The Road to Ongwen: Consolidating Contradictory Child Soldiering Narratives in International Criminal Law

Jonathan Kwik[*]

ABSTRACT

The trial of Dominic Ongwen, an ex-child soldier turned perpetrator, has attracted debate concerning the position of international criminal law (ICL) on perpetrators of war crimes with a complex background of childhood victimization. From some perspectives, such persons are accountable adults responsible for unspeakable crimes, while from others, the lack of regard for their oppressive and corrupting upbringing in a violent armed group does a disservice to their victim status. This article explores the development of the narrative in ICL on three key subjects related to the Ongwen discussion: (1) the traditional prosecutorial focus on adults vis-à-vis children; (2) to what extent children's agency is recognized; and (3) the long-term effects of child soldiering. Several potential inconsistencies are identified with respect to each subject. While it is found that most inconsistencies have formed as a result of positive intentions, they could nevertheless negatively impact future ex-child soldier perpetrator cases if left unaddressed. The article subsequently discusses the ramifications of each diverging narrative and whether they can be consolidated. It is demonstrated how most contradictions are theoretically reconcilable but that ICL must make deliberate efforts to do so, in order to guarantee the adoption of a consistent and congruent narrative moving forward.

Keywords: International Humanitarian Law, International Criminal Law, Child Soldier.

In March 2020, a defence counsel underlined for Trial Chamber IX of the International Criminal Court (ICC) where the prosecution had ostensibly strayed: they had "totally forgotten" the cumulative effect of what his

[*] Researcher and lecturer in international law and international humanitarian law at Soegijapranata Catholic University, Indonesia, and has worked together extensively with the ICRC on dissemination and academic events. He is currently a doctoral candidate at the University of Amsterdam researching modern technology and its ramifications on the regulation of means and methods of warfare.

client had been through since he was abducted at the young age of 10.[1] This counsel, Krispus Ayena Odongo, was pleading on behalf of Dominic Ongwen, an ex-child soldier-turned-adult perpetrator accused of committing numerous international crimes. On behalf of the prosecution, Benjamin Gumpert rejected this assertion; Ongwen may have been a victim in his youth, but this should be no reason to relieve the accused of accountability—at most, the matter could be revisited during sentencing. He presented an analogy: perpetrators of sexual crimes are not excused because they were themselves sexually abused in the past.[2]

Ongwen belongs to a specific subset of perpetrators, having walked through two phases of life: as a child soldier and, later, an adult soldier. Not all fighters experience both. Many child soldiers fight only as children, and many others only join in adulthood. Ongwen notably experienced both phases consecutively.[3] For brevity, these persons shall henceforth be referred to as "Ex-Child soldier Perpetrators" (ECP).

Ongwen is distinct, but not unique. For example, his fate is shared by Thomas Kwoyelo, who, at 13, was similarly abducted on his way to school by the Lord's Resistance Army (LRA), but who was tried at the national level.[4] In light of the scope of child soldiering still taking place today, many have and will follow in their footsteps;[5] as the first case of an ECP standing trial internationally, therefore, it is not unexpected that *Ongwen* would spark controversy.

---

[1] Tom Maliti, "Closing Statements Conclude in Ongwen Trial; Defense Ask for One of Three Outcomes", *International Justice Monitor*, 16 March 2020, available at: www.ijmonitor.org/2020/03/closing-statements-conclude-in-ongwen-trial-defense-ask-for-one-of-three-outcomes (all internet references were accessed 20 May 2020).

[2] Tom Maliti, "In Closing Statements, Prosecutors Say Ongwen Willingly Committed Crimes", *International Justice Monitor*, 10 March 2020, available at: www.ijmonitor.org/2020/03/in-closing-statements-prosecutors-say-ongwen-willingly-committed-crimes.

[3] Ledio Cakaj, "The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander", *Justice in Conflict*, April 2016, available at: www.justiceinconflict.org/2016/04/12/the-life-and-times-of-dominic-ongwen-child-soldier-and-lra-commander.

[4] *See* UGSC, Constitutional Appeal No. 1 of 2012, *Uganda v. Thomas Kwoyelo*, UGSC 5, 8 April 2015.

[5] In 2002, the United Nations International Children's Emergency Fund (UNICEF) estimated that approximately 300,000 children were actively involved in armed conflicts. UNICEF East Asia and Pacific Regional Office, *Adult Wars, Child Soldiers*, UNICEF, Bangkok, 2002, p. 8.

The complexity of ECPs lies primarily in the fact that they transcend several classic compartmentalisations in international criminal law (ICL). They are complex perpetrators difficult to delineate with one label. They have clearly been victims of recruitment, but have also committed many atrocities themselves as child soldiers. A significant part of their personality and morality could have been formed under oppressive and corrupting social circumstances, but this surely should not give them a "lifetime pass to commit crimes just because crimes were committed against them some time in the past."[6] As a result, their proper treatment by international criminal tribunals and courts (ICT/C) has attracted debate.[7]

This article takes a step back and examines the development of ICL on the issue of child soldiering, which narratives have been solidified over the years, and which are relatively new innovations. Through this dissection, the article identifies the positions of ICL with respect to several related matters: how are child soldiers and recruiters viewed in the victim-perpetrator duality? Are child soldiers, the first "stage" an ECP lives through, ever held accountable for their actions, and why (or why not)? How does ICL view the long-term effects of child soldiering?

The article considers all statutory and jurisprudential sources of ICL up to March 2020, when closing arguments were presented for *Ongwen*. Analysis is supplemented by official policy statements, other sources of international law, and supporting secondary sources and opinions. As a convention, "child soldier" is used to refer to persons below

---

[6] T. Maliti, above note 2.

[7] Gumpert's closing statement can still be considered moderate, as it left open the question of victimhood as one that could be revisited during sentencing. More extreme positions have been taken, such as those maintaining that Ongwen's situation is manifestly ordinary, which should not even merit a sentencing consideration. Alex Whiting, "There is Nothing Extraordinary about the Prosecution of Dominic Ongwen", *Justice in Conflict*, April 2016, available at: www.justiceinconflict.org/2016/04/18/there-is-nothing-extraordinary-about-the-prosecution-of-dominic-ongwen; *see also* Paul 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*, Vol. 2, 2011. On the other hand, some have strongly argued for adopting a full defence for perpetrators in situations of "strong sociopsychological coercion that seems to have influenced their behavior." Ziv Bohrer, "Is the Prosecution of War Crimes Just and Effective? Rethinking the Lessons from Sociology and Psychology", *Michigan Journal of International Law*, Vol. 33, 2012, p. 817.

18.[8] Conclusions drawn also do not refer to anything other than the ICL position, and may differ substantially with those of human rights law, domestic law, and scientific consensus.

The following sections explore different aspects of child soldiering in detail. The article identifies three major issues which feature (potentially) contradictory propositions: (1) a focus on recruiters and not child soldiers; (2) whether children can consent to become child soldiers, and thus have a certain amount of agency; and (3) what long-term effects can be attributed to child soldiering. The final section analyses the ramifications of each potential diverging narrative, and how they could be resolved in future ECP cases before an ICT/C. The contradictions are not found to be irreconcilable, but it would be desirable to develop ICL in such a way that they do converge to improve consistency and legal certainty.

I. Condemnation and Action

In *Children at War*, Peter Singer laments the widespread use of children in contemporary conflict as violating "the once universal rule that they simply have no part in warfare."[9] Until very recently, the general trend indeed leaned towards their exclusion from active participation, if not the battlefield entirely.[10] The latter half of the twentieth century introduced a dramatic shift, with child soldiering changing from "isolated incident[s]

---

[8] The Paris Principles: Principles and guidelines on children associated with armed forces or armed groups, February 2007, § 2.1. While authoritative, the Principles remain only soft law. Gus Waschefort, *International Law and Child Soldiers*, Hart Publishing, Oxford, 2015, p. 13. The IHL standard remains 15 years. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 77(2). Note also that the notion of "minor" varies per context and legal culture.

