CHILD SOLDIERS: CRIMINAL RESPONSIBILITY FOR INTERNATIONAL CRIMES

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1. Criminal Liability of Child Soldiers

Individually child soldiers have been tried for offences of war crimes by some national courts. For illustration, Government of Congo in the year 2000 executed a 14 year old kid trooper and in 2001 capital punishments were forced on another four, matured somewhere in the range of fourteen and sixteen, by the Congolese Military Order, although, following resistance by several NGOs, the sentences did not took place.\(^1\) Another example is of Uganda Government which brought conspiracy charges against two former LRA fighters, aged fourteen and sixteen but again due to NGOs pressure these charges were withdrawn.\(^2\)

Disagreement and debates exists with regards to the degree which child fighters ought to be considered in charge of their activities or basically treated as blameless instruments of their bosses. Most frameworks of criminal law take the view that before an individual can be held guilty and, consequently, culpable, his behavior must have contained an element of fault.

1.1. Proof of Culpability

To be guilty of any criminal offence especially serious criminal offence, it isn't sufficient just to have completed a specific denied act; there must be the requisite \(mens rea\) (guilty mind) as well

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as the *actus reus* (wrongful act).³ Therefore it is conceivable to escape from the criminal obligation by appearing one was inadequate with regards to the required blame personality or the demonstration was carried out accidently or in a condition of automatism.

However for a class of persons, the lack of mens rea is always resumed. As one of the authors said in his commentary on the English Law of Infancy:

“*Although it is a defence of status* *(no-one under 10 years of age [the minimum age of criminal responsibility in England and Wales] can commit a crime), the status is predicated on assumptions concerning a person's mental development and consequent moral irresponsibility for her actions.*”⁴

**A) PROOF OF MENS REA**

For illustration, let’s take the example of Common Art. 3 of the Geneva Convention. The purpose of Art. 3(1) of the Convention is to protect the inherent human dignity of the individual. It prescribes humane treatment without discrimination on race, religion, sex, place of birth. ICRC determined that material inhumane treatment is satisfied when the perpetrator caused serious mental or physical injury on the victim. With regards to the mental element, it is sufficient that the accused acted willfully.⁵

As was noted by the ICTY in *Aleksovski*⁶ that other than the offence of Genocide and crime of persecution, no other criminal offence under Crime against humanity requires a specific intent be it a discriminatory intent also. It quoted a para from *Furundzija* Judgment as follows:

“The general principle of respect for human dignity is the basic underpinning and indeed the very raison d'être of IHL and human rights law; indeed in modern times it has become of such importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or humiliating and debasing the honor, the self-respect or the mental well-being of a person.”

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⁵ The Prosecutor v. Zlatko Aleksovski, IT-95-14/I-T (Trial Chamber, ICTY)
⁶ Prosecutor v. Zlatko Aleksovski, IT-95-14/I-T (Appeals Chamber, ICTY)
This judgment does not make any reference to demonstrate any prejudicial aim in establishing the offence of outraging personal dignity. It does not impose that a specific intent is to be proven to hold any accused guilty of this offence. Moreover in Celebici judgment ICTY noted:

“...an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”

In the above stated judgments, one thing is crystal clear. To hold any person guilty of any offense under ICL, what is required is to prove that the particular person has committed the heinous offense. Whether that person had the requisite mens rea or not, it is not that important and the person can still be held liable for the same if he committed the offense. With such analogy, a child soldier can be held liable for the offense.

B) PROOF OF KNOWLEDGE

Generally speaking, most International Crimes don't require verification of any special intent. What they require is requisite knowledge with regards to the attack. This analogy is based upon the decision of ICTR judgment in Kayishema and Ruzindana case in which the court considered that the mens rea contains two parts, that is, knowledge of the attack and its far reaching or deliberate character and consciousness of the way that the crime comprises some portion of the assault. Thus the Court stated: some portion of what changes a person's demonstration into an unspeakable atrocity is the consideration of the demonstration inside a more prominent element of criminal lead; consequently a blamed ought to know for this more noteworthy measurement so as to be punishable thereof. As needs be, real or valuable learning of the more extensive setting of the assault, implying that the denounced must realize that his demonstration is a piece of a far reaching or precise assault on a non military personnel populace and compliant with some sort of strategy or plan, is important to fulfill the essential mens rea component of the blamed.

