

**THE APPLICATION OF THE DEFENCE OF DURESS AND MENTAL INCAPACITY  
IN RELATION TO FORMER ADULT CHILD SOLDIERS: A CASE STUDY OF  
DOMINIC ONGWEN**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,  
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Submitted 31 January 2018


### Declaration

I, ASKA OKEYO AWENE, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:  .....

Date: 31.01.2018 .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:  .....

(Jerusha Asin Owino)

Table of Contents

ACKNOWLEDGEMENTS ..... iv

DEDICATION..... v

LIST OF ABBREVIATIONS ..... vi

LIST OF LEGAL INSTRUMENTS..... vii

LIST OF CASES ..... viii

ABSTRACT ..... ix

CHAPTER 1: INTRODUCTION ..... 1

    1.1 Background of the problem..... 1

    1.2 Statement of Problem ..... 2

    1.3 Purpose/aim of the study ..... 2

    1.4 Hypothesis..... 2

    1.5 Research Questions..... 3

    1.6 Justification of the Study ..... 3

    1.7 Scope of the Study..... 3

    1.8 Summary of overall results..... 3

    1.9 Summary of overall conclusions..... 4

    1.10 Chapter Summary ..... 4

        Chapter One ..... 4

        Chapter Two ..... 4

        Chapter Three..... 4

        Chapter Four ..... 5

        Chapter Five ..... 5

CHAPTER 2: THEORETICAL FRAMEWORK..... 6

    CONCLUSION..... 10

CHAPTER 3: THE DEFENCE OF DURESS AS IT RELATES TO FORMER CHILD SOLDIERS ..... 11

    3.1 AN ANALYSIS OF THE REQUIREMENTS OF DURESS IN RELATION TO ARTICLE 31 (1) (D) OF THE ROME STATUTE AND THE CASE OF *PROSECUTOR V ERDEMOVIC* ..... 12

        3.1.1 PROSECUTOR V EDERMOVIC ..... 12

3.2 PRECONDITIONS FOR DURESS.....	14
3.2.1 Trial and Appeals Chamber in the <i>Erdemovic Case</i> .....	14
3.2.2 Rome Statute .....	14
3.3 APPLICATION OF THE PRECONDITIONS OF DURESS IN RELATION TO FORMER CHILD SOLDIERS.....	15
3.3.1 The element of ‘presence of threat’ .....	15
3.3.2 The element of ‘no other means of escape’.....	18
3.3.3 The element of ‘Proportionality’ .....	19
3.3.4 The element of ‘Involuntariness of the conduct’ .....	20
3.4 CONCLUSION .....	20
3.5 THE DOMINIC ONGWEN CASE IN LIGHT OF THE PRECONDITIONS OF DURESS .....	20
3.5.1 Was the threat of death or of continuing or imminent serious bodily harm present? ...	21
3.5.2 Were the actions taken by Ongwen necessary and reasonable to avoid the threat? .....	21
3.5.3 Did Ongwen exercise some form of proportionality while under duress?.....	23
3.5.4 Was there an aspect of involuntariness in the actions?.....	24
CHAPTER 4: DEFENCE OF MENTAL ILLNESS .....	25
4.1 THE ROME STATUTE PROVISION FOR THE DEFENCE OF MENTAL ILLNESS ....	26
4.2 JURISPRUDENCE ON THE DEFENCE OF MENTAL ILLNESS.....	26
4.3 MENTAL ILLNESS AND CHILD SOLDIERS .....	28
4.3.1 CONCLUSION .....	29
5.1 Observations .....	30
5.2 Recommendations.....	32
BIBLIOGRAPHY.....	34
Books.....	34
Journal articles.....	34
Thesis .....	35
Institutional Author.....	35
Internet Sources.....	35

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## DEDICATION

To my father, Bildad Kisero, whose continuous support and provision has encouraged me to continue pursuing my dreams. My mother, Immaculate Marende, who has constantly instilled in me the importance of having my own. My sisters, Tuffy Kisero and Florence Lynn, whose love and support have been continuous and endless. To Flora Okonji, whose support made my four years in school seem much shorter and who has always reminded me that no dream is too big for me to achieve.

## LIST OF ABBREVIATIONS

ICC	International Criminal Court
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
LRA	Lord Resistance Army
UN	United Nations
UPDF	Uganda People's Defence Forces
USSF	United States Special Forces
UNGA	United Nations General Assembly
PTSD	Post-Traumatic Stress Disorder

**LIST OF LEGAL INSTRUMENTS**

UNGA, *Rome Statute of the international criminal court*, 2187 UNTS 3 [1 July 2002]

Statute of The International Criminal Tribunal For Former Yugoslavia, UN Secretary Council  
Resolution 116/1998 [1993]

## LIST OF CASES

*Prosecutor v Zejnil, Delalic, Zdravco Mucic, Hazim Delic and Esad Landzo*, IT-96-21-A, ICL 96(ICTY 2001).

*Prosecutor v Drazen Erdemovic*, ICTY, IT-96-22-Tbis [1996]

*Prosecutor v Dominic Ongwen*, ICC-02/04-01/15 [2016-].

*R v M'Naghten* [1843] 8 E.R. 718.

## ABSTRACT

Child soldiers tend to be viewed as either victims or perpetrators. Child soldiers are seen to be victims because of the forceful recruitment and the inhumane treatment that they endure under the hands of their recruiters. They are exposed to violence; with most of them being forced to participate or witness the violent acts while being abused, exploited, injured and some even killed.<sup>1</sup> The act of recruiting child soldiers and using them to actively perpetuate crimes is a crime under international criminal law.<sup>2</sup>

The view of child soldiers as perpetrators is based on the fact that they have inflicted harm against members of their community and that it becomes difficult to ignore the atrocities they committed based on their status as children. The question that then arises is which of the two views is more beneficial towards attaining justice and what then would be the most appropriate defence that a former adult child soldier such as Ongwen, whose case will be discussed in the subsequent chapters, can possibly raise as an accused in the ICC.

International Criminal Law requires that during the prosecution of an alleged perpetrator of war crimes and crimes against humanity, it is necessary that the prosecution proves the existence of *actus reus* (act) and *mens rea* (intent).<sup>3</sup> In relation to former child soldiers, the challenge does not arise in proving that the act was committed but it arises in proving whether there was any intent to carry out the prohibited act. In determining the existence of intent, it is important to examine the circumstances that surrounded the accused. This paper will argue that a former child soldier that is appearing as an accused at the International Criminal Court, can successfully plead the defence of duress and mental illness. To advance this argument, the paper will rely on decided cases of the ICTY and the studies of psychologists that will prove the correlation between the mental state of a person and their involvement in crime.

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<sup>1</sup> [https://www.unicef.org/protection/57929\\_58007.html](https://www.unicef.org/protection/57929_58007.html) accessed 20 December 2017.

<sup>2</sup> Article 8(e) (vii), *Rome Statute*, July 1998.

<sup>3</sup> Article 30, *Rome Statute*.

## CHAPTER 1: INTRODUCTION

### 1.1 Background of the problem

Over the years there has been an escalation in the recruitment of children into joining armies and to participate in the wars not only in African states but around the world. There are many ways through which the children join become associated with the armed groups. Some children are abducted and are put in violent set ups that are used as tools in indoctrinating them into being members of the group. According to the UN office of special representative of the Secretary General, other children join the armed groups in the hopes of escaping poverty.<sup>4</sup> Of the two groups, those that are forcefully recruited into the armed groups fall within two spectrums. They can either be viewed as victims, based on the violent indoctrination they underwent and their status as children at the time of abduction or can be viewed as perpetrators based on the atrocities that they committed while members of the armed groups.

In his opening statement at the trial of Lubanga<sup>5</sup>, Luis Moreno Ocampo a former prosecutor of the ICC, stated that the children who were recruited by Lubanga continue to suffer the consequences of what they endured as they could not forget what they had seen, personally gone through or were forced to do.<sup>6</sup> This statement in itself highlights the plight of child soldiers as victims of the armed groups. The problem that often arises is whether those child soldiers that become adults and are still part of the group, ought to be charged of the crimes they committed once they became adults given the background of their upbringing.

The case of Dominic Ongwen serves as a perfect case study on how to deal with such former child soldiers. Dominic Ongwen was abducted at the tender age of 9 years old and he grew up as a member of the Lord Resistance Army and at the time of his arrest he was a commander in

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<sup>4</sup><https://childrenandarmedconflict.un.org/> accessed 6 August 2017.

<sup>5</sup>Situation in the Democratic Republic of the Congo (The Prosecutor v. Thomas Lubanga Dyilo) ICC-01/04-01/06 on 23 January 2017.