[9] Peter Singer, *Children at War*, Pantheon Books, New York, 2005, p. 7.

[10] However, *see also* Rachel Harvey, *Children and Armed Conflict: A Guide to International Humanitarian and Human Rights Law*, International Bureau for Children's Rights, 2010, p. 48 (explaining the use of children in the Greek and Roman forces); Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Oxford University Press, Oxford, 2012, p. 27 (explaining their use in supporting roles during the XVIIth-XIXth centuries).

happening here and there" to a systematic strategy, particularly adopted by non-state armed groups.[11]

Modern child soldiering is maligned for more than its widespread nature. Children are recruited at increasingly young ages, occasionally below the age of 10,[12] and frequently through abduction, coercion, or the slaughter of their family.[13] Once recruited, they are often exposed to brutal inductions designed to imbue them with the "new worldview of a soldier".[14] Training is often marked with physical and psychological abuse, beatings and indoctrination, while alcohol and drug abuse is employed to make them more fearless.[15] Children are deliberately exposed to extreme violence, sometimes against their own kin, as a method of desensitisation.[16]

Nevertheless, child soldiers are not merely passive victims. They themselves are responsible for a great number of atrocities and gross human rights violations. As child soldiers, they loot, kill, torture, maim, and rape.[17] Perversely, ECPs often contribute to recruiting the next wave of children, as was the case with Ongwen: an example of how one generation of abuse and atrocities only breeds the next.[18]

The international community has reacted vocally in condemnation of the architects of these practices, seen not only as

---

[11] Alcinda Honwana, "Children's Involvement in War: Historical and Social Contexts", *Journal of the History of Childhood and Youth*, Vol. 1, 2008, p. 146. Note however that some national armies have employed child soldiers as well. Report of the Expert of the Secretary-General, Impact of armed conflict on children, UN Doc. A/51/306, 26 August 1996, para. 36 (hereinafter "Impact of Armed Conflict on Children Report").

[12] Impact of Armed Conflict on Children Report, above note 11, para. 35.

[13] Report of the Secretary-General to the Security Council, UN Doc. A/69/926–S/2015/409, 5 June 2015, paras. 6-10.

[14] P. Singer, above note 9, p. 70.

[15] Impact of Armed Conflict on Children Report, above note 11, paras. 44, 47-48; P. Singer, above note 9, pp. 70-75.

[16] Impact of Armed Conflict on Children Report, above note 11, para. 48; P. Singer, above note 9, pp. 70-74.

[17] Matthew Happold, "Child Soldiers: Victims or Perpetrators?" *University of La Verne Law Review*, Vol. 29, 2008, p. 79; Monique Ramgoolie, "Prosecution of Sierra Leone's Child Soldiers: What Message is the UN Trying to Send?" *Journal of Public and International Affairs*, Vol. 12, 2001, p. 148.

[18] IRIN News, "Analysis: Should child soldiers be prosecuted for their crimes?" *The New Humanitarian*, 6 October 2011, available at: www.thenewhumanitarian.org/analysis/2011/10/06/should-child-soldiers-be-prosecuted-their-crimes.

atrocities committed against our weakest and most innocent, but also as an attack against humanity's future. United Nations (UN) Expert Graça Machel wrote:

> [M]ore and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped, and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink.[19]

Perhaps more succinctly, Colombian Minister Estrada emphasized: "[Child soldiering] is a demonstration of ruthlessness and cruelty. It's scary because these people could one day be governing this country."[20]

The international community did not resign itself to mere rhetoric. Treaties, conventions and agreements in the field of human rights law and international humanitarian law (IHL) have developed over time to improve the protection of child soldiers. Since 1977, the internationally accepted minimum age for recruitment has slowly risen from 15 to 18 years.[21] Notable international instruments for the protection of children include the Additional Protocols to the Geneva Conventions,[22] the Convention on the Rights of the Child (CRC) and its Protocol (OPAC),[23]

---

[19] Impact of Armed Conflict on Children Report, above note 11, para. 3.

[20] "Brutality of child army film shocks Colombia", *The Independent*, 2 May 2001, available at: www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=186500.

[21] *See* notes 8, 66 and 89.

[22] Additional Protocol I, above note 8; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978).

[23] Convention on the Rights of the Child (CRC), 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), 2173 UNTS 222, 25 May 2000 (entered into force 12 February 2002).

and the African Children's Charter.[24] The International Committee of the Red Cross database lists the prohibition on child soldiering as falling under customary IHL.[25] The UN has also been active in putting child soldiering on its agenda, predominantly since 1999.[26] Finally, in 2002, child soldiering was adopted as an international crime through the Rome Statute. It is to this final branch of international law which we now turn.

II. Adults as Perpetrators, Children as Victims

Child soldering is not a monolithic crime; rather, it establishes a perverted social situation which births a wide spectrum of harms, both against and by children. ICT/Cs have the freedom to choose which crimes and which actors to prioritize, as long as they fall under their material and personal jurisdiction. In practice, for a significant period, ICT/Cs have focused on the adults deemed responsible for the harm inflicted upon the children, either directly or, after novel legal reasoning, through the "original sin" of recruitment. Child soldiers, on the other hand, are rarely prosecuted.

The Recruitment Equivalency

Recently, a very directed effort has developed, both through the adoption of international instruments and the jurisprudence of ICT/Cs, to protect children as victims of the "original crime" of recruitment. Nevertheless, the condemnation on the use of children during hostilities is not new. Rules prohibiting child soldiering can be found in the Geneva Conventions and its Protocols,[27] with Additional Protocol II specifically

---

[24] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49, 11 July 1990 (entered into force 29 November 1999), Art. 22(2).

[25] ICRC, "Customary International Humanitarian Law Database", 2020, available at: www.icrc.org/customary-ihl/eng/docs/home, Rules 136-137. The ICRC stresses that development of international norms and standards is a priority. Kirstin Barstad, "Preventing the recruitment of child soldiers: The ICRC approach", *Refugee Survey Quarterly*, Vol. 27, 2008, § 5.

[26] The UN Security Council has passed a number of resolutions in this context. *See* UNSC Res. 1379, 20 November 2001, § 16; UNSC Res. 1460, 30 January 2003, § 4; UNSC Res. 1612, 26 July 2005, § 8.

[27] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, 12 August 1949 (entered into force 21 October 1950), Arts. 14, 24, 51; Additional Protocol I, above note 8, Art. 77(2).

establishing that children below 15 "shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities."[28] The CRC establishes a similar obligation for States to ensure that children under 15 are not used in such a capacity.[29] However, while the prohibition under international law is evident, it has been heavily contested whether recruitment also entailed *individual criminal responsibility* under ICL.[30]

Before continuing, it must be clarified under ICL, three different *actus rei* are distinguished: conscription, enlistment, and use.[31] *Conscription* and *enlistment* both refer to the act of recruiting children into an armed group,[32] but are differentiated by the voluntariness factor.[33] Conscription pertains to *forcible* recruitment, achieved through abduction, threats, and even legal means (e.g. conscription laws).[34] In contrast, enlistment is reactive and non-coercive.[35] *Use*, as its name implies, refers to actively using children during hostilities.[36] Somewhat unintuitively, therefore, the crime of "use" does not necessarily require the perpetrator to engage in the physical act of recruiting. Within the context of this article, the words "conscription", "enlistment" and "use" are applied as defined above, while "recruitment" is used to refer to the overall crime of "child recruitment."

---

[28] Additional Protocol II, above note 22, Art. 4(3)(c).

[29] CRC, above note 23, Art. 38(2-3).

[30] Report of the Secretary-General on the establishment of a Special Court for Sierra Leone (SCSL Report), S/2000/915, 4 October 2000, para. 17. *See also* SCSL, *Prosecutor v. Sam Hinga Norman*, SCSL-2004-14-AR72(E), Decision (Lack of jurisdiction), 31 May 2004, para. 30.

