (22 November 1995) [35].

⁴E.g. *Prosecutor v. Aleksovski (Appeals Judgment)* IT-95-14/1-A, ICTY Appeals Chamber (24 March 2000) [126]-[27], [135]; *Prosecutor v. Thomas Lubanga dyilo (Confirmation of Charges)* ICC-01/04-01/06, Pre-trial Ch I (29 January 2007) [311].

⁵E.g. K.S. Gallant *Principle of Legality in International and Comparative Criminal law* (Cambridge University Press New York 2009) 349.

⁶*Ibid* 366.