<sup>6</sup>Gurd Tracey, *Summary from Thomas Lubanga at the International Criminal Court*, 6 January 2010 <https://www.ijmonitor.org/2010/01/and-heres-what-the-prosecutors-opening-statement-said/> accessed 23 January 2017.

the LRA.<sup>7</sup> Dominic Ongwen underwent a series of violent activities that affected him both physically and psychologically at his young age which turned him into the ruthless killer he became.<sup>8</sup> Dominic has argued before the Pre-Trial Chamber that most of the crimes he committed, were done under duress as he had no other choice but to commit the crime or face dire consequences from Kony the founder of the LRA.<sup>9</sup>

## **1.2 Statement of Problem**

The case of Dominic Ongwen has sparked an interest on how international criminal law should handle the cases of former adult child soldiers that are defendants before the court. The Rome Statute in its articles provides grounds for which a defendant has to satisfy so as not to be held criminally liable for acts they committed. One of the grounds is the defendant must prove that they were under duress at the time of the crime and that they suffered from mental illness which would prevent them from understanding the nature of the crime and its consequences.<sup>10</sup>

The question then becomes whether a former adult child soldier can plead either or both of the defences successfully under international criminal law. Will they be able to the requirements as provided for in the Rome Statute in their defence?

## **1.3 Purpose/aim of the study**

This research paper intends on taking an in-depth look into the defence of duress and mental illness under article 31 of the Rome Statute. The paper will provide a well thought and reasoned out discussions that will dissect the defence of duress and mental illness and its applicability to former adult child soldiers.

## **1.4 Hypothesis**

- (i) Former adult child soldiers should be excluded from criminal liability if they successfully prove that they were under duress and that they had a mental illness that affected their ability to understand the consequences of their action.

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<sup>7</sup> Kersten Mark, *The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander*, 12 April 2016 <https://justiceinconflict.org/2016/04/12/the-life-and-times-of-dominic-ongwen-child-soldier-and-lra-commander/> accessed 6 August 2017

<sup>8</sup> Kersten Mark, 'The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander'.

<sup>9</sup> Kersten Mark, 'The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander'.

<sup>10</sup> Article 31, *Rome Statute*.

- (ii) International Criminal Law has failed to provide a balance in achieving justice for the victims of rebel groups, sometimes failing to recognize that the former child soldiers are also victims.

### **1.5 Research Questions**

This research will attempt to answer:-

- i. Whether former adult child soldiers can successfully rely on the defence of duress.
- ii. Whether having a senior position in an armed group means that one cannot be under duress.
- iii. What is the relation between the social environment/psychology of a child and the outcome of who they become as adults?
- iv. What factors must exist for a person to claim to be under duress?
- v. What factors must exist for a person to claim they lack the mental capacity to make decision on their actions or understand the outcome of their actions?

### **1.6 Justification of the Study**

This study is important as it explores the defences that can be relied on by a former adult child soldier being prosecuted at the ICC. It aims at addressing the issue on how to balance the role of the defendant as a victim and perpetrator while at the same time finding ways of ensuring that justice is attained for all victims. This paper recognizes the impact that the social environment has on the psychological development of a person and it will provide evidence that will show there exists a psychological difference between those that have been exposed to a normal social environment versus those that grew up in a hostile environment.

### **1.7 Scope of the Study**

This study will focus on Article 31 of the Rome Statute particularly on the defence of duress and mental illness as provided for in the Article. The study will rely on the opinions of the Judges in the *Erdemovic*<sup>11</sup> and *Celebici*<sup>12</sup> case to advance its arguments on the application of the defences.

### **1.8 Summary of overall results**

The preconditions that have been set out in the Rome Statute and the dissenting opinion of Justice Cassese in the *Erdemovic* case can easily be applied to former adult child soldiers and

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<sup>11</sup> *Prosecutor v Drazen Erdemovic*, ICTY No. 1T-96-22-A (1998).

<sup>12</sup> *Prosecutor v Zdravko Mucic, Hazim Delic, Zejnil Delalic*, ICTY No. IT-96-21-T (1998).

that duress is not just a defence that is applicable to ‘minor’ members in the armed groups but it is applicable to all members of an armed group. This paper will prove that mental illness is an issue that cannot be dealt with in unfriendly hostile environments and that one does not stop suffering from mental illness by merely attaining the age of majority.

### **1.9 Summary of overall conclusions**

Based on the research conducted, the paper will conclude that the trial of Former Adult Child Soldier is a unique situation that the ICC finds itself in especially in the case of Dominic Ongwen. It is essential that the ICC recognizes the status of such an accused person so as to ensure the attainment of justice for all. The defence of duress and mental illness are more than sufficient to create proper defences for the accused and that the real perpetrators are the recruiters of the children. It is because of such recruitment that the children are still mentally and emotionally scarred turning them into unfeeling humans that do not know how to live or exist in a normal environment.<sup>13</sup>

### **1.10 Chapter Summary**

The study will consist of five chapter with each addressing particular areas of the study that will present an aesthetic flow of arguments in the following manner:-

#### **Chapter One**

This chapter will contain an introduction to the paper.

#### **Chapter Two**

This chapter will look into the theories that advance the idea that adults are a product of the social environment they grew up in.

#### **Chapter Three**

This chapter will seek to provide the justifications for duress and provide an analysis that should be used by the International courts in determining whether it is sufficient defence. This chapter takes a look at the preconditions for the defence of duress and analyses its provision in the Rome Statute and the ruling of judges on the matter in relevant case law.

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<sup>13</sup><https://www.ijmonitor.org/2010/01/and-heres-what-the-prosecutors-opening-statement-said/> accessed 23 January 2017

#### **Chapter Four**

This chapter will discuss the defence of mental health with regards to former adult child soldiers. This will include a discussion on its preconditions as set out in the Rome Statute and a look into relevant case law. The chapter will also include the writings and studies of psychology experts on the effects that being a child soldier has on those that grew up in the armed groups.

#### **Chapter Five**

This chapter will be the overall conclusion to this paper as it will review the findings of the study and make the necessary recommendations.

## CHAPTER 2: THEORETICAL FRAMEWORK

The issue as to whether former adult child soldiers ought to be prosecuted for the roles they played in advancing massacres forms a large part of this research paper as it aims to look into the defences that a former child soldier can apply while being prosecuted. The argument is based on the fact that former child soldiers grew up knowing nothing but violence and therefore had no choice but to participate in the violent acts. This section aims to advance this argument based on the John Locke's Liberal Right theory and is also dependent on the theory of Social Ontogenesis by Bame Nsamenang.

Thomas Hobbes suggested the creation of a social contract in which free individuals decide to enter into a contract with the government where they give up their rights in exchange for protection from the government.<sup>14</sup> The contract is entered into by free choice and there is the lack of interference from the government while making the choice.<sup>15</sup> It was from this idea that John Locke raised the question as to whether children can be considered to fall within the scope of the social contract.

Locke's Liberal Rights theory argues that people's rights are founded on the independent nature of the laws of a society; these rights according to Locke come from Natural Law.<sup>16</sup> Locke views Social Contract to be based on free choice; which would then mean that the citizens are mentally aware of what they intend to do without interference or influence from others.<sup>17</sup> They willingly make the decision to enter into a social contract. This idea then raises the question as to whether children have the mental capacity to enter into any social contract with persons or group of persons that are in authority. In relation to child soldiers, it is important to question whether the child soldiers have the capacity to make a 'free choice' on their role in joining rebel groups and the choice of committing the violent acts in the name of the rebel groups.

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<sup>14</sup>Hobbes Thomas, *Leviathan*, Chapter XIII, in White Edward and Widger David, 11 October 2009.

<sup>15</sup>Hobbes Thomas, *Leviathan*, Chapter XIII.

<sup>16</sup>Locke John, *Two Treatises of Government*, Awnsham Churchill 1689, 106.

<sup>17</sup>Tuckness Alex, *Locke's Political Philosophy*, Stanford Encyclopedia of Philosophy, Nov 9 2005.

The possession of free choice is based on all men being equal in nature.<sup>18</sup> Based on Locke's theory of free choice, children cannot be considered to have the power of free choice as most of the decision-making process is taken out of their hands and they have to live with the choices that are made for them or the choices that they are able to make or are made out of some form of influence from their families.<sup>19</sup> Locke believed that children ought to be exempted from the concept that all men are equal in nature. Locke argues that a man's right is the result of his ability to reason which enables him to practice his freedom whereas children lack the ability to reason on their own. He explicitly states<sup>20</sup>:-

*'Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them when they come into the world and for some time after, but it is but a temporary one. The bonds of this subjection are like the swaddling clothes they are wrapt up in and supported by in the weakness of their infancy.'*

Locke considered children as persons that lack full rationality and he considers the human mind to be a *'white paper that is void of all characters and empty of ideas'* which is then filled up with the ideas that one is brought up on based on one's social interactions.<sup>21</sup> Locke states that Parents (or adults of any nature) have complete control, which he has referred to as *'jurisdiction'* over their children until they are able to attain full rationality<sup>22</sup>. Locke's theory concludes that children lack rational capacity, and therefore cannot be free to give consent.

