

# **DURESS AS A DEFENCE FOR FORMER CHILD SOLDIERS? DOMINIC ONGWEN AND THE INTERNATIONAL CRIMINAL COURT**

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## **ABSTRACT**

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The case of Dominic Ongwen, a former commander of the Lord's Resistance Army (LRA), before the International Criminal Court (ICC) is one of many firsts; the first member of the LRA to appear before the ICC, the first former child soldier to be prosecuted before an international tribunal, and the first person to be charged by an international tribunal for committing some of the same crimes of which he is also a victim, namely the conscription and use of child soldiers and enslavement. As a former child soldier himself, Ongwen's case raises a critical issue for a Court that has shed light on the problem of child soldiers and their illegal recruitment. This complex situation raises the dilemma of whether the ICC should take consideration of Ongwen's status as a victim of the crimes he is alleged to have committed himself. Specifically, could the fact Ongwen was abducted as a child, brutalised to accept LRA actions and to participate in them constitute the defence of duress? As the first case against a former child soldier before an international tribunal, Dominic Ongwen's case represents the opportunity for an important development in the interpretation of duress at the international level and in setting a precedent on the prosecution of former child soldiers. This Brief will examine the ICC's duress provision and jurisprudence on the requirements of duress in international criminal law, before assessing each condition against the circumstances of Ongwen's time in the LRA in order to determine whether a former child soldier could satisfy these requirements as a mitigating or exculpatory factor at trial.

## **I. INTRODUCTION**

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The case of Dominic Ongwen before the International Criminal Court (ICC) is one of many firsts; the first member of the Lord's Resistance Army (LRA) to appear before the ICC, the first former child soldier to be prosecuted before an international tribunal, and the first person to be charged by an international tribunal for committing some of the same crimes of which he is also a victim, namely the conscription and use of child soldiers and enslavement. Dominic Ongwen is a former commander of one of the world's most brutal rebel organisations: the Lord's Resistance Army. Originating in Northern Uganda in the 1980's as a movement to overthrow the Ugandan government and protect the interests of the Acholi people, the LRA has become renowned for its terrorising regime against the populations of Northern Uganda, on-going for more than 20 years and involving vicious attacks against

civilians, child abductions, rape and looting.<sup>1</sup> Driven out of Uganda by the Ugandan army, LRA rebels have scattered and are now present in the Democratic Republic of Congo (DRC), Central African Republic (CAR) and South Sudan, where their brutal attacks on civilians continue on an almost daily basis.<sup>2</sup> It is contended that the LRA are responsible for over 100,000 deaths since the conflict began<sup>3</sup> and between 60,000 to 100,000 children have been abducted by the rebels and forcefully conscripted into their ranks,<sup>4</sup> figures which are continuously rising.<sup>5</sup>

In July 2005, the ICC issued warrants of arrest against the leader of the LRA, Joseph Kony, and four of his commanders, including Dominic Ongwen, the only of the five indicted who was a former child soldier, for numerous counts of crimes against humanity and war crimes.<sup>6</sup> Almost ten years after the ICC indicted him, Dominic Ongwen made his first appearance before the Court in The Hague on 26 January 2015 for his initial appearance hearing<sup>7</sup> after surrendering himself at an American military base in CAR.<sup>8</sup> On 21 December 2015, the Prosecutor charged Ongwen with additional crimes to the seven counts of war crimes and crimes against humanity listed in the original arrest warrant. Ongwen is charged with a total of 70 counts<sup>9</sup> of various acts, alleged to have been committed between 2002 and 2005,<sup>10</sup> amounting to war crimes and crimes against humanity - including murder, enslavement,

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<sup>1</sup> War Child, The Lord's Resistance Army Profile. Accessed via <https://www.warchild.org.uk/issues/the-lords-resistance-army>.

<sup>2</sup> As according to the [LRA Crisis Tracker](#).

<sup>3</sup> United Nations Security Council; Report of the Secretary-General on the activities of United Nations Regional Office for Central Africa and on the Lord's Resistance Army-affected areas, S/2013/297, May 2013, para. 68.

<sup>4</sup> Ibid.

<sup>5</sup> In September 2015, LRA Crisis Tracker reported that in the period from January 2015 to September 2015, LRA abductions were the highest in four years. LRA Crisis Tracker; '[Update: The State of the LRA in 2015](#)'. September 2015.

<sup>6</sup> ICC Press Release, '[Warrant of Arrest unsealed against five LRA Commanders](#)', ICC-CPI-20051014-110, 14 October 2005.

<sup>7</sup> ICC Press Release; '[Dominic Ongwen makes first appearance before the ICC](#)', ICC-CPI-20150126-PR1085, 26 January 2015.

<sup>8</sup> At the beginning of January 2015, Dominic Ongwen voluntarily surrendered himself to US Special Forces in the Central African Republic (CAR). On the 16 January 2015, he was handed over to the Central African Authorities in Bangui, where he confirmed his intention to voluntarily surrender to the ICC and was immediately transferred into the custody of the Court, arriving in the ICC's Detention Centre in The Hague on 21 January 2015. ICC Pre-Trial Chamber II; *Situation in Uganda, In the case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Case No. ICC-02/04-01/05, 'Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court', 22 January 2015.

<sup>9</sup> This is the greatest number of counts against anyone accused before the ICC or ad hoc tribunals, and more than double that of Joseph Kony, the leader of the LRA, who is currently subject to 33 counts: ICC, Pre-Trial Chamber II, *Situation in Uganda, In the case of the Prosecutor v. Dominic Ongwen*. Case No. ICC-02/04-01/15, '[Transcript of the Confirmation of Charges Hearing](#)'. 25 January 2016, p. 47.

<sup>10</sup> ICC, *Situation in Uganda, In the case of the Prosecutor v. Dominic Ongwen*. Case No. ICC-02/04-01/15, '[Case Information Sheet](#)', 10 February 2016.

inhumane acts, cruel treatment, and pillaging<sup>11</sup> - in attacks on four different internally displaced person (IDP) camps. Furthermore, he is charged with numerous sexual and gender-based crimes – including forced marriage, rape, torture, sexual slavery, and enslavement – and the conscription and use of child soldiers under the age of 15.<sup>12</sup> The confirmation of charges hearing took place on 21 to 27 January 2016<sup>13</sup> and on 23 March 2016, the Pre-Trial Chamber of the ICC issued its decision confirming the 70 charges against Ongwen and committed him to trial,<sup>14</sup> which is due to begin on 6 December 2016.<sup>15</sup>

Dominic Ongwen was abducted by LRA rebels at the age of nine and a half<sup>16</sup> as he walked to school in Northern Uganda. He went on to spend a significant part of his childhood and his whole adult life in the LRA. He was trained as a ‘child soldier’ and forced to commit atrocities. In this time, he worked his way up the ranks of the LRA, allegedly to reach the post of Brigade Commander of the LRA’s Sinia Brigade and Kony’s third in command. Being a former child soldier himself,<sup>17</sup> Ongwen is the first person to be charged by the ICC with some of the same crimes of which he has also been a victim. This complex situation raises the dilemma of whether the ICC should take consideration of Ongwen’s status as a victim of the crimes he is alleged to have committed himself. Specifically, could the fact Ongwen was abducted as a child, brutalised to accept LRA actions and to participate in them constitute the defence of duress? As the first case against a former child soldier before an international tribunal, Dominic Ongwen’s case represents the opportunity for an important development in the interpretation of duress at the international level and in setting a precedent on the prosecution of former child soldiers.

