Children of Freedom: A Question of Responsibility?

Final Essay — International Criminal Law

"Seeing Ongwen in the ICC, (the people of Northern Uganda) see the picture of their own children. When Kony is there, they will feel good, (but) not Ongwen: he is almost born in the LRA. This was our child. He was taken, survived and ultimately escaped. They have the chicken thief, but not the real thief."

- Personal communications of Resident Direct Commissioner in Lira District, Northern Uganda, 2016

The rules prohibiting recruitment and participation of child soldiers in hostilities has been recognised to emanate from customary international law[1], yet there is not yet an uniform age limit for both recruitment and participation. UN's Convention on the Rights of a Child ('CRC') defines a child as a person under 18,[2] yet the age limit for recruitment[3] and participation[4] in armed conflicts is reduced to 15, resembled in the Rome Statute of the International Criminal Court ('ICC Statute')[5]. This ambiguity is further complicated by the disparity of domestic laws with regard to the minimum age of criminal responsibility,[6] ranging from 7 to 16 throughout the world.[7] The ICC's jurisdiction is to include everyone, as long as they are nationals of a State Party of the ICC Statute, above the age of 18.[8] The war crime of child soldier relates to two war crimes: the admission and use of child.

There are two forms of admission:[9] conscription and enlistment. The former is regarded as a forcible act that entails an element of compulsion, while enlistment encompasses the acceptance of a 'voluntary' child's decision to join the military force, which includes any form of participation as part of militia. The ICC Chambers also noted that a child's consent to recruitment is not a defence to admission of child soldiers[10]. Despite this, conscription is considered as an aggravated form of acceptance, and as such this aspect is usually included as consideration during the sentencing stage.

---

[1] United Nations Security Council, 'Report of the Secretary General on the establishment of a Special Court for Sierra Leone' (4 October 2000) UN Doc S/2000/915, ¶ 14.

[2] United Nations Convention on the Rights of a Child (adopted UNGA Res 44/25 of 20 November 1989, entered into force 2 September 1990) ('CRC'), art. 1.

[3] *Ibid*, art. 38(3): 'States Parties shall refrain from recruiting any person who has not attained the age of fifteen years 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, States Parties shall endeavour to give priority to those who are oldest.'

[4] *Ibid*, art. 38(2): 'States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.'

[5] Rome Statute of the International Criminal Court ('ICC Statute'), art. 8(2)(e)(vii).

[6] *Ibid*, art. 40(3)(a): 'States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised 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;'

[7] Committee on the Rights of the Child, General Comment No. 10 (2007): Children's Right in Juvenile Justice, ¶32.

[8] ICC Statute, art. 26.

[9] Prosecutor v. Thomas Lubanga Dyilo (Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) ¶246-247.

[10] Prosecutor v. Thomas Lubanga Dyilo (Prosecution Closing Submissions) (21 July 2001) ¶617.

This view is also shared by the Inter-American Court of Human Rights[11]. In addition, the decision of child soldiers' landmark case by Special Court of Sierra Leone ('SCSL') described the only method of conscription as abduction,[12] leading to heavy criticism since it failed to recognise that 'voluntary' enlistment of children in armed conflict is ultimately a desperate attempt of a child to survive, which can be attributed to socio-economic conditions: poverty, discrimination, and lack of education or as victims of indoctrination.

On the other hand, the crime of use of child soldiers is usually divided into direct and indirect participation. It is further described that direct participation requires elements of adversely affecting military operations/capacity, and the acts must be specifically designed to directly cause the threshold of harm.[13] Despite this distinction, the Preparatory Committee of the ICC Statute has specifically used the terminologies 'using' and 'participate' to cover both forms of participation[14]. Therefore, the ICC Statute included a broader language, 'using to participate actively', in lieu of the common classification. Instead of providing an autonomous interpretative guidance on the notion of active participation, the Court has decided that each activity must be considered in a case-by-case basis, in which the same approach was taken by the SCSL.

The Pre-Trial Chambers Court in Lubanga's case interpreted 'active interpretation' based on the child's exposure to real danger as a potential target,[15] as is similarly concluded by the SCSL that children guarding mines met the threshold of harm in its Statute due to the constant risk that they faced.[16] This was challenged by the Defence in the appeal stage, declaring it 'wholly unfounded in international law or internationally recognised principles and rules'[17]. The Appeals Chamber agreed and declared that the element for active participation shall be a link/connection between the activity in which the child is engaged in and hostilities/military operations.[18] While indirect participation, such as doing domestic chores for soldiers, will exclude the child from the ambit of active soldiers; this may nevertheless include the possibility of the perpetrators to be charged with other provisions of the ICC Statute, such as the prohibition against enslavement or rape, where applicable.

