CHILD SOLDIERS AND THE DEFENCE OF DURESS UNDER INTERNATIONAL CRIMINAL LAW (2020). Written by Noëlle Quénivet and Windell Nortje. Published by Palgrave Macmillan, imprint of Springer, Nature, Switzerland. Pp 160, Price: Rs. 7050/-. ISBN 978-3-030-20663-5.

DEFENCES OR the grounds for excluding criminal liability are important part of a fair trial, under any modern criminal justice system. However, the desirability of defences in international criminal law was always a subject of discomforting debate for many people, as crimes dealt under international law are of a massive scale. Similarly, deciding standards for the trial of a child soldiers is also a tough matter. Child soldiers represent a class, which is generally viewed as victim, but at the same time, they are perpetrators also. The authors of this book should be appreciated as they have endeavoured to discuss an area of international criminal law where both of these tough topics overlap each other. However, defence of duress in international criminal law as such is not deliberated upon, comprehensively. Discussion in the book is focussed on the application of defence of duress to child soldiers only. Authors have used socio-legal method or law in context method.[1]

In the introductory chapter, authors have highlighted binary approach of international criminal law, which is based on victim-perpetrator dichotomy. Especially child soldiers are always seen as pitiable kids who are victimised by the adults to fight their own selfish wars. Children being incapable of making decision to join or not, can be easily manipulated, persuaded, lured or forced to commit international crimes, hence they should not be held responsible. Traditional approach of international law is unable to imagine that children can be perpetrators or criminals. Therefore, the international community did not extend the jurisdiction of the Rome Statue over any person below the age of eighteen years.[2] It means if a child is found involved in any international crime then he/ she would not be prosecuted at the international criminal court. So, international law is treating persons below the age of eighteen years as *doli incapx i.e.,* incapable of committing crimes. But situation is different in municipal jurisdictions. Most

[1] Research Methods for Law Edited by Mike McConville and Wing Hong Chui Second Edition Research Methods for Law Second Edition, 1-9 (Edenborough University Press, Edenborough, 2007), *available at*: https://edinburghuniversitypress.com/pub/media/resources/9781474404259_Research_Methods_for_Law_-_Introduction_and_Overview.pdf (last visited on May 12, 2021).
[2] The Rome Statute of International Criminal Court, 1998, art. 26.

of the States consider children responsible for their 'crimes' in varying degrees, in different age groups. Blanket impunity as *doli incapx* up to the age of eighteen years is rare.[3]

However, international criminal law considers a person as child soldier, only if he/she is less than the age of 15 years and is bearing arms.[4] So there is a three year impunity window for child soldiers between 15 years to 18 years, in the Rome Statute. At the same time, authors have pointed out a dilemma that international crimes, by definition are those crimes, which satisfy the threshold limit of heinousness, and entire international community is interested in their punishment. In such a case, the adults to commit the most heinous crimes with impunity might misuse child soldiers in the age group of 15 years to 18 years. Then authors have discussed that child soldiers below 18 years of the age if are not prosecuted at the ICC (international criminal court) then they can be prosecuted at their domestic courts.

Since, subject matter of the book is application of duress to child soldiers in international criminal law only, so domestic trials of child soldiers are not discussed. To discuss this topic the authors have used article 31 of the Rome Statute, which is about 'grounds for excluding criminal responsibility'.[5] A natural question, which comes in reader's mind, is when the Rome

[3] International comparative information on the minimum age of criminal responsibility provided by the Department of Justice and Constitutional Development in support of the proposed raising of the minimum age of criminal capacity as provided for in the Child Justice Bill, 49 of 2002, *available at*: https://static.pmg.org.za/docs/2003/appendices/030310minimumage.htm (last visited on May 12, 2021).

[4] *Supra* note 2, art. 8 (2) (b) (xxvi).

[5] *Id.,* art. 31.

> Article 31 - Grounds for excluding criminal responsibility
> 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:
> (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
> (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
> (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;
> (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.

Statute is not exercising its, jurisdiction to the child soldiers, then why authors have used the provisions of the Rome Statute, to discuss defence of duress to the child soldiers in the international law; however, the authors have chosen not to answer this question in chapter 1 itself. They have left it to be answered in the next chapter. Although, article 31 of the Rome Statute is good for the purpose of understanding the nuances and various connotations of defence of duress in international criminal law, but it has made the discussion mainly hypothetical in nature.