According to the Rome Statute, anyone below the age of 18 cannot be prosecuted before the ICC.<sup>18</sup> This means, however, for those abducted as children, forcibly conscripted into the LRA and made to commit crimes, from the day of their 18<sup>th</sup> birthday they are criminally responsible and can be prosecuted for their acts. In a space of a day, they are no longer

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> ICC Pre-Trial Chamber II, *Situation in Uganda, In the case of the Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, ‘Decision on the confirmation of charges against Dominic Ongwen’, 23 March 2016.

<sup>15</sup> ICC Press Release, ‘[Ongwen Case: Trial to open on 6 December 2016](#)’, ICC-CPI-20160530-PR1216, 30 May 2016.

<sup>16</sup> ICC Pre-Trial Chamber II, *Situation in Uganda, In the case of the Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, ‘[Transcript of the Confirmation of Charges Hearing](#)’, 25 January 2016, p. 41.

<sup>17</sup> For the purposes of this Brief, the term ‘former child soldier’ refers to those who forcibly join an armed group as children and remain with the armed group over the age of 18 years old.

<sup>18</sup> Rome Statute of the International Criminal Court, 1998 (Hereafter ‘Rome Statute’), Article 26.

considered victims of the war crime of enlisting and conscripting of children,<sup>19</sup> but become criminals in the eyes of international law. With there being an estimated 300,000<sup>20</sup> child soldiers active in conflicts around the world, and 40% of armed forces (including national armies, militias, gangs, terrorist organisations and resistance forces) across the globe using child soldiers,<sup>21</sup> it is not difficult to envisage the thousands of children like Ongwen who grew up with rebel groups as a 'substitute family' subsequently being deemed war criminals, whilst being the products of a war crime themselves. As such, it is essential to establish a precedent in the legal rules applicable to such complex situations as those of former child soldiers.

Ongwen's case raises a critical issue for a Court that has shed light on the problem of child soldiers and their illegal recruitment.<sup>22</sup> This Brief will examine the ICC's duress provision and jurisprudence on the requirements of duress in international criminal law, before assessing each condition against the circumstances of Ongwen's time in the LRA in order to determine whether a former child soldier could satisfy these requirements at trial. It will then be determined whether a successful plea of duress constitutes exoneration or mitigation.

## II. ARTICLE 31(1)(D) OF THE ROME STATUTE

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Duress essentially entails that the accused succumbed to pressure so that his actions can be understood, although not condoned.<sup>23</sup> The person pleading duress is conceding that he did commit a crime, but that his actions are understandable in relation to the circumstances prevalent at the time the crime was committed, and therefore he should not be held criminally responsible.<sup>24</sup>

The defence of duress has generated much discussion amongst scholars,<sup>25</sup> yet little in the

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<sup>19</sup> Rome Statute, Article 8(2)(e)(vii).

<sup>20</sup> Eben Kaplan, '[Child Soldiers Around the World](#)'. *Council on Foreign Relations*, 2 December 2005.

<sup>21</sup> *Ibid.*

<sup>22</sup> See, for example, the trial of *The Prosecutor v. Thomas Lubanga Dyilo* Case No. ICC-01/04-01/06 for the war crime of conscripting and enlisting child soldiers.

<sup>23</sup> Beatrice Krebs, 'Justification and Excuse in Article 31 (1) of the Rome Statute', *Cambridge Journal of International and Comparative Law*, 2010, vol.2(3), pp. 382-410, p. 398.

<sup>24</sup> *Ibid.*, p. 406.

<sup>25</sup> For example: Marcus Joyce, 'Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse', *Leiden Journal of International Law*, September 2015, Vol. 28, Issue 03, pp 623-642; Peter Rowe, 'Duress as a Defence to War Crimes after Erdemović: A Laboratory for a Permanent Court?', *Yearbook of International Humanitarian Law*, December 1998, Volume 1, pp. 210-228; Noam Wiener, 'Excuses, Justifications, and Duress at the International Criminal Tribunals'. *Pace International Law Review*, 2014, Vol. 26, Issue 2, pp. 88-131.

way of practice exists, as of yet, at the international level. Prior to the adoption of the Rome Statute in 1998 and the first codification of the defence of duress at the international level under Article 31(1)(d) of the Statute, the most significant statements on duress and its status in international law were contained in the International Criminal Tribunal for the Former Yugoslavia's (ICTY) Appeals Chamber decision and the multiple separate opinions in the case of *Erdemović*.<sup>26</sup> Duress was not contained as a defence in any of the international tribunals' Charters or Statutes before the Rome Statute, and thus the *Erdemović* case stood as the last influential pronouncement on duress before the enactment of the Rome Statute. The majority of the ICTY Appeals Chamber in this case held that duress is not an available defence whereby the killing of innocent civilians is involved, but did accept that duress may be a mitigating factor in sentencing.<sup>27</sup>

However, the minority opinion of Judge Cassese perhaps provides the most guidance in assessing the applicability of duress at the international level. In his separate and dissenting opinion, Judge Cassese respectfully disagreed with the majority and concluded that duress, under strict requirements, may be a complete defence, removing criminality of the acts, to international crimes consisting of the killing of innocent civilians.<sup>28</sup> Agreeing with the majority that no customary international law exists on the applicability of duress as a defence in the case of the killing of innocents, he identified four common, strict conditions from analysis of relevant case-law which must be met for duress to be satisfied as a defence.<sup>29</sup> The codification of duress as contained in the Rome Statute appears to overrule the majority view in *Erdemović* and, rather, incorporates a similar outline to the requirements of duress as laid out by Judge Cassese in his dissenting opinion.

Article 31(1)(d) of the Rome Statute reads as follows:

#### Article 31

#### Grounds for excluding criminal responsibility

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<sup>26</sup> International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, 'Judgment', 7 October 1997 (Hereafter, *Erdemović*).

<sup>27</sup> Shane Darcy, 'Defences to International Crimes', in: William A. Schabas and Nadia Bernaz (eds.), *Handbook of International Criminal Law*. Routledge 2011, pp. 231 – 245. p. 239.

