Fertile or Futile Grounds for Excluding Criminal Responsibility? A Critical Analysis of the *Ongwen* Judgment in Relation to the Claim of Coercive Environment

1 Introduction

Children growing up in a war context suffer immensely and child soldiers even more as they must learn to survive amongst the violence and terror inflicted upon, around and by them. The recent judgment[1] and sentencing[2] by the International Criminal Court (ICC) of Dominic Ongwen, a former child soldier turned warlord in the LRA in Uganda, has put a face on this myriad of child soldiers. Assuredly, he might not be representative of all child soldiers, but he certainly is one of them. He was found guilty of 61 crimes comprising crimes against humanity and war crimes and sentenced to 25 years imprisonment. Judgment and sentencing were confirmed on appeal.[3] Throughout the trial, his Defence argued that he should not be held responsible for these crimes. Yet, none of the grounds for excluding responsibility advanced by the Defence – duress and mental defect – were accepted.

Duress, a ground for excluding responsibility listed in Article 31(1)(d) ICC Statute,[4] was used to absolve Ongwen of his crimes whilst his Defence team repeatedly and unsuccessfully

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1 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Trial Chamber, Judgment, 4 February 2021 (ICC *Ongwen* Judgment).

2 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Trial Chamber, Sentencing Judgment, 6 May 2021 (ICC *Ongwen* Sentencing).

3 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Appeals Chamber, Judgment on the Appeal of Mr Ongwen against the Decision of Trial Chamber IX of 4 February 2021 Entitled "Trial Judgment", 15 December 2022 (ICC *Ongwen* Appeal Judgment); ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Appeals Chamber, Judgment on the Appeal of Mr Dominic Ongwen against the Decision of Trial Chamber IX of 6 May 2021 entitled "Sentence", 15 December 2022 (ICC *Ongwen* Appeal Sentencing).

4 Rome Statute of the International Criminal Court, 1998, 2187 UNTS 90 (ICC Statute).

stressed the coercive environment in which he grew up and lived: 'throughout the turns and twists in the armed conflicts between the government of Uganda and the LRA, [Ongwen] lived his life under *duress'*,[5] 'the environment of *duress* never dissipated as Dominic remained in the rebel group. His so-called promotions in the rebel ranks were demonstrative of one thing; development of a higher survival instinct than others while under *duress* in the bush.'[6] The central aspect of such characterisations was that Ongwen had carried out these acts because he had no choice; external factors were forcing him to act in such a manner.

One of the basic tenets of criminal justice is *actus me invito factus non est meus actus*, an act done by me against my will is not my act.[7] Ongwen argued that he did not choose a life of crime; rather life chose it for him. The Defence provided ample evidence of the coercive environment that he endured, noting that the same harsh environment with devastating long-term effects on child soldiers had been previously acknowledged by the ICC. Yet, the Court dismissed the defence of duress on the basis of a coercive environment and its long-term effects.

This paper argues that the Court rejected the defence correctly because duress cannot be applied in a coercive environment. As Article 31(3) ICC Statute does not expressly recognise a coercive environment-related defence, albeit that it considers the possibility of using other defences, this article scrutinises alternative defences grounded in national law. Whilst not claiming to be representative of defences worldwide, this unprecedented overview reveals that it is highly unlikely that such an alternative defence exists. The article contends that,

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5 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 57, lines 3–4 (emphasis added).

6 *Ibid.,* lines 19–22 (emphasis added).

7 Raphael Lorenzo Aguiling Pangalangan, 'Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals', 33(3) *Am. U. Int'l L. Rev.* (2018) 605–635, p. 608. *See* Dusting Byrd, *Islam in a Post-Secular Society: Religion, Secularity and the Antagonism of Recalcitrant Faith* (The Hague, Brill, 2017) p. 297.

even if the Court were to have been creative, it would not have been able to fathom an accepted coercive environment-related defence.

Using the example of Ongwen, after sketching the coercive environment in which child soldiers grow up and live, this article analyses the ICC's decision to reject duress as a ground for excluding responsibility in *Ongwen*. After contending that the ICC Statute allows for broadening the range of grounds for excluding responsibility, it offers an *aperçu* of alternative defences found in national law, first focusing on defences based on the fact that the criminal act was caused by external factors and then examining defences in a detention context. It concludes that presently no ground for excluding responsibility is available to (former) child soldiers like Ongwen.

2 Child Soldiers, Ongwen and Coercive Environments

Child soldiers undergo a process of brutalisation and indoctrination that ensures their obedience and normalises violence as a method of interaction. Trapped in that coercive environment, they are obliged to act in a certain manner. Even as adults, they suffer from their experiences. Taking Dominic Ongwen as an example of a child soldier, this section defines the concept of a 'coercive environment' in the context of child soldering and sets out the long-term consequences of child soldiering.

2.1 *Child Soldiers, Coercive Environments and Ongwen, the 'Child' Soldier*

Child soldiers live in a coercive environment from the moment they enter the group until they leave it. The ICC has recognised this situation in relation to child soldiers as victims. Their experience remains extremely traumatic and violent.[8] Besides, 'the … serious trauma that can accompany recruitment including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear,'[9] children are confronted with physical and mental violence. First, they are threatened that they will be killed if they try to flee,[10] and such threats are executed.[11]

Second, military training is carried out brutally. The Prosecution in *Lubanga* explained that children 'were beaten, whipped, imprisoned and inadequately fed, and young girls were raped.'[12] If they disobey orders, they are punished,[13] beaten,[14] and violence is exercised in full view of others[15] for deterrence purposes. In *Ntaganda*, the ICC refers to the acts committed in the training camps for child (and other) soldiers as 'acts … alleged to have been committed in the *institutionalised coercive environment* of the UPC/FPLC'.[16] The Court adds that 'with regard specifically to these children, Mr Ntaganda [and commanders] … were taking advantage of the *coercive environment* in which they were at the time.'[17] Although this statement is limited to a specific context, the conditions described in the camps in *Ntaganda* are typical of those to which child soldiers are subjected. The Prosecution in

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8 *See* Rachel Brett, 'Adolescents Volunteering for Armed Forces or Armed Groups', 85(852) *Int'l Rev. Red Cross* (2003) 857–866.
9 ICC, *Prosecutor* v. *Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, para. 605 (ICC *Lubanga* Judgment).
10 ICC, *Prosecutor* v. *Ntaganda,* ICC-01/4-02/06, Trial Chamber VI, Judgment, 8 July 2019, para. 376 (ICC *Ntaganda* Judgment).
11 *Ibid.*, para. 376.
12 ICC *Lubanga* Judgment, *supra* note 9, para. 32.
13 ICC *Ntaganda* Judgment, *supra* note 10, para. 377. *See also ibid.*, paras. 883–889.
14 ICC *Ntaganda* Judgment, *supra* note 10, para 377.
15 *Ibid.*, para. 818.
16 *Ibid.*, para. 1112 (emphasis added).
17 *Ibid.*, para. 1195 (emphasis added).