Chapter 2 of the book has started with the discussion on the desirability, of defences in the international criminal law. Given to the heinous nature of international crimes, international community is always hesitant in application of defences in their prosecution. But in the absence of defences international criminal law would merely become a 'victor's justice'. Further, authors have pointed out, defences are subjective in nature; they depend on what a particular society condemns, punishes or tolerates. It can be different in various State jurisdictions, and it is different even in the common law and civil law legal systems. Further, this chapter has distinguished duress from necessity, which is wider and includes threats to individual and those threats, which are more general in nature, for example fire etc. Another important aspect, which this chapter has dealt with, is whether defence of duress is an excuse or justification. Justificatory defence considers an act appropriate in certain conditions, but adds the test of proportionality of the action taken; whereas in an excuse defence, an act is considered bad in nature but it is not punished because the act was committed in the pressure of hostile circumstances. According to the authors, defence of duress should be considered an excuse for the child soldiers, not justification. As an implication, it would not cover the crimes committed voluntarily, where a child soldier has willingly adopted the ideology of his abductor after spending some time in the hostile environment. This view is a little controversial, because a brainwashed child soldiers could start liking violent objectives of the group. However, from public policy point of view defence of duress should not be taken as a justification for the criminal conduct, otherwise, it might lead to glorifying the perpetrators by considering him/ her a victim. Authors contend that common law approach of non-applicability of defence of

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

duress to the murder, which was applied by ICTY in *Erdemovic*, should be abandoned.[6] Duress should be a complete defence, however for that case-by-case analysis is must, so that the defence is not misused. At the end of the second chapter the authors have abruptly dealt with question which comes in the readers' mind while reading first chapter, *i.e.,* why article 31 of the Rome Statute is being discussed, when the ICC jurisdiction does not cover prosecution of child soldiers. According to authors article 31 of the Rome Statute reflects rules of customary international law, and domestic courts might use it while interpreting elements of defence of duress in their own legal systems. Moreover, the Rome statute has not considered duress a complete defence, it has element of proportionality, which provides a good scope for interpretation and analysis of circumstances on case-by-case basis. It is good that authors have clarified the relevance of the Rome Statute in chapter 2 itself. It shows that the authors were very much aware what queries could come to a reader's mind and they were keen to address those queries.

In third chapter Windell Nortje and Noelle Quenivet have discussed various pre-conditions for invoking defence of duress in article 31 (1) (d) of the Rome Statute and have analysed a child soldier's circumstances and his/ her capacity to invoke this defence by satisfying these conditions.[7] The article mandates an individual must demonstrate that he/ she has committed these crimes under an imminent threat of death or continuing/ imminent serious bodily harm, and his/ her intention was not to cause greater harms than he/ she sought to avoid. Generally, in the circumstances of a child soldier threats are more of psychological nature, as child soldiers often have to see many people being killed, sometimes even their own family members. Therefore, when such a mentally shaken child starts obeying his master and starts killing people, then an imminent threat of death or bodily harm might not be present every time when he has killed someone. Moreover, examples of much abused erstwhile child soldiers Dominic Ongwen and Thomas Kwoyelo show initially they were forced to commit crimes, but later on they themselves became rebel commanders. The impact of initial threats was on their minds of permanent nature and it was continuously growing. Moreover, as discussed earlier duress is an excuse defence not a justification as 'self-defence', which is more objective in nature. Moments for taking action in self-defence might be very few but a child soldier can act out of duress

[6] *Prosecutor* v. *Draen Erdemovic,* Case No. IT-96-22-A, October 7, 1997, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, *available at*: https://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf (last visited on May 15, 2021).
[7] *Supra* note 5.

even long time after the immediate threat is removed. Further, 'action should have been taken with an intention to evert threat' and 'test of proportionality' are such conditions which a child soldier could rarely satisfy. These unfortunate children in their learning age have learnt that violence is the most effective way to resolve their disputes, so expecting reasonable and calculated response from them is almost impossible. Hence, it is very difficult for a child soldier to invoke the defence of duress. Authors argue, although article 40 of UNCRC (United Nations convention on rights of child) recognises special needs and requirements for children facing justice, but it neither encourage nor oblige States to make child friendly defences or adopt interpretation of defences in a child friendly manner.[8] However, article 3 of UNCRC underlines

[8] United Nations Convention on the Rights of the Child, 1989.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

that courts of law and other administrative institutions should take best interest of child in consideration.[9] Therefore, as of now international law in this regard has not adopted such approach to address needs of children taking part in hostilities and facing prosecution.