[31] Note that non-ICL texts, and occasionally even official sources, can contain inconsistencies in terminology. *See* e.g., G. Waschefort, above note 8, p. 109; *Norman*, above note 30, para. 4(c).

[32] SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao* ("RUF"), SCSL-04-15-T, Judgement (Trial Chamber), 2 March 2009, para. 190(i).

[33] *See Norman*, above note 30, Robertson Dissent, para. 27.

[34] *Norman,* above note 30, paras. 1, 5; *RUF* Trial Judgement, above note 32, para. 186; SCSL, *Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu* ("AFRC"), SCSL-04-16-T, Judgement (Trial Chamber), 20 June 2007, para. 734.

[35] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision (Confirmation of Charges), 29 January 2007, para. 246; ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment (Trial Chamber), 14 March 2012, para. 608.

[36] *RUF* Trial Judgement, above note 32, para. 193(i).

The Rome Statute was the first international instrument to explicitly include a criminalization of recruitment.[37] Under the Rome Statute, recruitment comprises "[c]onscripting or enlisting children under the age of 15 years into armed forces [or groups] or using them to participate actively in hostilities."[38] Two points merit some emphasis. First, child soldiers are defined as persons younger than 15, which is consistent with the minimum permitted age for recruitment in most international instruments (15 or older).[39] Second, it explicitly lists the three *actus rei* disjunctively, using "or". This is a subtle but important detail. The differentiation between conscription and enlistment, and the choice to include both actions in the provision, suggest that something "more passive, such as putting the name of a person on a list" was also being criminalized.[40] This formulation is commonly interpreted as being progressive and more expansive than what customary international law (CIL) prescribed at the time.[41] We shall refer to it as the "recruitment equivalency".

The Special Court for Sierra Leone (SCSL) Draft Statute was originally formulated more conservatively, and did not criminalize enlistment.[42] Eventually, however, it was amended to mirror the Rome Statute wording.[43] The SCSL strenuously but successfully defended this position when in *Norman*, the accused contested that enlistment had not

---

[37] This inclusion, notably, was made very late in its drafting stage. Julie McBride, *The War Crime of Child Soldier Recruitment*, Springer-Verlag, The Hague, 2014, p. 47.

[38] Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Arts. 8(2)(b)(xxvi) and 8(2)(e)(vii).

[39] The OPAC and Paris Principles set the age at 18. OPAC, above note 23, Art. 4(1); Paris Principles, above note 8, § 2.1.

[40] William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2001, p. 50. *See also* SCSL Report, above note 30, para. 18.

[41] M.C. Bassiouni, "The Normative Framework of International Humanitarian Law Overlaps, Gaps and Ambiguities", *International Law Studies*, Vol. 75, 2000, p. 20; G. Waschefort, above note 8, p. 109. *See also Norman*, above note 30, Robertson Dissent, para. 4.

[42] SCSL Report, above note 30, Enclosure art. 4(c). See also *Norman*, above note 30, para. 8.

[43] G. Waschefort, above note 8, p. 107; *Norman*, above note 30, para. 8. *See* Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, 22 December 2000, Annexed Statute, Art. 4(c).

acquired the status of an international crime under CIL.[44] While some commentators have criticized the decision of upholding enlistment as a separate crime as being legal fiction,[45] it had achieved its aim: it was a pragmatic, if legally questionable, effort that safeguarded the SCSL's jurisdiction over future child soldiering cases,[46] and was thereby responsible for holding many other Sierra Leonean perpetrators accountable for recruitment.[47] One author argues: "If for the wrong reasons (…) the Appeals Chamber did come to the right result."[48]

The recruitment equivalency had significant consequences. In both *CDF* and *Lubanga* it was held that each act constitutes a distinct *actus reus*,[49] implying that they can be charged together and only one needs to be proven to obtain a conviction under recruitment.[50] It also removed the special purpose requirement which originally required the perpetrator to have had recruited the child *for the purpose of* using them in hostilities. In *Lubanga*, it was reaffirmed that no specific intent is needed with respect to conscription and enlistment.[51]

One can notice a very directed effort throughout this jurisprudence to protect child soldiers under criminal law, almost to a fault, categorically targeting any contribution to child soldiering

---

[44] *Norman*, above note 30, paras. 1-3, 53. Norman argued that this violated the principle of legality.

[45] *See* e.g. G. Waschefort, above note 8, p. 109; J. McBride, above note 37, p. 104.

[46] J. McBride, above note 37, p. 107.

[47] G. Waschefort, above note 8, pp. 110-111.

[48] Matthew Happold, "International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone's Decision in *Prosecutor v. Samuel Hinga Norman*," *Leiden Journal of International Law*, Vol. 18, 2005, p. 289.

[49] SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa* ("CDF"), SCSL-04-14-A, Judgment (Appeals Chamber), 28 May 2008, para. 139; *Lubanga* Trial Judgment, above note 35, para. 609.

[50] *See* ICTY, *Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo and Zejnil Delalić*, IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para. 412.

[51] *Lubanga* Trial Judgment, above note 35, para. 609; *see also* SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa* ("CDF"), SCSL-04-14-T, Judgment (Trial Chamber), 2 August 2007, para. 195; *RUF* Trial Judgement, above note 32, para. 190; SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Judgement (Trial Chamber), 18 May 2012, para. 439 note 1055; compare SCSL Report, above note 30, Enclosure, Art. 4(c): "Abduction and forced recruitment of children under the age of 15 years into armed forces or groups *for the purpose of* using them to participate actively in hostilities." (emphasis added)

irrespective of the actual role played in the process. The underlying motivation is expressed clearly in *Lubanga*, where it was held that the "principal historical objective" of the prohibition had always been the protection of children in armed conflict from harm.[52]

Children

While ICL utterly condemns the adults responsible for child soldiering, it is in practice the children under their command who commit many of the atrocities. These child soldiers, however, are almost universally spared from responsibility under ICL. In several situations, this did not occur for procedural reasons. Only the ICC features a flat statutory minimum age of 18.[53] In contrast, the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) were not beholden to any jurisdictional limitation based on age.[54] The SCSL could try minors aged 15-18, but under a specific juvenile procedure,[55] an approach replicated by the UN Transitional Administration in East Timor (UNTAET) Panels with a modified range (12-16).[56] The SCSL and UNTAET Panels were therefore not procedurally barred from prosecuting child soldiers.

Despite there being no positive prohibition on trying child soldiers,[57] no child soldier has ever been tried internationally.[58] Even in cases where the court had personal jurisdiction *de jure*, ICT/Cs have been extremely reluctant.[59] This extends beyond child soldiers: no person under

---

[52] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on Sentence (Trial Chamber), 10 July 2012, para. 38; *see also* Robert Cryer et al., *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge University Press, Cambridge, 2014, p. 303.

[53] Rome Statute, above note 38, Art. 26.

[54] *See* Fanny Leveau, "Liability of Child Soldiers Under International Criminal Law", *Osgoode Hall Review of Law and Policy*, Vol. 4, 2013, p. 41; Magne Frostad, "Child Soldiers: Recruitment, Use and Punishment", *International Family Law, Policy and Practice*, Vol. 1, 2013, p. 86; IRIN News, above note 18.

[55] Like most domestic juvenile proceedings, it emphasized restoration, rehabilitation, education and juvenile guarantees. Statute of the Special Court for Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000, 16 January 2002, Art. 7(1-2); *see* SCSL Report, above note 30, paras. 32-35.

[56] UNTAET Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, UNTAET/REG/2000/30, 25 September 2000, § 45.1.

[57] M. Drumbl, above note 10, pp. 103, 106.

[58] F. Leveau, above note 54, p. 37.

[59] M. Frostad, above note 54, p. 86.