Dominic Ongwen forms a perfect case study for Locke's theory. Ongwen was abducted by the LRA at around the age of 9 and it was at the hands of the rebel group that he received military training which turned him into one of the army's commanders over the years.<sup>23</sup> Ongwen did not have the choice as to whether he wanted to be part of the LRA because he was forcefully

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<sup>18</sup> Locke John, 'Two Treaties of Government', 106-214.

<sup>19</sup>Tamar Ezer, *A Positive Right to Protection for Children*, page 2, Volume 7, Issue 1 Yale Human Rights and Development Journal, 18 February 2014.

<sup>20</sup>John Locke, 'Two Treaties of Government', 127.

<sup>21</sup>Tamar Ezer, 'A Positive Right to Protection for Children', 2-4.

<sup>22</sup>John Locke, 'Two Treaties of Government', 129.

<sup>23</sup><https://www.hrw.org/news/2016/12/05/questions-and-answers-lra-commander-dominic-ongwen-and-icc#Q2> accessed Dec 5, 2017.

made to join the group. His evolution into being a ruthless killer and one of the commanders of the army was not based on free choice but was as a result of his mind, which Locke would say was 'void of all characters and empty of ideas', being infiltrated by the values of the adults that he was surrounded by at the time or who had 'jurisdiction' over him. Ongwen's lack of free choice; supports Locke's theory on the children's inability to form their own opinions and choices and are therefore the product of their parents (referring to adults around them) 'jurisdiction'.

John Stuart Mill agreed with Locke's idea and stated that children ought to be excluded from the conception of liberty.<sup>24</sup> Mill stated that it would be more beneficial for the doctrine to be applicable only to 'human beings of a maturity faculty' which does not include children as they are still under the care of others and are required to be protected from their own choices.<sup>25</sup>

The interdependence of children to a society plays a major role in determining the kind of persons they will be as adults in a society.<sup>26</sup> Bame Nsamenang, a Cameroonian African philosopher, in his study of the theory of human development with regards to children; used the theory of social ontogenesis which addresses how, all through ontogeny, children are co-participants in social and cultural life, this theory affixes the fact that human development is relatively established by the social ecology in which the development of a human being takes place and by how human beings learn and develop.<sup>27</sup> The pioneering concept of social ontogenesis is defined as the development of an individual that is identified and explained based on a function of social factors.<sup>28</sup> Bame argues that adults should be considered to be a reflection of the society they grew up in and the values they were taught.<sup>29</sup>

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<sup>24</sup>Tamar Ezer, 'A Positive Right to Protection for Children', 2-4.

<sup>25</sup> Tamar Ezer, 'A Positive Right to Protection for Children', 2-4.

<sup>26</sup>Nsamenang Bame, *Human ontogenesis: An indigenous African View on development and intelligence*, Volume 41, Issue 4 International Journal of Philosophy, August 2006.

<sup>27</sup>Nsamenang Bame, 'Human ontogenesis: An indigenous African View on development and intelligence', 293-297.

<sup>28</sup>Nsamenang Bame, 'Human ontogenesis: An indigenous African View on development and intelligence', 293-297.

<sup>29</sup>Nsamenang Bame, 'Human ontogenesis: An indigenous African View on development and intelligence', 293-297.

Bame would consider the violent nature and actions of a child soldier that becomes an adult while still being under the influence of a rebel group, such as Ongwen, to be attributed to the society they were part of, making them victims of circumstances. Bame used social ontogenesis to emphasize the interdependence of children to the society and their parents.<sup>30</sup> Bame argues that the social environment of children influences how they correlate in a society with the assigning of different roles which provide a perception of their social maturity or competence<sup>31</sup>. He goes on to state that for African parents, social cognition is translated into responsible intelligence as it enhances the attainment of social ends.<sup>32</sup>

Locke's and Bame's ideas highlight the important role that the society of an individual plays in determining their actions and relations with other people and this idea can be applied to child soldiers and in some ways explain their actions even after them becoming adults. Mark Kersten in his blog article on Ongwen, states that '...that world that Ongwen-the-soldier inhabited was different from the one Ongwen-the-child left behind...'<sup>33</sup> Ongwen had to resort to killing others so that he may be able to protect his life, actions that were driven by the fear of death and instinct for survival.<sup>34</sup> The option of killing others originated from the society that he was brought up in and that was a society that was filled with violence and one that forcefully turned children into killing machines with their survival being highly dependent on killing others.<sup>35</sup> The chances of his survival continued to increase as he was promoted into officer ranks as the lower-level fighters were amongst the first to die from bullets or pervasive shortages of food.<sup>36</sup> The application of Locke, Mill and Bame's ideology on the interdependence of children on the adults in their communities; highlights the interdependent nature of children which can be considered to originate from the vulnerable nature of children. This is emphasized by

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<sup>30</sup>Nsamenang Bame, 'Human ontogenesis: An indigenous African View on development and intelligence', 293-297.

<sup>31</sup>Nsamenang Bame, 'Human ontogenesis: An indigenous African View on development and intelligence', 293-297.

<sup>32</sup>Nsamenang Bame, 'Human ontogenesis: An indigenous African View on development and intelligence', 293-297.

<sup>33</sup>Kersten Mark, 'The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander'.

<sup>34</sup>Kersten Mark, 'The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander'.

<sup>35</sup>Kersten Mark, 'The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander'.

<sup>36</sup>Kersten Mark, 'The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander'.

Martha Fineman an American jurist and legal theorist who advances the theory of vulnerability which states that a human being is vulnerable and is likely to depend on another human being based on the fact that in our nature as humans we are always seeking connection with other human beings.<sup>37</sup>

Martha explains that,

*'Our vulnerability and the need for connection and care [that] it generates are what make us reach out and form a society. It is the recognition and experience of human vulnerability that brings individuals into families, families into communities and communities into societies, nation-states, and international organizations.'*<sup>38</sup>

## CONCLUSION

Taking into account the liberal rights theory and other theories discussed hereinabove, it can be concluded that children are easily swayed and manipulated into obedience given their vulnerable nature and inability to freely make decisions. When given a chance to make a choice after having their innocence and vulnerability taken advantage of, their first instincts is that of survival and ensuring that they avoid the least desirable option. The forceful recruitment of Ongwen to his growth in the ranks of the LRA, was not driven by the need to succeed but rather he was driven by the need and fight for survival. The state of nature that he had been forced into was one that was 'nasty, brutish and short' and only those that had mastered the art of avoiding pain and death could survive in such a state.

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<sup>37</sup>Nina K, *Vulnerability theory and the role of the government*, Volume 26, Issue 1 Yale Journal of Law and Feminism 2014, page 6.

<sup>38</sup>Nina K, 'Vulnerability theory and the role of the government', 6.

### CHAPTER 3: THE DEFENCE OF DURESS AS IT RELATES TO FORMER CHILD SOLDIERS

Duress has been defined to be a threat of harm that is made so as to compel a person to carry out a particular action against their will or judgment.<sup>39</sup> The threat that is issued is usually posed to bring harm to the life or limb of a person. Duress exists where a person's will has been profusely interfered with to the point at which they are not able to possess the ability to have the free choice as to whether or not they want to actively participate in a wrongful action.<sup>40</sup> The absence of 'free choice' element, plays an important role in answering the question whether a person was under duress. Under International Criminal Law, a person that has been accused of committing crimes against the Rome Statute can only be censurable for the actions he/she not only purposefully participates in but also does so with the intent of generating the end result that is aimed at being prevented by the prohibition of such conduct.<sup>41</sup>

The defence of duress has been accepted as an applicable defence in international law by the ICTY in the *Erdemovic* case and Article 31(1) (d) of the Rome Statute. Whether the defence is one that can be fully applicable to former child soldiers is a matter that will be addressed in this chapter. One cannot ignore the social conditions that a child soldier grew up in and it is because of such circumstances that the defence should be relied on by former child soldiers as the social environment of the child plays an important role in their transition as adults and will still influence the actions of the child even as an adult.<sup>42</sup>

The defence is however subject to certain preconditions which will be discussed at length in this chapter. There is a threshold that the said threat must meet so as to distinguish it from the almost similar defence of superior-orders which also possesses some degree of coercion.<sup>43</sup>

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<sup>39</sup>Black's Law Dictionary, 8<sup>th</sup> Ed, 2004 accessed 7January 2018.

<sup>40</sup> Wakuthii Viola, Duress as a Defence in International Criminal Law: From Nuremberg to Article 31(1) (d) of the Rome Statute of the International Criminal Court, unpublished LLM thesis, University of Western Cape, October 2013, 13.

<sup>41</sup> Article 30, *Rome Statute*.

<sup>42</sup>Nsamenang Bame, 'Human ontogenesis: An indigenous African View on development and intelligence' 293-297.

<sup>43</sup> Wakuthii Viola, 'Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court'.

