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### **Child soldiers: a devil's choice or are they really guilty?**

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#### **Abstract**

It is without a doubt that today one of the worst humanitarian crises our world is going through which is not addressed properly is the menace of child soldiers. The small children are recruited by the non-state actors or specifically the terrorist's groups which results in the destruction of the early life of these children. The problem is not restricted just to the early childhood of these children, but a more pertinent question is whether these children should be held guilty for the crime they commit? There are no specific answers to the same. In this paper, I shall delve into the history of the recruitment of the child soldiers along with taking into consideration some of the viewpoints of the legal scholars and the judicial sentiments in this regard.

#### **Keywords**

Child soldiers, International Criminal Law, Dominic Ogwen, Special Court of Sierra Leone, Rome Statue

#### **Introduction**

As of now, a large number of child warriors are holding the positions of soldiers in both inter-state and domestic clashes. Many are constrained into fight

by mentally conditioning and being medicated; others pressured at gunpoint or through outrageous savagery in type of discipline or attempting to flee to wage war;<sup>1</sup> sometimes they are abducted by forces; others are dealt and sold to these military groups to be utilized as food collector or doing other household errands of the officers; and some are the descendants of contenders, naturally introduced to these conflicts, who don't know about anything aside from battling from the time they are mature enough to utilize a weapon.<sup>2</sup>

Numerous youngsters are pressured to stroll into mine fields so that there are clear ways for the more established warriors to move. These youngsters frequently unwittingly are given bikes or cruisers pressed with explosives and are advised to ride into a populated zone or military/police station so these explosives when exploded causes disorder yet in these cases subsequently the tyke is savagely shredded in the impact. These youngsters are likewise compelled to partake in the bloodiest demonstrations of mercilessness and many carry out monstrosities which can't be clarified in words, regularly in light of the fact that they are not mature enough to comprehend the gravity of their demonstrations. Generally the young ladies who are enrolled in the powers are constrained into the positions to be "comfort ladies" who takes care of the individual and sexual needs of commandants and male warriors. These youngsters are minimal more than human property beaten, tranquilized, explicitly ambushed, and are discarded when their handiness closes.

## **Current STATUS OF CHILD SOLDIERS**

### **2.2. Recruitment, Coercion and Forced Servitude**

In earlier years, kids battling in war were seen as heroes. On the other hand, developed nations, including the United States, select high school students into military through junior save officer preparing programs, portraying an actual existence of military administration as the most honorable and devoted calling.

#### **2.2.1. Voluntary Recruitment (Enlistment of children in armed forces)**

Sixteen-year-old High school students after graduation in Britain,<sup>3</sup> and seventeen in case of US<sup>4</sup> are legitimately permitted to be enrolled into the military. official age of enlistment in Burundi & Canada is fixed at at sixteen years (with

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<sup>1</sup> Nienke Grossman, "Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations", *Georgetown Journal of International Law* 38 (2007) 328.

<sup>2</sup> Luz E. Nagle, "Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflicts", *Cardozo Journal of International and Comparative Law* 19 (2011) 1

<sup>3</sup> Armed Forces (Enlistment) Regulations 2009 SI 2009/2057 § 4 available at: <https://www.legislation.gov.uk/uksi/2009/2057/regulation/4/made>

<sup>4</sup> 10 U.S.C. § 505(a) (2010). "Recruits who are seventeen at the time of enlistment must have written permission from their parents or guardian." Id. "The United States Pentagon sponsors programs for approximately 400,000 high school children, where they are taught how to be soldiers, including how to march, shoot, act, and think like soldiers." U.N. Briefing Paper on Child Soldiers

parental or guardian permission), while Middle East Countries like Oman and Yemen have official willful enlistment set at age 14, and Bahrain at 15 years.<sup>5</sup>

### 2.2.2. Falsified or forceful recruitment

In some states where indiscriminate compulsory conscription is the basis of military service, recruited people can be very young. For example: In a country like Bolivia, where the official period of willful enrollment is nineteen years, around 40% of the military power consist of the people who are undern eighteen years of age, a portion of which is around sixteen years of age.<sup>6</sup> Numerous high school young men are gathered together in enrollment activities called "batidas" (likewise rehearsed in Colombia) in which enlistment units go to open regions where youth accumulate, for example, transportation focuses, and check military administration archives against a man's age.<sup>7</sup> Formally, if these young fellows don't have legitimate records and are eighteen years old or more established, they are set on a truck and are sent off to enrollment stations for being handled into the military to serve somewhere in the range of twelve and two years.<sup>8</sup> Under international law, such involuntary recruitment method is a clear violation of Art. 9 of the ICCPR,<sup>9</sup> & it doesn't support that numerous countries, for example, Colombia, don't perceive meticulous protests which is a further infringement of Art. 18 of the Covenant.<sup>10</sup>

### 2.2.3. Environment for children in armed forces

As kids become progressively alluring to be utilized as troopers, especially by sporadic powers, they progressively moved toward becoming casualties of their conditions, frequently gotten by powers past both their control and the control of the grown-ups who are accountable for them.<sup>11</sup> Since these kids are so youthful who can be effectively impacted, they will in general become brave, as they have not yet built up a grown-up's feeling of self-conservation, and are "*less able to assess the risks of combat.*"<sup>12</sup> They don't effectively look for selection, despite the fact that now and again they do volunteer so as to escape neediness or to get