18 has ever been brought before the ICTY and ICTR.[60] The SCSL, despite active requests from the population to do so,[61] has never tried a child soldier. Chief Prosecutor David Crane's position on the matter was quite clear: "I am not interested in prosecuting children".[62] Before the UNTAET Panels, one case arose featuring an ex-child soldier tried for crimes committed when he was 14, but this was resolved through a plea bargain.[63] Drumbl alleges that this resolution, too, is indicative of *de facto* reluctance in ICL to try minors.[64]

It must be underlined that this unwillingness is not a product of hard law, but largely a matter of policy. Nevertheless, it is reflective of a broader propagated position viewing the prosecution of child soldiers by way of ICL as "unimportant, embarrassing, and unhelpful."[65] The Paris Principles state that "[c]hildren should not be prosecuted by an international court or tribunal."[66] Even courts that provide for special juvenile procedures are distrusted: children "have no place at a war crimes tribunal, no matter how benevolent such a tribunal may be towards them."[67] Authors broadly condemn trying child soldiers internationally, suggesting they be tried at most domestically, through rehabilitation or even not at all, in light of what they went through.[68] David Crane added:

---

[60] IRIN News, above note 18.

[61] *See* SCSL Report, above note 30, para. 35.

[62] SCSL Public Affairs Office, "Special Court Prosecutor Says He Will Not Prosecute Children," *OTP Press Release*, 2 November 2002.

[63] Judicial System Monitoring Programme, "The Case of X: A Child Prosecuted for Crimes Against Humanity", January 2005.

[64] M. Drumbl, above note 10, p. 125.

[65] M. Drumbl, above note 10, p. 127.

[66] Paris Principles, above note 8, § 8.6. Coomaraswamy also argued that "there is an emerging consensus that children below the age of 18 should not be prosecuted for war crimes and crimes against humanity by international courts." Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/HRC/12/49, 30 July 2009, para. 49.

[67] Save the Children Sweden, cited in Ilene Cohn, "The Protection of Children and the Quest for Truth and Justice in Sierra Leone", *Journal of International Affairs*, Vol. 55, 2001, note 28; *see and compare*: United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, 29 November 1985 (Beijing Rules), Rule 17.1(b); Paris Principles, above note 8, §§ 3.7, 8.9.0; ECtHR, *T. and V. v. United Kingdom*, App nos. 24724/94 and 24888/94, 16 December 1999, para. 84.

[68] G. Waschefort, above note 8, p. 139; Nienke Grossman, "Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations", *Georgetown Journal of International Law*, Vol. 38, 2007, p. 351. The only prominent counterargument in favour

"The children of Sierra Leone have suffered enough both as victims and perpetrators. (…) I want to prosecute the people who forced thousands of children to commit unspeakable crimes."[69] Despite only being a statement of prosecutorial policy, this position has become quite authoritative and widely supported internationally,[70] and summarizes this section nicely.

III. When Does Agency Start?

Prosecutor Crane's statement above contains a hidden element: that the children were "forced" to commit their crimes, implying they had no "choice" in the matter. This brings us to a possibly more fundamental reason for excluding child soldiers from prosecution, besides prosecutorial policy: the question of children's agency. From what point do they possess the necessary intent to commit a crime according to ICL? The answer can lead to a single threshold, either high or low, or a spectrum. The inquiry is relevant because the question of agency has surfaced several times in child soldiering cases: if there is "choice" (e.g., choice to stay, choice to kill), there is culpability.[71] In this section, it is demonstrated that ICL applies inconsistent approaches, but that generally, it does acknowledge some degree of agency much earlier than the ICC's 18-year-old statutory minimum.

---

of trying them internationally rests on victim's justice: "Justice for the victims may be the most relevant justification when dealing with prosecution of child soldiers." F. Leveau, above note 54, p. 49.

[69] SCSL Public Affairs Office, above note 62.

[70] G. Waschefort, above note 8, p. 139.

[71] In *RUF*, the Court held Kallon and Sesay were not entitled to mitigation due to their conscription, because they could have "chosen another path" than that of committing crimes. SCSL, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, SCSL-04-15-T, Sentencing (Trial Chamber), 8 April 2009 ("RUF"), paras. 220, 250. In *Ongwen*, the Court maintained that there was no duress because "the circumstances of Ongwen's stay in the LRA … cannot be said to be beyond his control." ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Decision (Confirmation of Charges), 23 March 2016, para. 154.

Legal Responsibility

Legal responsibility in criminal law has always been inextricably linked with the core matter of *mens rea*.[72] From which point in their lifetime do children possess the necessary intent to commit a crime? Different legal cultures have vastly diverging views on the exact threshold,[73] although the global average is relatively low (13-15).[74] Some jurisdictions recognize transitory stages. Scottish courts, for example, can apply a doctrine of diminished responsibility as a mitigating circumstance that describes children as independent agents, but with "defective or incomplete" responsibility.[75] International instruments are not in agreement. The CRC only asks States to "establish (…) a minimum age,"[76] while the Beijing Rules ask for a qualitative test "bearing in mind the facts of emotional, mental and intellectual maturity."[77]

Although criminal law has not traditionally based its policies on scientific research,[78] it could be worthwhile to briefly explore psychological findings on the issue. Studies generally support a casuistic approach. "[U]p to a certain age, a child is not fully able to understand his or her acts, nor the consequences attached to it."[79] UN Expert Coomaraswamy places the threshold at somewhere "younger than eighteen,"[80] although the exact moment when this occurs is undetermined and likely varies between individuals.[81] External factors, such as

---

[72] David Ormerod, *Smith and Hogan's Criminal Law*, 13th ed., Oxford University Press, Oxford, 2011, p. 340.

[73] There is no general agreement on this matter. *See* Gerry Maher, "Age and Criminal Responsibility", *Ohio State Journal of Criminal Law*, Vol. 2, 2005, p. 496.

[74] F. Leveau, above note 54, p. 42.

[75] G. Maher, above note 73, p. 508.

[76] CRC, above note 23, Art. 40(3). Its commentaries suggest an absolute minimum age of 12, however. UN Committee on the Rights of the Child, "CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice," CRC/C/GC/10, 25 April 2007, para. 32.

[77] Beijing Rules, above note 67, Rule 4.

[78] Naomi Cahn, "Poor Children: Child Witches and Child Soldiers in Sub-Saharan Africa", *Ohio State Journal of Criminal Law*, Vol. 3, 2006, p. 429. For a comprehensive summary of neuroscientific findings on this issue, *see ibid.*, pp. 424-430.

[79] F. Leveau, above note 54, p. 38.

[80] G. Waschefort, above note 8, p. 124 note 104.

[81] F. Leveau, above note 54, p. 38. It has also been stated that "even within adolescence, there are varying levels of maturity and understanding, with eleven to thirteen-year olds

upbringing, experiences, and abuse and neglect, also influence the mental maturity age.[82]

In this respect, ICL does not deny some level of agency with respect to children. As discussed above, all courts except the ICC do not exclude the possibility of trying persons under 18 if *mens rea* can be proven. In addition, the SCSL and UNTAET incorporated a spectrum of transitory stages, which would be more in line with Coomaraswamy's report. There are also indications that the ICC standard, sometimes criticized for its flat transition between non-liable to liable at the turn of one's 18th birthday,[83] was more the product of policy than a belief in the polarising dichotomy between minor and adult for the purposes of determining accountability.[84]

Children Volunteering

One interesting anomaly with regard to the concept of child soldiers as victims is the phenomenon of voluntary recruits. Not all child soldiers are forcibly recruited in the sense of "conscription". Some are "enlisted" and volunteer to join. They do this knowingly for a variety of reasons. Children may preventively join an armed group to protect their family or themselves.[85] As organizations that provide safety, shelter, food, and social connections, armed groups may be enticing as a medium for self-preservation, employment, the pursuit of material gain, and to combat feelings of exclusion.[86] True—it is debatable whether these are

---

showing significantly poorer reasoning skills than sixteen to seventeen-year olds." N. Cahn, above note 78, p. 425.

[82] N. Cahn, above note 78, p. 426-247.

[83] J. McBride, above note 37, p. 149.

[84] The choice was largely practical, to avoid having to make a compromise between the different legal traditions of Signatories. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, "Working Paper No 3: Children and Justice During and in the Aftermath of Armed Conflict," September 2011, p. 37.