Lubanga acknowledged the existence of this coercive environment, referring to the omnipresent 'environment of terror'.[18] 'The children were terrorised', said Chief Prosecutor Moreno-Ocampo in his opening statement of the *Lubanga* trial.[19]

Third, their young age and underdeveloped morality make them susceptible to indoctrination and other psychological abuse aimed at turning them into killers.[20] In *Ntaganda*, the ICC found that child soldiers, as 'vulnerable soldiers were subjected to conditions of living and training which could only have the impact of increasing their vulnerability and making them even more docile and submissive to their commanders.'[21] It observed that such 'conditions of living, training and service' 'were, beyond reasonable doubt, of such a nature that the soldiers reliably acted in complete obedience in the execution of orders', further adding that 'the will of the individual soldiers was irrelevant for the execution of a given order.'[22] Even, if they do not adhere to the values of the group, they see no choice but to comply.[23] Research reveals that child soldiering does not destroy *per se* the capacities of moral agency, but creates considerable risks of harm to moral development in the sense that child soldiers apply moral concepts in a problematic way, i.e. consistent with the values and the notions of right and wrong as known in the group.[24]

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18 ICC, *Prosecutor* v. *Ongwen*, ICC-01/04-01/06, Opening Statement of Moreno-Ocampo, 26 January 2009, p. 6 lines 8-11.

19 *Ibid.,* p. 7 line 10.

20 Jonathan Kwik, 'The Road to Ongwen: Consolidating Contradictory Child Soldiering Narratives in International Criminal Law', 1 *A. P. J. I. H. L.* (2020) 135–163, pp. 154–155. *See also* SCSL, *Prosecutor* v. *Brima, Kamara and Kanu*, SCSL-2004-16-T, Trial Chamber II, Judgment, 20 June 2007, para. 1275 and SCSL, *Prosecutor* v. *Sesay, Kallon and Gbao,* SCSL-04-15-T, Trial Chamber I, Judgment, 2 March 2009, para. 1616.

21 ICC *Ntaganda* Judgment, *supra* note 10, para. 818.

22 *Ibid.*, para. 819.

23 *See* Gamaliel Kan, 'The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen', 5 *SOAS L. J.* (2018) 70–86, p. 80-81.

24 Renée N. Souris, 'Child Soldiering on Trial: An Interdisciplinary Analysis of Responsibility in the Lords' Resistance Army', 13(3) *Int. J. L. C.* (2017) 316–335, pp. 323–324.

Fourth, violence becomes normal, child soldiers being 'empty vessels into which the capacity for violence has been poured'[25] and they, willingly, partake in the commission of crimes.[26]

Ongwen was brutally abducted on his way to school in 1987 when he was nine years old.[27] During the first four days of his abduction, he was initiated, taught how to assemble and fire a gun and witnessed the killing of recaptured escapees.[28] LRA members were forced to obey the rules, as they were placed in constant surveillance, and closely monitored, making it hard to escape.[29] Ongwen felt permanently watched.[30] The ICC avowed that the LRA adopted 'a disciplinary system to ensure compliance, and it noted that its effect was heightened by the living conditions to which its members were subjected.'[31] This compounded the suffering and emotional strain Ongwen was under owing to living in a coercive environment based on apprehension and constant fear making him susceptible to the authority of Kony who was able to control him.[32] The Defence argued that Kony created a coercive environment where survival depended on following the rules of the LRA.[33] Moreover, indoctrination and constant death threats for disobeying the rules created a coercive environment in which any pre-LRA teachings were suppressed.[34] This type of abuse

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25 Alcinda Honwana, 'Innocent and Guilty: Child-Soldiers as Interstitial and Tactical Agents', in Alcinda Honwana and Filip de Boeck (eds), *Makers and Breakers: Children and Youth in Postcolonial Africa* (Africa World Press, Trenton, NY, 2005) 31, p. 48.

26 *See* Souris, *supra* note 24, p. 320.

27 ICC *Ongwen* Sentencing, *supra* note 2, para. 67.

28 *Ibid.*, para. 72.

29 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Appeals Chamber, Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021, 21 July 2021, paras. 556 and 595 (ICC *Ongwen* Defence Appeal Brief).

30 *Ibid.*, para. 595.

31 *Ibid.*, para. 689.

32 *See* Kan, *supra* note 23, p. 79.

33 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Trial Chamber IX, Defence Closing Brief, 24 February 2020, para. 475 (ICC *Ongwen* Defence Closing Brief).

34 *Ibid.*, para. 576.

was compounded by the 'use of witchcraft to intimidate recruits and to magnify perception of the group's power throughout the indoctrination process.'[35] As the Defence claimed, Ongwen 'held his ranks under duress through a methodological process of spiritual indoctrination.'[36]

2.2 *Long-Term Effects of Child Soldiering and Ongwen, the 'Adult' Soldier*

Although the crime of enlisting and conscripting children 'ends only when the child reaches 15 years of age or leaves the force or group',[37] child soldiering has long-term effects. In brief, former child soldiers suffer from a lack of education and social upbringing, PTSD, physical and mental disabilities and disorders, ongoing aggressiveness, depression and dissociation, social stigmas, etc.[38] The ICC in *Lubanga* upheld testimonies by expert witnesses who emphasised the 'devastating long-term consequences' of child soldiers who have 'experienced or witnessed acts of violence'.[39] The Prosecutor, commenting on Lubanga's sentencing, also stressed the physical and psychological scars of child soldiering.[40] In Ongwen the ICC repeated that '[i]t is clear that the impact of the crime on the victims was devastating'.[41] The long-term consequences of child soldiering have thus been acknowledged by the Court.

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35 Jocelyn T.D. Kelly, Lindsay Branham and Michele R Decker, 'Abducted Children and Youth in Lord's Resistance Army in Northeastern Democratic Republic of the Congo (DRC): Mechanisms of Indoctrination and Control', 10 *Conflict and Health* (2016) 1–11, p. 4.

36 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Trial Chamber II, Defence Brief for the Confirmation of Charges Hearing, 18 January 2016, para. 106 (ICC *Ongwen* Defence Brief Confirmation of Charges).

37 ICC *Lubanga* Judgment, *supra* note 9, para. 618.

38 *See* Kwik, *supra* note 20, pp. 153–154; ICC, *Prosecutor* v. *Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I, Decision on Sentence Pursuant to Article 76 of the Statute, 10 July 2012, paras. 40–41 referring to Schauer (expert witness) (ICC *Lubanga* Sentencing).

39 *Ibid.*, para. 39. *See* Kan, *supra* note 23, p. 77.

40 Statement of the Office of the Prosecutor, ICC Prosecutor's Address on the Sentencing of Thomas Lubanga, 13 June 2012, <www.icc-cpi.int/news/icc-prosecutors-address-sentencing-thomas-lubanga>, accessed 2 May 2023.

41 ICC *Ongwen* Sentencing, *supra* note 2, para. 366.

It can thus be safely stated that Ongwen, as a child soldier, suffered the same fate and that his life after he reached the age of 15 years old, even if he had left the group, was still affected by his experience. Whilst the physicality of the coercive environment might have disappeared once child soldiers have left the group, the group's values and beliefs linger: 'Ongwen's values and beliefs were molded by his environment while he was a child soldier'.[42] As Drumbl explains, such an environment 'rendered the children as victims damaged for life, with their reality today as deriving from their previous suffering. Once a child soldier in fact, always a child soldier in mind, body, and soul.'[43] As Aguiling Pangalangan poignantly states, 'Ongwen, the Brigadier General, carries with him the same traumas and values formed by Ongwen the child soldier.'[44] The Defence maintained that although Ongwen was an adult when he committed the offences, the ICC should have contemplated the long-term effects of living in a coercive environment where his mental, physical and emotional development was severely impeded.[45]

If child soldiers who have left the group suffer from such devastating effects, one might assume that staying in the group has an even more pervasive effect on them. When child soldiers stay in the group as adults, the coercive environment might seem 'normal' to them as they have integrated all the values, principles, and habits of the group. The physical coerciveness might at times be felt though it has been internalised.[46] To the outsider, it does not seem that the former child soldier is coerced. Yet, as the Defence essentially argued that

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42 Aguiling Pangalangan, *supra* note 7, p. 629.