---

[11] Paraguay v. Vargas-Areco (Judgment) Inter-American Court of Human Rights Series C No 155 (26 September 2006) ¶122.

[12] Prosecutor v. Alex Tamba Brima and others ('The AFRC Case') (Judgment) SCSL-04-16-7 (20 July 2007) ¶274.

[13] Boothby, Bill, '*And for Such Time As: The Dimension to Direct Participation in Hostilities'* (Journal of International Law and Politics 42/3, 2010) p. 741-768.

[14] Draft Statute of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998) UN Doc. A/CONF./183/2/Add.1, ¶21.

[15] Prosecutor v. Thomas Lubanga Dyilo (Judgment Pursuant to Art. 74 of the Statute) (14 March 2012), ¶628.

[16] Prosecutor v. Charles Taylor (Judgment) SCSL-03-01-T (18 May 2012), ¶1479.

[17] Prosecutor v. Thomas Lubanga Dyilo (Decision on Appeals) (1 December 2004), ¶319.

[18] *Ibid.*

Children's position in the crime of child soldiers is multi-faceted: they are both victims and perpetrators. Since many international instruments have declared that children below the age of 15 are absolutely protected, an analogy that a child too young to fight shall also be too young to be held criminally responsible for serious violations of IHL has emerged. However, a child is anyone under the age of 18. Noting the absence of a prohibitive provision in international law with regard to prosecutions of children between the age of 15 and 18, this indicates that children between such age range can be held criminally responsible for their crimes. The Committee on the Rights of the Child has simply stated that the international standard of minimum age shall not be below 12 years old.[19] However, child soldiers are only under ICC's jurisdiction as they reached the age of 18.

In all decisions relating to administration of juvenile justice, the primary consideration has to be the best interests of the child.[20] Furthermore, the CRC provides a right for accused children to be treated in a manner consistent with the promotion of their sense of dignity and worth,[21] hence the imposition of a criminal punishment to children must be intended to promote reintegration and re-appropriation of a constructive role in society. Even if holding children accountable may become problematic in some regards, absolving them from complete responsibility is also not in their best interests, since acknowledgement, atonement and in some instances, prosecution, may be important for personal recovery; contributing to acceptance by families, communities and societies at large. Moreover, there can be no capital punishment.[22] Domestic trials in Democratic Republic of Congo in 2001 had imposed death sentences to four boys between the ages of 14 and 16, yet they were never executed due to interventions led by the Human Rights Watch.[23] Imposition of life imprisonment may be permitted, yet this must be considered against the right to periodic review and cannot be imposed without the possibility of parole,[24] since all sentences imposed upon children must bear the possibility of release that should be realistic and regularly considered.[25]

Furthermore, criminal prosecutions are justified, even in the case of children as perpetrators, since there is a need to erase a culture of impunity with respect to acts constituting mass atrocities. Accountability is an important phase to accomplish to enable societies coping with the past and for post-conflict reconstruction. The lack of case-law of administration of juvenile justice for serious

---

[19] General Comment No. 10 (n.7), ¶30.

[20] UNCRC (n.2), art. 3.

[21] UNCRC (n.2), art. 40(1).

[22] *Ibid*, art. 37(a).

[23] Human Rights Watch, 'Congo: Don't execute Child Soldiers' (2 May 2001), <https://www.hrw.org/news/2001/05/02/congo-dont-execute-child-soldiers>, accessed on 20 November 2017

[24] General Comment No. 10 (n.7), ¶77.

[25] UNCRC (n.2), art. 25.

violations of IHL shows the preference of international tribunals to undertake a different approach: rather than prosecuting children, another possibility is to bring child soldiers before a court once they are of age. This approach erases the debate on jurisdiction and child soldiers' accountability depends upon the existence of two compulsory aspects of the crimes: establishment of *actus reus*/ physical act and *mens rea*/intent. While establishing the *actus reus* of crimes was always completed with ease based on factual evidences of such atrocities, the establishment of intent was much more abstract and problematic, especially in the case of children. The dual status of the convicted, both as victim and perpetrator, has initiated discussions about long-term effects of socialisation with armed groups on children. Researches[26] have shown that the risk of developing a mental impairment is highly probable, yet the plea of diminished responsibility or lack of mental capacity has not been accepted by international criminal courts. A precedent for such denial was first established by the International Criminal Tribunal of the Former Yugoslavia ('ICTY'), in which the Trial Chamber acknowledged the existence of a personal disorder but rejected that it shall mitigate responsibility for Landžo,[27] but it duly noted his young age at the relevant commission of the crime and the effect that the armed conflict in his hometown had inflicted upon him.