[85] Rachel Brett, "Adolescents volunteering for armed forces or armed groups," *International Review of the Red Cross*, Vol. 85, 2003, p. 861; ILO, "Wounded Childhood: the use of children in armed conflict in Central Africa," 1 December 2003, available at: www.ilo.org/ipecinfo/product/download.do?type=document&id=948. The UNTAET case actually features a good example of this, as the defendant claimed to have joined the militia to protect his father. *Case of X*, above note 63, p. 18.

[86] R. Brett, above note 85, pp. 859-861; ILO, above note 85, pp. 29, 31, 34.

"voluntary" reasons or just brought about by the need to survive.[87] Others, however, are decidedly deliberate: many children join for ideological reasons, desires for revenge, or fascination with the prestige of war.[88] How ICL responds to voluntary recruits can serve as an indicator as to whether it awards agency to children below 15 years, the age below which recruitment is prohibited.[89]

The first conclusion that may be drawn from our previous discussion would be that it does not. The equivalency between conscription and enlistment in fact suggests the opposite. It is "legally irrelevant" whether the child consented.[90] Such an elimination of the voluntariness factor has been justified in *Lubanga* through the argument that children "cannot give 'informed' consent when joining an armed group, because they have limited understanding of the consequences of their choices,"[91] and that within armed conflict, "children's participation in armed forces will always involve some form of pressure."[92] This narrative is supported by the firmly established rule that consent, as an expression of voluntariness, can never be a valid defence to a charge of recruitment.[93]

---

[87] Michael Wessels, *Child soldiers: From violence to protection*, Harvard University Press, Harvard, 2006, p. 4; David McNair, "Historical and Psychological Origins of Child Soldiering in Ba'athist Iraq", *Digest of Middle East Studies*, Vol. 19, 2010, p. 39.

[88] ILO, above note 85, pp. 31-35.

[89] There has been some debate whether this should be 18 instead. *See* Megan Nobert, "Children at War: The Criminal Responsibility of Child Soldiers", *Pace University Law Review*, Vol. 3, 2011, p. 7.

[90] *Lubanga* Trial Judgment, above note 35, para. 612. *See also CDF* Appeals Judgment, above note 49, Winters Opinion, para. 11 note 1207.

[91] *Lubanga* Trial Judgment, above note 35, para. 610.

[92] No Peace Without Justice and UNICEF Innocenti Research Centre, "International Criminal Justice and Children", 2002, available at: www.unicef.org/emerg/files/ICJC.pdf, pp. 73-74. See *Lubanga* Trial Judgment, above note 35, paras. 611-612. Graça Machel also stated that "[i]t is misleading (…) to consider this voluntary. While young people may appear to choose military service, the choice is not exercised freely. They may be driven by any of several forces, including cultural, social, economic or political pressures." Impact of Armed Conflict on Children Report, above note 11, para. 38.

[93] *Lubanga* Trial Judgment, above note 35, para. 617; *Lubanga* Confirmation of Charges, above note 35, para. 247; *AFRC* Trial Judgement, above note 34, para. 735; *CDF* Appeals Judgment, above note 49, para. 192. The Geneva Conventions also proscribe that protected persons can never renounce their rights under the Convention. Geneva Convention IV, above note 27, Art. 8.

Something interesting, however, occurred during Lubanga's sentencing judgement. As a reference, SCSL sentences for recruitment relied on relatively standard aggravating factors, such as drug abuse, the scale and brutality of the acts, and long-term harm to the victims.[94] The ICC opted for a curious, different approach. In 2012, Lubanga was given three individual sentences: twelve, thirteen and fifteen years of imprisonment for enlistment, conscription and use, respectively.[95] The rationale was not explicitly given in the judgement. Kurth suggests that it reflected the Chamber's views on the different gravities of the offences, clearly establishing "some sort of hierarchy".[96] He speculates that conscription was likely given a higher sentence than enlistment to acknowledge the added element of compulsion. Use was punished most severely because it directly exposes children to danger, whilst conscription and enlistment can be viewed as mostly "preparatory."

Judge Odio-Benito appended two major points of dissent to the judgement. Odio-Benito "firmly disagree[d]" with the choice to establish a hierarchy between the three *actus rei*.[97] In her view, all three acts cause "severe physical and emotional" damage to the victims, regardless of whether the children are actually forced to fight or not.[98] Jørgensen agrees that the majority's choice to introduce a hierarchy was artificial and that there is "no clear basis for applying a gravity scale";[99] they are, after all, alternative forms of the "same" offence. Odio-Benito's second objection is discussed below.

---

[94] *See generally*: SCSL, *Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu* ("AFRC"), SCSL-04-16-T, Sentencing (Trial Chamber), 19 July 2007, paras. 53(ii), 85; SCSL, *Prosecutor v. Charles Ghankay Taylor*, SCSL-03-01-T, Sentencing (Trial Chamber), 30 May 2012; SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa* ("CDF"), SCSL-04-14-T, Sentencing (Trial Chamber), 9 October 2007, para. 97; *RUF* Trial Sentencing Judgement, above note 71, paras. 180-186.

[95] *Lubanga* Decision on Sentence, above note 52, para. 98.

[96] Michael Kurth, "The Lubanga Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity", *Goettingen Journal of International Law*, Vol. 5, 2013, p. 452. *See Lubanga* Trial Judgment, above note 35, para. 608.

[97] *Lubanga* Decision on Sentence, above note 52, Odio-Benito Dissent, para. 3.

[98] *Lubanga* Decision on Sentence, above note 52, Odio-Benito Dissent, para. 25.

[99] Nina Jørgensen "Child Soldiers and the Parameters of International Criminal Law", *Chinese Journal of International Law*, Vol. 11, 2012, paras. 43-44.

While it is true that sentencing can fundamentally involve different factors than that of responsibility, the *Lubanga* divide somewhat confounds the issue of agency. The recruitment equivalency was motivated by the position that children cannot consent. They are impressionable and must be protected from themselves by adults carrying the positive obligation to deny them admission, even if they apply voluntarily. "Volunteering is presented as an illusion."[100] They cannot apply voluntarily, because they have insufficient capacity to do so. It is then inconsistent to acknowledge enlistment as a "lesser" offence for sentencing. If agency is denied, it should be invariably immoral and irresponsible to recruit children into an armed group, regardless of whether they ostensibly "volunteer" or not. The position that enlistment is "less severe" than conscription is only justifiable if some degree of juvenile agency is presupposed.

To complicate matters further, there are indicators that, with the exception of the recruitment equivalency, ICL has consistently supported the recognition of children's agency. A "hierarchy" has always existed.[101] Most telling is the fact that enlistment was not criminalized until the Rome Statute,[102] signifying that conscription had always been regarded as the more "severe" crime. In *Norman*, Justice Robertson opined that "forcible recruitment is always wrong, but enlistment (…) might be excused if they are accepted (…) only for non-combatant tasks,"[103] and described "use" as "taking the more serious step" *vis-à-vis* conscription and enlistment.[104]

So, which is it?

IV. Does Child Soldiering Shape Its Victim?

Answer: Significantly So

Odio-Benito, it must be recalled, had a second objection. She argued that the sentences failed to take into consideration the "abundant evidence" of

---

[100] M. Drumbl, above note 10, p. 13.

[101] Gus Waschefort, "Justice for Child Soldiers? The RUF Trial of the Special Court for Sierra Leone", *International Humanitarian Legal Studies*, Vol. 1, 2010, p. 195; *Lubanga* Trial judgment, above note 35, para. 582.

[102] SCSL Report, above note 30, para. 18.

[103] *Norman*, above note 30, Robertson Dissent, para. 9.

[104] *Norman*, above note 30, Robertson Dissent, para. 5(c).

long-term harm caused to ex-child soldiers.[105] She is correct that this evidence had indeed been adduced.