43 Mark A. Drumbl, 'Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering', 20 April 2016, <justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of-child-soldiering/>, accessed 2 May 2023.

44 Aguiling Pangalangan, *supra* note 7, p. 629.

45 ICC *Ongwen* Defence Appeal Brief, *supra* note 29, para. 697.

46 *See* Everisto Benyera, 'Child Victim, Loyal War Spirit Medium or War Criminal: Shifting the Geography and Logic of Historical Accountability in Dominic Ongwen's ICC Trial', *African Identities* (2021) 1-16, p. 12.

Kony created a permanent coercive environment. We agree that Ongwen remained under the apprehension of fear of imminent death throughout his entire stay in the LRA as the constant environment of duress or, better phrased, the coercive environment never dissipated.[47]

3 Use of Duress as a Ground for Excluding Responsibility in Relation to a Coercive Environment

Ongwen's Defence raised several times the issue of the coercive environment in which he grew up and lived, even as an adult. To this effect, it used duress as a ground for excluding responsibility for crimes Ongwen committed as an adult; yet the Court rejected this ground. After briefly explaining duress as a ground for excluding criminal responsibility under the ICC Statute and case law, the following sections examine in detail its application in *Ongwen*.

3.1 *Duress as a Ground for Excluding Criminal Responsibility under the ICC Statute*

Article 31 ICC Statute lists admissible 'grounds for excluding criminal responsibility'[48] that can be classed as grounds relating either to the individual's qualities (affecting the capacity to act autonomously) or the circumstances of the act (impeding the freedom of choice): mental disease or defect, intoxication, self-defence, and duress.[49]

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47 ICC *Ongwen* Defence Brief Confirmation of Charges, *supra* note 36, para. 4.

48 ICC Statute, *supra* note 4, Arts. 31–33.

49 As a non-exhaustive list, other grounds include abandonment (Art. 25(3)(f)), exclusion of jurisdiction because the individual is under the age of 18 years old (Art. 26), mistake of fact or mistake of law (Art. 32), and superiors order and prescription of law (Art. 33).

Article 31(1)(d) ICC Statute identifies duress as a ground for excluding responsibility and specifies that three requirements must be met for this ground to be successful.[50] First, the defendant must prove that he committed the crime because of a threat of imminent death or of continuing or imminent or serious bodily harm.[51] Moreover his criminal conduct 'must have been in response to a threat of death or serious bodily harm that was aimed at either the actor herself or a third party'[52] and the threat 'may either be: (1) made by other persons or (ii) constituted by other circumstances beyond that person's control'.[53] Moreover, it is not the threat to his life or body that must be immediate but rather the harm itself that is imminent (in case of death) and continuing or imminent (in case of serious bodily harm).[54] 'When imminence is mentioned in duress, the question dealt with by the court or tribunal is really whether the individual had any freedom to choose.'[55] The threat must also be considered real since an elevated probability of danger or a mere abstract danger would not suffice.[56] There must be an 'actual bona fide belief' on the defendant's part that a threat existed at the time, which requires the court to determine whether the defendant subjectively foresaw that the

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50 ICC *Ongwen* Judgment, *supra* note 1, para. 2581. Prior to the case, some scholars (authors included) considered that there were four requirements. *See* Clare F. Moran, 'A Perspective on the Rome Statute's Defence of Duress: The Role of Imminence', 18 *I. C. L. R.* (2018) 154–177, p. 155; Windell Nortje and Noëlle Quénivet, *Child Soldiers and the Defence of Duress in International Criminal Law* (Palgrave, Cham, 2020), p. 50.

51 ICC Statute, *supra* note 4, Art 31(1)(d). *See also* Nortje and Quénivet, *supra* note 50, p. 52.

52 ICC *Ongwen* Judgment, *supra* note 1, para. 2581. See Jennifer Bond and Meghan Fougere, 'Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law', 14 *I. C. L. R.* (2014) 471–512, p. 492.

53 ICC *Ongwen* Judgment, *supra* note 1, para. 2581.

54 *Ibid.,* para. 2582.

55 Moran, *supra* note 50, p. 175.

56 ICC *Ongwen* Judgment, *supra* note 1, para. 2582. See Albin Eser, 'Article 31: Grounds for Excluding Criminal Responsibility', in Otto Triffterer and Kai Ambos (eds), *The Rome Statute of the International Criminal Court: A Commentary,* 3rd edn (Beck, Munich, 2016), 1125–1160, pp. 1149–1150. *See also* Nortje and Quénivet, *supra* note 50, p. 54.

harm was immediate and present.[57] A causal link between the threat and the conduct must be established to determine how the threat impacted the defendant's conduct.[58]

The second requirement is that the defendant must prove that he intended to avert the threat and acted necessarily and reasonably in doing so.[59] This is a subjective and objective test. It is subjective because it determines whether the defendant, in his unique position, showed some resistance to avert the danger, taking into account 'the totality of the circumstances in which the person found themselves'.[60] It also adopts an objective approach 'which includes the question whether a reasonable person would have given in to the threat.'[61] This objective test determines whether a person in a similar position to the defendant's would have acted in the same manner:[62] 'whether others in comparable circumstances were able to necessarily and reasonably avoid the same threat'.[63] If he had any reasonable opportunity to remove himself from the coercive situation, such as escaping or resisting the coercer, then the defence is unsupportable.[64]

The final requirement is that the defendant 'does not intend to cause a greater harm than the one sought to be avoided.'[65] As the Court explained, '[t]his is a subjective element – it is not required that the person actually avoided the greater harm, only that he/she intended to

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57 Nortje and Quénivet, *supra* note 50, p. 54.
58 *Ibid.*, p. 54.
59 ICC Statute, *supra* note 4, Art. 31(1)(d).
60 ICC *Ongwen* Judgment, *supra* note 1, para. 2583.
61 *See* Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford University Press, Oxford, 2013), *supra* note 58, p. 359; Nortje and Quénivet, *supra* note 50, p. 64.
62 Beatrice Krebs, 'Justification and Excuse in Article 31(1) of the Rome Statute', 2(3) C. J. I. C. L. (2013) 382–410, pp. 408–409; Nortje and Quénivet, *supra* note 50, p. 64.
63 ICC *Ongwen* Judgment, *supra* note 1, para. 2583.
64 Eser, *supra* note 56, p. 1150; Nortje and Quénivet, *supra* note 50, pp. 58-59.
65 ICC Statute, *supra* note 4, Art. 31(1)(d). *See also,* Nortje and Quénivet, *supra* note 50, p. 64.

do so.'[66] To determine whether the harm is greater, the Court is obliged to compare the harms and in doing so it examines the character of the harms.[67]

3.2 *Duress as a Ground for Excluding Criminal Responsibility in the Ongwen Case*

Duress was analysed and applied in both the judgment and appeal judgments and was dismissed accordingly. From the outset, it should be noted that the Court did not apply the above-mentioned requirements in a rigorous manner. In the Judgment it boldly ascertained that since 'the first element of duress [...] is not met [...] it is not necessary, or even possible, to consider its remaining elements',[68] eventually concluding 'that there is no basis in the evidence to hold that Dominic Ongwen was subjected to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct underlying the charged crimes.'[69] Although the Court was right to reject Ongwen's defence of duress as a ground to exclude criminal responsibility, it is submitted that it should have applied all the Article 31(1)(d) requirements.[70] Concentrating on the first element, given it considered the two other elements irrelevant,[71] the Court focused on some relevant issues which included (1) Ongwen's position in the hierarchy of the LRA; (2) the execution of Ongwen's fellow commanders; (3) the possibility of escape; (4) Kony's alleged spiritual powers; (5) loyalty and career advancement and (6) private acts.