<sup>28</sup> *Erdemović*, 'Separate and Dissenting Opinion of Judge Cassese', para. 50.

<sup>29</sup> These four conditions consisted of: 1) the act was committed under an immediate threat 2) there were no adequate means of averting the threat 3) the crime committed was not disproportionate to the evil threatened and 4) the situation leading to duress must not have been voluntarily brought about by the person coerced. *Erdemović*, 'Separate and Dissenting Opinion of Judge Cassese', para. 16.

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

(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.

These individual requirements of the defence of duress as contained under Article 31(1)(d) will be analysed, in conjunction with international criminal law jurisprudence, before assessing whether a former child soldier, like Dominic Ongwen, could successfully plead duress before the ICC.

### **1. Threat of imminent death or of continuing or imminent serious bodily harm**

Firstly, it must be determined whether Dominic Ongwen, or a third person, could be said to have been under an imminent threat of death or a threat of continuing or imminent serious bodily harm. Article 31(1)(d) also encompasses continuing threats to that of the defendant or a third person that may take place at any time.<sup>30</sup> However, despite this flexibility in the presence of an imminent or continuing threat, the threat must be real; a mere abstract or increased likelihood will not suffice to reach the threshold of a threat of death or serious bodily harm.<sup>31</sup> In establishing the existence, or non-existence, of this threat, an account of the environment of which child soldiers are subject to when forcibly recruited by the LRA will be determined, before analysing whether any threat can be said to remain to be present when the child reaches adult age and/or gains rank in the LRA.

While a personal account of the time Ongwen spent with the LRA, highly important in establishing the existence of duress, has not yet been completed, many researchers, writers

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<sup>30</sup> Gerhard Werle, *Principles of International Criminal Law*. The Hague: T.M.C. Asser Press 2005, para. 560.

<sup>31</sup> *Ibid.*

and investigators have conducted research into the life of Dominic Ongwen and his experiences in the LRA through consulting those who knew of Ongwen at different life stages.<sup>32</sup> The results of this research, and especially the many statements available from fellow (former) child soldiers, give a strong insight into the experiences of child soldiers in the LRA generally, and on the life of Dominic Ongwen more specifically.

The LRA are widely known to abduct children from the streets in order to recruit them in their ranks. This infamous fact resulted in mothers, including that of Ongwen,<sup>33</sup> to drill their children into giving false details in the event of being abducted, as the LRA keeps records of the personal details of those captured. The rebels store the name, clans and villages of birth of the abductees to use in future retaliatory attacks against children who have escaped.<sup>34</sup> Once the LRA abduct children, they put them through a brutal indoctrination process before training them as 'child soldiers'. Accounts from those who were able to successfully escape reveal that immediately upon arrival at LRA camps, they are told to forget everything about their life up until the point of capture and they are taught that any thoughts of their 'old lives' or of escape will be detected and punished.<sup>35</sup> Any suspicions, which are often founded on little or even no evidence, that an abductee is considering an escape attempt results in severe beatings and, in many cases, death.<sup>36</sup> As such, former abductees report that they quickly learn to emotionally shut down, as any sign of emotion, whether it be crying or simply being quiet and pensive, may be interpreted by the rebels as a sign of remorseful thoughts about home, and therefore thoughts of escape, resulting in punishment.<sup>37</sup>

The LRA's indoctrination process is brutal at minimum and abductees are drilled with fear and made to believe from the offset that escaping is almost an impossibility. Instilling fear into the new recruits is one of the central aims of the LRA. Violence plays a great part in this and it is common practice to force the children to witness or commit heinous barbarities.

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<sup>32</sup> For example: Justice and Reconciliation Project, '[Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen](#)'. Field Note 7, July 2008.

<sup>33</sup> Ongwen, born Dominic Okumu Savio, gave this false name when abducted as a child and reported that he was from a village on the opposite of the district to where he truly originated. Such reports of misinformation are a common 'survival strategy' Acholi parents teach their children for the case of abduction. Erin K. Baines, 'Complex Political Perpetrators: Reflections on Dominic Ongwen', *The Journal of Modern African Studies*, 2009, Volume 47, Issue 2, p. 169.

<sup>34</sup> A working example of such an act is the massacre in Mucwini, northern Uganda, in which over 50 persons were killed by the LRA in an attack on the community of an abducted escapee. Andres Jimenez, '[10<sup>th</sup> Anniversary of the Mucwini Massacre](#)', *Justice and Reconciliation Project Blog Post*, 16 August 2012.

<sup>35</sup> Stephanie Nolan, '[The Making Of A Monster](#)', *The Globe and Mail*, 31 March 2009.

<sup>36</sup> Erin K. Baines, 'Complex Political Perpetrators: Reflections on Dominic Ongwen', *The Journal of Modern African Studies*, 2009, Volume 47, Issue 2, p. 170.

<sup>37</sup> Ibid.

These acts tend to be forced towards family, communities or against fellow abductees who have broken one of the many rules of captivity imposed by the LRA. It has been reported that children were forced to kill other child soldiers who were caught trying to escape, while the others were forced to stand around and watch.<sup>38</sup> One former child soldier who managed to escape recalled that she was forced to kill a boy who tried to escape the clutches of the LRA, she witnessed another boy being hacked to death, and was beaten herself when she dropped a water container and ran for cover while under fire.<sup>39</sup> Even in some cases, the young recruits were made to taste the blood of the dead child after such a killing or eat with bloodied hands while sitting atop a dead body.<sup>40</sup>

These practices of forced violence and killing, in turn, generate a feeling of guilt and fear among the children and send a strong message as to their fate if they ever attempt escape or disobey rules themselves.<sup>41</sup> Research into the LRA has claimed that these truly horrendous methods and processes of indoctrination are made to “break the identity of the child with his former life and usher him into the life of a soldier”.<sup>42</sup> A former child soldier who spent eight years with the LRA after being abducted at the age of ten years old, commented that:

*“It takes time, about six months, to brainwash the new abductees totally. What they do first is, when you are still new, beat you about 500 times. But if you are lucky it is only 200. Then they force you to watch terrible things. We were abducted as a group of students. One of us was brought in front of us and killed there so that we could see. Those are the things they do. They force us to do it. Then, second, anyone among you who tries to escape will be killed the same way. So, as this might be the first time you see a person being killed, this will traumatise you and make you very afraid.”<sup>43</sup>*

Many former LRA soldiers testify that this is the reality of being in the LRA and one simply has to obey otherwise you will be killed. Abductees adopt this ‘bush mentality’ in order to make it day by day and it has been reported that many children said that they soon forgot

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<sup>38</sup> Human Rights Watch, ‘[Coercion and Intimidation of Child Soldiers to Participate in Violence](#)’, 2008.

