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**CAN DURESS EXCLUDE CRIMINAL
RESPONSIBILITY OF FORMER CHILD SOLDIERS?
THE CASE OF DOMINIC ONGWEN BEFORE
THE INTERNATIONAL CRIMINAL COURT***

1. INTRODUCTION

Child soldiering is not a new phenomenon since the use of children as troops in domestic and international conflicts was a reality as early as in ancient times.¹ Nowadays, however, it is especially the unprecedented scale as well as a much more diversified character of these practices which constitute a particular challenge and concern to the international community. Available – but also often contested – statistics show that there are approximately 300,000–500,000 child soldiers worldwide at the moment.² Even more deplorable than the sheer number, however, is the involuntary way of becoming a child soldier which characterizes the majority³ of those recruited. They are abducted, coerced to undergo demanding and in many ways humiliating military training, and subsequently

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¹ See also: M. Denov, *Child Soldiers. Sierra Leone's Revolutionary United Front*, Cambridge 2010, pp. 21–23 (enumerating several examples of child soldiers' participation in the hostilities, for instance the Children's Crusade in 1212 when roughly 30,000–50,000 children were recruited).

² These estimates are retrieved from: T. Betancourt, I. Borisova, J. Rubin-Smith, T. Gingerich, T. Williams, J. Agnew-Blais, *Psychosocial Adjustment and Social Reintegration of Children Associated with Armed Forces and Armed Groups: The state of the field and future directions. A report prepared for psychology beyond borders*, Austin 2008, p. 6. Source: <http://psychologybeyondborders.org/wp-content/uploads/2013/08/RPCGA-CAAFAG-REPORT-FINAL-JULY-2008.pdf> (accessed: 20 June 2018).

³ This contention stems from P. W. Singer's estimate that only 15% of child soldiers join the armed forces voluntarily. P. W. Singer, *Children at War*, Berkeley–Los Angeles 2006, p. 66. Data retrieved from: A. Smeulders, *Eroding the Myth of Pure Evil. When Victims Become Perpetrators and Perpetrators Victims*, (in:) R. Letsschert, R. Haveman, A.-M., de Brouwer, A. Pemberton (eds.), *Victimological Approaches to International Crimes: Africa*, Cambridge–Antwerp–Portland 2011, p. 79.

forced to actively participate in hostilities. Yet, among child soldiers, there are also adolescents who decide to join armed forces of their own free will mainly due to extreme poverty, lack of prospects for the future or other personal reasons such as broken families.⁴ As a result, the category of child soldiers is a conceptually complex phenomenon. Interestingly, this becomes even more evident when the semantic and visual sides of the problem are analyzed, as nowadays the child soldiers' label applies not only to an already symbolic image of a black young boy carrying a Soviet-made AK-47⁵, but also to victims of sex and gender-based crimes (i.e. sex slaves), porters, cooks, servants, guards etc. hidden, in a sense, behind the scenes of open violence.⁶ Child soldiers, therefore, take on a number of different roles and victimize as well as are victimized in a variety of ways. The characteristic which is shared by all child soldiers, however, is without a doubt their 'child status'. Since the 'child status' category is to a great extent a culturally-dependent phenomenon⁷, it is also open to divergent interpretations and

⁴ See also: M. A. Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Oxford 2012, pp. 12–16 and chapter 3 (underscoring the phenomenon of 'youth volunteerism' which collides with 'the international legal imagination').

⁵ M. Happold, *Child Soldiers in International Law*, Manchester 2005, p. 7. The symbolic character of this image is undeniable. Importantly, however, this symbolism is not limited to mere factual relevance, but is deeply rooted in an explicitly contradictory message that this image produces. More precisely, it stems from the fact that childhood is not – at least in the common understanding of this word – defined as a time of military training and fighting, but as a period of emotional development and security. Apart from that, the image of a young warrior carrying a weapon distorts the vision of a child as an innocent human being. Neither does it fit the image of a soldier or a villain who is – as Christine Schwöbel-Patel rightly points out – “the antithesis of the victim of international crime: he is typically male, strong, independent and gruesome”. Since child soldiers do not share these characteristics, at a visual level they are viewed more as victims rather than offenders. See: C. Schwöbel-Patel, *Spectacle in International Criminal Law: The Fundraising Image of Victimhood*, “London Review of International Law” 2016, Vol. 4, issue 2, p. 256.

⁶ D. M. Rosen, *Child Soldiers in the Western Imagination from Patriots to Victims*, New Brunswick–New Jersey–London 2015, p. 178 (adding that child soldiers are frequently depicted not merely as slaves, but also as commodities or even robots which directly leads to their de-humanization).

⁷ This bears particular significance when viewed from the perspective of the complementarity principle (Article 1 and Article 17 of the Rome Statute – ICCSt.). Although this principle solves potential jurisdictional conflicts between State Parties and the Court in favour of the former, it also indirectly calls for the harmonization of criminal laws so that the scope of international criminalization introduced by the Rome Statute is not broader than the scope of criminalization at the domestic level. Nevertheless, it is also worth mentioning here that certain standards in this respect have been introduced in international law. According to Article 1 of the 1989 Convention on the Rights of the Child – in general – ‘a child means every human being below the age of eighteen years’. This definition, however, is useful only to a limited extent, as it remains uncertain if it is applicable also outside the Convention (on account of the “For the purposes of the present Convention” limitation). On the other hand, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which has already been ratified by 167 states, introduces a corresponding obligation upon the states to ensure that those “who have not attained the age of 18 years do not take a direct part in hostilities” (Article 1).

– as such – by its very nature remains semantically imprecise.⁸ Still, even if one accepts that nowadays the age of international criminal responsibility is eighteen years, does this necessarily entail that criminal acts committed by child soldiers should be prosecuted as soon as the offenders cross this age barrier? Or, perhaps, such acts – also when committed by a (former) child soldier who at the time of their commission is already over 18 – should be viewed more as a continuum stemming from child soldiers’ previous status and thus remain outside the scope of prosecution?

This paper aims at examining the case of Dominic Ongwen which, at the time of writing, is still in a trial phase of the proceedings before the International Criminal Court (ICC). I will focus primarily on two issues. First, I will describe Dominic Ongwen’s life through the prism of the ‘victim’ and ‘perpetrator’ labels. In this respect I will try to prove that in many situations these two labels do not fit the social reality which they are supposed to classify or categorize. Second, I will refer to the taxonomy of defences, justifications, excuses and grounds for excluding criminal responsibility in domestic and international criminal law before examining the concepts of duress and necessity as they are codified in the Rome Statute of the International Criminal Court (hereinafter: ICCSt).⁹ On these bases, I will venture to address the question whether Dominic Ongwen will be able to effectively invoke one of these defences in order to limit or exclude his criminal responsibility. In my conclusions I will provide a short assessment of ‘the law as it is’ (de lege lata).

