

# Child Soldiers caught in a cultural kaleidoscope

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## **Abstract** (100 words)

Child participation in armed conflicts continues to challenge societies. Many diverging opinions and (perceived) legislative inconsistencies can be brought back to cultural differences spread over three axes. First, the recognition of child competence and their right to decide to participate in an armed conflict, differs significantly across and even within cultures. Second, the notion of “child” in child soldiers is conceptualized differently. Third, questions concerning their criminal liability for acts committed whilst being a child soldier continue to be fiercely debated. The question arises whether it is possible to draft a solid legal framework, recognizing the vast cultural diversities.

**Keywords** (10): CRC, Child Soldier, Culture, Childhood, Competence, Criminal liability, Duress, Prior Fault, Victimhood, Dominik Ongwen

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## 1 Introduction

In the past decades, authors have consistently referred to an estimated 300,000 children participating in armed conflicts all around the world (Furley, 1995; Sainz-Pardo, 2008; Williams, 2011; Yuvaraj, 2016). Contrary to what some may believe, the participation of children in armed conflicts is not a new nor a mere African phenomenon. Different authors have documented the use of child soldiers in a wide variety of conflicts well beyond the African continent. Reference can easily be made to the role of children in the Crusades, the children accompanying Napoleon's armies and the child drummers leading the American soldiers into battle during the Revolutionary war. Similarly, children were engaged by the Nazi regime, or during the Gulf war or the Spanish Civil War (Orwell, 1952; Maher, 1989; Furley, 1995; Wessells, 2002). More recently terrorist organisations such as Boko Haram and Islamic State have equally recruited child soldiers (Oladeji, 2014; Kononenko, 2016). These examples come to testify that the idea of child soldiering being new or somehow rooted in an inferior African culture, can easily be rebutted. To the contrary, child soldiering is spread over a wide variety of highly different cultures. Children have always participated to armed conflicts all around the world and will continue to do so in the future (Cohn & Goodwin-Gill, 1994; Happold, 2011).

There is however a clear difference in the intensity with which children participate. That difference in the participation of children then and now, when comparing older to newer conflicts, can easily be brought back to technological development in weaponry (Sainz-Pardo, 2008). In older conflicts the engagement of children was held back by the limited availability and heaviness of weapons. The more recent development and proliferation of inexpensive, small arms, which can easily be handled

as from the age of 10, has led to what some have called ‘a coexisting proliferation of children in war’ (Peters & Richards, 1998; Machel, 2001; Maxted, 2003).

Adding complexity, are the different cultural perspectives that give way for different opinions on the acceptability of engaging children in armed conflicts and the accountability of children for acts committed in the course thereof. Whereas some consider children incompetent regardless of their age, others see children as gradually gaining competence to take ever weighty decisions. Whereas some would see child soldiers as innocent victims, others see them as competent survivors.

In light of the possibility of an ever increasing intensity in child participation in armed conflicts against the backdrop of the complexities of cultural diversity, the questions regarding the kind of legal framework needed to balance the rights of children when confronted with an armed conflict, become all the more pressing. This contribution aims at revealing and contextualising the implications some of those cultural differences underpinning current legal discussions as well as pointing to consequences that might not receive the legal attention they deserve. The metaphor of a cultural kaleidoscope in which child soldiers are caught, is sparked by the observation that small changes in perspective and small twists in culturally inspired concepts can paint completely different pictures on the acceptability and accountability of child soldiers.

## **2 Cultural perspectives on the competence of children**

### ***2.1 Lack of competence as the driving indicator to condemn child soldiering***

From a Western perspective, the idea of child soldiers and thus children participating in an armed conflict is commonly received with appal. The combination of the words ‘child’ and ‘soldier’ sends chills up many spines and is regarded as completely unacceptable (Rosen, 2005). Child soldiering is considered a *faux pas* that is to be condemned.

That *'faux pas'*-reasoning is underpinned by the traditional idea of children being incompetent to make rational decisions (James, Jenks & Prout, 2004; Cordero Arce, 2012). They are incompetent to assess the danger of an armed conflict and make reasoned choices regarding their participation therein. That is the driving factor to condemning child soldiering. Children are bearers of rights, but are incompetent to execute their rights autonomously before reaching adulthood. Their ability to exercise a free will has traditionally been viewed as hindered by their physical weaknesses and lack of purpose or long-term objectives (Woods, 1982; Van Bueren, 1995; Brighouse, 2003).

Rooted in that incompetence argument, the reason why some advocate strongly against the use of child soldiers coincides with the reason why armed groups are interested in child soldiers. Armed groups see children as desirable recruits. Their perceived incompetence to properly evaluate danger and assess the consequences of their actions, results in a presumption of being more agile, fearless, obedient, brutal and fierce when compared to adult recruits (Furley, 1995; Maxted, 2003). For that reason, child soldiers are deemed to be a powerful tool to terrorize civilian populations. With respect to the child soldiers in Sierra Leone it has been argued that they were particularly feared for not having yet developed a sense of sympathy or mercy (Boyden, 1994; Maxted, 2003; Park, 2006).

Child soldiers are not just 'mini-adult' soldiers. Height and age are not the only discriminating factors. For long however the difference between children and adults went unnoticed; not only in this context, but more in general. The difference between childhood and adulthood simply did not exist (Hanawalt, 2003). Children were considered mini-adults who were yet to take their position in society (Verhellen, 2000; Kloek, 2003). Only at the turn of the century and the proclamation of the 20th century as "the century of the child" (Keys, 1909), more attention was paid to the difference between children and adults and the consequences this should have. Advocates with a moralist point of view argued that children were inherently bad humans and should be shielded from society until they were taught how to behave and participate meaningfully to society. Advocates with a more romanticist point of view argued that children were pure, unprejudiced and open-minded human

beings that should be shielded from the negative influences of society until they were properly skilled to counter those influences (Verhellen, 2000; Jenks, 2004). In any event, regardless of the view point underpinning the school of thought, childhood is a generally accepted socially constructed category, based on a lack of competence (James, Jenks & Prout, 2004; Qvortrup, 2005).

As a result, if condemning the participation of child soldiers is linked to their incompetence (Kononenko, 2016; Quenivet, 2017), that incompetence needs to be properly delineated. The question arises how 'child' in 'child soldier' should be interpreted. It should be made clear who qualifies as competent and who does not; who is to be shielded from the conflict and who is to be allowed to participate therein.