<sup>39</sup> Nienke Grossman, ‘Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations’, *Georgetown Journal of International Law*, 2007, vol. 38, pp.323-361, p. 328.

<sup>40</sup> Erin K. Baines, ‘Complex Political Perpetrators: Reflections on Dominic Ongwen’, *The Journal of Modern African Studies*, 2009, Volume 47, Issue 2, p. 170.

<sup>41</sup> Human Rights Watch; ‘[Coercion and Intimidation of Child Soldiers to Participate in Violence](#)’, 2008.

<sup>42</sup> Justice and Reconciliation Project; ‘[Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen](#)’. Field Note 7, July 2008. p. 9.

<sup>43</sup> Ariadne Asimakopoulos, ‘Justice and Accountability: Complex Political Perpetrators. Abducted as Children by the LRA in Northern Uganda’, *Utrecht University Master Thesis*, 2010, p. 31.

about home altogether.<sup>44</sup> In the case against Congolese warlord Thomas Lubanga Dyilo, the ICC recognised “the environment of terror” that child soldiers are subject to when forcibly recruited and stated “the oppressive environment deprived [them] freedom of choice”.<sup>45</sup> In the Pre-Trial Brief ahead of Ongwen’s trial before the ICC, the ICC Prosecutor herself goes into great detail on the brutalities and coercion endured by child soldiers at the hands of the LRA,<sup>46</sup> a plight which Ongwen himself suffered, although is notably not mentioned.

As can be seen from the above discussion on the brutality that abductees are subject to, it is not an exaggeration to claim that child soldiers are tormented, traumatised and under a constant threat of death or serious injury. However, the vital question to be determined in Ongwen’s case is: despite being trained and ordered as a young abductee, does this threat continue to apply to those who turn eighteen years old and remain with the LRA? Can a former child soldier be held responsible for the acts he goes on to commit as an adult while still in the same environment he was raised? Importantly in the case of Ongwen, does the ‘kill to survive’ scenario still hold true for those who gain rank in the LRA?

Due to the brutal indoctrination process that child soldiers are subjected to after abduction, the threat against their own and their community’s lives is deeply ingrained and this aspect distinguishes former child soldiers from ‘regular’ LRA rebels who joined the group through choice. It may be said that the threat of death or serious bodily harm against former child soldiers is greater than that against ‘regular’ LRA rebels as a result of the higher will of escape of those forcibly conscribed. Moreover, those who voluntarily join the LRA are more likely to obey the rules prescribed and thus suffer a lower risk of a retaliatory act for disobedience.

Interviews conducted with an ex-commander of the LRA who did manage to escape, Thomas Kwoyelo, gives an insight into the answers to these complex questions. Kwoyelo’s life story follows very much the same path as that of Ongwen; abducted as a child soldier, spent most of his life in the LRA, advancing to the rank of Colonel, before being captured by the Uganda People’s Defence Force (UPDF), the armed forces of Uganda, in early 2009. Although under a number of higher ranks and thus not in direct contact with Kony, Kwoyelo

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<sup>44</sup> Erin K. Baines, ‘Complex Political Perpetrators: Reflections on Dominic Ongwen’, *The Journal of Modern African Studies*, 2009, Volume 47, Issue 2, p. 170.

<sup>45</sup> ICC, Office of the Prosecutor, *Situation in the Democratic Republic of Congo, In the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, ‘[Opening Statement](#)’, 26 January 2009.

<sup>46</sup> ICC Trial Chamber IX, *Situation in Uganda, In the case of the Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, ‘[Prosecutor’s Pre-Trial Brief](#)’, 6 September 2016.

describes his time as the following: “My situation in the bush was like that of a dog and his master. When you tell a dog to do something, it will act as instructed.” He went on to confirm that: “My master was Kony and everything I did came from Kony; the attacks, the ambushes, the abductions. When he tells you, ‘ambush a car there and come back with 25 new recruits’, you do it because otherwise he will kill you.”<sup>47</sup> From this it can be argued that even advancing in rank does not evade LRA members from the consistent threat of death from those above them, and ultimately, Kony.

Kony is known to have used various methods of propaganda to deter his commanders from deserting him by establishing a fear of leaving the LRA. It is known that Kony tells his subordinates that the UPDF will kill them if they escape, as they view the members of the LRA as rebels, and the messages heard on the radio regarding the amnesty packages offered by the government for those who hand themselves in are claimed by Kony to be a trap by the government to entice them out the bush and kill them.<sup>48</sup> He even used the ICC indictments as a threat against deserting bush life, threatening that if commanders dare leave the LRA they will be faced with prosecution. This fear of the unknown of what is awaiting them on the ‘outside’ and Kony drilling a fear of death may be what stops many recruits from attempting to escape the LRA. It has been claimed that due to Kony’s knowledge that Ongwen had a *desire* to escape, he had Ongwen imprisoned and tortured in Sudan.<sup>49</sup> It also may seem like an impossibility to return home for many due to rejection by communities and the stigma attached to their forced recruitment. A former child soldier who spent a number of years with the LRA commented: “Kony used to promote those who do a lot of bad things because he knows that they will never go back home”.<sup>50</sup>

Additionally, the repercussions of an escaped commander can be far more severe than those when a fighter without rank escapes, highlighting not just the increased threat to the commanders themselves but also the ramifications attached to their disobedience. In the case of an escaped commander, the LRA have killed whole clans or villages of which the escaped commander originated from.<sup>51</sup> A former abductee and mother of a child soldier stated that commanders are aware of, and their actions influenced by, the fact that the LRA

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<sup>47</sup> Ariadne Asimakopoulos, ‘Justice and Accountability: Complex Political Perpetrators. Abducted as Children by the LRA in Northern Uganda’, *Utrecht University Master Thesis*, 2010, p. 49.

<sup>48</sup> *Ibid*, p. 32.

<sup>49</sup> Mark A. Drumbl, ‘[A former child soldier prosecuted at the International Criminal Court](#)’, *Oxford University Press Blog*, 26 September 2016.

<sup>50</sup> Stephanie Nolan, ‘[The Making Of A Monster](#)’, *The Globe and Mail*, 31 March 2009.

<sup>51</sup> Ariadne Asimakopoulos, ‘Justice and Accountability: Complex Political Perpetrators. Abducted as Children by the LRA in Northern Uganda’, *Utrecht University Master Thesis*, 2010, p. 38.

are known to seek their revenge against an escaped commander's community.<sup>52</sup> Another, who was in the bush for 14 years as a wife of another commander who was friends with Ongwen, commented that "he felt very bad because the rebels threatened to kill him if he escapes" and they also told him his family home would be burnt down.<sup>53</sup> This documents the increased threat for higher-ranking members, not only on their own lives, but also of those of third persons, namely their family and community.