2. DOMINIC ONGWEN – VICTIM OR OFFENDER?

Dominic Ongwen’s case before the ICC has already been hailed as symbolic, even though the Court has not rendered a judgment yet. This is so inasmuch as the case touches upon some serious social, political and legal dimensions of child soldiering. In his initial appearance as a suspect before the Court on 26 January 2015 – no less than ten years after the issuance of the arrest warrant – Dominic

⁸ As obvious as it may sound, international criminal law does not prescribe age limits for becoming a victim. On the other hand, such a limitation (incapacitating condition) exists with respect to offenders who – as Article 26 ICCSt. stipulates – must be over 18 years old at the time of the alleged commission of a crime. It follows that offenders and victims of crime are not mirror reflections of each other. See also S. C. Groover, *Child Soldier Victims of Genocidal Forcible Transfer. Exonerating Child Soldiers Charged with Grave Conflict-Related International Crimes*, Berlin–Heidelberg 2012, pp. 62–65 (arguing that the age-based exclusionary clause is not merely a jurisdictional matter but that it reflects a general principle of criminal law).

⁹ Rome Statute of the International Criminal Court. Source: https://www.icc-cpi.int/nr/rdon-lyres/.../rome_statute_english.pdf (accessed: 25.06.2018).

Ongwen testified that he was born in Uganda in 1975, and that at the age of thirteen he was abducted and taken to the bush.¹⁰ Since an abduction may amount to a war crime of conscripting or enlisting children under the age of fifteen years (Article 8 b) xxvi or Article 8 e) vii ICCSt.), Ongwen may be – informally – classified as a victim of war crimes, and most probably also of other international crimes such as humiliating and degrading treatment.¹¹ In its first judgment in the case of Prosecutor v. Thomas Lubanga (Lubanga), the ICC ruled that “the offences of conscripting and enlisting are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group, with or without compulsion”.¹² It follows that the Court has accepted a broad definition of child soldiers which is not limited merely to involuntary members, but also embraces those who have joined armies or armed groups of their own free will.¹³ Importantly, the serious nature of acts amounting to conscripting or enlisting stems, among other things, from the fact that they are directed at a particularly vulnerable group of children. The damaging impact which this particular crime has had upon the lives of many adolescents was already underscored in Lubanga where in his opening statement Luis Moreno Ocampo, the ICC Prosecutor, submitted that:

Hundreds of children still suffer the consequences of Lubanga’s crimes. They were 9, 11, 13 years old. They cannot forget what they suffered, what they did, what they saw. They cannot forget the beatings they suffered, they cannot forget the terror they felt and the terror they inflicted. They cannot forget the sounds of the machine guns, they cannot forget that they killed. They cannot forget that they raped, that they were raped. Some of them are now using drugs to survive, some of them became prostitutes and some of them are orphaned and jobless.¹⁴

¹⁰ *The Prosecutor vs. Dominic Ongwen*, Initial Appearance. Transcript, 26 January 2005, p. 4. Source: <https://www.legal-tools.org/doc/5c45fa/pdf/> (accessed: 25.06.2018).

¹¹ According to rule 85 of the Rules of Procedure and Evidence of the International Criminal Court (RPE ICC), victims are natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. Importantly, the ICC has adopted a broad understanding of the notion of harm. See, for instance: *In the case of the Prosecutor v. Ahmad Al Faqi Al Mahdi, Decision on Victim Participation at Trial and on Common Legal Representation of Victims* (ICC-01/12-01/15), 8 June 2016, para. 20.

¹² *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06, 14 March 2012, para. 618.

¹³ This conclusion, however, may be challenged by those who claim that children cannot exercise free will, *ergo* all child soldiers are recruited against their will and – as such – are involuntary members of armed groups. Having familiarized myself with many different stories of child soldiers, as well as considering the criminal acts committed by them, I am only partly sympathetic towards this view.

¹⁴ ICC, Lubanga Dyilo, *Opening Statement Luis Moreno-Ocampo and Fatou Bensouda*, 26 January 2009. The quote is retrieved from: L. Stehl, *Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law*, Berlin 2017, p. 13.

It is most probable that Dominic Ongwen's abduction had an equally harmful effect on him as a child.¹⁵ All the same, from a broader perspective this seems to be too narrow a statement. Nowadays, after all, it is commonly accepted (i.e. in psychology) that traumatic experiences from childhood may have a direct impact upon human personality later in adulthood.¹⁶ To what extent, however, this reflects or justifies Ongwen's personality traits and his behaviour as a grown-up remains an open question.¹⁷

And yet, Dominic Ongwen's life story is even more complicated than previous paragraphs might suggest, for it goes in the very opposite direction than a simple affirmation of his victimhood. Since 1988 (when Ongwen was abducted) until 2015 (when the transfer to the Detention Centre in the Hague finally took place) Ongwen was an active soldier in the Lord's Resistance Army (LRA). What seems to be of particular importance, however, is the fact that only 5 out of Ongwen's 17 years in service could be classified as underage military activity. And even this five-year period (until 18 years) cannot be altogether qualified as illegal from the perspective of the Rome Statute, inasmuch as the Statute sets the age limit of unlawful conscription and use of child soldiers at 15, not 18 years.¹⁸ Thus, only 2 out of 17 years of Ongwen's activity in the LRA can be considered as a period of his victimization on the basis of this prohibition (Ongwen as a victim).

Further, it is undisputed that Ongwen did not stop fighting for the LRA even when he could no longer be classified either as a child soldier (15 years) or as a child in general (18 years). This is especially relevant from the perspective of attribution, for once Ongwen became an adult, no longer could he shield himself from potential prosecution on the basis of Article 26 ICCSt., which excludes the Court's jurisdiction over persons under the age of 18 (Ongwen as a potential offender).¹⁹ It seems, therefore, that the normative continuum mentioned in

¹⁵ It should be stressed here that Dominic Ongwen is not a victim of crimes committed by Thomas Lubanga. These are two completely separate situations and cases. See: <https://www.icc-cpi.int/pages/situation.aspx> (accessed: 1.07.2018).

¹⁶ See F. D'Alessandra, *The Psychological Consequences of Becoming a Child Soldiers: Post-Traumatic Stress Disorder, Major Depression, and Other Forms of Impairment*, pp. 1–22. Source: https://carcenter.hks.harvard.edu/files/cchr/files/dalessandra_pshychol_cons_of_child-soldiers.pdf (accessed: 2.07.2018).

¹⁷ Three expert-witnesses – mental health experts – have already testified before the Court to assess Ongwen's mental health in the course of the proceedings. See, for instance: *The Prosecutor v. Dominic Ongwen*, Transcript, 28 March 2018, ICC-02/04-01/15-T-168-ENG (C. Abbo claiming that Ongwen did not suffer from a mental disorder between 2002 and 2005).

¹⁸ This gap constitutes a grey area between being considered a victim and an offender. See f. 20.