## ***2.2 Anchoring childhood in a legal framework: twisting the kaleidoscope***

It is important to note that this social construction based on a lack of competence is not only historically but also culturally contingent (Jenks, 1996). Different cultures have different views on competence and attaining adulthood. Anthropological research underpins the claim that a plurality of childhoods exists, varying along e.g. age, ethnicity, gender (Qvortrup, 2005; Kononenko, 2016). There is no cross-cultural consensus as to when adulthood is reached. There is no cross-cultural consensus on the length of the application of child protection through specific children's rights. NIEUWENHUYNS (2008) had referred to this as the cultural relativism of children's rights. With a view to ensuring the effectiveness of internationally safeguarded children's rights, BREMS (2002) has introduced what she calls 'inclusive universality', referring to the need to find a common understanding respecting cultural diversity. This can be attained by either accepting flexibility (and thus allowing an interpretation that differs across cultures) or transformation (and thus where necessary amending the international standards).

This search for an approach able to respect the diversity in views across cultures and legal traditions, is reflected in the Convention on the Rights of the Child. It is an example of a text that embraces the cross-cultural flexibility. That has however resulted in what some have identified as internally contradictory provisions. The perceived contradiction stems from inconsistently elaborating on the impact of presumed incompetence. This perceived contradiction merits further consideration.

On the one hand, this children's rights convention stipulates in its Article 1 that anyone under 18 is to be regarded a child. Building on that incompetence-based age demarcation, anyone under 18 is presumed not fully competent and therefore deserving of additional protection. That starting point is however far from absolute (Freeman 1992; Detrick, 1999). Despite what could be expected from an overarching children's rights convention, the age limit is dependent on the national rules applicable to the child and thus the cultural differences they reflect. After all, the provision continues, further stipulating that the age limit is set at 18, *unless* the national rules applicable to the child stipulate that maturity is attained sooner and thus before reaching the age of 18. Differently put, depending on the local culture and the way this is translated into the local legal framework, childhood can differ in length. This acceptance of flexibility in light of cultural differences is a way to ensure a wider ratification and effect of the convention (Buck, 2010). Cultural differences give way for small twists to the kaleidoscope, painting different pictures on the length of incompetence and thus the length of childhood.

On the other hand, that same convention – in its Article 12 – recognises some competence of children when acknowledging that some children are capable of forming their own views. These children should be regarded as competent to freely express those views knowing that their views will be given due weight in accordance to their age and maturity (Lücker-Babel, 1995; Krappmann, 2010; McBride, 2014). The acknowledgment of a legitimate voice in children means precisely the acknowledgement of their citizenship (Cordero Arce, 2012). In doing so children are attributed competence, whereas childhood is rooted in incompetence. Hence the perceived contradiction.

However, rather than interpreting those provisions as contradictory or inconsistently elaborating on the impact of incompetence, I am of the opinion that they are the translation of the progressive maturing process that children go through, from childhood to adulthood – whilst demonstrating cultural sensitivity by accepting flexibility. The gradual growth into adulthood should be reflected in a gradual gaining of competence to take decisions, the selection and sequence of which should be made dependent on the consequences of those decisions. The competence to take decisions with little impact should be attained sooner than the competence to take decisions with significant – potentially even life changing or life threatening – impact not only for themselves, but also for other human beings. The ability to take decisions and to execute self-determination should be granted gradually.

This narrative of reflecting the gradual maturing process into the legal framework is not generally accepted and EEKELAAR (1994) rightly concludes that there is a stark contrast between what he calls ‘dynamic self-determination’ of children and the classic view of a child as incompetent and requiring protection up to the age of 18. Competence, autonomy and the idea of self-determination operate in complete contrast to the equally accepted notion of children requiring protection and nurture (Freeman, 1997). The normative position defended in this contribution is that children gradually mature what should be translated into gradually gaining autonomy and power to self-determine. That translation may differ across cultures, without however denying the impact of the gradual maturing process.

### ***2.3 Conflicts shorten childhood***

Finding the right balance between acknowledging the lack of competence of children (and therefore underlining their need for protection) and acknowledging their gradual gaining of competence (allowing them the power to make their own decisions on issues that affect them), has repercussions for children and the legal framework governing their position in relation to an armed conflict. Even though the Cape Town Principles define a child soldier as ‘any person under 18 years of age who is

part of any kind of regular or irregular armed force in any capacity' this capacious definition requires further refinement given the very heterogeneous group of children it encompasses. Given this gradual gaining of competence and the cultural differences in this respect, it is not possible to have one set of rules applicable to all children regardless of their background, age and maturity. Some sociologists view a child's choice to fight as a legitimate autonomous decision, made from the 'subjective appraisal of their options and safety' (de Berry, 2001). Depending on an individual maturing trajectory, as of a certain age, children are competent to make these kinds of decisions. Advocates of child autonomy view child soldiers not as incompetent victims, but as 'competent survivors' (Boyden, 2000). This reasoning only adds to the relevance of questioning how 'competence' and 'child' in the specific context of 'child soldier' should be interpreted. Apparently, a distinction should be made between competent and therefore acceptable child soldiers versus incompetent and therefore unacceptable child soldiers.

Interestingly, the Children's Rights Convention implicitly embraces the idea of gradually gaining competence and the idea to distinguish between acceptable and unacceptable child soldiers. Mirroring the principles anchored in international humanitarian law, its Article 38 introduces the age of 15 and stipulates that children below that age are not allowed to participate in an armed conflict.<sup>1</sup> A contrario, this means that children as young as 15 years old are considered competent to decide to either or not participate to the conflict. From a children's' rights perspective, having gained sufficient competence is the only plausible justification for the age limit set. Therefore, Article 38 CRC is the legal basis to distinguish between what will be referred to as 'acceptable' and 'inacceptable' child soldiers.

Though it is clear that conflicts conceptually shorten the length of childhood originally set at 18 in Article 1, the question arises how the interaction should be read. Should the provisions regarding armed conflicts impact on the definition of childhood in general or should the specific context of an

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<sup>1</sup> See e.g. in Article 4(3)(c) of the second Additional Protocol to the Geneva Conventions, which equally only forbids the use of children below the age of 15.



armed conflict impact on the childhood of a specific individual? Differently put, the question arises whether an internal inconsistency can be found in the co-existence of references to the ages of 18 and 15 in the same convention.

The co-existence of those two ages merits further elaboration. Regardless of possible cross-cultural differences in view on how and when to attain competence and linked thereto self-determination and adulthood, it is clear that the decision to either or not participate to an armed conflict and become a child soldier requires thorough consideration. It is a decision that cannot be taken lightly, given the impact on the life of not only the child involved, but also society at large. Hence, deciding to either or not participate requires significant maturity of the child involved. Moreover, one can question whether at all other decisions exist that have an even more significant impact or whether the choice to become a child soldier is the most significant and weighty decision a child can take. Differently put, one can question whether children competent to decide to participate to an armed conflict can be considered incompetent for any other decision. Or still, whether or not considering a 15 year old competent to take these decisions should automatically lead to the conclusion that this 15 year old is competent to take any other decision it is confronted with.