### 3.1 AN ANALYSIS OF THE REQUIREMENTS OF DURESS IN RELATION TO ARTICLE 31 (1) (D) OF THE ROME STATUTE AND THE CASE OF *PROSECUTOR V ERDEMOVIC*

#### 3.1.1 PROSECUTOR V EDERMOVIC

The ICTY Trial Chamber in the *Erdemovic* case highlighted duress as an absolute defence to the breach of international humanitarian law so long as its preconditions were satisfied.<sup>44</sup> The Appeals Chamber in the same case also recognized the validity of the defence but neither the Trial chambers nor the Appeals chamber implemented the preconditions in the Erdemovic case. The dissenting opinion of Justice Cassese in the Appeals Chamber is the one that provided a thorough examination of the preconditions.

#### 3.1.2 Summary of the facts and Trial Judgement of the Erdemovic case

The Srebrenica enclave (Bosnia and Herzegovina) was attacked by the Bosnia Serb Army on 6<sup>th</sup> July 1995. Bosnia Muslim men were then isolated from the women and children and later on taken to various sites where they were executed.<sup>45</sup> Erdemovic was a member of a unit serving under the Bosnia Serb Army and was actively involved in the killing of Bosnia Muslim men who had been taken to the Pilica farm that was situated near Zvornik (Bosnia and Herzegovina).<sup>46</sup> Erdemovic first pled guilty to murder as a crime against humanity but the Appeals Chamber later on directed that he be permitted to enter another plea before the new Trial Chamber, under which he pled guilty to murder as a war crime.<sup>47</sup> Erdemovic qualified his plea by stating that he had been compelled to commit the killings.<sup>48</sup>

The Trial Chamber concluded that the facts that Erdemovic raised to aid his defence of duress were not sufficient as they could not be corroborated leading to the Trial Chamber applying his defence as a mitigating factor while issuing his sentence, which accumulated to ten years

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<sup>44</sup> *Prosecutor v Drazen Erdemovic*, Sentencing Judgement, paragraph 17.

<sup>45</sup> *Prosecutor v Drazen Erdemovic*, para 17.

<sup>46</sup> *Prosecutor v Drazen Erdemovic*, para 17.

<sup>47</sup> *Prosecutor v Drazen Erdemovic*, para 17.

<sup>48</sup> Wakuthii Viola, 'Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court,' 27.

imprisonment.<sup>49</sup> Erdemovic later on, appealed the sentence issued to the Appeals Chamber but he did not appeal the guilty finding.

### **3.1.3 The Appeals Chamber Judgment in the Erdemovic case**

The Appeals Chamber that heard Erdemovic's appeal consisted of five judges with three of the five judges rejecting his duress plea. In his appeal, Erdemovic stated that the Trial Chamber was wrong in law by rejecting his plea of duress. It is important to note that Erdemovic did not raise the question on the validity of duress under international criminal law, and particularly whether duress can be applied as a complete defence to charges of crimes against humanity, resulting in exoneration.<sup>50</sup> The Appeal Chamber raised this question on its own notion in the separate joint opinion of Justices Vohrah and McDonald.<sup>51</sup>

The majority opinion of the Appeals Chamber rejected the idea that duress can be used as a comprehensive defence where the action in question involved killing, more specifically in circumstances where the accused/defendant is a trained combatant or soldier.<sup>52</sup> Justice Vohrah and McDonald stated that soldiers and combatants are required to employ a higher level of resistance to threats in comparison to civilians.

### **3.1.4 The Dissenting Opinion of Justices Cassese and Stephen in the Appeals Chamber**

According to the dissenting opinion of Justice Cassese and Stephen, duress is a suitable defence for crimes committed under international law under specific conditions. Judge Cassese was of the opinion that the preconditions ought to be the determinant as to whether the defence shall be successful as opposed to declining its use on the grounds of policy.<sup>53</sup> Justice Stephen stated that common principles of law did not issue a prohibition on the use of the defence of duress even for charges in murder, more specifically in situations where the accuser's actions were not disproportionate, and where the victims would still end up being killed.<sup>54</sup>

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<sup>49</sup>*Prosecutor v Erdemovic*, ICTY.

<sup>50</sup>Wakuthii Viola, 'Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court,' 27.

<sup>51</sup>*Prosecutor v Erdemovic*, ICTY.

<sup>52</sup>*Prosecutor v Erdemovic*, para 37.

<sup>53</sup>*Prosecutor v Erdemovic*, para 43.

<sup>54</sup>*Prosecutor v Erdemovic*, ICTY para 46.

### 3.2 PRECONDITIONS FOR DURESS

This section of this chapter will focus its examination on the preconditions for duress as discussed by the Trial Chamber and Appeals Chamber in the *Erdemovic* case and the Rome Statute that must be present for a former child soldier defendant to successfully plead duress.

#### 3.2.1 Trial and Appeals Chamber in the *Erdemovic* Case

The preconditions for duress that were set out by the Trial Chamber in the *Erdemovic* case were: - that 'the act charged was done to avoid an immediate danger both dangerous and irreparable,' that 'there were no adequate means of escape' and that 'the conduct was not disproportionate to the evil [avoided]'.<sup>55</sup>

In the Appeals Chamber, four out of the five judges concurred with the preconditions that were set out by the majority Trial Chamber.<sup>56</sup> Justice Cassese however provided additional preconditions that ought to be fulfilled for the defence to be sufficient. These preconditions included:-<sup>57</sup>

- i. An immediate threat of severe or irreparable harm to life or limb;
- ii. The existence of no other way to avert the harm;
- iii. The crime committed was not disproportionate to the harm avoided;
- iv. The situation leading up to duress was not brought upon purposefully by the person being coerced.

#### 3.2.2 Rome Statute

The defence of duress under the Rome Statute falls within a group of defences that will enable a defendant to exclude themselves from any form of criminal responsibility.<sup>58</sup> In setting out the preconditions that are required to fully support the defence of duress, the Rome Statute has

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<sup>55</sup> *Prosecutor v Erdemovic*, ICTY para 17.

<sup>56</sup> *Prosecutor v Erdemovic* Justices McDonald & Vohrah's opinion, paragraph 42; Justice Li's opinion, paragraph 5; Justice Stephen's opinion paragraph 14 & 67.

<sup>57</sup> *Prosecutor v Erdemovic*, ICTY.

<sup>58</sup> Article 31, *Rome Statute*.

created a blend of the Trial Chamber's preconditions and the Appeal Chamber's dissenting opinion by Judge Cassese, with a bit of adjustment to both.<sup>59</sup>

The Rome Statute in Article 31 (1) (d) states that the preconditions for duress are:-

- i. The existence of threat of death or serious bodily harm;
- ii. The person must have acted necessarily and reasonably to avoid the harm;
- iii. The person did not intend to cause a greater harm than the one sought to be avoided.

### **3.3 APPLICATION OF THE PRECONDITIONS OF DURESS IN RELATION TO FORMER CHILD SOLDIERS**

The preconditions of duress that have been set out in the Rome Statute, the Trial Chamber and the dissenting opinion of Judge Cassese in the *Erdemovic* case, will be discussed in relation to the case study of former child soldiers that were part of the LRA such as Ongwen. The aim of the discussion will be to determine whether such child soldiers, especially Ongwen, satisfy every precondition listed to successfully plead the defence of duress.

#### **3.3.1 The element of 'presence of threat'**

A threat can be defined as 'A declaration of one's purpose or intention to work injury to the person, property, or rights of another. A threat has also been defined to be any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent.'<sup>60</sup>

The Rome Statute provides for a threat and it recognizes the fact that a threat may either be 'made by another person,'<sup>61</sup> which is considered to constitute duress<sup>62</sup> or be 'constituted by other circumstances beyond that person's control,'<sup>63</sup> which is then considered to constitute

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<sup>59</sup>Wakuthii Viola, 'Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court,'

<sup>60</sup> <https://thelawdictionary.org/threat/> accessed 7 January 2017.

<sup>61</sup> Article 31 (1) (d) (i), *Rome Statute*.

<sup>62</sup>Wakuthii Viola, 'Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court'.

<sup>63</sup> Article 31(1) (d) (ii), *Rome Statute*.

necessity.<sup>64</sup> The Trial Chamber in the *Erdemovic* case did not necessarily use the word threat but it did, however, speak of the existence of ‘danger.’<sup>65</sup> Danger can be considered to not only be making reference to being coerced by another party but it can also involve necessity.<sup>66</sup> In his dissenting opinion, Judge Cassese was more distinctive and he asserted that the threats ‘only emanating from another person’ composed duress.<sup>67</sup>

The presence of threat acknowledges the fact that a defendant could have been unwilling to participate in genocide, war crimes and crimes against humanity and the fact that their state of mind must have been significantly influenced by the will of the ‘coercer’.<sup>68</sup> This means that the defendant would not have carried out such an action in the absence of the threat and if it can still be proved that the defendant would still have carried out the action in the absence of the threat, the defendant cannot then apply this defence.<sup>69</sup> In exercising this precondition it is essential to determine whether a reasonable person in the defendant’s position would have had no other choice but to surrender to the threat issued.