¹⁹ This attempt to attribute different roles to Ongwen can be summarized in a following way: below 15 years – Ongwen as a victim; 15–18 years – Ongwen neither a victim, nor a perpetrator (following the wording of Article 8b) xxvi or Article 8e) vii ICCSt – child soldiering); above 18 years – Ongwen as a perpetrator. Some scholars, however, adopt – wrongly in my view – a narrower binary vision (victim-villain) where the moment of transformation from a victim to an offender

the introduction is, in fact, irrelevant from the formal point of view, because it does not automatically preclude Ongwen's categorization as an offender. It may still, however, affect – for instance – the scope and type of punishment imposed upon him if the Court finds him guilty of committing the crimes enumerated below.²⁰

Another relevant fact resulting from Ongwen's military activity is his constant rise through the ranks of the LRA which eventually led to him becoming one of its brigade commanders. According to the ICC, "Dominic Ongwen was a commander in position to direct the conduct of the significant operational force subordinate to him. In August 2002, he is reported to have been the commander of Oka battalion. In September 2003, he progressed to the position of second in command of the Sinia brigade, and in March 2004 he became the brigade's commander. It is also notable that the evidence indicates that Dominic Ongwen's performance as commander was valued highly by Joseph Kony, and it is indeed telling that his appointments to more powerful command positions and his rise in rank followed and were associated with his operational performance, which included the direction of attacks against civilian (...)"²¹ Thus, in contrast to many other child soldiers who were also abducted at a very early age and who also remained in the LRA after turning 18, but who played only minor roles in the LRA's structure, Ongwen stood out from the crowd, got promoted and, to some extent, took control over the LRA's military activity.²² Certainly, he was not merely a passive member of this organization but, in fact, the very opposite. This explicit power shift constitutes another example of Ongwen's symbolic transformation from a victim to an offender.

To a certain extent, this transformation has already been recognized by the International Criminal Court itself when it ruled upon the confirmation of charges against Dominic Ongwen.²³ On the basis of this Decision, Ongwen is

is tied to the age of 18 years. For instance: W. Nortje, *Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court*, "International Criminal Law Review" 2017, Vol. 17, p. 197.

²⁰ S. Gates, *Why Do Children Fight? Motivations and the Mode of Recruitment*, (in: A. Özerdem, S. Podder (eds.), *Child Soldiers: From Recruitment to Reintegration*, New York 2011, p. 30 (aptly concluding that in Uganda, where the LRA abducted thousands of adolescents, a large number of these children have grown up and remained loyal to the organization well into adulthood).

²¹ *In the case of the Prosecutor v. Dominic Ongwen, Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, para. 58.

²² "To some extent" because the LRA's activities have been shaped predominantly by its leader Joseph Kony who still remains at large by effectively evading capture. See also: W. Nortje, *Victim or Villain...*, p. 195 (pointing out that Ongwen was part of the core leadership of the LRA, known as 'Control Altar', who reported directly to Kony).

²³ In its ruling the Court had to determine whether there was sufficient evidence to establish substantial grounds to believe that crimes have been committed. See *In the case of the Prosecutor v. Dominic Ongwen, Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, paras. 13–14. Nevertheless, the holding should not lead to a presumption

accused of committing several types of war crimes²⁴ and crimes against humanity²⁵. Among the seventy counts of these crimes, two are particularly striking, that is the conscription and use of child soldiers as well as the crime of enslavement. Paradoxically, Ongwen is accused of committing crimes of which he was and perhaps²⁶ still remains a victim himself as a young LRA's abductee.²⁷ But if the Prosecutor is successful in proving beyond a reasonable doubt that 'between at least 1 July 2002²⁸ and 31 December 2005 Dominic Ongwen (...) pursued a common plan to abduct children in the territory of northern Uganda and conscript them into the Sinia Brigade in order to ensure a constant supply of fighters'²⁹, the accumulation of victimhood and criminality in one person will become a legal reality also for D. Ongwen.³⁰

of Ongwen's guilt and – by that – to a violation of the rights of the accused (presumption of innocence). See also Article 61(7) and Article 66 ICCSt.

²⁴ War crimes: murder and attempted murder; torture; sexual slavery; rape; enslavement; forced marriage as an inhumane act; persecution; and other inhumane acts.

²⁵ Crimes against humanity: Attack against the civilian population; murder and attempted murder; rape; sexual slavery; torture; cruel treatment; outrages upon personal dignity; destruction of property; pillaging; the conscription and use of children under the age of 15 to participate actively in hostilities.

²⁶ For it is open to discussion if there are any temporal limits for viewing oneself as a victim of crime (subjective perspective), as well as for determining the victim status by way of applying criminal law mechanisms (objective perspective).

²⁷ After two years of trial, the Prosecution has completed the presentation of evidence. Importantly, the Legal Representatives of Victims have called additional witnesses to appear before the Court, among whom are also former child soldiers. The trial will resume in September 2018 with the opening statements and presentation of evidence by the Defence. More details: <https://www.icc-cpi.int/uganda/ongwen> (accessed: 3.07.2018).

²⁸ This limitation stems from the fact that the Court's jurisdiction is limited to crimes committed after the entry into force of the Statute (Article 11 ICCSt).

²⁹ *In the case of the Prosecutor v. Dominic Ongwen*, Document containing the Charges, 22 December 2015, ICC-02/04-01/15, para. 136.

³⁰ Obviously, the mere notion of being a victim of the same crime which one had committed before is nothing unusual, also in the case of ordinary crimes. For example, this would apply to a thief who one day is robbed and becomes a victim him/herself. The difference between the Ongwen case and the one described above, however, hinges upon the element of continuation which epitomizes the process of transformation from a victim to a villain. Another aspect of this dilemma is reflected in divergent social responses to crimes committed by child soldiers. In Uganda, for instance, 2000 saw the enactment of the Amnesty Act which – at least on paper – provided blanket amnesty for any Ugandan 'involved in acts of a war-like nature'. See K. J. Fisher, *Transitional Justice for Child Soldiers. Accountability and Social Reconstruction in Post-Conflict Contexts*, Hampshire 2013, pp. 163–165. In practice, however, it turned out that amnesty will not be granted to every member of the LRA. By December 2008, it had already been granted to 17.000 LRA fighters. However, this did not include Dominic Ongwen. See J. van Wijk, *Should We Ever Say Never. Arguments against Granting Amnesty Tested*, (in:) R. Letsschert, R. Haveman, A.-M., de Brouwer, A. Pemberton (eds.), *Victimological Approaches to International Crimes: Africa*, Cambridge–Antwerp–Portland 2011, pp. 305–306.

Before turning to the issue of grounds for excluding criminal responsibility, it is worth analyzing here briefly the conceptual dichotomy of victims and offenders through a more theoretical lens. This dichotomy, as many others commonly accepted in law, symbolizes the semantic and epistemological limits of legal terminology, which oftentimes is incapable of properly capturing the complex social reality without distorting its genuine nature at the same time. Certainly, being a victim or an offender is relevant not only from a procedural point of view, but also from the viewpoint of substantive criminal law. These labels are particularly discernible if the concept of crime is perceived as a conflict between two or more actors.³¹ Nowadays, however, due to the remarkably state-centric conceptualization of crime, this human-oriented approach is still very rare. Before somebody can be labelled as either a victim or an offender certain conditions or requirements must be fulfilled first. In relation to an offender, obviously, it is guilt which must be proved and attributed to a person before a conviction is reached³², while in case of victims attribution takes a distinct form of harm-identification. Thus, if a person is not harmed, they cannot be a victim.³³ This dichotomy, however, might also be misleading as it creates ‘ideal’ actors.³⁴ Child soldiers, for instance, from a legal perspective seem to be one-dimensional because the only label which the Court may apply in classifying them and their actions is the ‘victim-label’ which in many situations is simply counterfactual. Nevertheless, modern international criminal law does not allow prosecuting and convicting underage child soldiers for criminal acts which they commit – often with great brutality – during hostilities.³⁵ It follows

³¹ This method of conceptualizing crime as a solvable conflict is characteristic especially for the restorative justice paradigm. See esp. N. Christie, *Conflicts as property*, “The British Journal of Criminology” 1977, No 17/1, pp. 1–15 (introducing the notion of a conflict stolen by lawyers from victims of crime); L. Gröning, J. Jacobsen, *Introduction: Restorative Justice and the Criminal Justice System*, (in:) L. Gröning, J. Jacobsen (eds.), *Restorative Justice and Criminal Justice*, Stockholm 2012, p. 13 (noticing that in the restorative justice paradigm the conflict should be solved by those who own it, that is by those who are personally involved in it). See also f. 6.