<sup>5</sup> "Military Statistics: Conscription by Country", NATIONMASTER.COM, <http://www.nationmaster.com/graph/mil-con-military-conscription>

<sup>6</sup> Worst Forms of Child Labour Data: Bolivia, Global March Against Child Labor, <http://www.globalmarch.org/worstformsreport/world/bolivia-2002.html>

<sup>7</sup> Military conscript in Colombia is governed by Ley 418 de 1997, and in Bolivia by Ley Servicio Nacional Defensa, Artículo 22

<sup>8</sup> *Coalition to Stop the use of Child Soldiers*, (Child Soldiers Global Report 2004)

<sup>9</sup> International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171,6 I.L.M. 368, available at <http://www2.ohchr.org/english/law/ccpr.htm>.

<sup>10</sup> War Resisters' International, Military Recruitment and Conscientious Objection in Colombia, Report to the Human Rights Committee 2 (Aug. 2009), <http://www2.ohchr.org/english/bodies/hrcl/docs/ngos/WRIColombia97.pdf>.

<sup>11</sup> Integrated Regional Information Network (IRIN), Too Small to be Fighting in Anyone's War (Dec. 12, 2003), <http://www.irinnews.org/pdf/in-depth/Child-Soldiers-IRINIn-Depth.pdf>. [hereinafter Too Small to be Fighting in Anyone's War].

<sup>12</sup> Def. Mot. Dismiss 7, United States v. Omar Ahmed Khadr, (Jan. 18, 2008), [http://media.miamiherald.com/smedia/200802/03/21/Khadr-ChildSoldier.source.prod\\_affiliate.56.pdf](http://media.miamiherald.com/smedia/200802/03/21/Khadr-ChildSoldier.source.prod_affiliate.56.pdf)

individual wellbeing and insurance, or to seek after wants for vengeance. Anyway in the majority of the cases these youths become warriors just in light of the fact that they are naturally introduced to conflict areas, or on the grounds that they have a place with such social or innate gatherings that are misused by senior military commanders, who either involve their geographic area or enter their country with the express reason for reaping them to move toward becoming soldiers or fill different jobs of constrained bondage, including sexual subjugation.

As a component of their mentally programming procedure, these kids are compelled to commit mayhem, to kill their very own people and sometime their relatives too. The goal is straightforward. These kids not just adjust a feeling of carrying out mass abominations but these commandants adequately disjoins their connections to their networks, guaranteeing that they can never disappear to return home, and in this way making a compelling enthusiastic ward connection among them and their leaders.<sup>13</sup> For example, one of the brutal groups in Africa RENAMO, their strategy was to influence the kids in such a manner that every single thread of their connection with their society is broken completely. Like these kids were forced to kill someone close to them even if it includes their family member and bringing this in knowledge of every member of that society so as to completely close the doors of reintegration of these kids in the society.

#### 2.2.4. Treatment of girl child soldier

Girl soldiers are particularly treated brutally by armed forces. Although both govt. & non govt. forces that enlist young ladies into their positions without their consent are required to play out indistinguishable obligations from their male partners. Anyway, these female soldiers face sex explicit maltreatment, for example, sexual abuse, like constant assault and constrained premature births.<sup>14</sup>

As per some reports, 40% of the 300,000 youngsters related with military groups are young ladies. In Congo, where the essential job of young lady trooper was to battle, many of them faced heinous sexual offences. Usually it happens that the soldiers rape these girls twice or thrice in a day which in turn damage the private parts of these girls and moreover there are also high chances that these girls can contact sexually transmitted diseases as well which can ruin their life completely. In some cases at a very young age these girls become pregnant and when these soldiers refuse to acknowledge these girls, they have to bear the society's shame and their unhealthy body problems at the same time.<sup>15</sup>

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<sup>13</sup> The Redress Trust, *Child Soldiers before International Criminal Court* (Sep. 2006), available at: <https://www.refworld.org/docid/4bf3a5e22.html>

<sup>14</sup> George Bryjak, *The Tragedy of Child Soldiers*, PEACE MAGAZINE 26 (July-Sept. 2007) available at <http://archive.peacemagazine.org/v23n3p26.htm>; Child Soldiers Global Report, *Coalition to Stop the Use of Child Soldiers, child soldiers global report*, (2008) 99-103, [http://www.childsoldiersglobalreport.org/files/country-pdfs/FINAL\\_2008\\_Global\\_](http://www.childsoldiersglobalreport.org/files/country-pdfs/FINAL_2008_Global_)

<sup>15</sup> The Redress Trust, *Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court*, 7 (2006) 7 <http://www.redress.org/downloads/publications/childsoldiers.pdf>