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66 ICC *Ongwen* Judgment, *supra* note 1, para. 2584.
67 *Ibidem.*
68 *Ibid.*, para. 2585
69 *Ibid.*, para. 2668.
70 Ongwen's situation as a former child soldier turned warlord remains poorly understood and subject to simplistic thinking. Mark A. Drumbl, 'Victims', 4 *London Rev. Int'l L.* (2016) 217–246, p. 217; Kan, *supra* note 23, p. 77.
71 ICC *Ongwen* Judgment, *supra* note 1, para. 2669.

First, the Court held that, as a senior commander in the LRA, Ongwen did not receive the same threats to his life as low-level commanders[72] and, in fact, personally made death threats to low-level commanders and abductees.[73] The Trial Chamber also heard and accepted numerous witness testimonies explaining that Ongwen was a confident commander who made his own decisions, hence negating the Defence's argument that Ongwen religiously followed Kony's orders or was threatened to do so.[74] The Court held 'that the relationship between Joseph Kony and Dominic Ongwen was not characterised by the complete dominance of the former and subjection of the latter',[75] a point echoed by the Appeals Chamber that claimed that the LRA was a functioning hierarchy with several layers and should not be equated to Kony.[76] The ICC also rejected for lack of evidence the Defence's argument that Ongwen and others were forced to participate in sexual acts.[77]

Second, the Court rejected the Defence's claim that the killings by Kony of other high-ranking commanders like Otti Lagony and Okello Can Odonga were indicative of a threat to Ongwen's life.[78] The Court retorted that Lagony and Odonga were killed for politically challenging Kony's rule,[79] which Ongwen was not.[80] The Appeals Chamber held that Kony at most demoted or threatened to demote commanders not executing his orders.[81] To illustrate this, the Appeals Chamber noted that Ongwen was once reprimanded by Kony for being a

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72 *Ibid.*, para. 2591.
73 *Ibid.*, para. 2591.
74 *Ibid.,* paras. 2594 and 2602.
75 *Ibid*., para. 2602.
76 ICC *Ongwen* Appeal Judgment, *supra* note 3, para. 735.
77 ICC *Ongwen* Judgment, *supra* note 1, para. 2608.
78 *Ibid.*, para. 2609.
79 *See* ICC *Ongwen* Appeal Judgment, *supra* note 3, para. 735.
80 ICC *Ongwen* Judgment, *supra* note 1, paras. 2613 and 2614.
81 ICC *Ongwen* Appeal Judgment, *supra* note 3, paras. 1488–1489.

weak commander and threatened to demote him.[82] The Appeals Chamber accepted the Prosecution's argument that the commanders were killed for attempting to overthrow Kony.[83]

Third, the Court investigated whether Ongwen could escape.[84] The Court held that various other high-ranking officials escaped between 2002 and 2004, yet Ongwen remained.[85] The Appeals Chamber further accepted the evidence that several senior commanders, in a similar position as Ongwen, were able to escape the LRA.[86] Low-level LRA officials also testified that they managed to escape.[87] The ICC agreed with the Prosecution's argument that, because of Ongwen's high-ranking position, he was in a better position to escape as opposed to a low-ranking official.[88] The Prosecution further maintained that 'Dominic Ongwen's claim that he could have never escaped are an insult to the thousands of adults and children who showed great courage and resilience in braving the escape from the LRA captors.'[89] Moreover, approximately 21,000 LRA rebels took Uganda's offer for an amnesty in 2000.[90] Ongwen failed to take that opportunity. The Court held that escaping was a realistic option for Ongwen. Since he did not take this option, it meant he was under no serious threat from Kony.[91] The Appeals Chamber held that it was not unreasonable for the Trial Chamber to determine that Ongwen had various opportunities to escape.[92] The Defence, moreover, criticised the Trial Chamber by averting that it cherry-picked several cases of escape based on opportunity and by selecting commanders apparently on the same level as

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82 *Ibid.,* para. 1489.
83 *See* ICC *Ongwen* Appeal Judgment, *supra* note 3, para.1487.
84 *Ibid.*, para. 2619.
85 *See ibid.*, paras. 2621–2628.
86 ICC *Ongwen* Appeal Judgment, *supra* note 3, para. 1531.
87 *Ibid.*, para. 2632.
88 *Ibid.*, para. 2634.
89 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Pre-Trial Chamber II, Confirmation of Charges, Open Session, 25 January 2016, p. 35.
90 *See ibid.*, p.35.
91 ICC *Ongwen* Judgment, *supra* note 1, para. 2635.
92 ICC *Ongwen* Appeal Judgment, *supra* note 3, para.1520.

Ongwen,[93] a claim the Appeals Chamber dismissed.[94] This narrative is, however, an oversimplification of the situation. The fear and shame of returning to his community and the fact that he already bought into the ideologies of the LRA through indoctrination and brainwashing further complicates any agency to flee.[95] That he could not have run away is not argued, but such a decision was more difficult to take than presented by the Court.

Fourth, the Court probed the role of Kony's 'spiritual powers'. The Defence asserted that '[t]he indoctrination into Kony's perverted version of spiritualism created a coercive environment …. [that] compelled people to follow rules by preying on their fears of death or severe punishment.'[96] The Court dismissed such an account and, instead, accepted the testimony of other LRA members maintaining that Kony did not possess spiritual powers, and evidence indicating that Ongwen defied Kony's orders at times, all refuting Kony's spiritual influence on Ongwen.[97] On Appeal, the Defence argued, *inter alia*, that spiritualism in the LRA was 'inextricably interwoven' with duress and that the Trial Chamber did not consider its effects on abducted child soldiers.[98] It held further that the assessment of spiritualism required an in-depth analysis of the subjective belief of Ongwen *at the time*.[99] The Appeals Chamber disagreed and held that the Trial Chamber did not err in holding that the evidence showed that spiritualism subsided once the abducted child grew older.[100] Put simply, only children are susceptible to these beliefs and as an adult, it was not possible that Ongwen held such beliefs.

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93 *Ibid.,* para. 1530.
94 *Ibid.,* para. 1531.
95 *See* Kan, *supra* note 23, p. 80.
96 ICC *Ongwen* Defence Closing Brief, *supra* note 33, para. 477.
97 ICC *Ongwen* Judgment, *supra* note 1, para. 2658.
98 *Ibid.,* para. 1540.
99 *Ibid.*
100 *Ibid.*, para. 1554.