During the trial, the Court upheld expert testimonies underlining the "devastating long-term consequences" of child soldiering to accentuate the gravity of Lubanga's acts.[106] The Court also accepted, in the same paragraph, that child soldiering "can hamper children's healthy development and their ability to function fully even once the violence has ceased." Prosecutor Moreno-Ocampo delivered a similar, slightly dramatized account during his opening statement.[107] The child soldiering experience was cast as linear: "[I]t rendered the children as victims damaged for life, with their reality today as derivative of their previous suffering. Once a child soldier in fact, always a child soldier in mind, body, and soul."[108] Long-term harm was also recognized by the SCSL in the *RUF* case.[109]

There is more evidence suggesting this outside of *Lubanga* and *RUF*. One is reminded that much of the international condemnation is based on the notion of long-term harm and the threat that this new "risk generation" poses to a country's, and humanity's, future.[110] Much has been written about how a past of child soldiering is greatly damaging to that person's personality and morality. They suffer from a lack of education and social upbringing, physical and mental disabilities, PTSD,

---

[105] *Lubanga* Decision on Sentence, above note 52, Odio-Benito Dissent, para. 19. Note that in this specific case, this objection was unfounded as harm had already been acknowledged in the determination of the gravity of the offence: Odio-Benito's proposal would therefore have resulted in unjustifiably "double-counting" the harm factor in the final sentence. See *ibid*., para. 35; *see also* ICTY, *Prosecutor v. Momir Nikolić*, IT-02-60/1-A, Sentencing (Appeal Judgement), 8 March 2006, para. 58.

[106] *Lubanga* Decision on Sentence, above note 52, para. 39.

[107] "They cannot forget the beating they suffered. They cannot forget the terror they felt and the terror they inflicted. They cannot forget the sounds of their machine-guns, that they killed. They cannot forget that they raped and that they were raped." Cited in Tracey Gurd, "And here's what the Prosecutor's Opening Statement said…….," *International Justice Monitor*, 2010, available at: www.ijmonitor.org/2010/01/and-heres-what-the-prosecutors-opening-statement-said.

[108] Mark Drumbl, "Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering", 20 April 2016, available at: justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of-child-soldiering.

[109] *RUF* Trial Sentencing Judgment, above note 71, paras. 184-186.

[110] *See above* Section I.

STDs, drug dependency, and social stigmas.[111] Reportedly, effects persist even after demobilization, with psychological trauma sometimes staying with the ex-child soldier for a lifetime.[112] Post-traumatic stress has been reported to be severe and widespread;[113] in one study conducted in Uganda and the DRC, 34% of respondent ex-child soldiers were diagnosed with PTSD.[114] According to Schauer, long-term effects of child soldiering include a chronic absence of social skills, difficulties in suppressing aggressiveness, and cognitive and moral distortion, caused by an internalisation of perverse moral codes.[115]

Writers report on how easily child soldiers can become permanently moulded by spending their formative years in armed groups. Communities have described them as "bad", "disrespectful", "violent", and "out of control", and how the violence from their childhoods had become entrenched and irrevocable.[116] Ex-child soldiers have been found to be trapped in a form of moral atavism, being "'stuck' in a primitive stage of moral development."[117] "Increasing aggressive behavior, emotional numbing and loss of empathy, and changes in attitudes, beliefs, and personality," as well as proneness to categorical thinking and violence, have been cited.[118] Another research group stated that wartime experiences "deform [children's] sense of right and wrong."[119] Of course, this is exactly the aim of most recruiters: they prey on the unformed,

---

[111] *See* Elisabeth Schauer and Thomas Elbert, "The Psychological Impact of Child Soldiering", in Erin Martz, *Trauma Rehabilitation After War and Conflict*, Springer-Verlag, New York, 2010.

[112] E. Shauer, above note 111, p. 327.

[113] *See* Christopher Blattman and Jeannie Annan, "The Consequences of Child Soldiering", *Review of Economics and Statistics*, Vol. 92, 2010, pp. 884, 890; E. Schauer, above note 111, pp. 323-327; P. Singer, above note 9, pp. 193-195.

[114] C.P. Bayer, F. Klasen and H. Adam, "Association of trauma and PTSD symptoms with openness to reconciliation and feelings of revenge among former Ugandan and Congolese child soldiers," *Journal of the American Medical Association*, Vol. 298, 2007, p. 558.

[115] E. Schauer, above note 111, pp. 335-336.

[116] Jo Boyden, "The Moral Development of Child Soldiers: What Do Adults Have to Fear?" *Journal of Peace Psychology*, Vol. 9, 2003, pp. 345-348.

[117] J. Boyden, above note 116, p. 352.

[118] *Ibid.,* see also G. Straker et al., Faces in the revolution: The psychological effects of violence on township youth in South Africa, David Phillip, Claremont, 1992.

[119] B. Auster et al., "A fight over child soldiers", *US News and World Report*, 24 January 2000, p. 8.

pliable, easily influenced minds of children and their underdeveloped morality,[120] making them vulnerable to indoctrination and other psychosocial abuse designed to make them more effective killers.[121]

Answer: Not So Much?

If one accepts the position that child soldiering has permanent, morality-destroying effects on its demobilized victims, one would expect the same to have occurred to ECPs. The argument could in fact be made that their situation is worse, as they remained within the armed group until adulthood, never having the opportunity to leave the perverse social circumstances which shaped them. This should raise questions with regard to their capacity to appreciate the unlawfulness of their actions: does passing an arbitrary limit for "adulthood" suddenly make such persons accountable for (all of) their actions, or should their past become a consideration, either for responsibility or sentencing?

At least for responsibility, it seems that ICL does not accept that an ECP's past would preclude their capacity to appreciate the unlawfulness or nature of their crime.[122] During the *Ongwen* Confirmation of Charges, the Court rejected several Defence arguments that relied on the appreciation of how Ongwen's past had compromised who he had become.[123] One interesting detail concerns the Court's contention that

---

[120] J. Boyden, above note 116, p. 348; E. Schauer, above note 111, p. 316.

[121] *See* J. Boyden, above note 116, pp. 351-357; Erin Baines, "Complex political perpetrators: reflections on Dominic Ongwen," *Journal of Modern African Studies*, Vol. 47, 2009, p. 170; Morton Deutsch, "Psychological Roots of Moral Exclusion", *Journal of Social Issues*, Vol. 46, 1990, p. 24.

[122] Rome Statute, above note 38, Art. 31(1)(a); *see also* Raphael Pangalangan, "Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals", *American University International Law Review*, Vol. 33, 2018, pp. 619-629.

[123] The Defence argued separately for complete exclusion of criminal liability and of duress. *Ongwen* Confirmation of Charges, above note 71, paras. 150, 153. The Defence also requested the Court to look "more holistically in light of the indoctrination that child soldiers have to undergo," adding that "the LRA's spiritual indoctrination had a profound impact on young abductees by shaping their beliefs and perceptions of right and wrong." Cited in Sharon Nakandha, "Ongwen Confirmation of Charges Hearing Continues at ICC", International Justice Monitor, 26 January 2016, available at: www.ijmonitor.org/2016/01/ongwen-confirmation-of-charges-hearing-continues-at-icc.

evidence had demonstrated how "Ongwen shared the ideology of the LRA, including its brutal and perverted policy."[124] The Court here fails to consider *why* Ongwen shared this ideology, and whether this was a result of conscious choice or his compromised childhood circumstances—an omission which can point to a disregard of the long-term effects on an ECP's morality.

That (adult) defendants' pasts in armed groups are given insignificant weight during sentencing is displayed in *RUF*.[125] Kallon's Defence claimed that he was "completely brainwashed" into the RUF ideology,[126] which did not even merit Kallon a mitigation.[127] Sesay had only been an "adult" for one year when he was conscripted into the RUF as a 19-year-old,[128] which was also dismissed.[129] A counterpoint must however be added to this: Kallon and Sesay were not ECPs (they did not spend their childhood in an armed group). This finding does not therefore necessarily indicate that courts will adopt the same position *vis-à-vis* ECPs: in fact, the Office of the Prosecutor (OTP) for *Ongwen* has consistently not excluded the possibility of its relevance during sentencing, although they have been adamant that it cannot play a role for responsibility.[130]

V. Narrative Contradictions

As the previous sections have demonstrated, ICL has adopted a number of positions with regard to several aspects related to child soldiering. Not all are in harmony and some appear to be irreconcilable. In this section, an attempt is made to analyse these narratives, determine their legal ramifications, and if possible, provide a solution to reconcile them.