Based on that reasoning the above question can be picked up again. Can a provision like Article 38 rendering a 15 year old competent to decide to become a child soldier, meaningfully co-exist with a provision like Article 1 stipulating that minus 18 year olds may be regarded as at least partially incompetent. It seems as though this co-existence can only be defended if it is interpreted as to be understood in a contextual manner. This would mean that the context of an armed conflict should be seen as a specific context speeding up the gradual maturing process and resulting in attaining adulthood faster when compared to children growing up in a different context.

It should be noted again that the idea of gradually gaining competence and the possible application thereof in the context of an armed conflict, is not generally accepted. Some have suggested that the current legal framework fails to provide adequate protection for children confronted with an armed

conflict. It has been suggested that age limits should be pulled up even above 18, and set the legal age for enlistment and/or recruitment at 18 and for active combat at 21 (Williams, 2011).

The possible inconsistency in the co-existence of references to the ages of 15 and 18, can be explained by the deadlock caused by the cultural differences in accepting child soldiers. At the time of drafting the convention, and particularly the provisions regarding armed conflicts, it became clear that cultural differences would stand in the way of a political compromise satisfactory for all countries. The disappointment of countries seeking to provide children with a legal framework able to shield them from armed conflicts until reaching the age of 18, inspired them to start negotiations on an optional protocol on this matter (Desmet, 2011). The discussions resulted in the adoption of the 2000 Optional Protocol in which the age limits were pulled up to 18. Sharp cultural differences become clear when looking at the diversity in age limits and competence arguments found in the legal frameworks that are applicable to children depending on their nationality.

## ***2.4 Conceptual link between childhood, competence and criminalisation***

The conceptualisation of childhood and the distinction between acceptable and unacceptable child soldiers, underpins the choices regarding the criminalisation of using child soldiers. To add to the disapproval to engage children in an armed conflict, a mirroring provision can be found in criminal law.

The Rome Statute to establish the International Criminal Court (ICC), names conscripting, enlisting or using children a war crime, mirroring the minimum recruitment age of 15 to delineate 'child' for that purpose (Machel, 2001). From the integration of that age limit, it should be deduced that conscripting, enlisting or using a child soldier over 15 falls outside the scope of reprehensible behaviour.

The choice to anchor the criminalisation of conscripting, enlisting or using child soldiers in the philosophy of international humanitarian law, is also a choice to ignore the cultural differences in this

respect. The criminalisation could easily have respected cultural diversity by anchoring itself in the cultural traditions applicable to the child. The choice could have been made to formulate the criminalisation referring to acts related to child soldiers in light of the age limits nationally applicable to the child, only in absence of which the 15 year threshold known in international humanitarian law would apply. Rather than amending the Rome Statute to set the legal age for recruitment at 18 and at 21 for active combat as suggested by Roberge (1998), which risks being detached from the cultural reality applicable to the child, this alternative would truly respect and reflect cross-cultural differences (Williams, 2011).

One could easily make the mistake that the lack of reprehensibility of conscripting, enlisting or using child soldiers over the age of 15 – from a mere Rome Statute perspective – which may be presumed to find its justification in over 15 year olds being sufficiently competent to take decisions and take away punish ability of the behaviour, to a contrario mean that the reprehensibility of conscripting, enlisting or using child soldiers under the age of 15 is linked to their lack of competence. The relevance of that lack of competence may also be read into the irrelevance of children having joined voluntarily. Logically, that lack of competence will drain voluntariness of any legal value. Having volunteered is without any meaning in absence of the competence to meaningful take self-determining decisions. Seemingly supporting this reasoning, the ICCs pre-trial chamber ruled that consent is not a valid defence for recruitment of children under 15 (Williams, 2011; McBride, 2014).

Interestingly, an argumentation that opens the door for at least a level of competent decision making of children to become a child soldier even under the age of 15, can also be found in the case law of the ICC. As elaborated on by McBride, considerable debate took place on the difference in meaning of conscripting and enlisting. It has been argued that enlistment follows a voluntary act of a child, whereas conscription refers to a aggressive and forceful recruitment. Because both labels appear in the criminalisation, the question arose whether the difference should have any legal consequences. In Lubanga, it has been suggested that the distinction may have a bearing on the sentencing of the

defendant. If difference in sentencing is based on the use of force or aggression, this would not have any links to the appreciation of the competence of the child involved. If however, the difference in sentencing is motivated on the basis of voluntary versus involuntary recruitment, the opposite would be true. In such case, the competence of the child to voluntarily participate even below the age of 15, would come into play.

In theory it would indeed be possible for criminal law to have a different understanding of competence of children to take decisions in the context of an armed conflict, when compared to the understanding in another legal branch such as for example international humanitarian law. There is no apparent legal problem with international humanitarian law questioning the competence of a minus 15 year old and therefore excluding him from participation to an armed conflict, and criminal law acknowledging the competence of that same minus 15 year old, either by mitigating the sentence of an adult prosecuted for illicit use of child soldiers, or by prosecuting the minus 15 year old in question for acts committed in his capacity as a child soldier. For that reason, it is important to note that the lack of reprehensiveness of conscripting, enlisting or using a child soldier over 15 because of perceived competence, should not be matched with reprehensiveness of conscripting, enlisting or using a child soldier under 15 because of perceived incompetence. A position on child soldiers under the age of 15 either or not having competence, cannot be deduced from the legal provisions of the Rome Statute governing criminalisation.

### **3 Cultural perspectives on labelling of children as child soldiers**

Despite the persistent image of child soldiers being active combatants carrying AK-47s, children can be engaged in an armed conflict in many ways. A vast amount of research looked into the phenomenon of children participating in an armed conflict in one way or another. Children are used to perform a variety of tasks, including but not limited to acting as a cook, human shield, messenger,

mine sweeper, nurse, porter, radio operator, saboteur, sniper, spy, suicide kamikaze and sex slave (McCallin, 1998; Machel, 2001; Maxted, 2003; Park, 2006; Human Rights Watch, 2010; Williams, 2011). Whereas some of these children remained 'safely' out of arms way, it is equally clear that some tasks put them in direct danger of being caught in the hostilities (Tan, 2012).<sup>2</sup>

The wide variety of roles children take up during an armed conflict is acknowledged in the definition provided for in above-mentioned the Cape Town Principles. Reflecting that variety, a capacious definition was drafted, encompassing 'any person under 18 years of age who is part of any kind of regular or irregular armed force in any capacity'. In doing so, the definition not only includes those children involved with carrying arms, but who act in a variety of 'support' capacities or who are recruited for the purpose of forced marriage, or to render sexual services (Park, 2006).