Fifth, in analysing Ongwen's career advancement and his positions in the LRA, the Court whilst acknowledging that these were held for having followed many of Kony's orders, also submitted that much of Ongwen's conduct resulted from his own initiative, free from any fear or threats.[101] The Trial Chamber noted that Ongwen's conduct was regularly praised by Kony and held that Ongwen resembled 'a commander in control of his unit, directing its organisation and its actions according to his own planning.'[102] The Appeals Chamber dismissed the Defence's argument that the Trial Chamber erred in its assessment of intercepted LRA communications since the Defence did not provide any evidence of this.[103] Last but not least, to hammer in the point that Ongwen was not under duress when committing the crimes, the Court examined his behaviour in private, i.e., away from all external pressures. The Trial Chamber held that Ongwen never told the young girls he raped in his tent that they could simply pretend to have sex, thereby pleasing Kony's orders for them to have sex.[104] Ongwen never protected the girls from sex, and this was enough evidence for the Trial Chamber to hold that Ongwen could have prevented sexual offences from occurring in private. On Appeal, the Defence held that the Trial Chamber erred in holding that the commission of sexual offences was 'in private' and 'indicative' of the fact that Ongwen was not under duress when he committed these offences.[105] The Appeals Chamber agreed that Ongwen committed sexual offences in his sleeping place where no threats made to him could have any effect.[106]

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101 *Ibid.*, para. 2665.
102 *Ibid*.
103 ICC *Ongwen* Appeal Judgment, *supra* note 3, para. 1529.
104 ICC *Ongwen* Judgment, *supra* note 1, paras. 2666–2667.
105 ICC *Ongwen* Appeal Judgment, *supra* note 3, para. 1563.
106 ICC *Ongwen* Judgment, *supra* note 1, para. 1570.

3.3 *Duress and the Coercive Environment*

Applying duress to Ongwen as a possible ground for excluding criminal responsibility was always going to be challenging for the Defence. The problem, we submit, is that the past coercive environment of child soldiers (and especially their experience) and the present coercive environment of former child soldiers who stayed in the armed forces or group cannot *as such* be equated with duress. This is obvious when examining how the Trial and Appeals Chambers deal with the Defence's reliance on 1) Ongwen's past status as a victim of child soldiering growing up in a coercive environment and 2) the continuous spiritualism, ingrained indoctrination and a continuous coercive environment within the LRA, which it argued created an environment conducive to duress.[107]

The Trial and Appeals Chambers stressed on numerous occasions that his experience as a victim of child soldiering himself could not exclude his criminal accountability as an adult.[108] No doubt simply being a former child soldier does not absolve one from crimes committed later in life. However, it is the link between the experience as a child soldier growing up in a coercive environment and the adult that ought to be examined carefully. In Ongwen the ICC clearly illustrated the fact that duress is an unsuitable ground for excluding criminal responsibility when an individual has grown up in a coercive environment. To the Defence's argument that Ongwen's childhood abduction and death threats he received as a child were central to the duress defence, the ICC responded that those threats were too far removed from his conduct as an adult.[109] At the Appeal, the Defence insisted that a human cannot be separated from his past and that it was 'pathetic, insensitive and factually and

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107 *See* ICC *Ongwen* Appeal Judgment, *supra* note 3, para. 1396.
108 *See*, *e.g.*, ICC *Ongwen* Appeal Judgment, *supra* note 3, paras. 706, 708, 1383, 1471.
109 ICC *Ongwen* Appeal Judgment, *supra* note 3, para. 2592.

legally erroneous' for the Trial Chamber to focus solely on Ongwen's situation as a commander and mostly ignoring his history as a child soldier.[110] The Defence contended that the Trial Chamber should have considered Ongwen's (1) 'childhood immediately before and after his abduction'; (2) the 'vicissitudes and vacillations of his life under the coercive environment'; and (3) the special attention he was given leading to his expedited rise in rank.[111] The ICC entertained, but dismissed, the claim that there was a link between Ongwen, the child soldier, and Ongwen, the defendant. Both chambers held that the lack of evidence by the Defence to prove that this coercive environment as a child soldier led to him being in a state of duress as an adult, was one of the main reasons why the defence could not apply in this context.[112] In particular, the Appeals Chamber held that there was no evidence that the indoctrination and childhood experience of Ongwen had the effect of bringing about the circumstances identified in Article 31(1)(d).[113] The Appeals Chamber added that the Trial Chamber had 'considered his childhood experiences in its holistic assessment of the evidence relevant to [...] mental disease or defect'.[114] From the perspective of duress as a ground excluding criminal responsibility, the ICC rightfully dismissed Ongwen's dreadful and tragic past, background and experience and the devastating consequences this had on his behaviour as an adult.

The ICC also correctly did not accept that duress covered situations of a continuing, implied, latent coercive environment. The Defence averred that Ongwen, throughout his entire time in the LRA, 'was always under apprehension of continuing imminent serious

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110 *Ibid.,* para. 1466.
111 *Ibid.,* para. 1467.
112 *See* ICC Ongwen Judgment, *supra* note 1, paras. 2606, 2614, 2658, 2668; ICC Ongwen Appeal Judgment, ibid., paras. 1389, 1414, 1434,
113 ICC *Ongwen* Appeal Judgment, *supra* note 3, para. 1434.
114 *Ibid.,* para. 1472.

bodily harm.',[115] arguing 'that the threat should be interpreted to include a threat to be killed at a later point in time, and that the threat may emanate from the "perpetual hostile and violent environment" which ruled Mr Ongwen's life at the relevant time of the charges.'[116] The Defence essentially contended that Ongwen should have been able to claim duress due to the coercive environment and that the immediacy of the harm was interpreted too strictly by the Trial Chamber. The Appeals Chamber, however, held that the threat must be present and real at the time of the commission of the offence and 'cannot lie too far in the future.'[117] The Appeals Chamber confirmed the assessment by the Trial Chamber by agreeing that duress is not available where the defendant is threatened with serious bodily harm that is not materialising sufficiently soon.[118] This is one of the main reasons why the Defence failed in raising duress in such a coercive environment which Ongwen found himself in - at the time of the commission of the offences the coercive environment was simply not dangerous and immediate enough to excuse his abhorrent conduct. The Appeals Chamber also agreed with the Trial Chamber's decision that Ongwen was not under an immediate threat of death considering that he made his own decisions and even spared the lives of some victims.[119]

In conclusion, duress, as a ground for excluding criminal responsibility, cannot be raised in relation to a person's past, background and experience in a coercive environment nor in the situation of a coercive environment where the harm is not immediate or continuing and/or based on a defendant's (real or perceived) apprehension based on their past experience.

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115 *Ibid.,* para. 1398.
116 *Ibid.,* para. 1422.
117 *Ibid.*, para. 1423.
118 *Ibid.*, para. 1423.
119 *Ibid.*, para. 1452.

4 Broadening the Range of Grounds for Excluding Responsibility in a Coercive Environment

Since the defence of duress is inadequate to exclude responsibility for crimes committed in a coercive environment, a defendant might seek to explore alternative defences.

According to Article 31(3) ICC Statute, the ICC is not limited to the defences expressly listed therein but can also use other defences: 'where such a ground is derived from applicable law as set forth in article 21.' Article 21(1) in particular specifies the order in which the Court ought to use the applicable law. First, the Court must refer to the 'Statute, Elements of Crimes and its Rules of Procedure and Evidence'.[120] As seen, the Statute and the Rules of Procedure and Evidence are not useful. Second, the Court should turn towards 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'.[121] As there are no treaties on grounds for excluding responsibility and the established principles and rules of international law are limited to referring to duress, this source is again of limited use. The third and last resort potential source of ICC law[122] is

> 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent

120 ICC Statute, *supra* note 4, Art. 21(1)(a).
121 *Ibid.*, Art. 21(1)(b).
122 *See* M. Boumghar, 'Quelques utilisations des principes généraux du droit international et des principes généraux de droit en droit international pénal', *Afr. Yrbk Intl L.* (2012) 97–137, pp. 117–119.

with this Statute and with international law and internationally recognized norms and standards.'[123]

Whilst the ICC can thus use alternative defences grounded in national legal systems, several caveats must be stressed. As Ambos explains, any such principle 'must be based on comparative criminal law and not on one legal tradition alone' and 'must be comprehensible and accessible not only to those limited experts from a specific legal tradition but also to lawyers from all legal traditions'.[124] Cognizant of the difficulty to undertake such a comparative survey[125] within the constraints of this paper, its focus is on the most relevant national defences mentioned in English-language literature and then on ascertaining whether they were used in other jurisdictions. Moreover, it must be stressed that defences are fundamentally value-laden; they irresistibly depend on which acts society condemns, permits and tolerates.[126] Also, in importing national law into international criminal law the specificity, context and scope of international crimes, in contrast to 'common' crimes, must be given due consideration.