### 2.2.5. Use of culture and tradition against “child soldiers”

The mentally programming of youngsters into the positions of sporadic groups is likewise accomplished by misusing the taboos and convictions imbedded in their way of life. For outline, in Africa, child troopers are some of the time smeared in margarine arranged from the African Shea tree and are informed that this will stop shots and furthermore keep them away from returning home.<sup>16</sup> Amid the Iran-Iraq war during the 1980s, many Iranian kids were sent to battle and clear mines, “armed with makeshift rifles, a dose of ‘martyr’s syrup’, [sic] and the keys to paradise around their necks.”<sup>17</sup> Some were started into mystery social orders and were informed that the enchantment “(juju)” which they will get shield them from projectiles.<sup>18</sup> The brutal LRA forced children to murder their colleagues and to take part in blood ceremonies. Like in one of the incident, a kid tried to run away but unfortunately was caught by LRA people. Afterwards he was forced to eat red peppers and simultaneously was beaten by the people. Then the other kid troopers were asked to kill this boy. When they refused to beat him, they were threatened that they will be killed if not followed the commands. As a result these kids killed that boy and were then asked to smear the blood of this boy so that they never fear death and also would not think to escape.<sup>19</sup> The (1997),

## 2.3. The Child Friendly Business of Warfare

### 2.3.1. Easy adaptation to environment

The evolution of lightweight weaponry joined with higher abilities to incur obliteration has diminished the inborn physical impediments of youngsters to such an extent that “*the link between adulthood and the ability to bear arms no longer exists.*” Today numerous advanced weapons are easy to use, unctio n admirably in each condition, are promptly accessible, cheap to acquire, and do not require incredible physical solidarity to work with lethal impact. Alongside automated power, a young officer of a little age can move toward becoming as destructive as a grown-up twice his age. This simplicity of arming kids, combined with the medications, liquor, and otherworldly elixirs given to kids by military pioneers, convert these kids into heartless officers. Likewise adding to the expanding utilization of youngsters in fighting is that in some ongoing clashes in some nations which are situated in hot and moist tropical areas kids out there can battle with cruel atmospheres superior to more established soldiers. For instance, amid

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<sup>16</sup> Andrew Ehrenkranz, Cult of Combat, NEWSWEEK, May 16, 2007, available at <http://www.newsweek.com/id/34687>.

<sup>17</sup> Ilene Cohen and Guy S. Goodwin Gill, *Child Soldiers: The Role of Children in Armed Conflict*, (Clarendon Press, 1994) 100

<sup>18</sup> Children of Conflict, BBC WORLD SERVICE, <http://www.bbc.co.uk/worldservice/people/features/childrensrights/childrenofconflict/soldier.shtml>

<sup>19</sup> Human Rights Watch, *Scars of Death: Children Abducted by the Lord's Resistance Army in Uganda* (1997) 22 <http://www.hrw.org/legacy/reports97/uganda/>.

Mozambique's inside clash during the 1980s, the radical gathering RENAMO<sup>20</sup> forcefully constrained kids into its positions because as per them they have more stamina, they follow orders without any complain.

### **2.3.2. Injury caused to children during training**

Since these youngsters at such youthful age are not completely grown physically, they are increasingly inclined to damage brought about by their exercises as warriors and from disciplines and fierce preparing techniques forced by their administrators and more senior individual soldiers.

Detailed wounds incorporate hearing misfortune brought about by the utilization of substantial weapons with no insurance to ear, loss of appendages and visual impairment because of inappropriate or deficient preparing or wellbeing precautionary measures. These kids are compelled to perform strenuous undertakings for which they are not physically fit, and, without being given legitimate sustenance and rest, their delicate bodies suffer at a more rapid rate. They likewise experience the ill effects of long haul mental injury. On the off chance that being taken from the generally secure surroundings of their homes and network isn't sufficiently awful, the concurring maltreatment and beatings by their military chiefs adds to long haul obtuseness and weakening of emotional reactions. Child warriors are regularly the people in question, culprits as well as observers of terrible acts: executing, injuring, assault, torment, injuring, the annihilation of property and removal of individuals. They build up a reliance association with their officers and become inured to slaughtering.

Some young troopers also believe that they are more secured inside military than they remain among the groups such as street kids, stateless people among others.<sup>21</sup>

Several child soldiers develop "Post-traumatic stress disorder" (PTSD), as well as encountering sentiments of dread, weakness, blame and melancholy. They lose basic years of their life as they are out casted from education, which affects their emotions and mental development. Notwithstanding when they are saved, demobilized, and reintegrated, their absence of education and work aptitudes makes them unfit for occupations, and long haul absence of taking responsibility for their activities renders them irresponsible and erratic to their potential bosses.

### **2.3.3. Reintegration in Society**

Being a soldier at such young age is viewed as an act of "disgrace" by the society and this is another long haul issue for those kid troopers who endeavor to reintegrate into society. In numerous cliques, the outrages they have committed or

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<sup>20</sup> Bureau of African Affairs, *Background Note: Mozambique* (United States Department of State, Nov. 5, 2010), <http://www.state.gov/r/pa/ei/bgn7035.htm>

<sup>21</sup> Ilene Cohn and Guy S. Goodwin-Gill, *Child Soldiers: The Role of Children in Armed Conflicts* (1994) 67.

related with it directly or indirectly render them "*persona non grata*", indeed, even by relatives, who dread maltreatment and striking back by neighbors on the off chance that they acknowledge their kids. Stereotyping of previous kid troopers as being berserk further drive them away from society and increases their uneasiness and feeling of being an untouchable. In addition, conditions where the kid officer is endeavored to be reintegrated may become a tricky problem, especially in situations where the previous child fighter's home and region is presently controlled or populated by rivals of the gathering to which the person in question was a member in the past.