³² See K. Szczucki, *Ethical Legitimacy of Criminal Law*, “International Journal of Law, Crime and Justice” 2018, p. 7 (underlining that a person’s capacity for self-determination is a demonstration of the concept of human dignity).

³³ See also f. 12 and the definition provided therein.

³⁴ By ideal actors of criminal law I understand both victims and perpetrators who possess certain features usually attributable to a pure construction of them (i.e. innocent and weak victim; strong and formidable perpetrator). See also: N. Christie, *The Ideal Victim*, (in:) E. A. Fattah (ed.), *From Crime Policy to Victim Policy. Reorienting the Justice System*, London 1986, pp. 17–30 (defining an ideal victim as a category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim). Although I do not entirely espouse all the arguments relating to ‘ideal victims’ developed by Christie, I share his view that “[i]deal victims need – and create – ideal offenders. The two are interdependent” (p. 25).

³⁵ One relevant exception can be found in the Statute of the Special Court for Sierra Leone which allows for the prosecution of defendants who were fifteen years of age or older at the commission of the alleged crime (Article 7 of the SCSL Statute). Importantly, the SPSL also stipulates that “Should any person who was at the time of the alleged commission of the crime between

that by their very “normative nature” child soldiers are victims and not perpetrators of international crimes. All the same, they are not merely ordinary victims, but ‘ideal victims’³⁶. This is mainly due to the vision commonly diffused in social imagination where the child soldier is portrayed as a young, weak and dependent person who – on top of that – is coerced to fight. Paradoxically, this element of often mistakenly presumed coercion makes child soldiers even ‘more ideal’ in the eyes of public opinion. In reality, however, many child soldiers are recruited from voluntary adolescents who wish to improve their living conditions, begin a completely new life etc. And yet, the law in its current form does not differentiate between those children who join armed groups voluntarily, and those who are forced to do it. Perhaps it would be wise, therefore, to adopt a more sophisticated method of assessing the accused party’s guilt, and instead of simply affirming the impoverished image stemming from a ‘guilty offender’ – ‘innocent victim’ dichotomy, to implement a more complex concept of ‘comparative criminal liability’, whereby a crime is viewed not merely as an offender’s act, but rather as an interaction between him and a person victimized by his act.³⁷ It still remains controversial, however, if this is indeed a proper method to determine the scope of criminal responsibility. In some circles, for instance, the idea of shared responsibility is strongly rejected.³⁸ Notwithstanding, I believe it could help judges in passing judgments which better reflect the complex social reality accompanying an act of victimization.

3. INTERNATONAL CRIMES, DEFENCES AND GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

It could be argued that – on the basis of a plethora of evidence that have already been presented before the Court both by the prosecution and by the victims³⁹ –

15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights standards, in particular the rights of the child”. Source: <http://www.rscsl.org/Documents/scsl-statute.pdf> (accessed: 4.07.2018).

³⁶ N. Christie, *The Ideal Victim...*, pp. 17–30.

³⁷ See esp. V. Bergelson, *Victims’ Rights and Victims’ Wrongs. Comparative Liability in Criminal Law*, Stanford 2009.

³⁸ See a fascinating exchange of views on this issue between V. Bergelson, A. Harel, H. Hurd, D. Husak and K. Simmons in “Buffalo Criminal Law Review” 2005, Vol. 8/2. Also many feminist scholars argue against the idea of shared responsibility, especially in relation to the crime of rape where the argument of victims’ fault (consent) is usually invoked as a defensive strategy of the accused party, oftentimes leading even to secondary victimization of rape victims.

³⁹ Altogether 4.107 victims participate in the Ongwen case. See: *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Case Information Sheet, June 2018, <https://www.icc-cpi.int/uganda/ongwen/Documents/OngwenEng.pdf> (accessed: 5.07.2018).

Ongwen's participation in acts amounting to the *actus reus* element of many crimes that he is accused of is virtually indisputable. The same could be said about specific contextual elements (i.e. the nexus to an armed conflict for war crimes; widespread or systematic behaviour in case of crimes against humanity) which must also be proved before the Court.⁴⁰ As evident as it may sound, this should not imply, however, that Ongwen's eventual criminal responsibility is already somewhat 'predetermined'.⁴¹ After all, before such a final conclusion can be reached, the Court must ascertain the existence of the *mens rea* element of a crime which necessitates probing into the mental sphere (knowledge)⁴² of an offender and his attitude towards (intent)⁴³ a criminal act (*actus reus*).⁴⁴ And only then, according to G. Werle, that is after establishing both *actus reus* and *mens rea* elements, "it must be asked whether circumstances are present that exclude individual criminal responsibility on the part of the perpetrator".⁴⁵ Virtually the same conclusion with reference to English criminal law is reached by A. Simester who introduces a distinction between 'a prima facie crime' and 'a crime'.⁴⁶ A prima facie offence is in a sense 'committed' if a person satisfies specified *actus reus* and *mens rea* elements of an offence. This, however, would not be enough to sen-

⁴⁰ It should be stressed that these contextual elements are relevant not only from the evidentiary (procedural) point of view, but also with respect to the nature of international crimes themselves. It is this specific context which distinguishes many types of international crimes from domestic ones (i.e. rape as a conventional crime; rape committed during an armed conflict may amount to a war crime). See also: *In the case of the Prosecutor v. Dominic Ongwen, Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, para. 107.

⁴¹ See also f. 24.

⁴² According to Article 30(1) ICCSt., criminal responsibility requires that the material elements of international crimes falling within the jurisdiction of the Court must be committed with intent and knowledge.

⁴³ *Ibidem*.

⁴⁴ George P. Fletcher identifies four different systems for thinking about offenses but only three of them (excluding the so-called holistic response) can be found in specific countries or legal systems: bipartite (as a union of *actus reus* and *mens rea*), tripartite (consisting of the elements: definition, wrongdoing, culpability) and quadripartite (referring to the subject of the offense, the subjective side of liability, the object of the offense, the objective side of liability). As for international criminal law, the bipartite model has been incorporated into the Rome Statute of the ICC. See: G. P. Fletcher, *The Grammar of Criminal Law. American, Comparative and International. Volume One: Foundations*, Oxford 2007, pp. 43–58. The classic bipartite concept of crime, however, in case of international crimes is enriched by the specific context (i.e. international armed conflict) in which the crime is committed. In this respect I. Marchuk underscores that "[t]he link between the existence of the requisite contextual elements and underlying offences is reflected in the perpetrator's *mens rea*". See: I. Marchuk, *The Fundamental Concept of Crime in International Criminal Law. A Comparative Analysis*, Berlin–Heidelberg 2014, p. 92.