The heterogeneity of the tasks of children participating in an armed conflict, raises questions as to the impact this should have on their self-determination and their individual agency as discussed above and the impact of possible cultural differences in views. The interaction between these phenomenological insights and the idea of gradual gaining of competence remains largely unstudied. Would the difference in tasks give way for a different interpretation of competence, and thus the age as of which children should allowed to participate in an armed conflict?

Many authors have pointed to the difference in wording of the provisions in international humanitarian law when compared to the provisions in international criminal law, yet the link with competence implications and the cross-cultural diversity in views in this regard is yet to be subject to thorough academic debate.

The international humanitarian law provisions refer to a prohibition of children below the age of 15 to directly participate to an armed conflict. A contrario, this provision has been criticized for leaving the door open for children to participate in an indirect fashion. In light of the phenomenological

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<sup>2</sup> SCSL, Prosecutor v Charles Ghankay Taylor, SCSL-03-01-T, Judgment, 18 May 2012 (Trial Chamber) (hereinafter 'Taylor Trial Judgment'), para 1459.

insights regarding child soldiering, this indirect participation should be read as acting in some sort of support capacity without being directly engaged in the conflict. This means that acting as a nurse or cook would not be deemed unacceptable from an international humanitarian law perspective. Looking at this from a children's rights perspective, and trying to interpret these provisions in light of gradually gaining competence, it makes sense to draft the provisions in such a way as to allow less serious acts of participation below the age of 15 whilst requiring more serious acts of participation to be prohibited until reaching the more mature age of 15. In doing so the difference between acceptable and unacceptable child soldiers should not only be based on age, but also in light of the nature of the participation. Children under 15 acting as child soldiers in the wide sense of the word, are not necessarily problematic, as long as they stay away from direct participation. Only under 15 year olds, directly participating in the armed conflict are seen as in violation of international humanitarian law. In light thereof the provisions have been criticized for not being able to protect over 15 year olds from the negative influences of the armed conflict (Francis, 2007).

The international criminal law provisions paint a somewhat different picture with respect to participation and competence related implications thereof. International criminal law provisions twist the kaleidoscope in a different direction. The Rome Statute refers to conscripting, enlisting or using children for active participation below 15 as being a war crime. The use of the word 'active' as opposed to the word 'direct' known from international humanitarian law provisions has provoked a lot of criticism. The question of how 'active' differs from 'direct' and what 'active' participation in hostilities entailed, was already raised in the Preparatory Commission for the ICC. Some delegations wanted the term clarified in the Elements of Crimes. Others argued that it was already sufficiently clear, as the question had already been answered at the session of the Preparatory Committee immediately preceding the Diplomatic Conference at Rome, when a footnote was inserted explaining what was meant by the terms 'use' and 'participation' (Dormann, 2003; Happold, 2011). The footnote provided that *"The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as*

*scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, the use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included in the terminology".*<sup>3</sup> In doing so, no second criterion to differentiate between acceptable and unacceptable child soldiers is upheld. From a criminal law perspective conscripting, enlisting or using child soldiers under the age of 15 is problematic, regardless of the specific tasks children are entrusted with.

One could identify a difference in culture between these two branches of law. Different traditions are developed on how to approach the phenomenon of child soldiers. The cultural difference between the two legal branches, is due to the difference in the finality the branches are pursuing. The criminal law branch, aims at keeping the door open for prosecuting of as many adults as possible for acts committed against children, i.e. conscripting, enlisting or using child soldiers. Based on the idea that it is in the best interest of children to be kept as far away as possible from an armed conflict and to that end it is in their best interest to be able to prosecute as many adults as possible, the concept of child soldier has been broadened significantly. International humanitarian law pursues a different aim. Aimed at regulating the armed conflict and protection civilians including children, IHL aims at removing and keeping children from the battlefield. It is more restrictive in labelling children as child soldiers. Kononenko aptly concluded that children are caught in the development of the normative framework of two competing corpuses of law (Kononenko, 2016). Depending on using either an international humanitarian law or an international criminal law perspective, the kaleidoscope will be twisted differently and paint a different picture of who qualifies as a child soldier and when child soldiering is problematic.

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<sup>3</sup> Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, Part One (A/CONF.183/2/Add.1) (14 April 1998), p. 21.

In light of possible cultural differences regarding the qualification of a child soldier and the competence of children to participate in an armed conflict as well as regarding the need for a more gradual introduction of competence, this difference in labelling between international criminal law and international humanitarian law, opens the door for a twofold reflection.

First, the criminal law approach of widening the concept of child soldiering to encompass also forms of indirect participation, without matching that process with a more progressive gaining of competence, results in a very heterogeneous group of children participating in many different ways. Placing all forms of those participation at the same footing, does not only seem disproportionate from a criminal law perspective (making no distinction between rather distinct forms of criminal behaviour), it also feels disproportionate from a children's rights perspective (taking no account of the different levels of competence that need to be attained before being competent to take a decision to either or not participate in a specific way). This seems to contradict with the idea that competence is to be gained gradually, depending on the type of decision and on the impact of the decision, both for the child itself as well as for society at large. It could be argued that indirect participation is less dangerous, and arguments linked to being more ruthless and lacking mercy are only (at least mostly) relevant in relation to children who are actually active at the front line. Therefore, it makes sense for children to gain the competence to decide to participate in an indirect manner sooner, than gaining the competence to decide to participate in a direct manner. However, only international humanitarian law leaves the door open for a such interpretation / application of the international rules governing the prohibition of child participation in armed conflicts.

Second, the criminal law approach of widening the concept of child soldier to encompass also forms of indirect participation, inevitably impacts on the reintegration prospects of the child. Being labelled a child soldier complicates the reintegration of the child as it will be confronted with the prejudices related to that label on top of possible psychological trauma endured.



## **4 Cultural perspectives on the acceptance of child soldiers' victimhood**

### ***1. Conceptual link between competence and criminal liability***

The other side of the competence coin does not relate to the criminal liability of adults making improper use of children, but relates to the criminal liability of the children themselves. As McBride has put it: If a child's right to autonomy becomes accepted by society, then the terrible acts committed by child soldiers must consequentially be punished—just as the actions of any other person who possesses the power to self-determine (McBride, 2014). This power to self-determine is necessarily present in children that are considered competent to decide to become a child soldier. Addressing the possible criminal liability of the child soldiers is important for the recognition of those who fell victim to them (Kononenko, 2016).