Previous young lady warriors face much more difficulties. Many contacts explicitly transmitted sicknesses and have fertility issues due to poor medicinal consideration and treatment given to them amid their time as child soldiers.

In numerous societal structures, especially where there is a solid tribal structure, families face the disgrace of having young girls who were child fighters and were explicitly sexually abused. A girl child additionally faces issues to her marriage prospects which could have been critical in securing or improving monetary security, and she might be deemed to be considered unfit to work in comparison to her male partners.

#### **2.4. Current Report on "Child Soldier" Recruitment**

An annual report prepared by "Child Soldiers International" group in 2017-18 presented some statistics with regards to the use of children around the world by irregular forces. It can be summarized as follows:<sup>22</sup>

Over past 4 years, 19000 children were recruited by armed forces in South Sudan.

- In Central African Republic, around 14000 children were recruited since the latest conflict started in 2010-11.
- In 2017, UN Secretary General named 56 armed groups and seven state forces guilty for recruiting child soldiers
- Boko Haram in the areas of Nigeria and Cambodia reportedly used 203 children as "suicide bombers".
- Around 46 State militaries continue to recruit children as soldiers
- Around 240 million children live in armed conflict areas.
- Moreover there are certain other reports with regards to use of children by other States. This includes:<sup>23</sup>
- Human Rights Watch (HRW) reported that children were used by pro-government militias to fight against ISIS.
- Several irregular armed forces have been reported to use several children in armed forces to overthrow Gaddafi government in 2011.<sup>24</sup>

<sup>22</sup> Child Soldiers International, "*Child Soldiers International: Annual Report 2017-18*" (2018) p. 5 (available at [https://reliefweb.int/sites/reliefweb.int/files/resources/CSI\\_annual\\_report\\_2018.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/CSI_annual_report_2018.pdf))

<sup>23</sup> Child Soldiers International, "*Child Soldiers World Index: Iraq*", available at <https://chidsoldiersworldindex.org/view/IQ>

<sup>24</sup> Child Soldiers International, "*Child Soldiers World Index: Libya*", available at <https://chidsoldiersworldindex.org/view/Ly>

- Some non state actors like Ansar Eddine, Al Mourabitoun among others have been reported to recruit children in armed forces especially after the breakdown of peace accord in Mali in 2015. In fact UN received around 700 cases of alleged recruitment of children between 2014 and 2017 by these forces.<sup>25</sup>
- In case of India, armed groups which are associated with Communists Party of India (Moists) in Central India have been reported to recruit children as young as twelve years old but due to the difficulties in access to these areas, the actual number is unknown.<sup>26</sup>

## **Defining Child Soldiers: The Issue Of Age**

### **Introduction**

Human Rights groups around the world which are eager to boycott the military utilization of youngsters referred "child soldier" to a kid who has been enlisted in the military below eighteen years of age. ICC Statute makes it a "war crime" under Art. 8(2)(e)(vii) to "recruit or conscript children by national armed forces" to actively participate in hostilities below fifteen years of age. Similarly, SCSL Statute condemns the enrollment of kid warriors below age fifteen.<sup>27</sup> This court was made in the after effects of the civil war in which a large number of children were recruited to actively participate in war crimes and other inhumane activities.<sup>28</sup>

The Statue cannot assume jurisdiction to try any person below 18 years of age for committing any war crimes. But the disagreement lies over the trial and prosecuting age of persons. IHL provides that kids between the ages of 15 and 18 can be legitimately selected to be fighters under indistinguishable terms and conditions from grown-ups. In any case, in contrast to grown-ups, if they carry out atrocities they are not exposed to universal criminal indictment as a result of their age. The unintended result of this difference over age is the formation of a class of more seasoned kids who are permitted to battle, yet who are shielded from punishment for their activities.

### **3.1. "Age" & "Laws of War"**

#### **3.1.1. Criteria of "Age in International Conflicts"**

According to the Statute, enrolling youngster warriors under age fifteen is equivalent to being treated as an atrocity. Those war crimes which are "committed

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<sup>25</sup> Child Soldiers International, "*Child Soldiers World Index: Mali*", available at <https://childsoldiersworldindex.org/view/ML>

<sup>26</sup> Child Soldiers International, "*Child Soldiers World Index: India*", available at <https://childsoldiersworldindex.org/view/IN>

<sup>27</sup> Art. 4(C), SCSL

<sup>28</sup> Lansana Gberie, *A Dirty War in West Africa: The Ruf and the Destruction of Sierra Leone*, 28 (2005)

during both international and domestic conflicts, such as civil wars and insurgencies”, are the focal points of the Rome Statute. Prior to the Statute, IHL was largely concerned with trans-boundary conflicts. For illustration, GCs primarily concern was with the wars, which can be carried out between two nations.<sup>29</sup> Drafted because of the after effects of World War II, the GCs mirrored the same level of international state aggression, which was experienced by different countries at that time. Moreover, the original text of GCs never made any reference to child soldiers. The draft committee of the Conventions did not define the term “childhood”, despite having the knowledge that large numbers of child combatants were recruited in World War II.<sup>30</sup>

### **3.1.2. “Criteria of Age” in Non-International Armed Conflicts: The Absence of Protection**

Traditionally speaking, in opposite to international armed conflict, domestic armed conflicts referred were actually referred to rebellions or insurgencies<sup>31</sup> and enforcing universal treaties in case of domestic armed conflict is somewhat a complicated task.<sup>32</sup> Since only sovereign states can become a signatory party to treaties affecting non-international conflicts, the non-state actors or rebellion groups are not party to the drafting team, thus there is no provision of enforcement of laws on them.