⁴⁵ G. Werle, F. Jessberger, *Principles of International Criminal Law*, Oxford 2014, p. 171.

⁴⁶ A. Simester, *On Justifications and Excuses*, (in:) L. Zedner, J. V. Roberts (eds.), *Principles and Values in Criminal Law and Criminal Justice: Essays in honour of Andrew Ashworth*, Oxford 2012, p. 95.

tence the accused party if it can invoke a supervening defence which – according to Simester – “denies neither actus reus nor mens rea but, rather, seeks to avoid liability by reference to accompanying considerations not contemplated in those elements of the offence definition”.⁴⁷ In that sense, therefore, the supervening defence lies outside the bipartite concept of crime. This contention is aptly illustrated by G. P. Fletcher who notices that in spite of “the convenience of theoretical simplicity, it [the bipartite system of crime – P.G.] has one major drawback: it fails to account for the entire range of defences that are grouped under the categories of justification and excuse” which “(...) do not lend themselves to analysis as part of either the actus reus or mens rea”.⁴⁸

By contrast, the distinction between justifications and excuses is characteristic especially for civil law systems of criminal law.⁴⁹ Without going into details, generally it is accepted that while justifications exclude criminal responsibility by relating to the properties of an act (act-oriented), excuses refer to the actor and his blameworthiness (actor-oriented).⁵⁰ Thus, a successful invocation of a justification renders the act lawful. As for an excuse, although the act violating the norm is regarded as unlawful, the wrongdoer is not punished because the act – all things considered – is not viewed as reprehensible.⁵¹

In the civil law system justifications and excuses are also more clearly reflected in the crime structure than in its bipartite counterpart. In Germany, for instance, the three-partite concept of crime hinges upon the definition of a crime (Tatbestand), wrongdoing and culpability.⁵² Importantly, each of these three positive elements of liability has a corresponding negative formulation. It follows that justifications and excuses are situated at the second and third level of analysis which means that while justifications can negate the dimension of wrongdoing (act-oriented), excuses play the same role with regard to culpability (actor-oriented).⁵³ In the tripartite concept of crime, therefore, both types of defences (justifications and excuses) are situated within the crime structure. At the same time, however, not only the crime structure itself, but also the order of ascertaining each of these three elements is crucial to its proper understanding and

⁴⁷ *Ibidem*.

⁴⁸ G. P. Fletcher, *The Grammar of Criminal Law...*, p. 45.

⁴⁹ Nowadays, however, these two categories are also commonly applied in common law countries, a practice one can easily identify by reference to the tables of content in various criminal law textbooks.

⁵⁰ K. Ambos, *Treatise on International Criminal Law. Volume I: Foundations and General Part*, Oxford 2013, pp. 304–305.

⁵¹ See also: A. Cassese, *Justifications and Excuses in International Criminal Law*, (in:) A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Oxford 2002, pp. 952–953 (providing practical consequences of invoking justifications and excuses, i.e. modes of participation, compensation for victims etc.).

⁵² For comparison, check f. 45.

⁵³ G. P. Fletcher, *The Grammar of Criminal Law...*, pp. 50–53.

functioning. This is so because in the tripartite system one has to follow a specific way of reasoning which is demarcated by three levels of analysis where the evaluation of definition comes first, the element of wrongdoing second, and the element of culpability third. It also goes without saying that this method is applicable not only to so-called positive elements, but also to negative formulations of these elements (defences). Thus, if given conduct satisfies the definition of a crime but is at the same time justified, there is no need to continue the analysis at the third level where both culpability and excuses are situated. Accordingly, since positive and negative formulations of crime are closely interrelated both structurally and procedurally, the distinction between a 'prima facie' crime and a 'crime' – applied by Simester in his examination of the bipartite system of crime – possesses no explanatory value in its tripartite counterpart.

This concise comparative analysis of the concept of crime explicitly illustrates not only fundamental differences between various penal systems in general, but also divergent ways of understanding and locating criminal law defences within the crime structure in particular. As for the concept of an international crime, it is undisputed that it was patterned predominantly on the English bipartite model of crime and only subsequently supplemented by several different contextual elements which transformed 'ordinary crimes' into 'international crimes'. On the other hand, however, the same cannot be said about defences, for – upon a reading of the Rome Statute – it becomes clear that no direct semantic reference to them can be identified within the text of the Statute.

From a historical point of view, defences have not played an important role in international criminal law.⁵⁴ In fact, until 1998 'no serious efforts for any form of codification' or structural reflection upon the position of defences in ICL 'were administered by the international community'⁵⁵. And not without a reason, for it still remains debatable whether they should be available in cases involving international crimes as justifications or even as excuses. It is worth noting here that in some countries (i.e. USA, UK) duress cannot be raised as a defence to murder.⁵⁶ Perhaps – if one were to accept that international crimes are situated at the top of the ladder of offences in terms of their seriousness – the same limiting standard should also apply to them, since they would be – as a category – 'above' homicide on that ladder of gravity (a *minori ad maius*)?

⁵⁴ K. Ambos, *Treatise on International Criminal Law...*, p. 301; R. Cryer, *Defences/Grounds for Excluding Criminal Responsibility*, (in:) R. Cryer, H. Friman, D. Robinson, E. Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge 2010, p. 404.

⁵⁵ G. J. A. Knoops, *Defenses in Contemporary International Criminal Law*, Leiden 2008, p. 127.

⁵⁶ *R v Howe* [1987] AC 417; see also: J. Dressler, *Duress*, (in:) J. Deigh, D. Dolinko (eds.), *The Oxford Handbook of Philosophy of Criminal Law*, Oxford 2016, pp. 271–272; J. Herring, *Great Debates in Criminal Law*, Hampshire 2012, p. 210.

Nevertheless, these conceptual doubts have not precluded the drafters of the Rome Statute of the International Criminal Court from putting through the first complex treatment of defences to international criminal liability. The most relevant provision in this regard – Article 31 ICCSt. – contains a non-exhaustive list of “grounds for excluding criminal responsibility”.⁵⁷ One immediately notices that – despite the fact that international criminal law has absorbed the bipartite model of crime – the Statute makes no direct reference to the category of defences characteristic of the common law systems. The decision to introduce a different wording, however, was not mere semantics but a deliberate legislative choice of the drafters of the Rome Statute who ‘wanted to avoid certain ‘catch words’ too closely associated with either the common law or civil law system’⁵⁸ in order to lay the foundations for an independent system of universal criminal law.⁵⁹ Most probably due to similar reasons the Rome Statute is also silent about the traditional distinction between justifications and excuses. Nevertheless, since they are often discussed in scholarship, these two categories and the concept of defence will be utilized in this article as well.