In chapter four the book has underlined that the scope of child soldiers invoking defence of duress can be further narrower, due to the limits and exclusions, which are applicable to this defence. According to the jurisprudence of other international criminal tribunals, a soldier cannot invoke defence of duress as he is under a duty to assume danger.[10] But it would be unjust if a child who has adapted himself to the situation, is considered to be under a duty to assume danger. Such children who were abducted and brutally tortured in the beginning might not have a concept of dangers, which they might face, in the act of hostilities. For them killing might be way to get some respect among their peers and a little good treatment from their commander who was otherwise oppressing them. Another ground of exclusion is doctrine of prior fault or *culpa in causa*. It means a person should not have voluntarily joined any such hostile situation or rebel group. This requirement is again impractical in the case of child soldiers. There might be some children who might have willingly joined a rebel militia because of allurement *etc.* Some children might have been impressed by the violent ideology. Authors argue in such cases is it right if international law interprets the term 'voluntarily' in same manner for adult soldiers and for child soldiers? Whether a child was capable to decide legal/ illegal or fair/ unfair cause of the hostile group, before joining it 'voluntarily'. However, the book does not argue different standards of proof for child soldiers, rather they ask for reversing the burden of proof in case of child soldiers. In the case of a child, soldiers there should be a presumption that he/she has acted under duress, and then prosecution should discharge the burden of proof that he/ she was not under duress or there exists a ground for exclusion of defence.

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[9] *Id.,* art. 3.

> Article 3
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

[10] *Supra* note 6.

Chapter five have forcefully contended in the case of child soldiers defence of duress should not be seen as a justification defence, rather it should be seen as an excuse defence. It would allow society to affirm that the conduct of the child soldier was bad and is not approved in the society. It would be opposite to justification defence where in the given condition the act is seen as a right course of action, here the act would be considered as not permissible: however, the doer is excused because of duress. It will give a judge chance to focus on the accused child soldier and his/ her circumstances and not on his/ her conduct. Further, 'balance of harms test' which comes with the justification defence, is very difficult to apply in extreme situations. Law should not ideally demand, probably other than professional soldiers of a State, to sacrifice himself/ herself to save the life of others. Common civilians might in such situations adopt a wrongful conduct to save their own life. And especially in case of a child soldiers balance of harms test is not appropriate at all. Considering duress an excuse might lead to a complete defence. However, another benefit of considering duress as an excuse is that situations falling short of the defence parameters might be considered as mitigating factors.

In concluding chapter authors have summed up all arguments and have suggested, *inter alia*, that the defence of duress in the case of child soldiers should be considered as an excuse offence. The authors have written this book in the year 2020, just a few months before the ICC has pronounced its final decision in May 2021, on the erstwhile child soldier Dominic Ongewen, for his crimes on the counts of genocide and crimes against humanity. The authors suggested it is an opportunity for the ICC to discuss at length the tests for considering criminal liability of the child soldiers. However, the ICC has not prosecuted Dominic Ongewen for his crimes as child soldier; rather he was punished with a sentence of 25 years imprisonment for his crimes, which he committed, in next ten years or more, after becoming an adult commander of the same militia in which he was once forced to join as a child soldier. The court did not accept defence of duress in case of adult Dominic Ongwen, as he rose to higher ranks by committing these international crimes voluntarily, sometimes even without orders or prior permissions of his seniors just to advance the group ideology as a committed member.[11]

In conclusion, one must agree that, the book has addressed that area of the international criminal law, which was not much discussed; and the authors have filled that important research gap. The book is rich in intellectual discussion, but it is too much overloaded with ideas. However, authors should have added more material with in the main body of the book, but they

[11] *The Prosecutor* v. *Dominic Ongwen*, ICC-02/04-01/15, May 6, 2021, *available at*: https://www.icc-cpi.int/CourtRecords/CR2021_04230.PDF (last visited on May 16, 2021).

chose to add many relevant examples in endnotes only. Consequently, they have dedicated several pages to the endnotes after every chapter. Although, this strange design of the book interrupts the flow of reading, but its tight academic discussion with scholarly logics keeps reader spellbound. Probably, adding more illustrations etc. would have diluted the impact of book. Overall, this book is a very good read for the students, professors and lawyers of international criminal law and for the individuals who are working for child rights. For, ordinary readers with non-legal background, it would be a very brain taxing book, but for those law lovers who can appreciate legal delicacies this book is a feast.

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