Considering this, it should be noted that GCs virtually offered no protection to the children, recruited as non-combatants in armed conflicts. These treaties do not provide any status of “prisoners of war” to belligerents, militants, rebels or others involved in domestic conflict.<sup>33</sup> In the case of children, other than the procedural benefit provided under common Art. 3, no protection was provided to them under prisoner of war rules. Infact the situation is such that since these GCs do not prohibit the State parties to impose capital punishments, they can be given capital punishment as well.<sup>34</sup> Moreover in contemporary scenarios, most of the children are serving in domestic conflicts; they are not afforded any protection like lawful combatants.

### **3.1.3. Child Protection and the Creation of Age Categories: 1977 Additional Protocols to Geneva Conventions**

Since the GCs of 1949 failed to provide protection to child combatants, APs of 1977 provided some protection to the same. These protocols were created in the

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<sup>29</sup> E Van Sliedregt, *The Criminal Responsibility Statue of Individuals for Violations of IHL* (2003) 33

<sup>30</sup> R.K. Dixit, *Special Protection of Children During ACss Under the Geneva Conventions Regime*, I ISIL YBHL 12-13 (2001).

<sup>31</sup> Lindsay Moir, *The Law of Internal Armed Conflicts* 1-21 (2002).”

<sup>32</sup> Lindsay Moir, *The Historical Development of the Application of Humanitarian Law in Non-International ACss to 1949*, 47 INT’L & COMP. L.Q. 337, 338 (1998)

<sup>33</sup> Matthew Happold, *Child Prisoners in War*, in *Prisoners in War* (Sibylle Scheipers ed.) 2-3, available at <http://ssm.com/abstract=-1321546>).

<sup>34</sup> William a. Schabas, “The Abolition of the Death Penalty in International Humanitarian Law”, *Washington and Lee Law Review*, 55(5) (1983) 802

line of GCs and distinguished the war into two categories: Protocol I dealt with IACs while Protocol II dealt with NIACs. Also these Protocols categorized children in two parts: Children who are not above the age of fifteen & children who are situated between the age of fifteen and eighteen. William a. Schabas, "The Abolition of the Death Penalty in International Humanitarian Law",

The children's protection under APs is provided according to the age of children and the nature of conflict involved. Art. 77(2) of AP I states:

*"The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest."*

Though ICRC proposed a total prohibition on the children's recruitment below fifteen years of age, it met with stiff opposition from the states as they were not ready to take unconditional obligations. As a result the term "all necessary measures" which was mentioned in the draft proposal was changed to "all feasible measures".<sup>35</sup> Three other protections are provided to child soldiers under the same Art.:

Para 3 of the same Art. provides that if in "exceptional cases" child under fifteen years of age participate directly in hostilities and falls into the power of adverse party, then he shall be accorded special protection no matter that child is POW or not.

Para 4 provides that child soldiers detained shall be kept separately from the adults

Para 5 states that no death penalty shall be imposed on the person who was not eighteen years old at the time of commission of the offense.

In the case of AP II, there is a total prohibition on the use and children's recruitment as soldiers. Art. 4(3)(c) of the Protocol provides:

*"3. Children shall be provided with the care and aid they require and in particular c) Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;"*

This law entails complete prohibition not only on forced recruitment but voluntary recruitment as well. Moreover these children "shall not be allowed to gather information, transmitting orders etc. forming part of 'taking part in hostilities'". NIACs are comprehensively dealt with by AP II civil wars, rebellions etc. and in these wars non-states actors have major roles. Sovereign states knew the fact that since these non-state actors are the major source of child soldiers' recruitment, they made the language of Art. 4 of the Protocol is strong without leaving any kind of doubt.<sup>36</sup>

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<sup>35</sup> International Committee of Red Cross, *Commentary on Additional Protocol I, 1977* (1980) para 3184

<sup>36</sup> Howard Mann, "International Law and the Child Soldier", *International Journal of Comparative Law Quarterly* 36 (1987) 44

### 3.2. Straight 18- Position

In general, human rights group adopted "Straight 18 position" which fixes a universal age of childhood, which commences from the birth of the child and ends with the child turning 18.<sup>37</sup> In contrast, Sovereign States expressed that national and domestic legislations should play major role in determining the age of childhood rather than setting a universal age.<sup>38</sup>

This "Staright-18 position" is considered as one of the ambitious project of human rights group around the world where the idea regarding setting the age varies drastically.<sup>39</sup> This can be seen in the wordings of the Additional Protocols which are symbolic of the earliest attempt to introduce this concept, indirectly in the war laws. Though the specific age of the protocols focused on fifteen years, the drafters of the proposal hoped that this age limit could be broadened further on recruitment of child soldiers.<sup>40</sup>