The Rome Statute in Articles 31–33 ICCSt. provides for several justifications and excuses such as mental disease, intoxication, self-defence, duress, mistake of fact, superior orders, as well as for other grounds for excluding criminal responsibility enshrined in other rules of the applicable law (Article 31(3) and Article 21 ICCSt.). The last open-ended category – which could very well serve as another ‘escape route’ for an accused – has been correctly characterized as a reference aimed at covering customary international law. In this vein, A. Cassese identifies both grounds for excluding criminal responsibility, that is justifications (lawful use of force, lawful reprisals, consent) as well as excuses (physical compulsion, necessity, force majeure) which form part of international customary law.⁶⁰ But since it seems to be impossible to examine at length all these defences with respect to the case of Ongwen in one article, the following analysis will be limited to just two of them, that is to duress and necessity.

⁵⁷ Article 31 ICCSt. serves the function of ‘negative formulations’ – to refer to the previously discussed tripartite model and the position of defences within this model.

⁵⁸ K. Ambos, *Treatise on International Criminal Law...*, p. 302.

⁵⁹ This, as it seems, directly affects also the way this provision will be applied in practice. According to A. Eser: ‘Whereas the interpretation of other parts of the Rome Statute may easily take resort to legal precedents both in international and national criminal law, with regard to this section particular heed must be paid to the wording of these provisions, thus avoiding both an uncritical adoption of the ambiguous and controversial drafting at the Rome Conference and an unreflected implantation from national criminal justice systems’. A. Eser, *Article 31. Grounds for excluding criminal responsibility*, (in:) O. Triffterer, K. Ambos (eds.), *The Rome Statute of the International Criminal Court. A Commentary*, Nomos 2016, p. 1131.

⁶⁰ A. Cassese, *Justifications and Excuses in International Criminal Law...*, p. 955.

4. DURESS AND NECESSITY

According to Article 31(1) ICCSt. '[i]n addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(...)

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

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.'

After a careful reading of this provision, it becomes clear that Article 31(1) (d) produces certain terminological confusion. This confusion is caused, first and foremost, by the lack of any explicit reference to necessity, for the provision – at least at the semantic level – revolves solely around the concept of duress. It seems, therefore, that – prima facie – an interpretation of this provision can lead to two contradictory results: either duress is the sole defence regulated therein – in which case it would have a broader meaning that is traditionally attributed to it; or that this provision espouses both duress and necessity – in which case an interpretative dilemma arises as to the precise meaning of each of these defences in the Rome Statute.

In spite of this indeterminacy, the prevailing position seems to support the former option. A. Eser, for example, claims that 'paragraph 1 (d) blends the justifying choice of a lesser evil (necessity) with excusing situations where the defendant's freedom of will and decision is so severely limited that there is eventually no moral choice available (duress).⁶¹ An analogous contention is articulated by K. Ambos who notices that necessity has been subsumed under the concept of duress, and – because of that – Article 31(1)(d) contains objective elements of both necessity and duress.⁶² G. J. A. Knoops, in turn, considers as remarkable the fact that the drafters of the Rome Statute adopted such a flexible approach by combining 'two different concepts: (justifying) necessity and (merely excusing) duress'.⁶³ On the other hand, W. Schabas shortly concludes that 'Article 31 also codifies the defences of duress and necessity'.⁶⁴ In this article, however, it is assumed that

⁶¹ A. Eser, *Article 31. Grounds for excluding criminal responsibility...*, p. 1150.

⁶² K. Ambos, *Treatise on International Criminal Law...*, p. 356.

⁶³ G. J. A. Knoops, *Defenses in Contemporary...*, p. 59.

⁶⁴ W. A. Schabas, *An Introduction to the International Criminal Court*, Cambridge 2011, p. 242.

Article 31(1)(d) contains only one of these defences,⁶⁵ that is the defence of duress which departs from the traditional meaning attributed to this concept by combining two distinct and – unfortunately – to some extent mutually exclusive defences of duress and necessity.

The formulation of duress in the Rome Statute allows for an identification of several separate components, which will be briefly interpreted below. First, the defence of duress included in Article 31(1)(d) is applicable only to those crimes which fall within the jurisdiction of the Court (Article 5–8 ICCSt.). In relation to Dominic Ongwen, this requirement is clearly met, for – as already discussed above – he is accused of committing many different types of war crimes and crimes against humanity.

Furthermore, the Statute provides for two core requirements which – it could be argued – justify the very existence of this defence, namely ‘a threat of imminent death’ as well as ‘a threat of continuing or imminent serious bodily harm’. The requirement of a threat leads to a conclusion that it must be objectively genuine, it must ‘exist in reality’.⁶⁶ Therefore, this provision ‘is not applicable in case a defendant falsely believes he is threatened’.⁶⁷ As for the normative content, both conditions are limited solely to a threat to ‘life’ or ‘bodily integrity’ which inevitably excludes, for instance, mere psychological pressure. In this regard R. Cryer argues that ‘blackmail or other threats not involving imminent serious violence will not suffice’ and that ‘those threats must be very serious’.⁶⁸ On the other hand, one has to agree with G. Werle and F. Jeßberger when they claim that also states of psychological coercion may fall under these two conditions but ‘only if they threaten imminent serious physical consequences to life or limb’.⁶⁹

Importantly, both types of threats must be of such magnitude as to ‘result in duress’ leading to conduct which may amount to international crimes codified in the Statute. It follows that duress here ‘functions as a mediator’ between a threat and the criminal conduct.⁷⁰ This causation requirement, however, is subject to various interpretations. A. Eser, for example, holds that this is an objective standard, which means that it would be met only if a reasonable person could have endured the threat.⁷¹ But the application of the standard of a reasonable person seems to have some limitations. K. Ambos refers in this respect to the ‘actor’s status’ and indicates that ‘soldiers have a special duty to take on dangers inherent in

⁶⁵ The same conclusion is reached by I. Marchuk. See: I. Marchuk, *The Fundamental Concept...*, p. 265.

⁶⁶ K. Ambos, *Treatise on International Criminal Law...*, p. 357.

⁶⁷ M. Krabbe, *Excusable Evil. An Analysis of Complete Defenses in International Criminal Law*, Cambridge–Antwerp–Portland 2014, p. 225.

⁶⁸ R. Cryer, *Defences/Grounds for Excluding Criminal Responsibility...*, p. 412.

⁶⁹ See G. Werle, F. Jessberger, *Principles...*, p. 241.

⁷⁰ I draw this comparison from A. Eser. See A. Eser, *Article 31. Grounds for excluding criminal responsibility...*, p. 1152.

⁷¹ *Ibidem*.

their profession'.⁷² Although this does not automatically preclude the application of the 'reasonable person standard' also to them, in effect the unified standard of this test loses its original character by becoming a multifaceted category whose exact meaning and scope will have to be determined by the Court on a case-by-case basis.