The Rome Statute goes ahead to state that the threat that is being issued should be that of ‘imminent death or of continuing or imminent serious bodily harm.’<sup>70</sup> This sentiment is similar to that of Justice Cassese who stated that the threat should be a threat to the life or limb of the defendant.<sup>71</sup> The Rome Statute’s view as compared to that of Justice Cassese requires that the threat be ‘imminent’, meaning that there is a great chance that something will happen at any

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<sup>64</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

<sup>65</sup> *Prosecutor v Erdemovic*, ICTY Para 17 of the sentencing judgment.

<sup>66</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’

<sup>67</sup> *Prosecutor v Erdemovic*, ICTY Opinion of Judge Cassese paragraph 14.

<sup>68</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

<sup>69</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

<sup>70</sup> Article 31 (1) (d), *Rome Statute*.

<sup>71</sup>*Prosecutor v Erdemovic*, ICTY.

moment, or there is a chance that the threat will be ‘continuing’.<sup>72</sup> The Trial Chamber in the *Erdemovic* case only stated that duress ought to be of ‘serious and irreparable danger’<sup>73</sup> and failed to define what would adequately constitute ‘serious and irreparable danger’.<sup>74</sup> The threshold of the threat being discussed also takes into account that the threat had not only been issued to the defendant but also to another person.<sup>75</sup> Based on this it can be concluded that the defendant must have acted with a bona fide belief of the immediate existence of danger.<sup>76</sup>

The LRA which was formed and headed by Joseph Kony is responsible for the recruitment and kidnapping of more than 60,000 children who are trained into becoming ruthless ‘machine guns’ that perpetrate war crimes and crimes against humanity.<sup>77</sup> Dominic Ongwen was one of the children that were kidnapped as he was abducted by LRA fighter while he was on his way home from school at the tender age of 9 years old.<sup>78</sup> Ongwen spent a large part of his childhood and his entire adult life in the LRA. He was trained to become a ‘child soldier’ and forced to commit atrocities. According to the Human Rights Watch, children like Ongwen were threatened into carrying out the orders of the LRA and one of them was a 16-year-old girl by the name Susan who was forced to participate in the murder of fellow abductee, a boy from her village.<sup>79</sup>

*‘One boy tried to escape, but he was caught. They made him eat a mouthful of red pepper, and five people were beating him. His hands were tied, and then they made us, the*

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<sup>72</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

<sup>73</sup>*Prosecutor v Erdemovic*, ICTY.

<sup>74</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

<sup>75</sup>*Prosecutor v Blagoje Simic, Miroslav Tadic & Simo Zaric*, ICTY IT-95-9 (17 October 2003)

<sup>76</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’

<sup>77</sup>Chothia Farouk, *Profile: Dominic Ongwen of Uganda’s LRA*, 26 January 2015 <http://www.bbc.com/news/world-africa-30709581> accessed 7 January 2018.

<sup>78</sup>Drumbl A. Mark, *A Former Child Soldier prosecuted at the International Criminal Court*, 26 September 2016 <https://blog.oup.com/2016/09/child-soldier-prosecuted-icc-law/> accessed 7 January 2018.

<sup>79</sup><https://www.hrw.org/news/2008/04/16/coercion-and-intimidation-child-soldiers-participate-violence> accessed January 12, 2018.

*other new captives, kill him with a stick. I felt sick. I knew this boy from before. We were from the same village. I refused to kill him and they told me they would shoot me. They pointed a gun at me, so I had to do it. The boy was asking me, "Why are you doing this?" I said I had no choice. After we killed him, they made us smear his blood on our arms. I felt dizzy. There was another dead body nearby, and I could smell the body. I felt so sick. They said we had to do this so we would not fear death and so we would not try to escape.'*

Given the account of the LRA abductee, it can be concluded that the LRA employed the use of threat to all its child abductees. This type of threat fulfills the threshold stated in the Rome Statute that the threat should be issued by another individual<sup>80</sup> and that of Justice Cassese<sup>81</sup> with the LRA being the other individual in this case.

### **3.3.2 The element of 'no other means of escape'**

The Rome Statute, Justice Cassese's dissenting opinion and the *Erdemovic* Trial Chamber judgment did not necessarily state that there ought to have been no means of escape, but they have all hinted at this precondition.<sup>82</sup>

The Rome Statute has done so by stating that while surrendering to the threat, the defendant ought to conduct themselves in a manner that is 'necessary and reasonable' so as to avoid the threat.<sup>83</sup> An objective analysis in looking at the application of the words 'necessary' and 'reasonable' as used in the Statute would mean that the applicable standard is that of an ordinary person in the position of the defendant.<sup>84</sup> While a subjective analysis would refer to

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<sup>80</sup> Article 31 (1) (d) (ii), *Rome Statute*.

<sup>81</sup> *Prosecutor v Erdemovic*, ICTY Opinion of Judge Cassese, paragraph 14.

<sup>82</sup> Wakuthii Viola, 'Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court'.

<sup>83</sup> Article 31 (1) (d), *Rome Statute*.

<sup>84</sup> Wakuthii Viola, 'Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court'.

what the defendant understood the word ‘necessary’ and ‘reasonable’ to mean.<sup>85</sup> The ICC, however, has the burden of interpreting the meaning intended by the Rome Statute.<sup>86</sup>

Justice Cassese and the Trial Chamber in the *Erdemovic* case interpretation of the precondition alluded to there being no other means of avoiding the harm or danger at the time the action was being carried out.<sup>87</sup> This can be interpreted to mean that the defendant had no other choice but to succumb to the threat at that time. From the accounts of former child soldiers that have been discussed above, the child soldiers made the choice not to escape based on the consequences that one would undergo for attempting to escape. The act of escape and more so the attempt to escape carried extreme forms of punishment that one would prefer to forgo.

### **3.3.3 The element of ‘Proportionality’**

The *Erdemovic* Trial Chamber and Justice Cassese in their opinions required the actions of the defendant ought not to cause greater harm than the one which they avoided. This condition is onerous to fulfill more so with regards to the murder of innocent people as it then poses the question as to whose life is more valuable:- the victim’s life or the perpetrator’s life. Justice Cassese states that in ensuring proportionality to the question, the defendant’s act should be one of the lesser evils.<sup>88</sup> This means that the defendant chooses an option that is the least immoral. The Rome Statute, on the other hand, does not require the defendant to choose one of the lesser evils but requires the defendant to possess the intention of avoiding the evil act.<sup>89</sup> Therefore the assessment of an action is solely left on the defendant as they are the ones that have to balance the options presented to them based on the harm that they may face for failing to follow the orders and the crime they are being forced to carry out.<sup>90</sup>

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<sup>85</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

<sup>86</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

<sup>87</sup>Wakuthii Viola, Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

<sup>88</sup>*Prosecutor v Erdemovic*, Opinion of Judge Cassese, paragraph 16.

<sup>89</sup>Article 31 (1) (d), *Rome Statute*.

<sup>90</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

### **3.3.4 The element of ‘Involuntariness of the conduct’**

This precondition was suggested by Justice Cassese and it requires the defendant to not have in any way; shape or form willingly put themselves in a position that would bring about a situation of duress.<sup>91</sup> Children become child soldiers in different ways; there are some that are abducted, like Ongwen, while there are others who join the rebel groups voluntarily because of the level of poverty they live in, the conflict around them and their families amongst other reasons.<sup>92</sup> This precondition only applies to those that were forced to join the rebel groups.

### **3.4 CONCLUSION**

Article 31 (1) (d) of the Rome Statute has developed its preconditions with regards to duress from the Trial Chamber judgement and the dissenting opinion of Justice Cassese in the *Erdemovic* case but it did not adopt all of the preconditions. The Rome Statute has discarded the involuntary requirement by Cassese and the aspect of proportionality.<sup>93</sup> Based on the preconditions set out in the Rome Statute, the ICC has unlimited discretion as to the interpretation of Article 31 (1) (d) such as determining what would amount to reasonable and necessary action and taking into account whether the defendant willingly put themselves in such a position.<sup>94</sup>

### **3.5 THE DOMINIC ONGWEN CASE IN LIGHT OF THE PRECONDITIONS OF DURESS**

On the basis of the preconditions discussed previously that play an essential role in determining the existence of duress, it is necessary that we apply them in line with the case of Ongwen so as to determine whether he is able to fully satisfy the preconditions. This analysis will assist in critiquing and determining whether the Pre-Trial Chamber II was justified in

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<sup>91</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

<sup>92</sup> Cahn Naomi, *Poor Children: Child ‘Witches’ and Child Soldiers in Sub-Saharan Africa*, The George Washington University Law School.

<sup>93</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’

<sup>94</sup>Wakuthii Viola, ‘Duress as a Defence in International Criminal Law: From Nuremberg to Article 31 (1) (d) of the Rome Statute of the International Criminal Court’.

rejecting the defence of duress, and failing to acknowledge Dominic Ongwen's Status as a child soldier.<sup>95</sup>

### **3.5.1 Was the threat of death or of continuing or imminent serious bodily harm present?**

The threat is required to be imminent or there exist the potential of the threat being continuous. There is no specific account on the life of Dominic Ongwen while he was part of the LRA but according to the research conducted by various authors, the indoctrination process carried out by the LRA was nothing but vicious.<sup>96</sup> The abductees were subjected to fear and from the beginning they were made aware of the impossibility of attempting to make an escape.