The supporters of "Straight-18" have been successful in influencing the laws of human rights. They helped in shaping many international treaties and conventions which dealt in child's rights rather than concentrating on child soldiers. These conventions include 1989 "Convention on the Rights of the Child", "the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict", "the 1990 African Charter on the Rights and Welfare of the Child", and the "1999 International Labor Organization Worst Forms of Child Labor Convention". However it is to be understood that if anyone violates these treaties then it won't be considered that there was a violation of war laws and hence the person cannot be prosecuted solely for the violations of these.<sup>41</sup> But the major challenge before these human rights group is their dependence on the States to sign, ratify the treaties as many States on one hand are eager to sign these international treaties as they account as a great source of international customs but on other hand they eschew in signing these treaties when they think that their "Sovereignty" can be hampered while framing the domestic laws.<sup>42</sup>

### 5.1. 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

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<sup>37</sup> Matthew Happold, "Child Soldiers: Victims or Perpetrators?", *University of La Verne Law Review* 29 (2008) 69

<sup>38</sup> Lainie Rutkow & Joshua T. Lozman, "Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child", *Harvard Human Rights Journal* 19 (2006) 175

<sup>39</sup> David F. Lancy, *The Anthropology of Childhood: Cherubs, Chattel and Challenges* (2008)

<sup>40</sup> David M. Rosen, Who Is a Child - The Legal Conundrum of Child Soldiers, *Connecticut Journal of International Law* 25 (2009) 96

<sup>41</sup> Statute of the Special Court for Sierra Leone, art. 4(c), Jan. 16, 2002, 2178 U.N.T.S. 145; see also Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, art. 1(1), Jan. 16, 2002, 2178 U.N.T.S. 138

<sup>42</sup> Emilie Hafner-Burton, Kiyotoku Tsutsui & John W. Meyer, International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties, *International Sociology* 115 (2008) 23

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 take place.<sup>43</sup> 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.<sup>44</sup>

Disagreement and debates exist 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.

### **5.1.1. 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 as the *actus reus* (wrongful act).<sup>45</sup> 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 accidentally 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."*<sup>46</sup>

### **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

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<sup>43</sup> Human Rights Watch, Letter to Foreign Minister of Democratic Republic of Congo, May 2, 2001, <http://www.hrw.org/wr2kl/index.html>; Press Release, Human Rights Watch, Congo: Don't Execute Child Soldiers: Four Children to be Put to Death (May 2, 2001), <http://www.hrw.org/press/2001/05/congo0502.html>; Human Rights Watch, Congo Spares Child Soldiers, June, 2001, <http://hrw.org/updatew/2001/06.html>.

<sup>44</sup> Human Rights Watch, Uganda: Letter to Minister of Justice, Feb. 19, 2003 <http://hrw.org/pres/2003/02/uganda021903-ltr.html>; Press Release, Human Rights Watch, Uganda: Drop Treason Charges Against Child Abductees (March 4, 2003), <http://www.hrw.org/press/2003/03/uganda030403.html>; John Eremu, Treasons Suspects Apply for Amnesty, THE NEW VISION, April 5, 2003, available at <http://www.newvision.co.ug>; Human Rights Watch, Uganda: Treason Charges Against Former Child Soldiers Dropped, Apr. 2003, <http://www.hrw.org/update/2003/04.html#7>.

<sup>45</sup> Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press 3d. ed., 1999) 87-88

<sup>46</sup> A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Practice* (Hart Publishing 2000) 541.

physical injury on the victim. With regards to the mental element, it is sufficient that the accused acted willfully.<sup>47</sup>

As was noted by the ICTY in *Aleksovski*<sup>48</sup> 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."*

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."<sup>49</sup>*

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

<sup>47</sup> The Prosecutor v. Zlatko Aleksovski, IT-95-14/I-T (Trial Chamber, ICTY)

<sup>48</sup> Prosecutor v. Zlatko Aleksovski, IT-95-14/I-T (Appeals Chamber, ICTY)

<sup>49</sup> Prosecutor v Delalic et al, Case No.: IT-96-21-T, Trial Chamber, 16 Nov. 1998 ("Celebici Judgement"), para. 543

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.<sup>50</sup>

## 5.2. "Minimum Age for Criminal Responsibility (MACR)"

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.<sup>51</sup> Because there is no MACR for international crimes, any nation that assumes jurisdiction over the child can apply its domestic MACR.<sup>52</sup>

In Rwanda, where the MACR is fourteen<sup>53</sup> the kid trooper would not be held guilty. However, the MACR in the Congo is thirteen,<sup>54</sup> 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.<sup>55</sup>

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."*

### 5.2.1. 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:

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<sup>50</sup> The Prosecutor v. Clement Kayishema and Obed Ruzidana, Case No. ICTR-95-1-A (Appeals Chamber, ICTR)

<sup>51</sup> Brittany Ursini, "Prosecuting Child Soldiers: The Call for an International Minimum Age of Criminal Responsibility", St. John's Law Review 89 (2015) 1024

<sup>52</sup> Matthew Happold, "Excluding Children from Refugee Status: Child Soldiers and Art. 1F of the Refugee Convention", American University International Law Review 17 (2002) 1156

<sup>53</sup> Don Cipriani, Children's Rights and The Minimum age of Criminal Responsibility: A Global Perspective, (Routledge 2009) 105