Whether specific national defences might be suitable to the situation of individuals in a coercive environment and, more specifically, to (former) child soldiers, must be determined on the basis that defendants 1) claim that external factors were at play and 2) they have engaged in unlawful activities against the general public and not against the person who has

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123 ICC Statute, *supra* note 4, Art. 21(1)(c).

124 Kai Ambos, 'Remarks on the General Part of International Criminal Law', 4 *J.I.C.J* (2006) 660–673, p. 662. *See also* Boumghar, *supra* note 122, p. 126.

125 *See* Ottavio Quirico, 'General Principles of International Criminal Law and their Relevant to Africa', *Afr. Yrbk Intl L.* (2012) 139–163, p. 160.

126 M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd edn., Martinus Nijhoff, Leiden, 2013), p. 285.

established and is maintaining the coercive environment.[127] Consequently, the following defences are considered: the rotten social background defence and the brainwashing or indoctrination defence. The reasons for focusing on these defences are that they have already been suggested by academics (see below) and whilst it is acknowledged that they all or mostly stem from the American legal system (in a legal system that allows for a wider range of defences to be mounted) they have been chosen for explorative purposes rather than to provide a full picture of all potential alternative defences available worldwide. Moreover, mindful of the context in which international crimes are committed and the specificity of such crimes as well as the need to understand better the impact of the coercive environment on an individual through the prism of detention which is *per se* a coercive environment, defences raised in two specific situations are scrutinised: the prosecution of 1) individuals held as prisoners in the context of an armed conflict and 2) 'Kapos' of concentration and labour camps during WWII. It should also be borne in mind that this paper cannot provide an exhaustive analysis of all the cases where these defences were raised and thus uses the most prominent and representative (in relation to a coercive environment) cases for illustrative purposes.

5 Defences Based on Criminal Acts Caused by External Factors

Duress is a ground for excluding responsibility based on individuals claiming that external factors constrained their choice to such a level that they had no choice. The defences of rotten

[127] This sets aside defences relating to victims of abuse at home who commit crimes against their abusers, and the battered woman's syndrome.

social background (that has only been raised in US courts) and brainwashing/indoctrination work on a similar basis as in both instances the defendants' criminal behaviour is caused by external factors beyond their control.[128] They are thus defences that could be reckoned with by the ICC, should they meet the requirements of being recognised as defences and general principles of law.

5.1 *The Rotten Social Background Defence*

The rotten social background defence recognises 'the relationship between environmental adversity and criminal propensity,'[129] thus acknowledging that an individual's criminal behaviour might be explained by environmental, external factors. Consequently, 'when environmental tensions create a predisposition to commit a crime, it would be an injustice to adjudge culpability'.[130] As Harris bluntly enounces, '[i]f society has failed to be responsible to its citizens, those citizens cannot justly be held "responsible" for their crimes against that society.'[131] The possibility of using this defence in relation to child soldiers has already been mounted by Aguiling Pangalangan[132] and Brown[133] and was used, though not expressly, by Ongwen's Defence[134] and flatly rejected by the Court.[135]

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128 Aguiling Pangalangan, *supra* note 7, p. 627.
129 *Ibid.*, p. 609.
130 *Ibid.*
131 Angela P. Harris, 'Rotten Social Background and the Temper of the Times', 2(1) *Ala. C. R. & C. L. L. Rev.* (2011) 131–146, p. 134.
132 Aguiling Pangalangan, *supra* note 7, p. 605.
133 Julia Brown, 'When Children Are Trained to Kill: A Look at the Victim-Perpetrator Debate in the United States and Uganda', 38(3) *Ariz. J. Int'l & Comp. L.* (2022) 375–401, p. 375.
134 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Pre-Trial Chamber II, Further Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", filed on 18 January 2016, 3 March 2016, paras. 36–49. *See* also discussion above.
135 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Pre-Trial Chamber II, Decision on the Confirmation of Charges against Dominic Ongwen, 23 March 2016, para. 150 (ICC *Ongwen* Confirmation of Charges).

This defence emerged for the first time in the dissenting opinion of Judge Bazelon in *US v. Alexander,* a case that dealt with Murdock who had shot and killed a Marine who called him a 'black bastard'. Judge Bazelon explained that the rotten social background evidence should not have been dismissed and that '[t]he thrust of Murdock's defense was that the environment in which he was raised - his "rotten social background"- conditioned him to respond to certain stimuli in a manner most of us would consider flagrantly inappropriate. Because of his early conditioning, he argued, he was denied any meaningful choice when the racial insult triggered the explosion in the restaurant.'[136] Delgado championed that defence, maintaining that external factors create a propensity to perpetrate crimes; he argues that persons who grow grown up in socially deprived environments do not have the same chances to absorb the majority's legal and moral norms'.[137] The defence appears best acknowledged in relation to children who have grown up in such an environment,[138] notably because developmental psychology supports the view that 'developmental trajectories are established in early childhood'.[139]

Using this defence is undoubtedly controversial since many issues can be raised at a practical, theoretical and policy level. First, the defence has never been successfully pleaded as a stand-alone defence in American courts[140] and 'has failed utterly to gain any real world

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136 *U.S.* v. *Alexander,* 471 F.2d 923, 960 (D.C. Cir. 1973). *See* Mythri A. Jayaraman, 'Rotten Social Background Revisited', 14(2) *Cap. Def. J.* (2002) 327–348, pp. 327–329.

137 Richard Delgado, 'Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?', 3 *Law and Inequality* (1985) 9–90, pp. 55–56. *See also* Erik Luna, 'Spoiled Rotten Social Background', (2011) 2 *Ala. C. R. & C. L. L. Rev.* 23–51, p. 45.

138 Paul Robinson, 'Are we Responsible for Who we Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background"', 2 *Ala. C. R. & C. L. L. Rev.* (2011) 53–77, pp. 54 and 69–74 referring to Cabarga, a boy who suffered abuse and indoctrination at the hands of a sexual predator after a rather disturbed youth and helped his abuser groom children.

139 Michael Tonry, *Doing Justice, Preventing Crime* (Oxford University Press, Oxford, 2020), p. 81.

140 Jayaraman, *supra* note 136, p. 330; Brown, *supra* note 133, p. 386.

traction'.[141] If a person's social background was used to negate legal responsibility, it was linked to a defence of insanity.[142] In other jurisdictions such as Australia and Canada, it was only raised as a mitigating factor.[143] Second, as Delgado himself avows, the relationship between deprivation and criminal responsibility 'while intuitive and compelling, still has yet to be determined'.[144] Moreover, many people with a rotten social background do not become criminals.[145] Third, as Morse explains, 'all environments affect choice, making some choices easy and others hard'.[146] And whilst there might be a correlation (though not necessarily a causal relationship[147]) between the environment and a propensity to commit a crime, an element of personal choice remains.[148] Furthermore, as Jayaraman explains, 'the cognitive requirement of "knowledge" or right and wrong will usually be met as well because, despite a rough childhood, the defendant usually knows that killing is wrong'.[149] Fourth, as the defence works on the basis of social determinism, an entire class of individuals could be viewed as criminals or at least viewed in the same brushstroke. Whilst criminologists involved in international criminal justice have argued that 'certain social environments may be inherently "criminogenic", producing cultures of criminality',[150] accepting such social

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141 Elisabeth Winston Lambert, 'A Way out of the "Rotten Social Background" Stalemate: "Scarcity" and Stephen Morse's Proposed Generic Partial Excuse', 21 *U. Pa. J. L. & Soc. Change* (2018) 297–338, p. 299.