In this regard, the question arises how their competence interplays with the context of the armed conflict and impacts on their criminal liability. Should children below the age of 15, who are commonly accepted as incompetent to decide to participate in and therefore deserving to be shielded from the armed conflict, equally be shielded from any criminal liability they may be confronted with for acts committed during the armed conflict in the capacity of a child soldier? And vice versa, should children above the age of 15, who are – at least by some – accepted as competent to participate in an armed conflict equally be regarded competent to be held criminally liable for their acts? To what extent can the context of the armed conflict interfere with those premises?

Article 40 (2) of the children's rights convention omits to standardise the age as of which children are considered criminally liable. It does require states to establish a minimum age below which children are presumed not to have the competence to infringe penal laws. The Beijing Rules further detail in Rule 4.1 that the age for criminal liability shall not be fixed too low, bearing in mind emotional, mental and intellectual maturity. In its General Comment n°10, the Children's Rights Committee

stipulates that the age for criminal responsibility shall not be lower than 12. The co-existence of this age limit and the age limit found in international humanitarian law regarding the acceptability of child soldiering, reveals that despite not being allowed to directly participate in the armed conflict, a minus 15 year old could be considered competent to bear criminal responsibility. In doing so, the question arises how such criminal responsibility interacts with the incompetence argument used to deny those children the right to participate in the first place.

For children who are considered incompetent, a lack of mens rea is presumed (Ormerod & Laird, 2018). For children who are considered competent, the picture is rather complex. The kaleidoscope can be twisted in many different directions. It goes without saying that the phenomenon of child soldiers 'defies criminal law's binary characterisation of innocent and guilty' as KAN (2018) described, and challenges 'the binary reductionism of the criminal law categorisation of either pure victim or ugly perpetrator', as DRUMBLE (2016) had put it. Regardless of cultural differences on maturing trajectories and reaching adulthood, because of their age and physical appearance, child soldiers combine both the qualification of victim as well as that of perpetrator.

#### ***4.1 Voluntariness and criminal liability: the defence of duress***

Taking account of a fundamental principle of criminal law, criminal liability of individuals is dependent on free will and on the voluntariness with which acts are committed. Tampering with an individuals' free will, will always affect the appreciation of the behaviour and appropriateness (at least severity) of punishment. Assessing the criminal liability of child soldiers requires insight into the voluntariness of their behaviour.

Empirical research into the reality of child soldiering, reveals that children are often recruited forcibly through abductions or pressganging. Armed groups that recruit children display a similar culture or strategy of how to maximise the potential of child participation in the conflict. Children who are already very vulnerable, such as refugee and street children are particularly at risk of recruitment,

although, in some conflicts, children have even been indiscriminately rounded up from schools and marketplaces.

Immediately upon their recruitment, children are made acquainted with what I would refer to as the so-called '*bush culture*'. Firstly, with a view to harden the children and raise them to become ruthless fighters indoctrinated with loyalty to the cause, new recruits are initiated into military like training, hard labour, frequent canings and in some conflicts child soldiers are forced to undergo so-called cleansing rituals which would entail blood tasting and rolling in the blood of the dead. (Baines, 2008) Furthermore, children are often forced to take drugs to make them feel fearless (Machel, 2001; Park 2006). Not seldom they are forced to commit heinous acts even against their own communities (Furley, 1995; Thompson, 1999; Maxted, 2003). In doing so, the option to leave and return back to their previous lives, is made impossible.

From that point forward, life as a child soldier is hard and requires obedience to rigid structures based on a strict hierarchical chain of command. The smallest violation of rules could result in severe canings or even a death sentence. Abductees are systematically confronted with or even forced to participate in the beating and killing of recruits who attempted or were suspected of trying to escape. Displays of remorse or discontent are cause for suspicion, and are punishable in the same way (Baines, 2008) The strictness of those rules applies regardless of the rank of combatants. Even high-ranked combatants have been subject to threats of death or serious bodily harm. Reference can be made to the execution of Vincent Otti for his interest in escaping from the LRA in spite of being a particularly high-rank member. His death was acknowledged by the ICCs prosecution<sup>4</sup> and the Vice-President of South Sudan (Maliti, 2017).

In general, lack of voluntariness that characterises the *bush culture* should rule out any form of criminal liability and stand in the way of being criminally convicted for the acts committed. As was

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<sup>4</sup> Prosecutor v Dominic Ongwen (Trial Hearing) ICC-02/04-01/15-T-26-ENG (6 December 2016) 26-27  
<[https://www.icc-cpi.int/Transcripts/CR2016\\_25802.PDF](https://www.icc-cpi.int/Transcripts/CR2016_25802.PDF)>

argued by others 'the oppressive environment deprives child soldiers of their freedom of choice'<sup>5</sup> (Kan, 2018). A defendant who claims duress is not saying that he did not do or did not intend to do what he did, but rather that, faced with an imminent and unavoidable threat aimed at persuading him to commit the offence, he had no viable alternative but to do as he was told (Happold, 2005).

However, the applicability of a form of duress in an international criminal law context is not self-evident. The reservations to accepting the defence of duress in relation to war crimes and crimes against humanity, became clear with the case of Erdemovic (Turns, 1998; Brooks, 2003, Heim, 2013).

Erdemovic had been charged for his participation in a Bosnian Serb firing squad following the fall of Srebrenica in 1995. Erdemovic had pleaded guilty for he had committed the war crimes he was charged with, but at the same time he referred to duress. He argued being deprived of free will when committing the war crimes and that this should be taken into account. Moreover he submitted that it must not merely be regarded a mitigating circumstance, but more fundamentally as a defence to free him of any punishment. He should not be punished for something he was coerced to do. However logic this may seem, the majority of the Appeals Chamber argued that there was insufficient legal basis to follow the reasoning he had presented to court.<sup>6</sup>

The legal uncertainty regarding the possibility to call upon duress as a defence in relation to war crimes and crimes against humanity, was resolved with the adoption of the Rome Statute (Ambos, 1999; Tonkin, 2005). In its Article 31 a legal basis for duress is enshrined, be it that three cumulative requirements need to be satisfied: 1) Urgency: the threat should relate to imminent death or serious bodily harm; 2) Necessity: the committed crimes should be necessary and reasonable to avoid the

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<sup>5</sup> Prosecutor v Thomas Lubanga Dyilo (Opening Statement), ICC-01/04-01/06, 26 January 2009 10 < <https://www.icc-cpi.int/NR/rdonlyres/89E8515B-DD8F-4251-AB08-6B60CB76017F/279630/ICCOTPSTLMO20090126ENG2.pdf>>.