2. “Minimum Age for Criminal Responsibility (MACR)”

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7 Prosecutor v Delalic et al, Case No.: IT-96-21-T, Trial Chamber, 16 Nov. 1998 (“Celebici Judgement”), para. 543
8 The Prosecutor v. Clement Kayishema and Obed Ruzidana, Case No. ICTR-95-1-A (Appeals Chamber, ICTR)
The troublesome undertaking of setting up “MACR” has generally been overlooked by worldwide courts. However, with the steadiness of internal conflicts far & wide and the growing use of these kid troopers in these conflicts, the global community can never again bear to disregard this issue. For example, expect that a thirteen-year-old kid soldier from the Congo is associated of participating in decimation in Rwanda. The percept of universal jurisdiction provides that any state can accept jurisdiction to indict a person for a universal wrongdoing without depending on the jurisdictional standards of territoriality or nationality.9 Because there is no MACR for international crimes, any nation that assumes jurisdiction over the child can apply its domestic MACR.10

In Rwanda, where the MACR is fourteen the kid trooper would not be held guilty. However, the MACR in the Congo is thirteen,12 obligating the country to prosecute the child pursuant to the “Genocide Convention”. These differences in MIACRs makes a disturbing circumstance where a youngster could be regarded unequipped for having criminal purpose in one country, but then, in another country, a similar individual carrying out a similar demonstration could be considered criminally dependable and condemned to death.13

The contemporary problem of these child soldiers makes the situation impossible to ignore. These children are recruited to commit horrific war crimes including rape, murder etc. In the case of Genocide, states are obliged to take action against those responsible. Art. IV of the Convention clearly states:

“persons charged with genocide. . . shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

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12 ALAN WATSON, ROMAN PRIVATE LAW AROUND 200 BC, at 35 (1971)
2.1. Jurisdiction of International Tribunals

It is to be noted that many international tribunals do not provide any specific age at which they have the jurisdiction to try any offender. For illustration, Art. 7 of ICTY statute which talks about “Individual Criminal Responsibility” states in Para 4:

“4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.”

Same provision is provided under Art. 6 of the ICTR Statue as well. Basically these statues do not provide any minimum age for holding a person criminally responsible for any offence. With regards to the Statue Art. 26 states: “The Court shall have no jurisdiction over any person who was under the age of eighteen at the time of the alleged commission of the offence.” However the language of the Statue and its drafting history clearly indicates that this provision is merely procedure in nature rather than substantive. It is simply exclusion of ICC jurisdiction, leaving the jurisdiction with national courts.¹⁴ During the negotiations of this statue, discussion as to fixing the minimum age for criminal responsibility varied from twelve to eighteen but due to disagreement between various members, this discussion took sidestep. Moreover this decision to exclude the jurisdiction of ICC from trying individuals under eighteen is ascribed more to the court's limited mandates and resources than to the possibility that kids are unequipped for perpetrating universal wrongdoing.¹⁵

But with regards to drafting of the Statue of SCSL, the situation was quite different. The civil war in the country resulted in the recruitment of large number of child soldiers committing various serious offences of war crimes. Special Secretary to UN in his report of establishing the SCSL expressed difficulty with regards to prosecution of child soldiers as they were both perpetrators as well as victims. He stated that The Government of Sierra Leone and agents of

Sierra Leone common society obviously wish to see a procedure of legal responsibility for tyke soldiers assumed in charge of the violations falling inside the locale of the Court.

It is said that the general population of Sierra Leone would not look benevolent upon a court which neglected to convey to equity kids who perpetrated wrongdoings of that nature and saved them the legal procedure of responsibility. The universal non-administrative associations in charge of tyke care and restoration programs, together with a portion of their national partners, in any case, were consistent in their protests to any sort of legal responsibility for youngsters beneath 18 years old for dread that such a procedure would put in danger the whole recovery program so meticulously accomplished.\textsuperscript{16}

Finally after much deliberation, the Statue of SCSL was created and Art. 7 of the same provided that that the court “\textit{shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime.}” The Art. further states:

\textit{“Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child.”}

In other words, the provision retains the possibility that the court can prosecute the offenders between fifteen and eighteen years of age.