---

[124] *Ongwen* Confirmation of Charges, above note 71, para. 154.

[125] Courts have, in the past, issued mitigations based on the youthful age of the defendant; these mitigations, however, were not granted for reasons pertaining to indoctrination or compromised ideology. *See* ICTY, *Prosecutor v. Drazen Erdemović*, IT-96-22-A, Judgement (Appeals Chamber), 7 October 1997, para. 10(b); ICTY, *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Judgement (Trial Chamber), 10 December 1998, para. 284.

[126] *RUF* Trial Sentencing Judgment, above note 71, para. 85.

[127] *RUF* Trial Sentencing Judgment, above note 71, para. 250.

[128] *RUF* Trial Sentencing Judgment, above note 71, para. 69.

[129] *RUF* Trial Sentencing Judgment, above note 71, para. 220.

[130] S. Nakandha, above note 123; T. Maliti, above note 2.

(1) ICL focuses its efforts on adult recruiters. Child soldiers are victims. A significant body of ICL attributes to children enough agency to be prosecuted *de jure*, but they are never tried in practice for policy reasons.

Two matters are relevant for discussion here. First, how can this policy be justified on legal grounds, and second, what is the basis for drawing the line between "child victims" and "adult perpetrators"?

Absent procedural reasons, two possible justifications come to mind that can support the tendency to forego children. First, ICL places priority on prosecuting only major criminals, such as senior leaders and perpetrators of the gravest international crimes.[131] This rationale could seem convincing based on the intuition that for child soldiers "it is difficult to believe that they bear the greatest responsibility."[132] However, it does raise the question of how ICL would react in the hypothetical case that a child soldier commits crimes on the scale of Ongwen. By itself, it does therefore seem insufficient as a basis for excluding children *in abstracto*.

The second possibility is the interests of justice guideline,[133] a countervailing principle that allows proceedings to be discontinued if this would be in the interests of justice, even if other admissibility and jurisdictional criteria are fulfilled.[134] Even individuals deemed "most responsible" can be excluded from prosecution by virtue of this principle, including the theoretical "major" child soldier criminal discussed

---

[131] SCSL Report, above note 30, paras. 29-31; Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, 82 UNTC 280, 8 August 1945, Art. 1; UNSC Res. 1534, 26 March 2004, para. 5; UNSC Res. 1315, 14 August 2000, para. 3; Rome Statute, above note 38, Art. 1. It is also included explicitly in the title of the Nuremberg Charter.

[132] Ilona Topa, "Prohibition of child soldiering – international legislation and prosecution of perpetrators," *Hanze Law Review*, Vol. 3, 2007, p. 115. Note this does not mean that they would go unpunished, but that their cases would be delegated to national courts.

[133] *See* Rome Statute, above note 38, Art. 53; *see also* Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.50, 11 February 1994, last amended 8 July 2015, Rules 4, 15*bis*, 44; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, ITR/3/REV.1, 29 June 1995, last amended 10 April 2013, Rules 4, 15*bis*, 45*quater*; SCSL Statute, above note 55, Arts. 17(4), 23; UNTAET Rules, above note 56, § 28.2; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 14; European Convention on Human Rights, ETS 5, 4 November 1950 (entered into force 3 September 1953), Art. 6.

[134] Office of the Prosecutor, "Policy Paper on the Interests of Justice", September 2007, § 3.

above.[135] The ICC OTP has said that "international justice may not be served by the prosecution of (…) a suspect who has been the subject of (…) serious human rights violations."[136] This would seem a more robust justification for the position.

This, however, creates an inconsistency *vis-à-vis* ECPs. They too have been the subject of serious human rights violations. Why then are they "exempted" from this clemency? The simple answer would be that they are adults. Prosecutor Gumpert correctly underlines: the case of the victim-perpetrator is only "new" for ICL.[137] In that case, the next question would be where to draw the line. Making nominal age the ultimate factor presents problems. Adulthood is a cultural concept: Which cultural standard should be used and why?[138] Even in a purely ICL context, one can ask if 15 (the IHL standard) or 18 (the ICC standard) should be applied.[139] Appling arbitrary thresholds, for example, 18, also leads to awkward scenarios whereby "acts committed by child soldiers prior to their 18th birthday are not eligible for prosecution but for those who do not escape until they are adults, the law holds them responsible (…) regardless of how they came to be fighters."[140]

This matter raises interesting considerations particularly for future decisions to prosecute ECPs internationally. The author would encourage further reflections on this issue.

(2) ROThe recruitment equivalency establishes a paternalistic duty to always refuse voluntary recruits because they do not have the ability to give informed consent. However, conscription is a graver crime than enlistment, implying the recognition of some degree of agency.

---

[135] Office of the Prosecutor, above note 134, § 5(c): "It is possible however, that even an individual deemed by the OTP to be among the 'most responsible' would not be prosecuted in the 'interests of justice.'"

[136] *Ibid.*

[137] T. Maliti, supra note 2.

[138] P. Singer, above note 9, p. 7.

[139] *See* M. Nobert, above note 89, p. 7.

[140] Kimberly Curtis, "This child soldier grew up to become a hardened war criminal. Should he go to jail?" *UN Dispatch*, 9 January 2015, available at: www.undispatch.com/child-soldier-grew-become-hardened-war-criminal-go-jail.

This particular contrast is intriguing but not necessarily irreconcilable. There are two possibilities that can be adopted, but which both carry ramifications that must be respected.

The first is to acknowledge that children (can) indeed give consent to volunteer. This option would be more in line with the general position in ICL that some level of agency is assigned to children. It is consistent with the lower or non-existent statutory limits of ICT/Cs, as well as the classic recognition that conscription is graver than enlistment (which until recently, had not even been criminalized). The recruitment equivalency can be justified as a practical way to penally protect the interests of children, by dissuading (potential) perpetrators from becoming involved with child soldiering in any capacity, pursuant to ICL's deterrent function.[141] For example, Prosecutor Moreno-Ocampo once proclaimed that the *Lubanga* trial would "make clear that (…) [i]f you conscript, enlist or use child soldiers you will have a problem, you will be prosecuted."[142] This position however entails that courts must respect the hierarchy between conscription and enlistment during sentencing to stay consistent. Additionally, questions can be raised with respect to labelling. Due to the recruitment equivalency, a convicted person would simply be labelled as a "recruiter", lacking the nuance of whether he committed the "graver" crime of conscription, or merely enlistment.

The second option, which the author does not recommend, is to maintain the notion that the recruitment equivalency applies in general. This would be a novel approach and potentially contrary to other previous developments in ICL. It would also entail that courts should avoid repeating the gravity hierarchy made in *Lubanga*: the alternative to this would be to simply make general calculations, such as those based on the

[141] Note however that the deterrent effect of ICL in practice has been very questionable. Immi Tallgren, "The Sensibility and Sense of International Criminal Law", *EJIL*, Vol. 13, 2002, p. 569; David Bosco, "The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?" *Michigan State Journal of International Law*, Vol. 19, 2011, p. 177.

[142] "Lubanga trial will open eyes to child soldiers: ICC prosecutor – Interview," *Lanka Business Online*, 23 January 2009, available at: www.lankabusinessonline.com/lubanga-trial-will-open-eyes-to-child-soldiers-icc-prosecutor-interview.

actual treatment of the children and the scale and brutality of abuse, as the SCSL has done.[143]

(3) ICL acknowledges the devastating long-term effects of child soldiering with respect to the perpetrator's victims, but not if the accused himself had experienced it.