<sup>6</sup> Prosecutor v. Drazen Erdemovic, Case no IT-96-22-T, Judgement of the Appeals Chamber of the ICTY, 7 October 1997.

threat; and 3) Proportionality: the defendant ought not to have had the intention to cause a greater harm to others than the harm to himself he sought to avoid.<sup>7</sup>

The current legal framework governing duress in international criminal law, demonstrates that it is possible for child soldiers who were considered competent to make decisions, to rely on this defence, provided that the requirements are met. It also demonstrates that the mere fact of being a child soldier and being submerged into the bush culture is not accepted as a sufficient argumentation to sustain a duress argumentation (Happold, 2005).

#### ***4.2 Voluntariness and criminal liability: the doctrine of prior fault***

Whereas some child soldiers are coerced to join an armed group, it has equally been documented that children voluntarily join armed groups. As argued above, some authors content that children are rational actors making calculated decisions (Peters & Richards, 1998; Richards, 2002). Hence it is possible for child soldiers to be qualified as having voluntarily decided to join an armed group.

Empirical research into child soldiering has revealed that these voluntary, conscious and calculated decisions may be driven by the will to avenge wrongs committed against their communities or family members (Allsebrook & Swift, 1989) or by cultural influences. McCallin pointed to the existing masculinist cultures that valorise militarism (McCallin, 1998). Children enlist for social status, power and recognition, due to family and peer pressure, for ideological or political reasons or to honour the family tradition (Williams, 2011). Participation can also be purely a means of survival. Joining an armed group is a source of protection for themselves or their families (McCallin, 1998; Machel, 2001). Poverty and lack of access to education and employment is said to drive many children into the arms of the armed forces (Robbins, 1941; Park, 2006) .

This empirical research underpins that even where it is argued that children voluntarily choose to join an armed group, the voluntary nature of this choice is considerably constrained given the many

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<sup>7</sup> Rome Statute 1998, Article 31(1)(d)

references to peer pressure, protection and survival strategies. Despite this constrain, the voluntary nature of participation has previously had serious implications in a criminal law context. Whereas child soldiers who have been forcefully recruited and indoctrinated may rely in the defence of duress, this is far less likely for children who have volunteered. An interesting parallel can be drawn with the consequences of membership of a violent criminal gang, or a paramilitary organisation. Case law contents that in those situations the doctrine of prior fault should be applied. This doctrine is summarized by Ashworth and Horder as 'not allowing a person to take advantage of any defence or partial defence to criminal liability if the relevant conditions or circumstances were brought about by his or her own fault'(Knoops 2008; Duff, 2009; Ashworth & Horder, 2013; Bassiouni, 2013; Reed & Bohlander, 2016).

Differently put, having volunteered for membership of an armed group, takes away the possibility to call upon duress. It therefore requires thorough consideration, not only in relation to the interaction between the group and society at large, but also in relation to the internal functioning of the group, the internal peer pressure and difficulties in escaping from the group in a later stage.

Given the consequences this reasoning will have and the constrain of the voluntary nature of becoming a child soldier, the application of the prior fault doctrine to children remains controversial (Happold, 2005). In light of the requirement to have sufficient competence to decide to become a child soldier, it may be argued that the impact of prior fault on the possibility to either or not rely on duress, coincides with the competence to take a reasoned decision to either or not become a child soldier. Or, because of impact of the possible application of the prior fault doctrine, the competence threshold to become a child soldier is raised considerably. As the recruitment of all children over 15 is lawful for they are competent to decide to become a child soldier, they risk losing the benefits of duress based on the prior fault doctrine.

However, for children under the age of 15, the situation is more complex. The combination of two different age limits featuring for criminal liability and choosing to become a child soldier, render a

picture rather difficult to read. On the one hand, it is generally accepted that the recruitment of all children under 15 is unlawful for they are incompetent to take those kinds of decisions. However, the Children's Rights Committee accepts criminal liability as of the age of 12. Reading those two age limits together results in a minus 15 year old not being competent to choose to become a child soldier, but possibly considered competent and held criminally liable for the acts committed. This seems to be contradictory in nature and an inconsistent appreciation of the competence of the child. However, looking at criminal liability from a different perspective, it would be difficult to accept an interpretation that would hold a minus 15 year old liable for committing a minor offence outside the context of the armed conflict, whereas that same minus 15 year old would not be liable for committing heinous crimes whilst being a child soldier, for he would not have the competence to decide to become one in the first place. It is unclear whether the incompetence of a minus 15 year old to choose to become a child soldier should equally be understood as the incompetence to commit a prior fault precluding the use of duress as a defence. A coexistence of the age of 12 for criminal liability and the age of 15 to decide to become a child soldier, seems only acceptable if the criminal liability is automatically squashed by duress.

#### ***4.3 Cultural kaleidoscope applied in practice: the case of Dominik Ongwen***

The complexity becomes even sharper when child soldiers grow older and turn into adult soldiers. Finding a proper and acceptable answer to defendants who started their criminal career as an involuntarily recruited child soldier, and continued their criminal career into adulthood defy the criminal laws binary way of thinking the most. On the one hand, the difficulty is caused by the divergent opinions on the impact and effect of a past life as a child soldier. As was acknowledged in the Lubanga judgement, sociologists content that the impact of the armed conflict and the atrocities they were confronted with in one way or another, hamper the child soldier's healthy psychological

development.<sup>8</sup> These psychological consequences continue to have their effect into adult life. It has been argued that the trauma in child soldiers is complex and is known to often result in a psychological disorder.<sup>9</sup> It is therefore clear that the duration of the trauma is not limited to the duration of the conflict, but extends far beyond that. Former child soldiers more often than not have insufficient skills to continue their lives in a non-violent social context.<sup>10</sup> On the other hand, it has been argued that a missing link in the debate on child soldiers, is that child soldiering is a dynamic phenomenon in which children's status and agency may change. As Kononenko argues 'children who are recruited into the armed forces could undergo a metamorphosis from the status of disoriented and highly impressionable youngsters into effective combatants' (Kononenko, 2016).

This explains why the case against former child soldier Dominik Ongwen is the most controversial case brought before the ICC to date (Quenivet, 2017). KAN (2018) rightly argued that the Ongwen case will have 'an insurmountable impact on future proceedings' setting the scene and guiding the reaction to former child soldiers not only in international but also in domestic courts'.

Taking account of the argumentation developed above and the relevance of distinguishing between acceptable and unacceptable child soldiers as well as distinguishing between voluntary and involuntary child soldiers, there is no discussion as to Ongwen's entry into the LRA. He was forcefully recruited and 'a product of the ruthless system forced upon him' (Kan, 2018). Despite overall consensus regarding the psychological impact of child soldiering, and the continuity of the effect, there is far from a consensus regarding the victimhood of Ongwen and the impact that should have. Whilst it is clear that the effects of child soldiering continue over time, continuing the case against Ongwen seems to somehow imply – for this specific case – that the psychological impact of the conflict stopped having effect the day Ongwen became 18.