2.1. Interpretation of International Laws

Art. 77 of AP I provides that the States shall take all feasible measures to ensure that no child under fifteen years of age is recruited in the armed forces. Taking this provision into consideration, many legal theorists argue that fifteen is the age which can be considered as the MACR. However these arguments don’t stand valid as this is no where written in the Convention itself.\textsuperscript{17}

\textsuperscript{17} Matthew Happold, Child Soldiers: Victims or Perpetrators, 29 U. La Verne L. Rev. (2008) p. 75
The Convention on the Rights of the Child takes the matter further. Art. 40(3a) of the Convention states:

“3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.”

In other words the Convention provides the power to the State parties to fix minimum age for holding any person criminal responsible. Another Convention i.e. United Nations Standard Minimum Rules on the Administration of Juvenile Justice (“the Beijing Rules”) is more interesting. Art. 40 of the CRC were drafted so as to reflect the ways to deal with adolescent equity taken in the Beijing Rules.18 Rule 4 of the Beijing Rules states:

“In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age limit, bearing in mind the facts of emotional, mental and intellectual maturity.”

The Commentary to the same provides that the cutting edge approach is think about whether a youngster can satisfy the good and mental parts of criminal obligation; that is, regardless of whether a kid, by goodness of his or her individual acumen and comprehension, can be considered responsible for antisocial behavior. On the off chance that the time of criminal duty is fixed excessively low or if there is no lower age limit by any stretch of the imagination, the idea of obligation would end up futile.

Discussion with regards to fixing the minimum age for criminal responsibility has also taken place in European Court of Human Rights in V. vs. United Kingdom and T. vs. United Kingdom19. The facts of the case are as follows: There were two boys T & V both aged 10 years abducted and killed a two year old boy. They were tried in an adult court and were convicted of

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19 T v. United Kingdom, 30 Eur. Ct. H.R. 121 (both the case of T v. United Kingdom and V v. United Kingdom were heard together
murder and abduction and as a result were sentenced of indefinite detention period.\textsuperscript{20} Thereafter they applied to ECHR. The Court concluded that the attribution of the applicants of criminal responsibility for their acts did not violate Art. 3. Consequently the Court held:

“Even if England and Wales is among the few European jurisdictions to retain a low age of criminal responsibility, the age of ten cannot be said to be so young as to differ disproportionately from the age limit followed by other European States. The Court concludes that the attribution of criminal responsibility does not in itself give rise to a breach of Art. 3 of the Convention.”

\textbf{2.3. Need of fixing MACR: Omar Khadr Case}

The urge of setting MACR at International Level can be understood from the perfect example of Omar Khadr case.

\textbf{A) FACTS OF THE CASE}

The boy was detained by US army in Afghanistan.\textsuperscript{21} As per the allegations he was caught following a small battle between the US Special Forces and Al-Qaeda agents. The Comrades of the terrorists group were killed but Khadr was alive and wounded. When the forces entered the area of the operatives, Khadr threw a hand grenade on them resulting in injury to one of the soldier who ultimately succumbed to death. When Khadr was captured, he cried to be killed.\textsuperscript{22}

Originally he was held at an airbase in Afghanistan but later on was transferred to prison of Guantanamo Bay, Cuba. President of US acting pursuant of the Military Order dated 13\textsuperscript{th} November, 2001 on the trial of Certain Non-Citizens in the War Against Terrorism assigned Khadr to be tried before a military commission.

Charges were approved against Khadr. He was charged with conspiracy, murder & helping foe. But after the judgment of US SC in \textit{Hamdan v Rumsfeld}\textsuperscript{23} the proceedings were discontinued.

\begin{footnotesize}
\textsuperscript{23} \textit{SALIM AHMED HAMDAN v. DONALD H. RUMSFELD, SECRETARY OF DEFENSE}, 548 U. S. ____ (2006)
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However a new prosecution was instituted following the enactment of the Military Commissions Act ("MCA"). Charges of homicide disregarding the law of war, endeavored murder infringing upon the law of war, connivance, giving material help to fear mongering and spying were sworn against Khadr and were referred to a military commission by the Convening Authority in April 2007.