Another important condition – a temporal one – for duress is that the threat has to be either imminent in case of death or imminent or continuing in case of serious bodily harm. The requirement of imminence must be 'objectively given and not merely exist in the perpetrator's mind'⁷³. As for the element of continuing threat, this condition will most probably be applied in long-lasting conflicts where 'the violation of protected interests may occur at any time'⁷⁴. It should not follow, however, that the threat will become a catch-all condition. Therefore, one has to agree with G. Werle and F. Jeßberger when they claim that "a mere higher general probability of harm, such as the 'omnipresence of the Gestapo' in the Third Reich, is not enough".⁷⁵

An assessment of the already examined conditions of duress from the perspective of Dominic Ongwen's personal story – apart from the first formal criterion (crime within the jurisdiction of the Court) which has clearly been met – is a difficult task. In fact, it seems that several questions can and should be asked and dealt with before giving a final answer, such as: Was Ongwen under one of the threats provided for in Article 31(1)(d) ICCSt.? Did Ongwen actually commit the crimes he is accused of? If he did, was it because he had found himself in an extreme situation or – perhaps – he would have committed these offences anyway even if no presumed threat could have been identified by a reasonable person?

Indubitably, on various occasions Ongwen found himself under a threat of being harmed. After all, there was even a time when these threats materialized, that is when Ongwen was imprisoned and tortured in Sudan.⁷⁶ It has also been confirmed that for some time Ongwen was hiding from J. Kony because he was scared of him. Nevertheless, given the temporal scope of the prosecution (3 years), it seems that at that time – at least on account of available information – Ongwen was neither under a threat of 'imminent death', nor under a threat of 'continuing or imminent serious bodily harm'. Actually, the same conclusion was reached by the Pre-Trial Chamber which proclaimed that 'there exists no evidence indicating a threat of imminent death or continuing or imminent seri-

⁷² K. Ambos, *Treatise on International Criminal Law...*, p. 358.

⁷³ A. Eser, *Article 31. Grounds for excluding criminal responsibility...*, p. 1151.

⁷⁴ G. Werle, F. Jessberger, *Principles...*, p. 241.

⁷⁵ *Ibidem*.

⁷⁶ M. A. Drumbl, *A former child soldier prosecuted at the International Criminal Court*, Oxford University Press Blog, 26 September 2016: <https://blog.oup.com/2016/09/child-soldier-prosecuted-icc-law/> (accessed: 1.07.2018).

ous bodily harm against Dominic Ongwen (or another person) at the time of his conduct with respect to the particular crimes charged.⁷⁷ This does not signify, however, that analogous conclusions will be reached by the Trial Chamber in its future judgment.

Nevertheless, considering the fact that Ongwen is charged with no less than 70 counts of war crimes and crimes against humanity, acceptance of the grounds for excluding criminal responsibility by the Court seems very unlikely. After all, in addition to crimes which are strictly linked to certain military activity undertaken by the LRA between 2002 and 2005 (even if illegal; i.e. attacks on camps or the conscription of child soldiers), within the charges there are also other acts which clearly cannot be treated as the LRA's military objectives. This concerns, for instance, Ongwen's direct commission of a number of sexual and gender based crimes against eight women (counts 50–60).⁷⁸ One of Ongwen's wives (Witness P-101), for example, testified that she had been held captive by the LRA for eight years since her abduction in August 1996 by Dominic Ongwen and other LRA fighters until her escape in July 2004. On the day of her abduction, Dominic Ongwen forced her to become his so-called "wife" and continued to have sex with her by force until her escape. Ongwen also made her perform various domestic duties for him, including cooking and fetching and chopping wood.⁷⁹ In this regard, the ICC also noted that the Defence, neither during the taking of the testimony of the seven witnesses, nor at the confirmation of charges hearing, 'raised any significant disagreement with the narrative provided by the witnesses'.⁸⁰ This statement and the passive attitude of the defence counsel may serve, in my view, as a strong indication of Ongwen's guilt. As for the defence of duress, it would rather be too far-fetched an argument to claim that Ongwen committed these crimes because of 'a threat of imminent death' or of 'continuing or imminent serious bodily harm'.

Assuming, however, that such threats were made, there are still additional criteria which must be fulfilled first before the defence of duress can be successfully invoked. This involves the requirements that 'the person acts necessarily and reasonably to avoid this threat' and that it 'does not intend to cause a greater harm than the one sought to be avoided'. According to A. Eser this 'means that the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect'.⁸¹ In other words, the objective balancing test to be applied must be based upon the principle of proportionality, and the reaction should not be intended to cause greater harm

⁷⁷ *In the case of the Prosecutor v. Dominic Ongwen, Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, para. 153.

⁷⁸ *In the case of the Prosecutor v. Dominic Ongwen, Decision on the confirmation of charges against Dominic Ongwen*, 23 March 2016, ICC-02/04-01/15, para. 102.

⁷⁹ *Ibidem*, para. 111

⁸⁰ *Ibidem*.

⁸¹ A. Eser, *Article 31. Grounds for excluding criminal responsibility...*, p. 1153.

than the one sought to be avoided.⁸² From Ongwen's perspective, this additional requirement stemming from necessity as traditionally defined ('lesser-evil principle') seems to be particularly problematic, especially in light of the nature of crimes that Ongwen is charged with. Apart from that, it would be difficult to argue that D. Ongwen acted in order to avoid a threat. After all, instead of escaping and hiding in the bush, Ongwen remained in the LRA and rose through its ranks.

The same conclusion will most probably be reached with regard to the two subsequent conditions (made by other persons – duress; or constituted by other circumstances beyond the person's control – necessity) included in Article 31(1)(d) ICCSt. This is mainly due to their secondary character with respect to 'threats' discussed above. Nevertheless, although no information is available as to whether such threats have actually been made against persons other than Ongwen himself, for instance against his family, it is undisputed that – in view of the LRA's practice – this is indeed very possible and should not be entirely excluded. Also, one should not forget that in case of child soldiers' escapes retaliatory attacks against these persons' next of kin were often an automatic response of the LRA.⁸³ These attacks, however, were not mere punishments but – first and foremost – served as a forward-looking mechanism of deterrence against child soldiers' fleeing.

5. CONCLUSIONS

This article addressed two separate issues. Firstly, how social or historical complexity is viewed through the 'legal lens', especially with regard to the victim-offender dichotomy. And secondly, where the defence of duress is situated in the modern criminal justice system as well as whether Dominic Ongwen will be able to effectively invoke this defence in order to exclude his responsibility for crimes which he most likely committed as an LRA commander.

Attribution of specific labels to events or people often leads to a twofold distortion: first, it usually captures only part of the social reality assessed through the prism of legal norms (external distortion); and second, for even if such a categorization is correct from an external point of view, the label itself may distort the social complexity internally through its unifying force (internal distortion). Although this phenomenon is universal in scope, it is also very well exemplified

⁸² K. Ambos, *Treatise on International Criminal Law...*, p. 359.