Former child soldier Dominic Ongwen was the first Lord Resistance Army ('LRA') member and commander to be brought before the ICC, also the first former child soldier to be prosecuted in such courts. To understand the extent of the Ugandan conflicts, it is to note that civilians living in Uganda's northern and southern side were divided by ethnic, linguistic, and socio-cultural divisions, in which the former worked with the British before their independence, while the latter supplied national manual labor and ended up to comprise the majority of ranks in the military. Such military and political figure was Yoweri Museveni, and following his defeat in Uganda's 1979 elections, he claimed that the election result was fraudulent and waged a rebellion with his National Resistance Army ('NRA'). This strife turned into a civil war in which NRA was victorious and assumed control of Uganda, and further sought vengeance against Acholi, the ethnic group of Northern Uganda, and committed atrocities: child soldiers were widespread in their ranks, and its soldiers attacked villages and engaged in burning, raping, kidnapping, looting, and killing of civilians.

Concerned with acts of violence by the government, Alice Auma, an Acholi 'spirit medium' started a civilian resistance movement. However, a figure also came to rise with Auma's movement: Joseph Kony. He started LRA and used Auma's popularity to gain support, claiming that he was a

[26] Elbert, Thomas and Schauer, Elisabeth, '*The Psychological Impact of Child Soldiering*' in Martz, Erin, Trauma Rehabilitation After War and Conflict: Community and Individual Perspectives, New York (Springer Publishing, 2010), p. 311-360.

[27] Prosecutor v. Mucic and others, (Judgment of the ICTY Trial Chamber) CC/PIU/364-E (16 November 1998), ¶1173-1186.

spokesperson of God, a cousin of Auma, and likewise also another 'spirit medium'. By 2006, LRA's insurgency and their battle against the new government had resulted in the displacement of 95% of Acholi's population. It was noted that 1.7 million people lived in more than 200 internally displaced persons camps throughout Northern Uganda.[28]

Dominic Ongwen was the leader of one of LRA's four brigades, the Sinia Brigade. However, Ongwen was abducted by the LRA at the age of 12, in which recruitment of children under 10 years old was common practice and policy of the organisation that was supported by abundant evidence.[29] ICC's Pre-Trial Chambers expressly rejected the argument that since Ongwen was recruited as a child, he shall be excluded of responsibility, to be entirely without legal basis.[30] Even though ICC Statute remarked the possibility of other grounds for excluding criminal responsibility other than those included in the Statute,[31] legal scholars find it unlikely for individuals, no matter how much circumstances have influenced their decisions, to be able to absolve full responsibility when they have committed serious international crimes.[32]

Ongwen argued the defence of duress under art. 33(1)(d) ICC Statute, yet this was rejected by the Chambers since he did not fulfil its two elements. Since the possibility of later disciplinary measures was not considered as imminent, there was no threat as required in paragraph (i). Even if considering that membership of such group was not voluntary, duress was not regulated in a way to create blanket immunity for its members.[33] Escapes from LRA were not rare, hence Ongwen's stay in the LRA could not be said to be beyond his control, in which this argument was heavily relied upon by the Defence as the source of threat.[34] The Chambers also declared, even if the decision had confirmed the existence of a threat, Ongwen did not intend to mitigate further harm as he was able in his position, as required by the subsequent paragraph of the provision. This was illustrated by the fact that he had brutally raped his four forced wives with ruthless regularity. Even if he could not have avoided accepting them as wives, he could have avoided raping them.[35]

Despite not being evaluated in Ongwen's case, the ICTY case law provided another possible defence that could be invoked with respect to cases for former child soldiers. Article 33(1)(a) ICC

---

[28] United States Agency for International Development, 'Situation Report #3: Uganda — Complex Emergency' (15 September 2006).
[29] Prosecutor v. Dominic Ongwen (Decision on the Confirmation of Charges) ICC-02/04-01/15-422-red (23 March 2016), ¶141.
[30] *Ibid*, ¶150.
[31] ICC Statute, art.31(1) and (3).
[32] Marković, Darija, '*Child Soldiers: Victims or War Criminals?'* (Regional Academy of United Nations, University of Belgrade) (14 December 2015), p. 12.
[33] Prosecutor v. Ongwen (n.29), ¶153.
[34] *Ibid*, ¶154.
[35] *Ibid*, ¶155-156.