In 2010, Khadr pleaded guilty and as a result he was transferred to a Canada Prison in 2012. After this, he fought for his freedom and finally on 7th May, 2015 a Canadian Judge ordered him free from all charges with certain conditions.

B) AGE OF KHADR

Important fact here is to be noted that at the time he was detained at Afghanistan he was just fifteen years old, sixteen years old when he was transferred to Guantanamo Bay spending almost a decade and finally when he was set free by the Canadian judge he was 29. He is the son of Ahmad Sa‘id Khadr who is alleged to be a close associate of Osama Bin Laden. Khadr was born in Toronto in 1986 and spent his childhood shuttling between Canada, Pakistan and Afghanistan. From ’96 till 2001 it is alleged that he travelled around Afghanistan meeting senior rank commanders of Al-Qaeda, visiting their training camps and guest house. In the year 2002, he received training in the use of arms and explosives and after the completion of the training, he joint a team of the Al-Qaeda which constructed and planted landmines against US and its coalition forces.

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C) TORTURE AT GUANTANAMO

Though treatment with the prisoners at Guantanamo Bay is not uncommon, however the treatment with Khadr at his age is something can be called as a “horrific nightmare”. One of the news reporters Jeff Tietz in his report described the life of Khadr in a very disturbing detail. Some of the tortures with him can be summarized as follows:28

- Guards binded him to the floor of a cross examination room. They hauled his arms and legs behind in a "bow" position, until his appendages stressed horrendously at their attachments.
- While at Guantanamo, he was beaten in the head, almost choked, and compromised with having his garments taken uncertainly and, as at Bagram, thrusted at by assault hounds while wearing a sack over his head.
- The cross examiner told Omar, would hand him to an Egyptian guard, who spent significant time in assaulting detainees.

Overall the torture was both psychological and physical. It can be argued on the basis of the above facts as to how important is to fix the minimum age for criminal responsibility.

II. PROSECUTOR V. DOMINIC ONGWEN: A NEW CHALLENGE TO IHL

It was the year 1988 when a nine-year old kid heading to class was all of a sudden taken by the forces of LRA.29 The boy, who was once described as shy and innocent, went on to spend the rest of his adolescent life as a soldier; forced by his superiors to carry out incomprehensible barbarities in numbers and in anguish; in scale, yet in seriousness.

29 Andrew Green, To Forgive a Warlord, FOREIGN POL’Y (Feb. 6, 2015, 9:00 AM), http://foreignpolicy.com/2015/02/06/ongwen-uganda-icc-joseph-kony-inter national-justice
Thirty years later, the boy named as Dominic Ongwen went on to become the Brigadier General of LRA. Currently he is on trial in ICC and is charged with maximum number of counts regarding “crimes against humanity and war crimes”, faced by any accused before ICC. A tug of war is surely to arise between the liability which IHL imposes and the protection given by IHRL, IHL & ICL.

3. Criminalization on the recruitment of children in armed forces

IHL prohibits the recruitment of children in armed forces. Art. 77 of AP I obliges, nations to the ACs to take every practical measure all together that youngsters who have not achieved the age of fifteen years don't take an immediate part in threats and shun enrolling them into their military, and, in selecting among those people who are somewhere in the range of fifteen and eighteen years of age nations to the ACs are obligated to give priority to those who are oldest.

However there is one disagreement over these provisions. Prof. H. Harry L. Roque, leading Public International Law experts at University of Philippines expressed that though Additional Protocols and other international treaties prohibit the recruitment of children but they do not criminalize the same. He has written in one of his books that there is ample evidence to prove that since the GCs do not provide enlistment of kids as troopers as a kind of grave beach of IHL because of which no obligation is imposed on state parties to create such domestic laws regarding criminalization of these kinds of acts.