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<sup>8</sup> Prosecutor v Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, (Judgment) ICC-01/04-01/06 (10 July 2012) 39

<sup>9</sup> Third Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", Pre-Trial Chamber II, ICC-02/04-01/15 (25 May 2016) (Defence Brief) [46] <[https://www.iccpi.int/CourtRecords/CR2016\\_03711.PDF](https://www.iccpi.int/CourtRecords/CR2016_03711.PDF)> accessed

<sup>10</sup> Prosecutor v Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, (Judgment) ICC-01/04-01/06 (10 July 2012) 40-41.



Notwithstanding the gravity of the atrocities Ongwen allegedly committed, it is generally accepted he was a victim prior to becoming a perpetrator. Ongwen was forcefully recruited and placed under the reign of Vincent Otti, who at the time was an LRA Commander, and worked his way up to become a Deputy Leader (Baines, 2008). Under the watchful eye of Otti, Ongwen was forced to follow a ruthless training and was confronted with brutalities and atrocities under the constant threat of death or serious injury to 'initiate' him into the LRA (Baines, 2008). He was subjected to an indoctrination of fear and violence characteristic of the so-called *bush culture* (Kan, 2018). Based on his individual background, it is argued that Ongwen did not voluntarily commit the alleged crimes, with his actions having been the result of the forced adaptation to the LRA's brutal environment and indoctrination. The Defence claimed that Ongwen's experience in the LRA was instinctive in that his survival depended solely on his compliance with the organisational rules under Kony's leadership. It was argued that Ongwen could not then be held responsible as he could not have controlled the 'ruthless environment' of the bush culture he had been raised in since childhood.<sup>11</sup> The Prosecution on their turn, argued that it is not only relevant to look into the voluntary or involuntary nature of joining the LRA, but rather that the voluntariness of the crimes should be assessed. In light thereof, the Prosecution argued that the context in which the acts were committed is most telling as to the state of mind and thus possible criminal liability of Ongwen. To support their line of argumentation, the Prosecution uses a number of examples to illustrate that state of mind. It is highlighted that within the organised and hierarchical structure of the LRA there was no developed mechanism to ascend ranks and Ongwen must have ascended the ranks of the LRA through his own initiative. Ascending ranks would only have been possible if Ongwen demonstrated a growth in authority and power over lower ranks.<sup>12</sup> To illustrate his character, reference is made to intercepted radio communications in which Ongwen's laughter could be heard following an atrocity. Massidda asserted

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<sup>11</sup> Third Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", Pre-Trial Chamber II, ICC-02/04-01/15 (25 May 2016) (Defence Brief) [50-57] <[https://www.icccpi.int/CourtRecords/CR2016\\_03711.PDF](https://www.icccpi.int/CourtRecords/CR2016_03711.PDF)>

<sup>12</sup> Prosecutor v Dominic Ongwen, Confirmation of Charges, ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (Prosecution Transcript) 53 <[https://www.icc-cpi.int/Transcripts/CR2016\\_00552.PDF](https://www.icc-cpi.int/Transcripts/CR2016_00552.PDF)>

that the nature of his laughter represented 'not the state of mind of somebody under duress, rather, [...] the state of mind of somebody who is enjoying and proud of what he is doing'.<sup>13</sup>

Against the background of that characterisation, the court is to make a proper legal assessment of the possibility to rely on the defence of duress. For the argument of duress to have any chance of success, Ongwen must demonstrate that he meets the three cumulative requirements set out above.

First, the danger must be imminent. There is no consensus as to whether Ongwen was in fact in any imminent danger at the time he committed the alleged war crimes. There is no consensus on how to interpret the way the bush culture had manifested itself in the evidence brought before court. The lines of argumentation of the Defence and the Prosecution could not be more opposite. The Defence argues that several testimonies illustrate how ruthless the bush culture worked. In their view, they demonstrate how orders from Kony constituted law and how ascending in rank should only be seen as an adaptation to the feared bush culture, as a means of survival. In light thereof the Defence suggests that these threats continued throughout his promotions within the LRA, up to and including his time as a Commander (Kan, 2018). Completely to the opposite, the Prosecution argues that the bush culture was not as rigid and unsurmountable as it is proclaimed to be. The Prosecution argues that escapes were not rare, (Kan, 2018)<sup>14</sup> that Ongwen had ample opportunity to desert the LRA and more fundamentally that he himself was in fact the source of the threats. It was argued that Ongwen himself was amongst the leaders ordering the brutal canings and executions.<sup>15</sup>

A proper assessment of the opposite lines of argumentation requires thorough insight into the bush culture and into the individual mind-set of Ongwen. Some authors have argued that in any event the Prosecution's narrative suggesting that Ongwen had ample opportunity to escape, is in fact an

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<sup>13</sup> Prosecutor v Dominic Ongwen, Confirmation of Charges, ICC-02/04-01/15-T-22-ENG (24 January 2016) 36 <[https://www.icc-cpi.int/Transcripts/CR2016\\_00529.PDF](https://www.icc-cpi.int/Transcripts/CR2016_00529.PDF)>

<sup>14</sup> Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II, ICC-02/04-01/15 (23 March 2016) (Pre-Trial Chamber decision) <[https://www.icccpi.int/CourtRecords/CR2016\\_02331.PDF](https://www.icccpi.int/CourtRecords/CR2016_02331.PDF)> [150-154].

<sup>15</sup> Prosecutor v Dominic Ongwen, Confirmation of Charges, ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (Prosecution Transcript) 21.

oversimplification of the conflict's reality and the interaction between bush culture, competence and individual decision making. Sociologists have commented that child soldiers either 'play stupid' or 'play smart', and demonstrate their willingness to kill to avoid being killed and to secure better security, food, and quality of life in the 'bush' (Baines, 2008). Ongwen may have 'played smart' and adopted the 'bush mentality' in his attempt to survive his brutal environment. His behaviour may well have been a forced adaptation for survival in a brutal environment and it would be incorrect to use that behaviour to deduce an assumption as to whether Ongwen genuinely embraced the LRA ideology. It may well be that Ongwen involuntarily suppressed his moral sensibilities to create the illusion of assimilation to the LRA ideology. The difference between both positions is crucial to be able to correctly apply criminal law provisions, most notably the determination of duress.<sup>16</sup>

Second, the actions must be absolutely necessary to avoid the aforementioned threat, and furthermore, it is required that a 'reasonable person' in his position would have made the coerced decisions as he had done (Werle, 2009). Depending on the application of this standards in individual cases, this second criterion may result in the defence never being accepted. Therefore, it has been argued that the court should be cautious in applying the standard of 'the reasonable man' to Ongwen's case. KAN has argued that setting too high a standard for Ongwen would mean that the Court expects 'the ordinary and reasonable person to perform heroic acts' and further that 'It would need to contextualise his rank in the LRA and the agency of the child soldier such as to avoid imputing an expectation of heroism in the defence of duress' (Kan, 2018).