<sup>54</sup> Alan Watson, Roman Private Law Around 200 BC (Edinburgh University Press 1971) 35

<sup>55</sup> Ann Davison, "Child Soldiers: No Longer a Minor Incident", *Willamette Journal of International Law and Dispute Resolution* 12 (2004) 134

"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 Statute as well. Basically these statutes do not provide any minimum age for holding a person criminally responsible for any offence. With regards to the Statute 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 Statute and its drafting history clearly indicates that this provision is merely procedural in nature rather than substantive. It is simply exclusion of ICC jurisdiction, leaving the jurisdiction with national courts.<sup>56</sup> During the negotiations of this statute, 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.<sup>57</sup>

But with regards to drafting of the Statute 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.<sup>58</sup>

Finally after much deliberation, the Statute of SCSL was created and Art. 7 of the same provided that that the court "*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:

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<sup>56</sup> Richard Clark & Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article (Triffterer ed., 1999) 499.

<sup>57</sup> Ccile Aptel, International Criminal Justice and Child Protection, 105; in Sharanjeet Parmar et al. eds., *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation* (Harvard University Press 2010)

<sup>58</sup> The Secretary-General, Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915 (Oct., 4 2000).

*"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.

## **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.<sup>59</sup> 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.

Thirty years later, the boy named as Dominic Ongwen went on to become the Brigadier General of LRA.<sup>60</sup> 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.<sup>61</sup> A tug of war is surely to arise between the *liability* which IHL imposes and the protection given by IHRL, IHL & ICL.

### **5.3. 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 breach 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

<sup>59</sup> Andrew Green, *To Forgive a Warlord*, Foreign Policy (Feb. 6, 2015, 9:00 AM), <http://foreignpolicy.com/2015/02/06/ongwen-uganda-icc-joseph-kony-international-justice>

<sup>60</sup> Open Society Justice Initiative, *The Trial Of Dominic Ongwen at The ICC* (2016) 2-4, [https://www.opensocietyfoundations.org/sites/default/files/briefing-ongwen-201611290%20\(2\)1.pdf](https://www.opensocietyfoundations.org/sites/default/files/briefing-ongwen-201611290%20(2)1.pdf).

<sup>61</sup> ICC, Case Information Sheet the Prosecutor v. Dominic Ongwen (Jan. 2017), <https://www.icc-cpi.int/iccdocs/pids/publications/ongweneng.pdf>

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 youngster warriors, there is no obligation 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<sup>62</sup>

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".<sup>63</sup> 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.<sup>64</sup> 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*.<sup>65</sup>

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.<sup>66</sup> 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 *opinio juris*, only some countries have enacted household legislations to criminalize kid enrollment in forces.

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.

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<sup>62</sup> H. Harry L. Roque, Jr., "The Criminal Nature of Recruitment of Child Soldiers Under IHL", *Asia Pacific Yearbook of International Human Rights Law* 1 (2005) 113

<sup>63</sup> Michael Cottier, Art. 8 War Crimes -para. 2(b)(xxvi), 468; in Otto Triffterer ed., *Commentary on the Rome Statute of the ICC - Observers' notes, article by article* (Hart Nomos 2nd ed. 2008)

<sup>64</sup> Gerhard Werle, *Principles of International Criminal Law*, (T.M.C. Asser Press, 2005) 332

<sup>65</sup> North Sea Continental Shelf Cases (Ger./Den. & Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20)

<sup>66</sup> H. Harry L. Roque, Jr., "The Criminal Nature of Recruitment of Child Soldiers Under IHL", *Asia Pacific Yearbook of International Human Rights Law* 1 (2005) 121; Rome Statute of the ICC, UNITED NATIONS TREATY MATTERS, [https://asp.icccpi.int/en\\_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icccpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx)

#### 5.4. 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.<sup>67</sup> The risks presented to kids are not detached to physical prosperity alone, however psychosocial challenges that significantly influence their advancement.<sup>68</sup> 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:

##### 5.4.1. "Actus me incito factus non est meus actus"

"*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.'<sup>69</sup> Because of this either outside restrictions on volition or interior obstruction with perception<sup>70</sup> 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.<sup>71</sup> 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:

<sup>67</sup> *Child Recruitment and Use*, Office of Special Representative Secretary General Children & Armed Conflicts, <https://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/child-soldiers/>

<sup>68</sup> Elizabeth Protacio-Marcelino et al., *Torture of Children in Situations of Armed Conflicts: The Philippine Experience* (University of the Philippines, 2000) 78

<sup>69</sup> Enriquez v. Sandiganbayan, G.R. Nos. 120744-46, 689 Phil. Rep. 75 (S.C., June 25, 2012), [http://sc.judiciary.gov.plvjurisprudence/2012/june2012/120744-46.htm#\\_ftnl30](http://sc.judiciary.gov.plvjurisprudence/2012/june2012/120744-46.htm#_ftnl30).

<sup>70</sup> Paul H. Robinson, "Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background," *Alabama Civil Rights & Civil Liberties Law Review* 2 (2011) 55.