142 Peter Arenella, 'Demystifying Abuse Excuse: Is There One?', 19 *Harv. J. L. & Pub. Pol'y* (1996) 703–710, p. 704.

143 *See* Tonry, *supra* note 139, p. 93.

144 Richard Delgado, 'The Wretched of the Earth' (2011) 2 *Ala. C. R. & C. L. L. Rev.* 1–22, 5. *See also* Luna, *supra* note 137, p. 45; Robinson, *supra* note 138, pp. 58-59.

145 Robinson, *supra* note 138, p. 75; Stephen Morse, 'The Twilight of Welfare Criminology: A Reply to Judge Bazelon', 49 *So. Ca. L. Rev.* (1976) 1247–1268, pp. 1252 and 1259.

146 Morse, *supra* note 145, p. 1252.

147 *See* Robinson, *supra* note 138, p. 59.

148 Morse, *supra* note 145, p. 1259. *See also* Tonry, *supra* note 139, pp. 80–84.

149 Jayaraman, *supra* note 136, p. 343. *See also,* Sanford Kadish, 'Excusing Crime', 75 *Cal. L. Rev.* (1987) 257–289, pp. 284–285 and Joshua Dressler, 'Some Very Modest Reflections on Excusing Criminal Wrongdoers', 42 *Texas Tech L. Rev.* (2009) 247–258, p. 253.

150 Paul Roberts and Nesam McMillan, 'For Criminology in International Criminal Justice', 1 *J. I. C. J.* (2003) 315–338, p. 323.

determinism would at a policy level open the floodgates and, as Aguiling Pangalangan explains, would, in line with ICC *ratio decidendi* in relation to duress, 'provide blanket immunity to members of criminal organisations which have brutal systems of ensuring discipline as soon as they can establish that their membership was not voluntary.'[151]

Overall, the rotten social background defence does not work as an alternative defence because 1) it is not established as a defence in (US) national law and there is no evidence that it has been used in other jurisdictions; thus it cannot be considered as a general principle of law, and 2) it suffers from several critical flaws at theoretical and policy level.

5.2 *Brainwashing and Indoctrination*

The defences of brainwashing and indoctrination[152] work on the basis that individuals' minds have been influenced to such a level that their acts are not theirs anymore. Whilst they are 'free' in their decision-making, including the possibility to leave the coercive environment, that freedom has been withdrawn from them by an elaborate manipulation mechanism. Defendants 'argue that they should not be held responsible because their criminal actions were a consequence of mind control'.[153] The appositeness of this defence for child soldiers has been highlighted by Brown[154] and was used by Ongwen's Defence[155] as it referred to the

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151 ICC *Ongwen* Confirmation of Charges, *supra* note 109, para. 153. The California Supreme Court also stated: 'If duress is recognized as a defense to the killing of innocents, then a street or prison gang need only create an internal reign of terror and murder can be justified'. *People* v. *Anderson,* 50 P.3d 368, 374 (Cal. 2002).

152 Several concepts, some overlapping, are used to describe this defence (*see* Ann Penners Wrosch, 'Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent, Interests-Based Approach', 25 *Loy. L. A. L. Rev.* (1992) 499–554, p. 501 fn 20).

153 Alison D. Renteln, 'Criminal Defenses' in Neil J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier, 2001) 2945, p. 2948.

154 Brown, *supra* note 133, p. 375.

155 ICC, *Prosecutor* v. *Ongwen*, ICC-02/04-01/15, Pre-Trial Chamber II, Further Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", Filed on 18 January 2016, 3 March 2016, paras. 36–49. *See* also discussion above.

impact of the LRA's spiritual indoctrination on the child soldiers whose beliefs and perceptions of right and wrong were shaped by such indoctrination.

Brainwashing works on the basis that an individual is 'a relatively passive subject under the control of all-powerful ... external agents who use coercive and manipulative techniques'.[156] Delgado explains that individuals have undergone 'a forcible indoctrination process designed to induce the subject to abandon existing political, religious, or social beliefs in favor of a rigid system imposed by the indoctrinator.'[157] Not only the individuals' identity is disrupted but they also appear to have surrendered their will and autonomy and lost their ability to think independently.[158] The intent to commit the crime is superimposed by another person.[159]

In contrast, indoctrination aims to instil a 'doctrine and an ideology, a vision and a programme on how to create a better world'.[160] As such, indoctrination is a social process by which an individual's beliefs are altered, one step at a time.[161] '[I]ndoctrination is not an on-off switch rather a continuum of depth and control. Even after one is initially indoctrinated, a well-organized program will continue to work to deepen and "consolidate" the indoctrination.'[162] Eventually, individuals are unable to resist or even question the demands

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156 Ida-Gaye Warburton, 'The Commandeering of Free Will: Brainwashing as a Legitimate Defense', 16(1) *Cap. Def. J.* (2003) 73–97, p. 77 quoting David G. Bromley and James T. Richardson (eds), *The Brainwashing/Deprogramming Controversy: Sociological, Psychological, Legal and Historical Perspectives* (Mellen Press, New York, 1983) 6. Brainwashing consists of three stages namely 'breaking down the self, introducing the possibility of salvation, and rebuilding the self.' Rebecca Emory, 'Losing Your Head in the Washer – Why the Brainwashing Defense Can Be a Complete Defense in Criminal Cases', 30(4) *Pace L. Rev.* (2010) 1337–1359, p. 1340.

157 Richard Delgado, 'Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant', 63(1) *Minn. L. Rev.* (1979) 1–33, p. 1.

158 Richard Delgado, 'Religious Totalism: Gentle and Ungentle Persuasion under the First Amendment', 51(1) *S. Cal. L. Rev.* 1–98, pp. 21-22.

159 Warburton, *supra* note 156, p. 75.

160 Alette Smeulers, 'Punishing the Enemies of All Mankind', 251 *L. J. I. L.* (2008) 971–993, p. 978.

161 *Ibid*., p. 977.

162 Paul H. Robinson and Lindsay Holcomb, 'Indoctrination and Social Influence as a Defense to Crime: Are We Responsible for Who we Are' (2020) 85(3) *Mo. L. Rev.* 739–801, p. 783. There are four stages:

and orders of the indoctrinators. The grave impact brainwashing and indoctrination have on children has been highlighted on many occasions: 'There is a common view among psychologists that children's minds are so impressionable that merely teaching youth a certain ideology can steer their later intentions and motivations towards that ideology.'[163]

These defences appear particularly relevant in international criminal law. After all, as '[p]eople are social beings and conformity research has shown how susceptible people are to social influence such as peer pressure and how eager they are to show that they are good group members',[164] indoctrination is far more successful in a collective setting, a point to remember in the context of international crimes as they are committed by obedient masses.[165] As Stahn articulates, '[c]rimes are part of 'group dynamics, conformity pressures and reward schemes that create incentives to follow and "obey"'[166] and so indoctrination has an important role to play in the commission of crimes.