⁸³ This is possible because the LRA stores personal information about abductees and their families. In this regard, N. Grant refers in her research study to the massacre in Mucwini in Northern Uganda where over 50 persons were killed by the LRA during an attack on the community of an abducted escapee. See: N. Grant, *Duress as a defense for former child soldiers? Dominic Ongwen and the International Criminal Court*, ICD Brief 21, December 2016, p. 7.

by the interaction between child soldiers and international criminal law. First, as it is not possible – due to patent systemic limitation – for every person who have been victimized by crimes which fall under the Court’s jurisdiction to participate in proceedings before the Court, the Court must apply certain selection criteria which inevitably lead to greater or lesser degrees of selectivity. As a result, some victims are excluded from participation and their victim status is not confirmed. An analogous effect may also eventuate due to limitations of the charges brought before the Court, for the concept of victimhood in international criminal law is inextricably linked to the concept of harm itself.⁸⁴ So, to take the case of Dominic Ongwen, only persons who have been wronged through the commission of two crimes – war crimes and crimes against humanity – can participate in the proceedings, while others – who were also harmed by the LRA and perhaps even by Ongwen himself – are deprived of this right.⁸⁵ Furthermore, in relation to the second – internal – distortion, it is undisputed that even those who are categorized as victims of certain crimes are not a homogenous group. In fact, quite the opposite seems to be true. After all, they all may have different experiences, interests, needs and expectations.⁸⁶ These divergent aspects of being a victim, however, usually fall outside the scope of the legally determined victim label, and even if they do fall within that scope, they often have very little bearing upon the procedural design of victim participation.⁸⁷

In relation to the second question, and on the basis of an examination that was conducted in this article, my contention is that Dominic Ongwen will not be able to successfully invoke the defence of duress in the ongoing trial proceedings before the International Criminal Court. In a sense this view is in line with the decision on the confirmation of charges issued by the Court in which the ICC was not persuaded

⁸⁴ See, for instance: L. Chappell, *The Gender Injustice Cascade: ‘Transformative’ Reparations for Victims of Sexual and Gender-based Crimes in the Lubanga Case at the International Criminal Court*, “The International Journal of Human Rights” 2017, No 21/9, pp. 1223–1242 (arguing that the failure of the Prosecution in the case of Thomas Lubanga to fully investigate, gather evidence or include charges of sexual and gender-based crimes has led to a ‘gender injustice cascade’).

⁸⁵ So, for example, initially only people from Lukodi could apply and participate in Ongwen’s trial because charges in the original arrest warrant were limited in geographic scope.

⁸⁶ Needless to say, the same could be imputed about perpetrators. It seems, however, that in relation to victims of international crimes this problem is multiplied by the large numbers of persons who are victimized and who participate in proceedings before the Court. The principle of individual responsibility, by definition, grants perpetrators a more individual treatment. See also: A. Smeulers, *Perpetrators of International Crimes: Towards a Typology*, (in:) A. Smeulers, R. Haveman (eds.), *Supranational Criminology: Towards a Criminology of International Crimes*, Antwerp–Oxford–Portland 2008, pp. 233–265 (introducing a typology of perpetrators of international crimes but also very ably outlining the ‘grey area’ between extreme images of offenders).

⁸⁷ On the basis of the Rome Statute, however, several exceptions to this rule can be identified. Without going into detail, these principally concern the so-called particularly vulnerable victims of international crimes.

by the Defence's arguments in relation to possible grounds for excluding criminal responsibility. Some scholars, however, underline the lack of choice on Ongwen's side (the compliance or death dilemma) which could serve as a strong argument for having this defence (re)considered by the Court.⁸⁸ Such statements, however, seem to be unsupported by the evidence as well as not entirely fall within the scope of duress provided for in Article 31(1)(d) ICCSt. Apart from the legal dimension, the moral and social ones could also serve – in my view – as an argument against defences in the Ongwen's case. After all, Ongwen continued committing these crimes long after becoming an adult (18 years). In addition, his innocence may be contested by reference to his 'career' in the LRA and the relatively strong position which he acquired with the lapse of time. Duress, therefore, is a useful defence especially for grassroots soldiers, since those who are at the top of a structure of power are less likely to be coerced because it is exactly their job to take decisions and give orders to subordinates, and not the opposite.

It is clear, therefore, that child soldiers – in general – can invoke the defence of duress before the ICC as no such limitation was introduced by the Statute itself. It could also be said that – as it appears – there is no reason why child soldiers should not be able to do so. Since the normative scope of the concept of duress enshrined in Article 31(1)(d) ICCSt. is still to be determined by the Court, it also remains to be seen, however, to what extent duress can be effectively invoked in practice. Should it, for instance, cover all four international crimes codified in Articles 5–8 ICCSt.?

Nevertheless, the general principle which I described in the previous paragraph does not apply – in my opinion – to Ongwen's case. On the basis of the facts available, I believe that Ongwen will be found guilty of committing at least some of the crimes enumerated in the charges (70 counts), and that his duress defence will not be effective. This does not mean, however, that Ongwen's complex life (i.e. his dual status as a victim and a perpetrator) will not have any impact upon the punishment imposed by the Court. In fact, even from a black-letter law perspective, the opposite seems to be true, for the Court is obliged – on the basis of rule 145(1)(c) of the Rules of Procedure and Evidence (RPE ICC) – to 'give consideration, inter alia, to (...) the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person'. In addition, according to paragraph 2(a) of this rule the Court shall take into account also mitigating circumstances which includes the circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress.

As for my assessment of 'the law as it is' (*de lege lata*), it is definitely far from ideal. A particularly striking feature of Article 31(1)(d) ICCSt. is the combina-

⁸⁸ For instance: N. Grant, *Duress as a Defense for Former Child Soldiers? Dominic Ongwen and the International Criminal Court*, ICD Brief 21, December 2016, p. 20 (claiming that Ongwen faced the choice between compliance or his own certain death and that his acts were necessary).

tion in one defence of two related but, in fact, both theoretically and practically distinct concepts. This peculiar legislative decision will certainly result in many interpretative dilemmas which the Court will have to face in the future. Even more worrisome, however, is the fact that it seems almost impossible to identify the motives which directed the drafters to combine these two concepts together.⁸⁹ In short – to my mind – this is nothing else than a clear example of poor drafting in international criminal law.

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⁸⁹ Especially considering the fact that before 1998 necessity and duress were included in different provisions.

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CAN DURESS EXCLUDE CRIMINAL RESPONSIBILITY OF FORMER CHILD SOLDIERS? THE CASE OF DOMINIC ONGWEN BEFORE THE INTERNATIONAL CRIMINAL COURT

Summary

The phenomenon of child soldiers encompasses up to half a million of adolescents around the world and is – without a doubt – one of the most pressing humanitarian problems of contemporary armed conflicts. This article aims at addressing this issue by examining an ongoing trial of Dominic Ongwen before the International Criminal Court. The first part is dedicated to the description of Dominic Ongwen's life through the prism of the 'victim' and 'perpetrator' labels. In this respect I try to prove that in many situations these two labels do not fit the social reality which they are supposed to classify or categorize. In the second part, I refer to the taxonomy of defences, justifications, excuses and grounds for excluding criminal responsibility in domestic and international criminal law. I also analyse concepts of duress and necessity as they are codified in the Rome Statute of the International Criminal Court. On these basis, I give a negative answer to the question if Dominic Ongwen will be able to effectively invoke one of these defences in order to limit or exclude his criminal responsibility, while in conclusions I also provide a short assessment of 'the law as it is'.

KEYWORDS

duress, defences, child soldiers, Dominic Ongwen, International Criminal Court

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przymus, obrona, dzieci żołnierze, Dominic Ongwen, Międzynarodowy Trybunał Karny