Drumbl has astutely marked the crux of this contradiction to be one between a "continuous" and "contingent" narrative,[144] referring to how the relationship between the two phases of the ECP is presented. Both narratives are well-represented in *Ongwen*. From the start, Ongwen's Defence adopted the continuous narrative: Ongwen's brutal past would have influenced his adult decisions and culpability.[145] In contrast, the OTP maintained the contiguous narrative, one which emphasizes agency, choice and action: Ongwen was fully conscientious of his membership in the LRA and their crimes. When he committed his crimes, he was an adult, fully in control, and willingly shared the perverse LRA ideology.[146]

It is certainly expected for the Defence and the Prosecution to adopt narratives pursuant to their respective roles in the courtroom, but a noteworthy contrast must be drawn with *Lubanga*, wherein the Court upheld a continuous narrative to accentuate the gravity of Lubanga's acts—here, it was the *prosecution* which relied on the continuous narrative.[147] Drumbl correctly points out that this juxtaposition is jarring, and even suspects opportunistic "instrumentali[sation of narratives] to suit the prosecutorial impulse."[148]

The author joins Drumbl's concerns that the Prosecution and the Court may, perhaps unwittingly and with good intentions, be applying a double standard with respect to this matter. In a vacuum, however, the propositions are not inherently irreconcilable. A troubled past or a

---

[143] *See AFRC* Trial Sentencing Judgment, above note 94; *Taylor* Trial Sentencing Judgment, above note 94; *RUF* Trial Sentencing Judgment, above note 71, paras. 180-186.

[144] M. Drumbl, above note 108.

[145] *See* note 123.

[146] *Ongwen* Confirmation of Charges, above note 71, paras. 150-156. It was held that Ongwen "shared the ideology of the LRA, including its brutal and perverted policy with respect to civilians" and that "the circumstances of Ongwen's stay in the LRA … cannot be said to be beyond his control." *See also* S. Nakandha, above note 123.

[147] *See* Section IV.

[148] M. Drumbl, above note 108.

compromised moral upbringing does not necessarily preclude a person's capacity to appreciate the wrongfulness of their actions in all circumstances. However, it would also be too simplistic to simply ignore the possibility that it could. ECPs experience all of the same processes as child soldiers, including those cited to induce long-term damage, but on a longer and more intensive scale.

The author endorses calls from authors not to prematurely fall back on traditional compartmentalisations in law. Drumbl points out how the law often draws "bright-lines" for convenience: persons are either perpetrator or victim, adult or child, culpable or not culpable.[149] The major issue in this regard is how ECPs have clearly been victims of recruitment in their past, but have equally undeniably become perpetrators of atrocities in adulthood.[150] There is a danger of falling into "binary reductionist"[151] views that deny ECPs the recognition of their "much coarser reality".[152] Pangalangan adds that Ongwen-the-victim and Ongwen-the-perpetrator cannot and ought not be separated: "[T]he child who suffers from the soldiering cannot be separated from the soldier he grew up to become."[153]

In the author's opinion, the best compromise would lie in casuistically assessing an ECP's capacity to appreciate the wrongfulness of their actions.[154] A genuine attempt should be made to assess the effect child soldiering had on that person's mental capacity to commit crimes in light of their exceptional background. Cases should not be decided through presuppositions, but in its totality, through the "enforcement of

---

[149] Mark Drumbl, "Victims who victimise", *London Review of International Law*, Vol. 4, 2016, p. 22.

[150] For example, can a person such as Ongwen truly be regarded as a "perpetrator" in the same sense of Lubanga, a university graduate who eventually became the president of the UPC? *See Lubanga* Trial Judgment, above note 35, para. 81.

[151] M. Drumbl, above note 10, p. 214.

[152] M. Drumbl, above note 149, p. 22.

[153] R. Pangalangan, above note 122, p. 621.

[154] There is scientific support that effects of child soldiering are extremely varied and that the only way to accurately determine its impact on particular persons is to consider them individually. *See* Alcinda Honwana, *Child soldiers in Africa*, University of Pennsylvania Press, Pennsylvania, 2007 (how child soldiers retain tactical agency through micro-decisions); E. Schauer, above note 111, p. 316 (internalisation of an armed group's morality); C. Blattman, above note 113 (pointing to resilience instead of permanent damage); J. Boyden, above note 116 (ex-child soldiers are generally neither amoral nor antisocial, and through "doubling" can revert back to old moral codes once demobilised).

individual measures in each particular case after a thorough, personal and individual investigation."[155] The Beijing Rule qualitative test "bearing in mind the facts of emotional, mental and intellectual maturity,"[156] which recognizes a spectrum of agency and individual differences among children, consistent with Coomaraswamy's findings, can serve as a point of departure.

This casuistic analysis need not necessarily result in a reduction of responsibility. It may not even need to result in a mitigation if the case does not warrant it. However, performing the individual analysis respects the position in ICL that child soldiering can cause long-lasting moral damage to its victims and, through this, also pays respect to the victim-perpetrator themselves by not denying them this reality. At the very least, it avoids inequitable situations wherein an ECP is equated with purely adult perpetrators such as Joseph Kony.[157]

Final Remarks

ICL needs to carefully consider how it should proceed with future ECP cases. Upon closer examination of the various aspects related to child soldiering, a number of potential discrepancies have been highlighted. Instead of attributing the frictions to opportunism, however, the author would like to assume that most of these were constructed with the best of intentions, perhaps incognisant of the different signals they transmit. On the one hand, one finds a strong desire to protect the child soldiers' interests: their captors are prosecuted regardless of their role in the wicked enterprise, while they are to be reintegrated or at most tried domestically.[158] On the other hand, there is an equally strong desire not to

---

[155] R. Pangalangan, above note 122, p. 631. Taking this line of logic to heart, this could also mean that rigid statutory age limits for imputing criminal liability should be removed, following the example of the ICTY and ICTR, opting instead for an individual analysis per defendant.

[156] Beijing Rules, above note 67, Rule 4.

[157] *See also* Windell Nortje, "Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court", *International Criminal Law Review*, Vol. 17, 2017, pp. 205-206.

[158] N. Grossman, above note 68, p. 351; ICRC, "Child victims of armed conflict: the view of the International Committee of the Red Cross", 23 May 2000, available at: www.icrc.org/eng/resources/documents/statement/57jqrc.htm.

let grave crimes, such as those of Ongwen, rest unpunished. This duality comes into conflict when one faces an ECP, who demands both.

ICL finds itself in an interesting position with regard to ECPs which it should take advantage of not only to provide the best possible justice to everyone involved—victims, child soldiers, and ECPs—but also to present a congruent position. ICL expresses itself primarily through statutes, trial judgements and sentencing judgements, which would ideally be properly aligned. A consistent narrative is beneficial for legal certainty, possibly avoiding future situations such as those in *Norman* and *Ongwen* where ICL is accused of opportunism or violations of legality. Policy also plays a major role in practice. ICL is selective in nature.[159] The choice to prosecute, refraining from doing so, or delegating the case to domestic courts forms part of the broader narrative. Particularly, ICL should pay attention to its position on children's agency and the long-term effects of child soldiering, as those were found to contain the most potential frictions.

For future ECPs, ICL should carefully consider the best course of action. It has been said that ICT/Cs are not the optimal forum to try victims of gross human rights violations and compromised perpetrators,[160] and it should strongly be considered whether ECPs such as Ongwen would fall under this category, or alternatively, if reconciliation or domestic proceedings would be more desirable.[161] In any situation, should ECPs be tried internationally in the future, the author encourages courts to adopt a casuistic analysis of their culpability— either for responsibility or sentencing—bearing in mind their personal experiences and an individual examination of how their past as a victim has shaped them as adults.

---

[159] Patrick Keenan, "The Problem of Purpose in International Criminal Law", *University of Illinois Legal Studies Research Paper 15-33*, 2015, available at: ssrn.com/abstract=2655631.

[160] M. Drumbl, above note 10, p. 127

[161] F. Leveau, above note 54, p. 61.