From the evidence presented above on the methods of the LRA to indoctrinate abducted children and instil a lasting fear in them in order to ensure their loyalty and the increased level of violence on commanders to prevent escape, it may be concluded that Ongwen, even as a high-ranking commander, could be considered under a threat of death or serious bodily harm and thus satisfy this requirement of duress under Article 31(1)(d) of the Rome Statute.

This being said, even with the existence of an overwhelming threat, the pressure may not constitute duress in the case where the actor himself caused the threat or voluntarily placed himself in the situation in which he would be required to perform the unlawful act.<sup>54</sup> This additional requirement can be read from the condition stated in Article 31(1)(d) that the threat must come from "circumstances beyond that person's control".<sup>55</sup> This is most applicable in the case of alleged war crimes committed by a member of an armed force; does their voluntary membership of an armed force and thereby self-exposure to a situation which is likely to lead to the threat, exclude the possibility of claiming the defence of duress in excluding criminal responsibility? The Special Panels for Serious Crimes Court in East Timor held in one of its cases that whilst it was agreed that the defendant had acted under duress, he would not be excluded from criminal responsibility as he had voluntarily joined the militia.<sup>56</sup> However, as is currently undisputed, Ongwen was abducted as a child and so he satisfies this requirement, as he did not voluntarily enlist in the LRA, nor cause the danger he was subject to himself. This is the requirement of duress that separates (former) child

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<sup>52</sup> A former abducted person, who was herself abducted, twice, and is also the mother of a former child soldier, gave her account in an interview of the retaliation methods the LRA used against commanders who tried to escape: "I heard about some mass killings after a senior commander escaped. I think this definitely influences the decision of other commanders to escape because you do not want to be the reason for mass killings in your village. The LRA will come and revenge on your community and they [the commanders] know that." Ariadne Asimakopoulos, 'Justice and Accountability: Complex Political Perpetrators. Abducted as Children by the LRA in Northern Uganda', *Utrecht University Master Thesis*, 2010, p. 38.

<sup>53</sup> Stephanie Nolan, '[The Making Of A Monster](#)', *The Globe and Mail*, 31 March 2009.

<sup>54</sup> Gerhard Werle, *Principles of International Criminal Law*. The Hague: T.M.C. Asser Press 2005, para. 565.

<sup>55</sup> Kai Ambos, 'Defences in International Criminal Law' in; Bartram S. Brown (eds.), *Research Handbook on International Criminal Law*, Cheltenham: Elgar 2011, p. 312.

<sup>56</sup> SPSCET, *Prosecutor v Joseph Leki*, Case No. 05/2000, Judgment, 11 June 2001.

soldiers from 'regular' LRA rebels. Whilst (former) child soldiers are abducted and forcibly conscribed to the LRA, members of the LRA who have joined willingly, have placed themselves in the position by their own means and thus do not satisfy this requirement in order to successfully claim duress, regardless of whether they are found to be under an imminent or continuing threat to life or serious bodily injury.

## **2. Person acted necessarily and reasonably to avoid the threat**

### *2.1 Necessary*

A reaction to a threat is necessary in the case it was the only means possible to deter the threat.<sup>57</sup> As previously mentioned, the system that abducted persons are subject to is often described as that of 'kill to survive'. It may be established from the evidence given on life within the LRA that abductees, whether child soldiers or those that progress in the LRA over the age of 18 and become high-ranking commanders, are not only under a constant threat of death, but that they must succumb to orders to kill in order to survive themselves. It could be said then that the only way Ongwen could avoid the threat was to kill in order to avoid his own death or to escape the LRA. In order to satisfy this requirement, it must be shown that Ongwen had no adequate means of escaping the clutches of the LRA and, thus, the continuing threat of harm against him.

As discussed above, it is no mean feat in general terms to escape the LRA alive, and it becomes even more difficult the higher up the ranks a rebel progresses. Hand-in-hand with the higher rank comes more observation. As a result of the greater knowledge held by commanders, they are more closely monitored due to the information they could release if captured or successfully escape. Commanders are constantly surrounded by their fighters and their wives and children kept close as an additional deterrent of escape. Moreover, those with higher ranks are granted extra 'protection' as a benefit of their rank, which further limits opportunities for escape as they are surrounded by guards and spies for Kony.<sup>58</sup> Therefore, the commanders are made fully aware of the extent to which Kony does not want them to escape and just how important it is that they never leave the LRA. The recruits' experiences of growing up within the LRA makes them conscious of the fact that Kony will not hesitate to

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<sup>57</sup> Gerhard Werle, *Principles of International Criminal Law*. The Hague: T.M.C. Asser Press 2005, para. 561.

<sup>58</sup> Stephanie Nolan, ['The Making Of A Monster'](#), *The Globe and Mail*, 31 March 2009.

kill them if need be; he ordered the execution of his deputy, Vincent Otti, in 2007, apparently due to disloyalty<sup>59</sup> and came close to executing Ongwen on several occasions.<sup>60</sup>

Whilst Ongwen's desire to leave the LRA has been noted,<sup>61</sup> and he even had his fair share of escape attempts<sup>62</sup> before his successful voluntary surrender at the beginning of 2015, it may be said that over 25 years of Kony's psychological pressures in captivity, inciting threats of death and capture, were instilled in him for life. Research has shown that among the children that stay with the LRA for more than a year, statements of loyalty and belief in the powers and promises of Kony increase.<sup>63</sup> As previously mentioned, the ICC declared in its *Lubanga* case that the environment that child soldiers are subject to removes their freedom of choice.<sup>64</sup> The lasting effects of the psychological torment and mind games that child soldiers grow up with, and, naturally, develop a deep belief in, results in a lack of any free will on the part of the individual. As such, it may be argued that the threat of death or serious bodily harm against Ongwen was so real and great that he had no option but to follow orders to commit crimes, and thus his acts were necessary in order to protect the lives of himself and his community.

## 2.2. Reasonable

Further, it must be established whether or not it was reasonable for Ongwen to act in the way he did to avert the threat. Following the notion of reasonableness in criminal law,<sup>65</sup> this requirement would entail that there exists a set of circumstances that prove the 'ordinary, reasonable person' would have believed they were in such grave danger that the threat deprived them of their ability to make moral choices.<sup>66</sup> If it can be found that the threat

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<sup>59</sup> Emma Mutaizibwa, '[LRA Under Pressure to Back Peace Plan](#)', *Institute for War and Peace Reporting*, 20 December 2007.

<sup>60</sup> Mark A. Drumbl, '[A former child soldier prosecuted at the International Criminal Court](#)', *Oxford University Press Blog*, 26 September 2016.