Nor is kid enrollment among those wrongdoings attempted by the Ad Hoc World War II Tribunals, be it in Nuremberg or Tokyo. This inability to indict especially by the Nuremberg Tribunal is a critical marker that the act has not been condemned since youngsters were broadly enlisted as soldiers, especially by Nazi Germany, but then not a solitary Nazi was striven for it. The equivalent might be said of the Statutes that made the UN War Crimes Tribunals for the Former Yugoslavia and for Rwanda. There is nothing in their particular rules that conceded this tribunal’s jurisdiction to indict people for the enlistment of youngsters. Moreover, even in the human rights laws that do disallow the enrollment of younger warriors, there is no obligation

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forced on State Parties to sanction local enactment condemning the act. As though to feature the non-criminal nature of child enrollment, the UN Secretary-General incorporated into his 2005 report a suggestion that national governments ought to establish and apply pertinent enactment to guarantee the security, rights, and prosperity of kids and ought to guarantee the assurance and recovery of war influenced kids inside their locale. This suggestion appears to surrender the need to establish household punitive enactment to condemn enlistment of kids.  

However after Statue, this practice was made a criminal act. During the negotiations of the Statue, the majority recognized that child soldiering was a “virtually universally accepted prohibition of most serious concern”. Art. 8(2)(b)(xxvi) of the Statute expressly criminalized conscription & enlistment of kids in armed forces who are under fifteen years age. It has been contended that the sheer wickedness of utilizing kids as the pawns of war requires the criminalization of kids’ soldiering under standard universal law. The supporters of this opinion cite the Statute to solidify that argument. While this is without a doubt a case established on respectable feelings, the status of child soldiering as a standard can't be pivoted on Statue alone showing an absence of state practice and opinio juris.

As of 2019, only 122 countries out of 197 have ratified the Statue comprising a majority of all States, this could scarcely qualify as 'practically uniform' accession. Interestingly, the absence of state practice is prove by the way that the states that have not ratified the Rome Statute contain a majority of global population i.e. more than 66% of the planet's populace. As to opinion juris, only some countries have enacted household legislations to criminalize kid enrollment in forces.

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34 GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 332 (T.M.C. Asser Press 2005)
35 North Sea Continental Shelf Cases (Ger./Den. & Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20)

www.turkjphysiotherrehabil.org 30043
Consequently, while the criminal idea of the enlistment and utilization of youngsters presently can't seem to take shape as CIL, there is adequate lawful premise to advance its criminalization past the four corners of the Statute.

4. Criminal Responsibility of Ongwen

Whether the child pulls the trigger or is but caught in the crossfire, universal law perceives kids in ACs for what they really are: unfortunate casualties.\(^{37}\) The risks presented to kids are not detached to physical prosperity alone, however psychosocial challenges that significantly influence their advancement.\(^{38}\) This is because the encounters of youngsters get from their condition are the essential factors that decide their physical, emotional, social, and psychological advancement or delay. Considering the serious outcomes endured by youngsters in conflicts alone, it has been presented that CIL thoroughly condemned the enlistment and utilization of child soldiers.

Ongwen henceforth brings up novel issues with regards to the unfortunate casualty status of the child soldier. While universal law perceives the child soldier’s secured status, Ongwen, a previous youngster child soldier himself, is attempted as the culprit. A victim cannot become a culprit on his eighteenth birthday. In fact, if the laws were implied to protect the child, it cannot be then argued that the same laws will make that child liable with the passage of time. The following fragment will entertain Ongwen’s rotten social background as a ground of exoneration:

4.1. “\textit{Actus me incito factus non est meus actus}”

“\textit{Actus me incito factus non est meus actus}” a basic principle of criminal law which means: ‘an act done by me against my will is not my act.’\(^{39}\) Because of this either outside restrictions on

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volition or interior obstruction with perception 40 is expressly excluded by the Statute from holding any person culpable.

“The Rotten Social Background” doctrine, in recognizing the relationship between environmental adversity and criminal propensity, advances the theory that a person’s criminal behavior may at times be caused by extrinsic factors beyond his or her control. Subsequently, when natural strains make an inclination to perpetrate wrongdoing, it would be a shamefulness to decree culpability.

A) ART. 31 OF ROME STATUE: GROUND FOR EXCLUDING CRIMINAL RESPONSIBILITY

Exonerating conditions assumed a minor job in the early history of international law.41 Remarkably, no reason for barring criminal obligation were given under the Nuremburg Charter, nor the in the statutes of the ICTY/ICTR. In this respect, the Statute makes “great strides in the direction of a fully-developed system of criminal law.” Art. 31 of the Statue states:

“In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

(a) The person suffers from a mental disease or defect that destroys that 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 law;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

41 GERHARD WERLE, “PRINCIPLES OF INTERNATIONAL CRIMINAL LAW” (T.M.C. Asser Press 2005) p. 138
(ii) Constituted by other circumstances beyond that person's control."