The vicious methods the LRA used to indoctrinate the children was a way for them to break the identity of the child, with regards to the former life they knew, and to prepare them for their new lives.<sup>97</sup> The means used by LRA to kidnap children was one that many were aware of and this resulted in mothers, Ongwen's mother included, training their children on how to provide false personal information should they be abducted.<sup>98</sup> This was done because the LRA was known to record the names, clans, and villages of birth of the children they had abducted so as to use them for future retaliation against those children that would have escaped.<sup>99</sup> This practice shows that the threat issued was not just a present threat, but one that possessed a futuristic character. The threat of the harm that would befall their communities was a reality that was heavily indoctrinated in the abductees so as to prevent them from falling out of line.

### **3.5.2 Were the actions taken by Ongwen necessary and reasonable to avoid the threat?**

As stated early on in this chapter, the failure of the abductees to follow the orders issued to them by the LRA would result in an automatic death sentence. The commission of the crimes was as a means of survival borne out of necessity to avoid facing the consequences that befell those considered to be disobedient.

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<sup>95</sup> *Prosecutor v Dominic Ongwen* ICC-02/04-01/15, Pre-Trial Chamber XI (6 September 2016).

<sup>96</sup> Grant Nadia, *Duress as a Defence for Former Child Soldiers? Dominic Ongwen and the International Criminal Court*, International Crimes Database, 21 December 2016.

<sup>97</sup> Baines Eric, *Complex Political Perpetrators: Reflection on Dominic Ongwen*, Volume 47, Issue 2 *The Journal of Modern African Studies*, 2009.

<sup>98</sup> Baines Eric, 'Complex Political Perpetrators: Reflection on Dominic Ongwen', 169.

<sup>99</sup> Baines Eric, 'Complex Political Perpetrators: Reflection on Dominic Ongwen', 170.

There was no way Ongwen could reasonably avoid the threat because there were dire consequences that the abductee not only faced for trying to escape, but the village from which they originated from would suffer.<sup>100</sup> This creates a dilemma as Justice Cassese observed that it would be difficult to determine if the life of the victims was more important than the life of the person under duress.<sup>101</sup> A similar dilemma that is created based on the tactics of LRA in advancing future retaliations on the villages of the escaped abductees is whether the lives of the villagers was more important than the life of those who had to be killed by the abductees to prevent harm from befalling their villages.

The other question that arises is whether Ongwen could have reasonably avoided the threat once he became a commander in the LRA. To answer this question it is important to understand the dynamics of the relationship of the LRA commanders with the founder Joseph Kony and to determine whether Dominic could have possibly still been under duress even as a commander in the LRA.

Joseph Kony is the alleged founder and Commander-in-Chief of the LRA who formed the rebel group in the name of seeking to free the North of Uganda from government oppression in 1986.<sup>102</sup> Every Commander within LRA was required to report to Kony and act according to his wishes and command.<sup>103</sup> Thomas Kwoyelo a former Colonel of the LRA who was able to escape, gave insight into the life of members of the LRA.<sup>104</sup> His story is similar to that of Ongwen as he was abducted as a young child and forced into becoming a child soldier and he was able to advance in the ranks of the LRA over the years before being captured by the UPDF.<sup>105</sup>

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<sup>100</sup> Baines Eric, 'Complex Political Perpetrators: Reflection on Dominic Ongwen', 170.

<sup>101</sup> *Prosecutor v Erdemovic*, Opinion of Judge Cassese, paragraph 16.

<sup>102</sup> <https://invisiblechildren.com/challenge/kony/> accessed 17 January 2018.

<sup>103</sup> Grant Nadia, 'Duress as a Defence for Former Child Soldiers? Dominic Ongwen and the International Criminal Court', 9.

<sup>104</sup> Grant Nadia, 'Duress as a Defence for Former Child Soldiers? Dominic Ongwen and the International Criminal Court', 9.

<sup>105</sup> Grant Nadia, 'Duress as a Defence for Former Child Soldiers? Dominic Ongwen and the International Criminal Court', 9.

Kwoyelo described his life in the 'bush' as one similar to that of a dog and his master with Kony being the master and him being the dog. He would do whatever he was instructed to do, even in his position of a Colonel.<sup>106</sup> He went ahead to say '....when he tells you to ambush a car there and come back with 25 new recruits, you do it because otherwise, he would kill you...'<sup>107</sup> From Kwoyelo's account it can be observed that even in attaining the highest rank within the LRA, one could not avoid the death threats from those above them in rank and mostly Kony.

Mark Drumbl in his blog article believed that Kony's relationship with Ongwen was an 'edgy' one as Kony was constantly suspicious of Ongwen and his intentions.<sup>108</sup> Mark goes ahead to state that Ongwen had wanted to leave the LRA, something Kony suspected which led to the imprisonment and the torture of Ongwen in Sudan on the orders of Kony.<sup>109</sup> Ongwen was able to escape barefooted in January 2015 where he surrendered to the United States Special Forces (USSF) and was later on transferred to the ICC.<sup>110</sup>

From the discussion above on the life of a member of LRA under the command of Kony, it becomes quite evident that Joseph Kony used every tool in his arsenal to ensure that no one dared to escape the rebel group. The use of threat and violence was not only limited to the subordinate members of the LRA but was exercised against top-ranking officials such as Ongwen to ensure that they stayed within Kony's control.

### **3.5.3 Did Ongwen exercise some form of proportionality while under duress?**

In determining the proportionality of an action, what is being considered is the balance of the options that have been made available to the abductee. There are various questions that emerge in determining which outcome would be considered to be more proportionate between: - the perpetration of crimes or the killing of members of your village for failing to perpetrate crimes.

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<sup>106</sup> Grant Nadia, 'Duress as a Defence for Former Child Soldiers? Dominic Ongwen and the International Criminal Court', 9.

<sup>107</sup> Grant Nadia, 'Duress as a Defence for Former Child Soldiers? Dominic Ongwen and the International Criminal Court' page 9.

<sup>108</sup> Drumbl Mark, *A former Child Soldier prosecuted at the International Criminal Court*, 26 September 2016, <https://blog.oup.com/2016/09/child-soldier-prosecuted-icc-law/> accessed 17 January 2017.

<sup>109</sup> Drumbl Mark, 'A former Child Soldier prosecuted at the International Criminal Court'.

<sup>110</sup> Drumbl Mark, 'A former Child Soldier prosecuted at the International Criminal Court'.

in determining which outcome would be considered to be more proportionate between: - the perpetration of crimes or the killing of members of your village for failing to perpetrate crimes. Which of the two is more proportionate than the other: to kill another or to be killed? These are the options that child soldiers or persons that were in the LRA were faced with every moment. What then becomes the measure of proportionality in such circumstances? The Trial Chamber and Justice Cassese in their opinions required that the actions of the defendant ought not to cause greater harm than the one which they avoided. Justice Cassese stated that achieving such balance is based on the option that is the lesser evil and to most of the child soldiers, the option of surviving and not being killed, was the lesser evil. To remain in the violent environment they had been placed in and not try to make an escape was a lesser evil as compared to making an escape and have their villages and members of their village suffer the consequences of their actions.<sup>111</sup>

#### **3.5.4 Was there an aspect of involuntariness in the actions?**

The actions being put under consideration are the actions that Ongwen undertook while he was an 'adult'. Other than the writings of authors stating that Ongwen had the choice to leave the LRA once he became an 'adult' there has been no evidence so far that indicates that Dominic Ongwen stayed with the LRA out of his own volition. There has however been documentation of the arrest and torture of Dominic Ongwen in Sudan by Joseph Kony because of the suspicion that Ongwen had the intentions of leaving the LRA.<sup>112</sup> This arrest has so far proved the level of control that Kony exercised and what an act of disobedience to Kony would lead to. The arrest also highlights that Ongwen's intention to leave the LRA was an indication of Ongwen being unwilling to continue being a commander of the group and that his actions to continue staying on as a commander were not of his own volition.

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<sup>111</sup> Grant Nadia, 'Duress as a Defence for Former Child Soldiers? Dominic Ongwen and the International Criminal Court', 9.

<sup>112</sup> Drumbl Mark, *A former Child Soldier prosecuted at the International Criminal Court*, 26 September 2016, <https://blog.oup.com/2016/09/child-soldier-prosecuted-icc-law/> accessed 17 January 2017.

## CHAPTER 4: DEFENCE OF MENTAL ILLNESS

Mental illness is a term that is used to describe a mental disorder that can be caused by emotional or physical elements.<sup>113</sup> Mental illness is used when making reference to a specific psychological pattern that an individual experiences and is usually linked to distress that is not expected to form part of a normal development or culture of a person.<sup>114</sup> In providing a sufficient definition of a person suffering from mental illness, the Trial Chamber in the *Celebici*<sup>115</sup> trial noted that there was no international statute that provided a complete definition and therefore saw it fit that such a defence be defined based on the concept of the rules that had been articulated in various national legal systems.<sup>116</sup> Mental illness has been referred to as a disease of the mind, diminished capacity, insanity, mental incapacity among others with all of them referring to persons with mental health issues.