Statute provides a defence that concerns the mental state of the accused during the commission of the crime. As such, the success of this defence relies upon two elements: abnormality of the mind, and such abnormality shall substantially impair the ability of the accused to control his actions.[36] In Landžo's case, prosecutor experts failed to conclude a precise disorder. Even without a psychiatric diagnosis, the Trial Chambers concluded that his mental state amounted to abnormality of the mind in the sense of the first element. However, this did not lead to an acquittal since the Chambers was in the view that he did not fulfil the second element in the mental incapacity test.[37] The Chambers acknowledged partial impairment of his mental capacity, but decided that an abnormal state of mind alone is neither a partial nor complete defence, but only a mitigating factor relevant in sentencing.[38]

In short, the war crime of child soldiers have been met with vigilance in the international community. However, with much ambiguity in international law, prosecuting children for serious violations of IHL remains an onerous challenge, since there is an obligation when administering juvenile justice to always consider decisions in the best interests of the child. Yet it is also difficult not to prosecute them, since grave violations of IHL should not be perpetuated with impunity. As such, the ICC has adopted a different approach, in which the prosecution of Dominic Ongwen is the first of its kind: Ongwen is an adult whom was abducted and recruited by the LRA when he was a child. Since his case is still ongoing at the time this essay was written, it remains to be seen if there may be additional defences to exclude child soldiers' responsibility. So far, case-laws have analysed the defence of insanity and duress. In both situations, their circumstances were not deemed severe enough to justify an acquittal, but their mental state may be used as a factor to consider during the sentencing stage to mitigate their punishment.

Word count: 2,211 words

[36] Prosecutor v. Mucic and others (n.27), ¶1162-1172.

[37] Sparr, Landy F., *'Personality Disorders and Criminal Law: An International Perspective'* (Journal of the American Academy of Psychiatry and the Law 37/2, 2009), p. 172.

[38] Prosecutor v. Mucic and others (n.27), ¶1183-1184.

BIBLIOGRAPHY

A. Legislations

Rome Statute of the International Criminal Court, art. 8(2)(e)(vii), 26, 31(1), 31(3), 40(3).

United Nations Convention on the Rights of a Child, art. 1, 3, 25, 37(a), 38(2), 38(3), 40(1).

B. Cases

Paraguay v. Vargas-Areco (Judgment) Inter-American Court of Human Rights Series C No 155 (26 September 2006) ¶122.

Prosecutor v. Alex Tamba Brima and others ('The AFRC Case') (Judgment) SCSL-04-16-7 (20 July 2007) ¶274.

Prosecutor v. Charles Taylor (Judgment) SCSL-03-01-T (18 May 2012), ¶1479.

Prosecutor v. Dominic Ongwen (Decision on the Confirmation of Charges) ICC-02/04-01/15-422-red (23 March 2016), ¶141, 140, 153-156.

Prosecutor v. Mucic and others, (Judgment of the ICTY Trial Chamber) CC/PIU/364-E (16 November 1998), ¶1162-1186.

Prosecutor v. Thomas Lubanga Dyilo (Decision on Appeals) (1 December 2004), ¶319.

Prosecutor v. Thomas Lubanga Dyilo (Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) ¶246-247.

Prosecutor v. Thomas Lubanga Dyilo (Judgment Pursuant to Art. 74 of the Statute) (14 March 2012), ¶628.

Prosecutor v. Thomas Lubanga Dyilo (Prosecution Closing Submissions) (21 July 2001) ¶617.

C. Reports and other secondary sources

Boothby, Bill, '*And for Such Time As: The Dimension to Direct Participation in Hostilities'* (Journal of International Law and Politics 42/3, 2010) p. 741-768.

Committee on the Rights of the Child, General Comment No. 10 (2007): Children's Right in Juvenile Justice, ¶30, 32, 77

Draft Statute of the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998) UN Doc. A/CONF./183/2/Add.1, ¶21.

Elbert, Thomas and Schauer, Elisabeth, '*The Psychological Impact of Child Soldiering*' in Martz, Erin, Trauma Rehabilitation After War and Conflict: Community and Individual Perspectives, New York (Springer Publishing, 2010), p. 311-360.

Human Rights Watch, 'Congo: Don't execute Child Soldiers' (2 May 2001), <https://www.hrw.org/news/2001/05/02/congo-dont-execute-child-soldiers>, accessed on 20 November 2017

Marković, Darija, '*Child Soldiers: Victims or War Criminals?'* (Regional Academy of United Nations, University of Belgrade) (14 December 2015), p. 12.

Sparr, Landy F., *'Personality Disorders and Criminal Law: An International Perspective'* (Journal of the American Academy of Psychiatry and the Law 37/2, 2009), p. 172.

United Nations Security Council, 'Report of the Secretary General on the establishment of a Special Court for Sierra Leone' (4 October 2000) UN Doc S/2000/915, ¶ 14.

United States Agency for International Development, 'Situation Report #3: Uganda — Complex Emergency' (15 September 2006).