In other words this provision provides that when the perpetrators’ mind is disturbed to such an extent that he is not able to differentiate between right & wrong then he shall be excluded from any type of culpability. However it should also be noted that in the case of domestic law, this situation can vary from country to country and from case to case.

In the case of mental insanity, the onus is upon the defendant to prove that he was suffering from some kind of mental defect at the time of the act. Since ICC directly addresses the issue of duress in Ogwen’s case, emphasis will be made on mental defect and duress keeping in mind the rotten social background.

**Duress or ‘Devils Choice’**

Ongwen’s Counsel emphasized, it isn't available to discuss that Ongwen endured every one of the notions of life as a youngster fighter of the LRA. This was neither rebutted by the Prosecution Counsel nor the Victim’s Counsel. The defense argued that growing in between the soldiers of LRA, Ongwen was under ‘devils choice’. The Counsel explained in a choice in the Ugandan court tyrant Idi Amin guided a specific lady to pitch her property to the government office of Somalia. The lady was left with no decision yet to sell the property. At the point when Idi Amin was ousted, this woman went to court, yet the litigant brought the deal understanding and stated, yet you marked this archive selling your property.

What's more, the choice was with respect to whether she deliberately assented to offer her property. Their Lordships all things considered, your Honors, said no, that was not assent. Given the tyranny of Idi Amin and his penchant to murder anyone who remained in his manner, the woman was left with no decision however the devil’s choice Your Honors, we present that in everything that Dominic Ongwen did, he was left with the devil’s choice.

Defense vehemently argued that throughout his life till the time he surrendered to US Special Forces, Dominic was under duress and he had no option but to follow his commanders. He explained that he had to follow the orders of his superiors as he was threatened to be killed and
even otherwise if he tried to flee, then also he would have been killed. The Court opined in the Decision on Confirmation of Charges, duress would exclude criminal responsibility when:

(i) The direct of the individual has been brought about by coercion coming about because of a risk (regardless of whether made by different people or established by conditions past the individual's control) of inescapable demise or unavoidable genuine real mischief against that individual or someone else; and

(ii) The individual demonstrations fundamentally and sensibly to maintain a strategic distance from this danger, gave that the individual does not expect to cause a more noteworthy mischief than the one looked to be kept away from.  

The Trial Chamber held that the defense was not able to establish that Ongwen's acts were somewhat necessary in terms that he had no alternative or choice and whatever he did was done to prevent a greater harm to the end that the harm. Regarding first case, it cannot be shown that the so called “threat of death” was immediate in nature. The court ruled that such an interpretation would dangerously provide protection to those groups which maintain discipline by such harsh methods.

As to the second element of duress, otherwise referred to as the “choice-of-less-evil approach”, an act is proportionate if “the crime committed under duress is, on balance, the lesser of two evils.” Chamber observed that it cannot be shown that the conduct of Ongwen was necessary and reasonable to avoid the so called death threats and “the required intent of proportionality for those crimes committed against the civilian population.” Ongwen has to face an uphill task of proving the defense of duress in order to escape culpability.

**Insanity: The Rotten Social Background**

The defense counsel on behalf of Ongwen argued that, he was so jumbled and overwhelmed by the hard experience as a tyke warrior with the LRA and the devil’s choice he was left with. Art.

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42 Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, Para 152
44 Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 153
46 Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 155
31(1)(a) of the Statue excludes any person from culpability who suffers “from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct.” It epitomizes a settled standard of criminal law that “incapacity or legal insanity serves as a categorical exclusion of criminal responsibility.” To establish a plea of insanity, the defense must prove:

1. That, at the time of the act, the individual experiences a psychological illness or imperfection; and

2. That the malady or deformity wrecks the individual's 'ability to value' the unlawfulness of his direct or the 'ability to control' his action.

The mental defect which is provided under Art. 31 refer to both debilitations of cognition, i.e. “awareness and understanding” and volition i.e. “uncontrollable, irresistible impulses”.