<sup>61</sup> *Ibid.*

<sup>62</sup> The situation in which Ongwen's dilemma is most prominent took place in 2006, when he contacted one of his wives to arrange his escape from the clutches of the LRA. However, at the last minute Ongwen became violent to his wife, questioning if she had forgotten about the ICC indictments, and disappeared back to the bush. Stephanie Nolan, '[The Making Of A Monster](#)', *The Globe and Mail*, 31 March 2009.

<sup>63</sup> Erin K. Baines, 'Complex Political Perpetrators: Reflections on Dominic Ongwen', *The Journal of Modern African Studies*, 2009, Volume 47, Issue 2, p. 171.

<sup>64</sup> ICC, Office of the Prosecutor, *Situation in the Democratic Republic of Congo, In the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, '[Opening Statement](#)', 26 January 2009.

<sup>65</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, Second Revised Edition, Dordrecht: Martinus Nijhoff Publishers 2012, p. 309.

<sup>66</sup> Jérémie Gilbert, 'Justice not Revenge: The International Criminal Court and the "grounds to exclude criminal responsibility": defences or negation of criminality?', *The International Journal of Human Rights*, 2006, Volume 10, Issue 2, p. 21.

against Ongwen was such that a reasonable person, in the same position, would have succumbed to it, then it can be classed as a reasonable act by Ongwen and thus satisfy this requirement.<sup>67</sup>

It may be argued that the reasonable person would conform to almost any demand when faced with the loss of their life.<sup>68</sup> The decision of the *Einsatzgruppen* case by the United States Military Tribunal II sitting at Nuremberg recognised this surrender to a threat due to an individual's will to live and contended that it would be hypocritical for the law to require a person to sacrifice their own life to save another. The Tribunal stated: "No Court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever."<sup>69</sup> On this point, the case of *Erdemović* has been criticised with regards to the conclusion of the majority of the ICTY Appeals Chamber, according to which the perpetrator should have chosen his own death in order to not be criminally liable, which goes against the basic human instinct of survival.<sup>70</sup> Judge Cassese, dissenting, contended that such an obligation would require acts of heroism, which is not the type of duty that should be made of individuals.<sup>71</sup>

If following Cassese's position, as the Rome Statute's duress provision appears to do so, a plea of duress by Ongwen may, however, be limited in relation to the position of duty that he held.<sup>72</sup> Some functions may involve a higher level of risk and danger inherent in their position, as is true, for example, of members of armed forces.<sup>73</sup> Greater resilience against pressure and duress than that of the 'reasonable person' may be required of persons in such positions. In the ICTY case of *Erdemović*, both the majority and the dissenting judges agreed that soldiers, and others with a special duty, should be expected to exercise a higher level of resistance to coercion.<sup>74</sup> Judge Cassese noted that a soldier's position and rank in the military must be taken into consideration in determining the level of danger to be

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<sup>67</sup> Beatrice Krebs, 'Justification and Excuse in Article 31 (1) of the Rome Statute', *Cambridge Journal of International and Comparative Law*, 2010, Volume 2, Issue 3, pp. 382-410, p. 409.

<sup>68</sup> Benjamin J. Risacher, 'No Excuse: the Failure of the ICC's Article 31 "Duress" Definition', *Notre Dame Law Review*, 2014, Volume 89, Issue 3, pp.1403-1426, p. 1424.

<sup>69</sup> *Ohlendorf and others (Einsatzgruppen case)* in; *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Volume IV, Washington D.C.: US Government Printing Office, para. 480.

<sup>70</sup> Benjamin J. Risacher, 'No Excuse: the Failure of the ICC's Article 31 "Duress" Definition', *Notre Dame Law Review*, 2014, Volume 89, Issue 3, pp.1403-1426, p. 1424.

<sup>71</sup> *Erdemović*, 'Separate and Dissenting Opinion of Judge Cassese', para. 47.

<sup>72</sup> *Ibid*, para. 16.

<sup>73</sup> Gerhard Werle, *Principles of International Criminal Law*. The Hague: T.M.C. Asser Press 2005, para. 567.

<sup>74</sup> Sarah J Heim, 'The Applicability of the Duress Defence to the Killing of Innocent Persons'. *Cornell International Law Journal*, 2013, Volume 46, Issue 1, pp. 165-190, p. 179.

assumed, although he did not specifically list it as a separate, additional requirement.<sup>75</sup> While it may be true that soldiers have to face higher levels of threat and risk than those of 'ordinary' persons who do not work daily in situations of conflict, it is said that soldiers cannot be obliged to accept their death or serious bodily harm from another person.<sup>76</sup> Judge Cassese summarised his position on this matter by stating the law "should not set intractable standards of behaviour which require mankind to perform acts of martyrdom".<sup>77</sup>

Whether it may be determined by the ICC that soldiers are held to a higher level of resistance to threats than the ordinary person, it is debatable whether, as an abducted child and forced recruit of a rebel group, Ongwen can be held to such a higher standard. However, even if it can be concluded greater levels of resilience are required of such recruits, this should still not oblige Ongwen to have acted against the threat and sacrificed his own life.

Following this view that to act reasonably does not require you to offer your own life and produce heroic acts when coerced, it may be argued that Ongwen was acting reasonably in avoiding his own certain death. However, the cruelty that can be seen in some of Ongwen's acts, a trademark of the LRA, leaves it questionable that a reasonable person, faced with the same 'kill or be killed' scenario, would have acted in the same way. It is left to the ICC to determine, with evidence gathered on the facts of the specific crimes that he is charged, whether it may be said that he acted reasonably. However, this Brief argues that this requirement would not require him to surrender his own life to save those of others.

### **3. Person did not intend to cause a greater harm than the one sought to be avoided (Proportionality)**

The sentence contained in Article 31(1)(d) requiring that "the person does not intend to cause a greater harm than the one sought to be avoided" introduces the requirement that the act must be proportionate to the harm threatened against the individual. It is not explicitly required that the individual causes less harm *in fact*, but rather that subjectively the person *intended* to cause no greater harm.<sup>78</sup> In customary international law, a proportionality requirement entails an objective balancing test, where "the crime committed under duress

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<sup>75</sup> Erdemović, 'Separate and Dissenting Opinion of Judge Cassese' para. 51.

<sup>76</sup> Kai Ambos, 'Defences in International Criminal Law' in; Bartram S. Brown (eds.), *Research Handbook on International Criminal Law*, Cheltenham: Elgar 2011, p. 313.

<sup>77</sup> Erdemović, 'Separate and Dissenting Opinion of Judge Cassese', para. 47.