<sup>71</sup> Gerhard Werle, *Principles of International Criminal Law*, (T.M.C. Asser Press, 2005) 138

*"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*

*(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 Ongwen'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 this choice by taking reference of a Ugandan court. The facts of the case were that the 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 and argued that this was a devil's choice because if she wouldn't have accepted the orders of the Idi Amin, then she would have been killed. The Court accepted the arguments of the lady.

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.<sup>72</sup>

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.<sup>73</sup> Regarding first case, it cannot be shown that the so called "threat of death" was immediate in nature.<sup>74</sup> 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-lesser-evil approach", an act is proportionate if "the crime committed under duress is, on balance, the lesser of two evils."<sup>75</sup> 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."<sup>76</sup> 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. 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."<sup>77</sup> To establish a plea of insanity, the defense must prove:

1. That, at the time of the acct, 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.

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<sup>72</sup> Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, Para 152

<sup>73</sup> Albin Eser, "Art. 31 Grounds for Excluding Criminal Responsibility, in *Commentary On The Rome Statute of The ICC observers notes, art. by art.* (Hart Publishers, 2008) 871

<sup>74</sup> Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 153

<sup>75</sup> Shane Darcy, "Defenses to International Crimes", 235; in William A. Schabas & Nadia Bernaz eds. *Handbook of International Criminal Law*, (Routledge Publishers 2010)

<sup>76</sup> Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 155

<sup>77</sup> Prosecutor v. Mucid, Case No. IT-1621-A, Judgment, ¶ 582 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001)

The mental defect which is provided under Art. 31 refer to both debilitations of cognition, i.e. "awareness and understanding"<sup>78</sup> and volition i.e. "uncontrollable, irresistible impulses".<sup>79</sup> 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<sup>80</sup>. 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.<sup>81</sup> 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 defense was first raised in the case of *U.S. v. Alexander*<sup>82</sup> 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.<sup>83</sup> 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

<sup>78</sup> William Wilson, *Criminal Law: "Doctrine and Theory"* (I.H. Dennis et al. eds., 2nd ed., 2003) 231

<sup>79</sup> Peter Krug, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", *American Journal of International Law* 94 (2000) 324

<sup>80</sup> Geert-Jan Alexander Knoops, *Defenses in Contemporary International Criminal Law*, (Martinus Nijhoff Publishers ed., 2nd ed. 2001) 114

<sup>81</sup> Prosecutor v. Mucid, Case No. IT-16-21-A, Judgement, ¶ 582 (International Criminal Tribunal for the Former Yugoslavia Feb. 20, 2001).

<sup>82</sup> United States v. Alexander, 471 F.2d 923 (D.C Cir. 1973)

<sup>83</sup> Paul H. Robinson, "Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background," *Alabama Civil Rights & Civil Liberties Law Review* 2 (2011) 53.

fact findings of Trial Chamber of SCSL in *Charles Taylor Judgment*.<sup>84</sup> 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 requests decisively, and demonstrates that kids would probably submit savage acts while affected by such substances.

#### 5.4.2. 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.<sup>85</sup> 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.<sup>86</sup> It is being argued that to indict Dominic would directly mean indicting all the child soldiers around the world.<sup>87</sup> 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.<sup>88</sup>

#### Conclusion

Child soldiers are principally viewed as casualties of wrongdoings under worldwide law. In any case, one ought not-neglect to focus on the way that they are additionally the culprits of such wrongdoings. However, the way that they face

<sup>84</sup> Prosecutor v. Charles Ghankay Taylor, Case No.: SCSL-03-01-T (Pre-Trial Chamber II, SCSL)

<sup>85</sup> Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 15-16.

<sup>86</sup> Nadia Grant, "Duress as a Defence for Former Child Soldiers? Dominic Ongwen and the ICC" 7 *International Crimes Databases* (2016) 7 (available at <http://www.internationalcrimesdatabase.org/upload/documents/20161209T155029-ICD%20Brief%20Nadia%20Grant%20202.pdf>)

<sup>87</sup> Raphael Lorenzo Aguilang Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", *American University of International Law Review* 33 (2018) 630

<sup>88</sup> Richard Delgado, "'Rotten Social Background': Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?", *Law & Inequality* 3 (1985) 9

various difficulties during their enrollment, just as time with the military or equipped resistance bunches including being influenced, controlled and compelled to kill regular citizens, doesn't imply that they will naturally be seen as guiltless and consequently cleared of the charges.

In its present structure, international law's stand on duress is considered a defense and, in this manner, amazingly hard to conjure effectively. The author proposes that the protection be reevaluated as a reason considering their discoveries "relating to its application to child soldiers". This would guarantee that while the global society denounces the goes about as wrongdoings and these small soldiers are cognizant of the guiltiness of their demonstrations, sympathy and compassion can be shown towards them. In addition, an excusatory guard permits the court to concentrate on the entertainer rather than on his/her activities, accordingly fostering a superior comprehension of the individual, social and cultural circumstance of these children. Albeit a reason doesn't require the supposed culprit to have acted in a proportionate way, the creators contend that a proportionality test should be kept up with and the equilibrium of damages test be eliminated. Additionally, pressure could be utilized as a total guard barring obligation just as an alleviating factor at the condemning stage, giving courts greater adaptability. Regardless, regardless of whether pressure is seen as a reason what's more courts are looking long and hard at a youngster amicable eye on kid warriors, the guard of coercion may in any case be far off for some, kid troopers.

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