National courts in both common and civil law jurisdictions have provided for a defendant to plead mental illness or mental incapacity with the plea sometimes being successful in providing an acquittal of the defendant. The very first attempt made at defining 'abnormality of the mind' was done by an English court in the case of *R v Byrne* where Lord Chief Justice Parker stated: '...it means a state of mind so different from that of ordinary human being that the reasonable man would term it abnormal.'<sup>117</sup> Over the years the McNaghten Rules<sup>118</sup> have played a major role in the establishment of the defence of mental illness more so in common law countries. The House of Lords stated that:

*"Every man is to be presumed to be sane, and ... that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of mind, and not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."*

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<sup>113</sup> <https://thelawdictionary.org/mental-illness/> accessed 19 January 2018.

<sup>114</sup> [https://www.sciencedaily.com/terms/mental\\_disorder.htm](https://www.sciencedaily.com/terms/mental_disorder.htm) accessed 19 January 2018.

<sup>115</sup> *Prosecutor v Zejnir Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, IT-96-21-A, ICTY Trial Chamber.

<sup>116</sup> Sparr Landy, *Mental Incapacity Defences at the War Crimes Tribunal: Questions and Controversy*, 2005, page 63.

<sup>117</sup> Sparr Landy, 'Mental Incapacity Defences at the War Crimes Tribunal: Questions and Controversy', 63.

<sup>118</sup> *M'Naghten's Case* [1843] ALL ER Rep 229.

The basic principle set out in this case is that once it has been proven that a person was insane or suffering from a mental illness at the time of the crime, it will be unjust to hold such a person criminally liable. This principle has found its way into the Rome Statute, which in its Articles has provided for certain grounds that the defendant will have to prove in order for them to be excluded from criminal liability. This chapter will discuss the preconditions to the defence as provided for in the Rome Statute together with other international instruments and case law.

#### **4.1 THE ROME STATUTE PROVISION FOR THE DEFENCE OF MENTAL ILLNESS**

Rome Statute states that a person will not be held criminally liable if at the time of the person's conduct, the individual suffered from a 'mental disease or defect that destroys the person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of the law...'<sup>119</sup> The Rome Statute has, in essence, provided the preconditions that are a requirement in enabling a defendant to be excluded from criminal responsibility. What these preconditions allude to is that the defendant must prove the absence of intent to commit the crimes and that had they been in the right frame of mind, they would not have committed the criminal acts.

#### **4.2 JURISPRUDENCE ON THE DEFENCE OF MENTAL ILLNESS**

The ICTY and ICTR statutes do not provide for the defence as it was left up to the tribunals to determine whether the personal defences that have been raised by the defendant, is sufficient enough to be able to relieve them from liability.<sup>120</sup> The ICTY statute required that should the defence have the intention of raising any special defence which included diminished or lack of mental responsibility, the defence was required to notify the prosecutor in advance.<sup>121</sup>

The *Celebici* case<sup>122</sup> provided the ICTY with the chance to examine the defence of duress and to determine its applicability in relation to international crimes and the role it plays in determining the criminal liability of an individual. Esad Landzo one of the defendants in the

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<sup>119</sup> Article 31 (1) (a), *Rome Statute*.

<sup>120</sup> <http://www.refworld.org/docid/3ae6af0110.html> accessed 19 January 2018.

<sup>121</sup> Rule 67(a) (2) (b), *ICTY statute*, 25 May 1993.

<sup>122</sup> *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, ICTY.

*Celebici* case, had been charged with 24 counts of Grave breaches of the Geneva Convention and Violation of the laws and customs of war.<sup>123</sup> Esad raised the defence of mental illness arguing that he possessed ‘diminished capacity’ as he had participated in the conflict at a young age and that the ‘impressionability and immaturity’ of his age, in addition to his ‘particular personality traits’ and the armed conflict that had taken place in his home town, had affected him mentally and therefore he was not in his full mental capacity at the time of committing the unlawful acts.<sup>124</sup> Landzo went ahead to argue that the events happened at a time when he had an induced abnormal mental state that led to Post Traumatic Stress Disorder (PTSD).<sup>125</sup> The Trial Chamber dismissed his defence stating that it did not believe that Landzo was a puppet used by his superiors to advance their orders and that he was not able to prove that he lacked the ability to independently exercise his will.<sup>126</sup>

On appeal, while determining whether diminished responsibility could constitute a defence, the Appeals chamber noted the absence of the term diminished responsibility in the Rome Statute.<sup>127</sup> Appeals Chamber stated that the diminished mental capacity of a defendant is only relevant in acting as a mitigating factor while imposing the sentence and that it is not a defence that would necessarily lead to an acquittal.<sup>128</sup>

What the Trial Chamber can be assumed to be saying in rejecting the diminished capacity defence raised by Landzo, is that in order for one to successfully prove that they lacked the mental capacity to commit crimes; it has to be proved that the person lacked the ability to act

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<sup>123</sup><http://www.icty.org/en/press/celebici-case-judgement-trial-chamber-zejnil-delalic-acquitted-zdravko-mucic-sentenced-7-years> accessed 10 January 2018.

<sup>124</sup><http://www.icty.org/en/press/celebici-case-judgement-trial-chamber-zejnil-delalic-acquitted-zdravko-mucic-sentenced-7-years> accessed 10 January 2018.

<sup>125</sup> Tobin John, *The psychiatric Defence and international criminal law*, 16 April 2007.

<sup>126</sup><http://www.icty.org/en/press/celebici-case-judgement-trial-chamber-zejnil-delalic-acquitted-zdravko-mucic-sentenced-7-years> accessed 10 January 2018.

<sup>127</sup> Tobin John, ‘The psychiatric Defence and international criminal law’.

<sup>128</sup> *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo*, ICTY, Para 590.

independently.<sup>129</sup> A reasoning which fails to adequately appreciate the true meaning of mental illness and the factors exists to set a basis for the existence of mental illness.

#### 4.3 MENTAL ILLNESS AND CHILD SOLDIERS

It is essential to note that the major consequence of being a child soldier is the exposure to traumatic stresses such as PTSD and depression. PTSD is an anxiety disorder that mostly occurs after a person has lived or experienced a traumatic event.<sup>130</sup> In her paper on the psychological effects that child soldiers suffer from, D'Alessandra describes a traumatic event as something dreadful and 'scary' that one might have seen or experienced.<sup>131</sup> The recruitment of child soldiers into rebel groups exposes them to an environment of extreme violence, which the child soldiers have no choice but to live and experience it as this, in essence, becomes their new realities which in turn and some of these realities include mental and psychological issues.<sup>132</sup> The constant condemnation of a violent environment creates chronic and traumatic stresses during the development of the children which scars them mentally and physically leading to PTSD and extreme personality changes.<sup>133</sup>

Dr. Elizabeth Schauer an expert witness in the Lubanga trial, spoke about the effect so of war on children with her expert opinion being relied on by the Trial Chamber in its sentencing judgement. Dr.Schauer submitted that 'children of war and child soldiers....often suffer from devastating long-term consequences of experienced or witnesses' acts of violence.'<sup>134</sup> Dr. Schauer went ahead and submitted that the experience of conflict tends to interfere with the development of the children and their ability to function even when the violence has

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<sup>129</sup><http://www.icty.org/en/press/celebici-case-judgement-trial-chamber-zejnil-delalic-acquitted-zdravko-mucic-sentenced-7-years> accessed 10 January 2018.

<sup>130</sup>D'Alessandra Federica, *The Psychological Consequences of Becoming a Child Soldiers: Post-Traumatic Disorder, Major Depression, and other Forms of Impairment*, page 4.

<sup>131</sup>D'Alessandra Federica, 'The Psychological Consequences of Becoming a Child Soldiers: Post-Traumatic Disorder, Major Depression, and other Forms of Impairment,' page 4.

<sup>132</sup> Schauer Elisabeth & Elbert Thomas, *The Physiological Impact of Child Soldiering*, Chapter 14, page 311.

<sup>133</sup> Schauer Elisabeth & Elbert Thomas, 'The Physiological Impact of Child Soldiering,' 311-312.

<sup>134</sup> Kersten Mark, *Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering*, 20 April 2016, <https://justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of-child-soldiering/> accessed 20 January 2018.

stopped.<sup>135</sup> Dr.Schauer acknowledged the fact that most of the children end up suffering from PTSD and the Trial Chamber I observed that those that have been child soldiers for a long period of time are usually unable to possess ‘civilian life skills’<sup>136</sup> which is as a result of their diminished capacity.