<sup>78</sup> Kai Ambos, 'Defences in International Criminal Law' in; Bartram S. Brown (eds.), *Research Handbook on International Criminal Law*, Cheltenham: Elgar 2011, p. 314.

must be, on balance, the lesser of two evils”.<sup>79</sup> This objective requirement was also specified in Cassese’s duress conditions in *Erdemović*.<sup>80</sup> Some have argued a close reading of the wording of this provision suggests that, since the harm caused must not be greater than the harm sought to avoid, the harm caused may be of equal damage in order to fall under the defence of duress.<sup>81</sup> Due to the fact that duress has never been invoked before the ICC, the interpretation remains uncertain and it may be clarified by the Court at trial.

This condition of the defence of duress would be the hardest to satisfy in the case of Ongwen, especially since the alleged acts include the killing of innocent civilians. The ICTY Appeals Chamber ruled by majority in the *Erdemović* case that duress is not an admissible defence against crimes against humanity or war crimes which involved the killing of innocent civilians, as it is impossible to balance one person’s life against another.<sup>82</sup> In his dissenting opinion in the case, Judge Cassese also agreed that normally the proportionality requirement cannot be met in these circumstances due to the impossibility of balancing human lives against each other.<sup>83</sup> However, he rejected the idea that the defence of duress would never be applicable to crimes involving the killing of innocents, but rather may be available “when the killing would be in any case perpetrated by persons other than the one acting under duress”.<sup>84</sup> Judge Cassese stated that the general rule of duress must be applied to all types of crimes on a case-by-case basis, regardless of whether the case involved the killing of innocent civilians or not.<sup>85</sup> Following this conclusion, it may be considered proportionate to save one’s own life when the other person(s) will inevitably die. A brief insight into the workings of the LRA, as outlined previously, reveals the power Kony has over his recruits and the sheer number of abducted children who are indoctrinated into the LRA. Under the oppressive environment of the LRA, it is not difficult to envisage another of Kony’s subordinates undertaking vicious acts in the case that Dominic Ongwen refused. In fact, it has been said that Ongwen mainly gained rank due to outliving his predecessors,<sup>86</sup> indicating that there have been, and will continue to be, many more just like him to succumb to Kony’s threats and commit the crimes.

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<sup>79</sup> Gerhard Werle, *Principles of International Criminal Law*. The Hague: T.M.C. Asser Press 2005, para. 564.

<sup>80</sup> *Erdemović*, ‘Separate and Dissenting Opinion of Judge Cassese’, para. 16.

<sup>81</sup> Benjamin J. Risacher, ‘No Excuse: the Failure of the ICC’s Article 31 “Duress” Definition’, *Notre Dame Law Review*, 2014, Volume 89, Issue 3, pp.1403-1426, p. 1418.

<sup>82</sup> ICTY, Appeals Chamber, *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, ‘Judgment’, 7 October 1997, para. 373.

<sup>83</sup> *Erdemović*, ‘Separate and Dissenting Opinion of Judge Cassese’, para. 42.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, para. 41.

<sup>86</sup> Ledio Cakaj, ‘The complex story of a child soldier’, *The Washington Post*, 12 January 2015.

Also in support of the view that duress is an admissible defence against crimes involving killing innocent civilians, the very nature of the crimes contained in the Rome Statute, classified as being the ‘most serious crimes of concern to the international community as a whole’,<sup>87</sup> are likely to consist of the death of such civilians. Therefore, the mere inclusion of Article 31 in the Rome Statute suggests that under the conditions laid out for the defence, a successful claim of duress may be made against the killing of innocent civilians, and could even be pled in the case of genocide; ‘the crime of all crimes’.

Despite the availability of duress to the killing of innocent civilians, proportionality remains the most difficult requirement for Ongwen to meet. Due to the sheer brutality of the LRA’s acts and the signature cruelty with which they are carried out, it is doubtful whether it can be found that Ongwen’s acts were proportionate to the threat against him. Some who witnessed Ongwen’s life in the LRA even say that Ongwen went too far and killed to “thrive”,<sup>88</sup> rather than survive, and if this can be found to be true, then the proportionality requirement will not be satisfied.

It may be briefly mentioned that the inclusion of a proportionality requirement in Article 31(1)(d), as was also included in Cassese’s requirements laid out in *Erdemović*, has been widely criticised in scholarly work for confusing and blending the separate defences of necessity and duress. This generates complications and incoherency in the Rome Statute in that necessity is a justification; that is, the threatened individual mindfully chooses an act which inflicts less damage than would otherwise be inflicted, and so his/her actions are justified and the actor cleared of criminal liability. Duress, on the other hand, acts as an excuse; in other words, society may still condemn the actor as their actions are considered criminal, but it is recognised that the individual was incapable of making a moral choice due to pressure from an overwhelming threat and is, thus, excused from punishment. According to Krebs, the codification in the Rome Statute thus creates a “hybrid defence”, which can neither be categorised as a justification nor as an excuse.<sup>89</sup>

The aim of the ICC, as stated in its Statute’s Preamble, and a fundamental principle of criminal law, is to punish ‘morally culpable’ perpetrators. By focusing on the individual’s mind-set and his ability to make moral decisions, the rationale behind the defence of duress

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<sup>87</sup> Rome Statute, Preamble.

<sup>88</sup> Mark A Drumb, [‘The Ongwen trial at the ICC: tough questions on child soldiers’](#), *Open Democracy*, 14 April 2015.

<sup>89</sup> Beatrice Krebs, ‘Justification and Excuse in Article 31 (1) of the Rome Statute’, *Cambridge Journal of International and Comparative Law*, 2010, vol. 2(3), pp. 382-410, p. 407.

is that the coerced individual's faculty of choice has been overcome by the presence of the threat of death or serious bodily harm to the point that he is unable to make any voluntary choice.<sup>90</sup> Consequently, it has been argued that there is no such balancing of 'lesser evils' and, therefore, no need for a proportionality requirement in determining the defence of duress.<sup>91</sup> Such a proportionality condition is thus only considered appropriate in assessing the defence of necessity, as necessity is a justification based upon the actions and conduct of the individual and the lesser-of-two-evils principle. However, despite the criticism, such a requirement is included in the Rome Statute and any claim of duress by Ongwen must satisfy this contested proportionality condition.

### III. DURESS AS AN EXONERATING DEFENCE OR MITIGATING FACTOR?

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Duress can perhaps be considered one of the most contentious of the defences contained in Article 31, particularly in relation to the question of its admissibility for crimes involving the killing of innocent civilians and whether a successful claim of duress constitutes a mitigating factor or exoneration. This may be due, at least in part, to the lack of uniformity and agreement between international criminal tribunals, as well as national legal systems,<sup>92</sup> on how duress ought to be applied in such cases.