However it can be said that it is both unnecessary and impracticable to decipher Art. 31 as referring only to either “cognition or volition” because mental qualification is in constant flux. It is to be noted that the term ‘insanity’ is not mentioned clearly in the Rome Statue. Rather, ICTY adopted an obscure and malleable standard and defined “mental disease or defect” as something which encompasses any psychological imperfection that accomplishes a level of seriousness and perpetual quality and can upset the culprit's capacity to acknowledge or control his or her direct. In other words it bars simply impermanent conditions of fatigue or energy. Only when the mental disturbance of that level which “destroys the perpetrator's capacity to appreciate” can lead to the avoidance of culpability.

With regards to the second element, one's ability must not only be impaired, but also destroyed. Many scholars opined that only substantial, rather than absolute impairment of cognitive abilities suffice. It is submitted that in such cases the principle of RCB plays an important role. This

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defense was first raised in the case of *U.S. v. Alexander*\(^52\) by a dissent Judge of the US Appeals Court. The facts of the case were that the defendant killed a person who called him a “black bastard”. Though the accused failed to prove clinical insanity, however the expert witness revealed that due to the RCB condition of Murdock, it made him to take such action. However the trial judge disregarded the testimony of the expert testimony resulting in twenty years life imprisonment to Murdock. However Judge Bazelon in his dissent argued that the evidence of the accuser’s RCB should have been considered while holding him culpable.

RCB defense is similar to that of coercive indoctrination-meaning changing a person’s belief or value through forceful means.\(^53\) In other words where a kid's action is under conditions that definitely standardize the youngster to see viciousness and misleading as satisfactory and without a doubt vital strategies for arranging the difficulties of day by day life one could contend that such conditions are comparable to a procedure of coercive teaching and can render a guilty party innocent. Hence, a litigant who might not have submitted the offense being referred to where he the bygone self may guarantee that he ought to get a resistance since he acted simply because of new convictions and qualities persuasively forced on him, for which he should not to be considered responsible.

It is not a disputed fact that the environment conditions around child soldier are more of a brutal rather than a matter of discipline. It can be understood from the fact findings of Trial Chamber of SCSL in *Charles Taylor Judgment*.\(^54\) A boy named as TFI-143 was captured by the forces of AFRC and was recruited in the armed forces. He was assigned to one of the commander of the forces who with other kids went to Konkoba village where this boy was asked to rape an old woman. On refusal, he was made to lie in the sun with his eyes open for the entire day as punishment. Infact the trial chamber observed that the RUF and AFRCs practice of giving children narcotics, Cocaine was some of the time directed by opening a cut on a youngsters' body, putting cocaine on it and then covering it up with a plaster. The Trial Chamber finds that this practice exemplifies a method of coercion used to make the children fearless and complete

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\(^{52}\) United States v. Alexander, 471 F.2d 923 (D.C Cir. 1973)


\(^{54}\) Prosecutor v. Charles Ghankay Taylor, Case No.: SCSL-03-01-T (Pre-Trial Chamber II, SCSL)
requests decisively, and demonstrates that kids would probably submit savage acts while affected by such substances.

4.2. Child Soldiers: Victim in Law, Perpetrators in Practice

Art. 26 of the Statue expressly bars the jurisdiction of the court over a person who was below 18 at the time of commission of the offence. A mere interpretation of proposes that according to the law, upon the kid warrior eighteenth birthday celebration, he ipso facto sheds the secured status of unfortunate casualty, and wears the job of culprit.55 As the counsel for Ongwen argued before the court on the off chance the universal law really tries to safeguard these children, it is contradictory to that reason to force criminal risk upon the unfortunate whom the law neglected to ensure.56 It is being argued that to indict Dominic would directly mean indicting all the child soldiers around the world.57 This is not the first case of child soldier before ICC. In Lubanga, the court adopted a favorable stance for child soldiers. During the course of the proceedings, the court will bear the weight of adjusting the clashing requests of criminal risk toward one side, and human rights securities of the children on the other. Indeed, excusing Ongwen based on the circumstances of his past means sowing the seeds of our own future degradation; yet on the other hand, the best reason to acknowledge Ongwen’s rotten social background would be the height of injustice if it is ignored.58