In their study on the psychological effects of child soldiering, Blattman and Annan conducted a study comparing the psychological state of abducted children and non-abducted children with Ugandan children forming part of their study.<sup>137</sup> In their study they found the abduction of a child did not automatically lead to instances of psychological distress, but the continuance participation of an abductee in the violent acts created such distress.<sup>138</sup> Their study showed that abductees were nearly 3 times more likely to be in the top quartile of psychological distress.<sup>139</sup>The study also showed that 97% of the abductees were prone to suffer from clinical PTSD while exhibiting extensive emotional and behavioral of having been affected.<sup>140</sup>

#### 4.3.1 CONCLUSION

The psychological effect of child soldiering is an issue that cannot be disputed. This does not mean that children with the psychological effects cannot be treated as this can be done once they are removed from the violent environment and are provided with the proper health care which will enable them to slowly transition into a proper state of mind. We, therefore, cannot assume that those that are still in such environments are able to get back to their proper senses once they become adults. It is unjust of international criminal law to expect that those that grew up in a hostile environment to be able to recover their mental fitness while still in the environment that was the root cause of the problem.

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<sup>135</sup> Kersten Mark, ‘Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering’.

<sup>136</sup> Kersten Mark, ‘Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering’.

<sup>137</sup> Blattman C & Annan J, *The Consequences of Child Soldiering: The Review of Economics and Statistics*, page 886-891.

<sup>138</sup> Gerard Ronald, *Development Economics*, Pearson Education Inc., 2014, page 558.

<sup>139</sup> Gerard Ronald, ‘Development Economics’, 558.

<sup>140</sup> Gerard Ronald, ‘Development Economics’, 558.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 Observations

The *Erdemovic* case has played a major role in the development of the defence of duress in international criminal law. It has created a scenario whereby duress can actually be used as a complete defence and not just as a mitigating factor as was the case in the Nuremberg tribunals.<sup>141</sup> The development of the defence through case law has led to its codification in Article 31 of the Rome Statute under the grounds of excluding an accused from criminal liability. The Rome Statute, as noted earlier on in Chapter 3 of this paper, has in some ways created a hybrid of the preconditions for duress as set out in the *Erdemovic* case by the Trial Chamber and the Appeals Chamber more recognizably in the dissenting opinion of Justice Cassese. The Defence can be raised regardless of the serious nature of the crimes and it is left to the accused to prove that they fulfill every precondition as set out in the Rome Statute unequivocally.

The challenge that the International Criminal Court faces is presented in the case of Dominic Ongwen and other child soldiers as there has never been a case where a former child soldier who was forcefully recruited and grew up in an armed group and committed grave crimes, has been brought forward as an accused. How will the courts then achieve a balance of the victim status and the perpetrator status in such a case? From the discussion in Chapter 3, it is possible for Dominic Ongwen to effectively fulfill the preconditions for duress that were set out in the Rome Statute and Justice Cassese's dissenting opinion. The challenge that arises is whether the court will be willing to tolerate the mere thought of letting an accused such as Ongwen free without any consequences and without setting the wrong precedent.

With regard to the defence of mental illness, the *Celebici* Trial was one of the first cases at the ICTY and in the field of international criminal law that dealt with the defence of mental illness in the form of 'diminished, or lack of, mental responsibility.'<sup>142</sup> As highlighted in Chapter 4, Landzo, one of the defendants in the *Celebici* case, raised the defence of duress in the form of diminished responsibility. At the time Rule 67(A) (ii) (b) of the ICTY Statute did not provide any preconditions or elements of defence which then led the Trial Chamber to establish a 'two-

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<sup>141</sup> Sparr Landy, 'Mental Incapacity Defence at the War Crimes Tribunal'.

<sup>142</sup> Sparr Landy, 'Mental Incapacity Defence at the War Crimes Tribunal'.

part test'.<sup>143</sup> The test required that at the time of the alleged act, the accused must have been suffering from an 'abnormality of the mind' which 'substantially impaired' their ability to control their actions.<sup>144</sup> It can be observed that the Rome Statute mirrors the 'two-part test' that was set out by the ICTY in the *Celebici* trial. The Rome Statute requires the accused to have suffered from a mental disease which will have destroyed the accused's ability to understand the unlawful nature of the act and that they had no ability to control their actions.<sup>145</sup>

The major observation that this study has unearthed and highly appreciates is the interface between the psychological development of a child and the independent nature of their actions once they become adults. As discussed in the theoretical framework in Chapter 2 of this paper, the social ontogenesis of a child is essential in their development in every aspect whether mentally or emotionally.<sup>146</sup> This study concurs with Locke's theory that children are a reflection of the society they grew up in and the ideas that they are instilled in are the ideas that continue to play a major role in their psychological development.<sup>147</sup> The psychological development of a child when interfered with especially when they are put in violent environs, tend to affect them even as adults. They will still be under the influence of the adults in that environment and will continue to be in an abnormal mental state unless they are removed from that society and given the necessary rehabilitation they need to get them out of that state.

States have recognized the vulnerable nature of children and through the Rome Statute, have made it a crime to recruit children to be part of military or any armed group.<sup>148</sup> In his opening statement at the *Lubanga* trial, Luis Ocampo then a Chief Prosecutor at the ICC, recognized the traumatic effect that being a member of an armed group had on children.<sup>149</sup> This effect can highly be associated to the vulnerable nature of children.<sup>150</sup> The International Criminal Law

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<sup>143</sup> Sparr Landy, 'Mental Incapacity Defence at the War Crimes Tribunal'.

<sup>144</sup> Sparr Landy, 'Mental Incapacity Defence at the War Crimes Tribunal'.

<sup>145</sup> Article 31(1) (a), *Rome Statute*.

<sup>146</sup> Nsamenang Bame, 'Human ontogenesis: An indigenous African View on development and intelligence', 293-297.

<sup>147</sup> John Locke, 'Two Treaties of Government', 127.

<sup>148</sup> Article 8, *Rome Statute*.

<sup>149</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ICC (-01/04-01/06).

<sup>150</sup> Nina K, 'Vulnerability theory and the role of the government', 6.

has however ‘dropped the ball’ in creating an assumption that the moment a child soldier becomes an adult, they are able to ‘magically’ return back to their normal mental state.

This study has observed that such an assumption is a failure on the part of international criminal law in truly appreciating and understanding that psychological development of every human from the time they were children, is essential in order for one to be considered in the same standard of a reasonable man who was not exposed to such violent environment. There have been many authors that have written on the psychological development of children. Jean Piaget,<sup>151</sup> a Swiss psychologist, explains that the thinking of young children is mostly based on how the actions they undertake end up affecting them or what results such actions bring.<sup>152</sup> Based on this notion, once child soldiers were recruited and forced to commit certain acts, anyone of them that refused to participate or tried to escape, was subjected to intense physical punishment which would vary from beating, whipping, caning and sometimes even death.<sup>153</sup>

## 5.2 Recommendations

This paper appreciates that the rule of law ought to be upheld and that the judicial system does not change its mind on a whim for sympathetic defendants, an idea this paper does not advocate for. As has been observed from the case study, the ICC has majorly focused its attention on the prosecution of those that it considers to be ‘high-level’ accused persons. In doing so, the ICC ends up failing to acknowledge the position of the accused, such as Dominic Ongwen, as a child soldier who was forced to join the armed groups.

This line of focus administered by the ICC fails to adequately represent all the victims of the armed groups. The Rome Statute in its provision for the grounds for excluding criminal responsibility has failed to take into account an accused child soldier. This paper therefore recommends the purposive widening of the defence of duress and mental illness under the

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<sup>151</sup>Piaget Jean , *The Moral Judgment of the Child* , The Free Press Glencoe, Illinois <https://ia800205.us.archive.org/5/items/moraljudgmentoft005613mbp/moraljudgmentoft005613mbp.pdf> accessed 20 December 2017

<sup>152</sup> Piaget Jean, *The Moral Judgment of the Child*, 64

<sup>153</sup> <https://www.hrw.org/news/2008/04/16/coercion-and-intimidation-child-soldiers-participate-violence> accessed 20 December 2017

Rome Statute so as to include former child soldiers that come under duress and suffer from mental illness.

The paper also recommends that the ICC must not always prosecute child soldiers and that the prosecution of specific child soldiers, especially those that were forcefully recruited, is best left to be handled at the national level of the accused home country. There are various restorative justice processes that can easily be carried out in their home countries so as to ensure that there is an attainment of some form of justice. This will enable the community and the perpetrator to be actively involved in resolving the conflict and will give the perpetrator a chance to reintegrate back into the community and be still be held accountable. This will not be the first time that such a method has been used to deal with crimes of a serious nature. The Gacaca courts in Rwanda form a perfect example of the use of restorative justice in reconciling the community members and the accused perpetrator, who we must not forget is also a victim.

This paper appreciates the fact that the resources of the ICC are limited and inadequate to deal with the issue of recruiting of child soldiers. It is because of this that the paper recommends the involvement of the international community to employ stringent measures aimed at curbing the forceful recruitment of children into armed groups and facilitate the creation of effective rehabilitation programs that will enable for a smooth reintegration of child soldiers back into the society as adults.

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