In *Erdemović*, it was held by the majority that a successful claim of duress may only be a mitigating factor in sentencing (for crimes against humanity and war crimes).<sup>93</sup> The Rome Statute appears to dismiss the majority opinion in *Erdemović* and includes duress as a defence under certain conditions for all crimes "within the jurisdiction of the court",<sup>94</sup> which include crimes against humanity, war crimes, and genocide.<sup>95</sup> Simply the title of Article 31 itself - "grounds for excluding criminal responsibility" - suggests that duress is a complete defence, in that it removes all criminal responsibility and the defendant will not be punished. Thus, it can be concluded that satisfying the conditions laid out in Article 31(1)(d) would

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<sup>90</sup> Benjamin J. Risacher, 'No Excuse: the Failure of the ICC's Article 31 "Duress" Definition', *Notre Dame Law Review*, 2014, Volume 89, Issue 3, pp.1403-1426, p. 1418.

<sup>91</sup> *Ibid*, p. 1417.

<sup>92</sup> For an overview of the differentiating applications of duress in common and civil legal systems, see Benjamin J. Risacher, 'No Excuse: the Failure of the ICC's Article 31 "Duress" Definition', *Notre Dame Law Review*, 2014, Volume 89, Issue 3, pp.1403-1426.

<sup>93</sup> Erdemović, 'Separate and Dissenting Opinion of Judge Li', para. 12.

<sup>94</sup> Jérémie Gilbert, 'Justice not Revenge: The International Criminal Court and the "grounds to exclude criminal responsibility": defences or negation of criminality?', *The International Journal of Human Rights*, 2006, Volume 10, Issue 2, p. 19.

<sup>95</sup> Rome Statute, Article 5(1).

result in the individual being exonerated from the crime committed on the grounds that he or she acted under duress.

Exoneration on the basis of duress is not a new theme in international criminal law. Duress was considered a complete defence, and thus removing criminal responsibility on satisfaction of certain requirements, in Regulation 2000/15 of the United Nations Transitional Administration in East Timor<sup>96</sup> and in a case before the Special Panel for Serious Crimes in East Timor, with the Presiding Judge declaring that “duress could be raised in trial as a form of defence and not just mitigation”.<sup>97</sup>

Although the defences contained in Article 31 of the Rome Statute are complete defences, allowing judges to find a person not criminally responsible for his or her acts, judges at the ICC also have the power to refer to the factual circumstances falling short of constituting these defences as mitigating factors when determining the sentence of the perpetrator. As such, in the case that Ongwen is found guilty and his former child soldier circumstances do not amount to satisfying the conditions contained in Article 31, his sentence may still be mitigated on the basis of his complex situation.<sup>98</sup>

#### **IV. CONCLUSION**

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International criminal law jurisprudence, especially that of the most significant duress case of *Erdemović*, shows that the defence of duress has previously been interpreted narrowly. This narrow interpretation indicates that there must be exceptional circumstances present in an individual’s case in order for a former child soldier to successfully plead the defence of duress before an international court. As the Rome Statute represents the first codification of duress in a tribunal statute, and Ongwen’s case being the first occasion that the ICC may have to apply Article 31(1)(d), it remains to be seen how the Court will interpret and apply its provisions.

From the above analysis of the Rome Statute’s duress requirements, it may be determined that, despite the fact that Ongwen is over 18 years of age and had reached the rank of commander, a real and continuing threat of death or serious bodily harm existed throughout

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<sup>96</sup> United Nations Transitional Administration in East Timor, ‘Regulation 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences’, UNTAET/REG/2000/15, s. 19.1(d).

<sup>97</sup> Dili District Court Special Panel for Serious Crimes, *The Prosecutor v. “X”*, Case No 4/2002, 2 December 2002.

<sup>98</sup> ICC, Rules of Procedure and Evidence, Chapter 7, Rule 145 (2)(a)(i).

his time with the LRA. It may even be said that the threat intensified as he obtained a higher rank. Abducted and forcibly enlisted, Ongwen did not voluntarily place himself in the situation in which he would be required to perform the unlawful acts and remained as a result of the continuous threat against his life, thus satisfying the criteria that differentiates (former) child soldiers from 'regular' LRA rebels. As a result of these threats, it could be said that Ongwen faced the choice between compliance or his own certain death and, thus, his acts were necessary. It could also be determined that, confronted with such a choice, he acted in the same manner as the reasonable person would have under the same circumstances and the crimes would have occurred regardless of whether Ongwen had sacrificed his own life. However, the biggest hurdle that Ongwen would have to overcome in pursuit of satisfying the duress requirements under Article 31(1)(d) is the proportionality requirement due to the signature brutality of LRA acts. This Brief argued that the defence of duress is applicable to crimes involving the killing of innocent civilians. However, it remains to be seen on analysis of each individual count of which Ongwen is charged whether his acts could be considered proportionate to the threat against him.

To conclude, in assessing the requirements of duress against the circumstances of Ongwen's life as a former child soldier, it seems somewhat unlikely that Ongwen will be able to successfully plead duress before the ICC and thus be exonerated for his crimes. The characteristic cruelty of LRA acts places serious difficulties on establishing that the acts were proportionate to the threat against Ongwen, and it will be even more challenging for Ongwen to successfully claim he acted under duress for many of the sexual and gender-based crimes of which he is accused. This being said, in the case that Ongwen is found guilty at trial, despite the situation that it may be determined he cannot satisfy all requirements of the duress provision, the Court may still take his circumstances as a former child soldier into consideration as a mitigating factor at the sentencing stage.<sup>99</sup>

Whichever the outcome, Dominic Ongwen's case represents an opportunity for the ICC to assess its Article 31(1)(d) provision and to develop an international standard on the defence of duress. As a Court which has previously highlighted the plight of child soldiers, and continues to do so in the process of Ongwen's case,<sup>100</sup> this trial offers an opportunity to push the issue of former child soldiers forward and set a precedent on the complexities involved with the prosecution of those abducted and conscripted into armed groups as children and

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<sup>99</sup> ICC, Rules of Procedure and Evidence, Chapter 7, Rule 145 (2)(a)(i).

<sup>100</sup> ICC, Trial Chamber IX, *Situation in Uganda, In the case of the Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, '[Prosecutor's Pre-Trial Brief](#)', 6 September 2016.

who do not escape before the age of 18 years old. During the time that Ongwen has been in detention in The Hague, LRA abductions have been the highest seen in four years.<sup>101</sup> Even within the LRA alone, and not taking into account the thousands of other child soldiers around the globe, the number of those who may end up in the same situation as Ongwen, remaining with an armed group over the age of 18 and gaining rank over the years, cannot be underestimated. As such, it is imperative that a precedent is set in recognising these complex situations and those who are forced to commit crimes whilst being the victims of such crimes themselves.

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<sup>101</sup> LRA Crisis Tracker, ['Update: The State of the LRA in 2015'](#), September 2015.