The Chamber however has contended that at least some of the offences committed by Ongwen were not necessary and omitting them would not constitute heroism. In absence of any other LRA soldiers present, the Chamber failed to see how Ongwen could not have avoided several cases of rape, 'at least he could have reduced the brutality of the sexual abuse' (Kan, 2018).<sup>17</sup> The question arises

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<sup>16</sup> Kan, G. (2018). "The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen." SOAS LJ 5(70), 80.

<sup>17</sup> Decision on the confirmation of charges against Dominic Ongwen, Pre-Trial Chamber II, ICC-02/04-01/15 (23 March 2016) (Pre-Trial Chamber decision) <[https://www.icccpi.int/CourtRecords/CR2016\\_02331.PDF](https://www.icccpi.int/CourtRecords/CR2016_02331.PDF)> [155].

whether his background of being a child soldier and the degree of indoctrination into the bush culture can ever successfully rebut that line of argumentation.

Third and final, no greater harm should be caused than the one aimed at avoiding. The final requirement for establishing duress is likely to be the most difficult for Ongwen to satisfy, as it requires that he demonstrates that he did not intend to cause greater harm than what he sought to avoid. This requires a proportionality test to be conducted between the crimes committed and the avoided harm against himself. The test must result in the crimes committed being deemed 'the lesser of two evils'.<sup>18</sup> The question arises how saving his own life can ever be deemed the lesser of the two evils when compared to the sheer number of civilian deaths and extent of the non-fatal violence. This question was raised by Judge Cassese in the Erdemovic case.<sup>19</sup> Interestingly, judge Cassese had a relatively moderate take on the proportionality test. He contended that where 'there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does, then duress may succeed as a defence' (Baines, 2008). This would mean that if Ongwen is able to demonstrate that the attacks would have been carried out with or without him, he may satisfy the proportionality test. Ongwen may argue that the brutal environment and the sheer number of abducted children in the LRA meant that if he refused to carry out the attacks, other abductees would have assumed his position and carried out the attacks. This would align with the position of several scholars, who attribute Ongwen's rise in the LRA ranks to him simply outliving his superiors, (Baines, 2008) but would run in against the Prosecutions argument that Ongwen himself was responsible for many of the orders,<sup>20</sup> and that his crimes were aggravated by his signature of brutality unprecedented by and unseen in the conduct of others.<sup>21</sup> It is therefore not surprising for the Trial Chamber to claim that it would be too speculative to assert the victims would have died

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<sup>18</sup> Prosecutor v Erdemovic (Separate and Dissenting Opinion of Judge Cassese) ICTY-96-22-S (7 October 1997) (Cassese's Opinion) 16

<sup>19</sup> Prosecutor v Erdemovic (Separate and Dissenting Opinion of Judge Cassese) ICTY-96-22-S (7 October 1997) (Cassese's Opinion) 42

<sup>20</sup> Prosecutor v Dominic Ongwen, Confirmation of Charges, ICC-02/04-01/15-T-20-Red-ENG (21 January 2016) (Prosecution Transcript) 21.

<sup>21</sup> Prosecution Pre-Trial Brief, Pre-Trial Chamber II, ICC-02/04-01/15, (6 September 2016) (Prosecution Brief) 201 < [https://www.icc-cpi.int/CourtRecords/CR2016\\_06511.PDF](https://www.icc-cpi.int/CourtRecords/CR2016_06511.PDF) >

anyway. Ongwen may not be seen as having done all that he could to save the victims before yielding to duress (Kan, 2018).

## **5 Conclusion**

The culturally contingent acceptability and accountability of child soldiers, challenges the development of a sound and solid legal framework. For now, child soldiers are caught in a twisted cultural kaleidoscope.

First, the either or not acknowledgement that children might have competence to at least take some decisions, is faced with sharp cultural differences. The cultural diversity is further complicated by a frequent intra-cultural failure to thoroughly consider the possible impact of the variety of tasks carried out by children during an armed conflict.

In some cultures possible debate on gradually gaining competence is squashed by an absolute 'right to nurture and protection'-narrative, applicable to anyone who is considered underage. On the other hand, in other cultures, the debate did get airborne and has resulted in the development of ideas regarding gradual maturing trajectories and the translation thereof into legal texts. These different cultural pictures in themselves often seem rather inconsistent with the applicable legal pictures regarding child soldiering. In light of the international humanitarian law provisions, in most jurisdictions, children as young as 15 are competent to consent to become a child soldier. Only few countries have endorsed the more stringent regime of the optional protocol prohibiting any participation in the armed conflict below the age of 18.

Deeping that line of argumentation, it is striking that even where thought has been put into the conceptualisation of gradually gaining competence, it has not been adequately developed and applied in the context of child soldiering. Although criminological and sociological research into child soldiering has persistently pointed to the wide variety of tasks carried out by children, it becomes

apparent that little thought was put into the impact thereof for the debate on competence and the setting of age limits. Whereas international humanitarian law – possibly unwittingly – does introduce a difference by distinguishing between direct and indirect participation of children in the armed conflict, no such distinction can be found in (international) criminal law provisions.

Second, the cultural differences regarding the competence of children are crystallized when looking at the accountability of child soldiers for acts committed during the armed conflict.

It is considered questionable that a child's qualification as 'incompetent to decide to become a child soldier' is not automatically complemented with a qualification as 'incompetent to be held accountable for the acts committed whilst being a child soldier'. Whereas – from an international humanitarian law perspective – children are deemed incompetent to participate in an armed conflict, – from a criminal law perspective – those same children could however be held criminally accountable for their acts. There are no clear and guaranteed legal basis to invoke the difference of the set age limits nor rely on the defence of duress when recruited, not even when there is clear evidence of being submerged in and coerced by the so-called bush culture.

Moreover, when children acceptably join the armed groups (i.e. when old enough to make that decision), there is significant legal uncertainty about the interaction between the defence of duress and the doctrine of prior fault.

All these discussions come together in the case of Dominik Ongwen, who was forcefully recruited as a small child, committed revolting acts whilst still being a young child, continued his repugnant career well into adulthood and is now being prosecuted by the ICC. It remains to be seen whether this case will nourish the debate on the need to better develop and streamline the legal framework governing the acceptability and accountability of child soldiers; the debate on the possibility to acknowledge and reflect cultural diversities without the children involved being surrendered to a twisted cultural kaleidoscope powered by inadequate or inconsistent legal provisions.



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