Brainwashing and indoctrination seem *prima facie* useful defences for those who commit crimes having been subjected to a coercive environment. However, two issues must be underlined. First, those defences are essentially deployed in relation to 'new' religious groups or cults.[167] Penners Wrosch warns against comparing brainwashing in religious cults and in other contexts such as criminal defendants and prisoners of war, pointing out that since the latter's behaviour significantly deviates from acceptable social norms, there must be further

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softening up, compliance, internalisation and consolidation. Robert S. Baron, 'Arousal, Capacity, and Intense Indoctrination', 4(3) *Pers. Soc. Psychol. Rev.* (2000) 238–254, pp. 240–241.

163 Brown, *supra* note 133, p. 384.

164 Alette Smeulers and Lotte Hoex, 'Studying the Microdynamics of the Rwandan Genocide', 50 *Brit. J. Criminology* (2010) 435–454, p. 447.

165 Smeulers, *supra* note 160, p. 974.

166 Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press, Cambridge, UK, 2019), p. 129.

167 Warburton, *supra* note 156, p. 74; James T. Richardson, 'Cult/Brainwashing Cases and Freedom of Religion', 33 *J. Church State* (1991) 55–74, p. 57. *See* cases in Penners Wrosch, *supra* note 152.

compelling reasons, such as (threats of) the use of physical violence, to excuse such acts.[168] Recent discussions suggesting that brainwashing and indoctrination are normal processes of socialisation, albeit in a more controlling environment,[169] warrant such a cautious approach. Second, these defences were used successfully in civil cases but not in criminal ones. In fact, they have never been raised in criminal cases as standalone defences. Remarkably, many such cases involved young adults or children, the most famous case being *U.S.* v. *Hearst* which dealt with a teenage girl who had been kidnapped, ill-treated and then embraced the views of her captors and eventually took part in a bank robbery.[170] Her lawyers did not raise the defence of brainwashing *per se*,[171] but relied on the coercion theory which failed.[172] Cases from the 1980s to nowadays show that even in combination with a defence of insanity, indoctrination has not been accepted as a defence.[173]

In conclusion, indoctrination and brainwashing do not work as alternative defences because 1) they are not well established in (US) national law and certainly not in criminal law; and 2) resultantly cannot be viewed as general principles of law.

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168 Penners Wrosch, *supra* note 152, p. 547.

169 Dominiek D. Coates, 'Life Inside a Deviant "Religious" Group: Conformity and Commitment as Ensured through "Brainwashing" or as the Result of Normal Processes of Socialisation', 44 *Int'l J. L. Crime & Just.* (2016) 103–121.

170 *U.S.* v. *Hearst,* 466 F. Supp. 1068, 1071 (N.D. Cal. 1978).

171 *See* Delgado, *supra* note 137, p. 4 fn 11.

172 *U.S.* v. *Hearst,* 563 F.2d. 1331, 1336–1337; *U.S.* v. *Hearst, supra* note 144, paras. 1071–1072.

173 *See, e.g.*, a Court, noting that a 17-year-old member of a cult was able to distinguish right from wrong, was convicted of murder having raised an insanity defence combined with indoctrination (*People* v. *Hoover,* 187 Cal. App. 3d 1074 (1986), p. 1080.) In *Ryan* which involved a 15-year-old who had tortured and killed a member of the cult of his father who had ordered the crimes, brainwashing was pleaded as part of an insanity defence as he was 'totally under the domination of his father' (*State* v. *Ryan,* 226 Neb. 59, 409 N.W.2d 579 (1987), p. 72). The Court found he understood the nature of his acts and willingly and enthusiastically participated in the murder. Malvo, a 17-year-old sniper, raised the defence of indoctrination, claiming to be under the control of his elder companion (*see* Thomas D. Nolan III, 'The Indoctrination Defense: From the Korean War to Lee Boyd Malvo', 11 *Va. J. Soc. Pol'y & L.* (2003-2004) 435–465, pp. 451–455).

6 Detention and Coercive Environment

Probably the most incisive way to understand the defences related to coercive environment is to investigate those raised by detainees – since detention is *per se* a coercive environment – in a situation where international crimes are rife. When detention occurs between groups opposing each other or looking to subjugate one another, the animosity leads to a heightened level of coerciveness driving detainees into committing crimes against their peers.

6.1 *Prisoners in Armed Conflict*

In some instances, prisoners of war associate with their captors and engage in unlawful activities, some of them of a criminal nature. Throughout history, the defence most raised in such cases was coercion.[174] Later, the terms 'coercive persuasion',[175] 'brainwashing',[176] and 'thought reform'[177] gained traction in academic circles, especially concerning the experience of American, British, and French soldiers in East Asia.

During the Korean War, American POWs were subjected to what can be described as highly sophisticated methods of coercive indoctrination to the effect that 'the subject does not feel manipulated and comes to truly hold the beliefs of his captors'.[178] Korean prison

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[174] No author, 'Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases', 56 *Colum. L. Rev.* (1956) 709–794, p. 722.

[175] *See* Edgar Schein, *Coercive Persuasion: A Socio-Psychological Analysis of the 'Brainwashing' of American Civilian Prisoners by the Chinese Communists* (W. W. Norton, New York, 1961); Vanessa Merton and Robert Kinscherff, 'Coercive Persuasion and the "Culpable Mind"', 11(3) *Hastings Center Report* (1981) 5–8, p. 6.

[176] *See* Edward Hunter, *Brainwashing: From Pavlov to Power* (The Bookmailer, New York, 1956).

[177] *See* Robert Lifton, *Thought Reform and the Psychology of Totalism: A Study of 'Brainwashing' in China* (W.W. Norton and Co., New York, 1963).

[178] Robinson, *supra* note 138, p. 66.

camps and conditions were so set up that many POWs collaborated with their captors,[179] some staying behind.[180] British POWs in Korea[181] and French soldiers in Indochina[182] were also indoctrinated though it is unclear whether they collaborated with their captors and mistreated their fellow prisoners.[183] In Vietnam, American POWs were subjected to similar treatment.[184] Several individuals were prosecuted in the US for acts committed in Korea[185] though much fewer for acts perpetrated during the Vietnam War.[186]

Much can be learned from these cases about alternative defences.[187] The defence of individual mental and psychological duress was only successfully used by Schwable (Korea) because he tried to resist as much as he could.[188] All other cases were dismissed.[189] General duress raised in many cases relating to Korean camps was only accepted on a perjury charge.[190] Many tried to fit what they had endured into an insanity plea but failed.[191] The defence of indoctrination was completely rejected by military courts in cases arising from

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179 *See* No author, *supra* note 174, pp. 725–733.

180 33 American POWs originally refused to be repatriated, then 20 stayed behind (No author, *supra* note 174, pp. 734–735). All but two returned to the US (Geoffrey S. Moakley, *U.S. Army Code of Conduct Training: Let the POWs Tell their Stories,* Command and General Staff College MMAS Thesis, Fort Leavenworth Kansas, 11 June 1976, p. 97).

181 Monica Felton, 'War Zone - PoW Camp, Korea 1952', 15 August 2012, *Military History Matters*; Kim Hoedong, 'The Korean War (1950-953) and the Treatment of Prisoners of War', in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law* (Cambridge University Press, Cambridge, 2019) 356–365, pp. 363–366.

182 Marie-Catherine Villatoux, 'Traitement psychologique, endoctrinement, contre-endoctrinement en guerre d'Algérie: le cas des camps de détention', 4(208) *Guerr. Mond. Confl. Contemp.* (2002) 45–54, pp. 47–50.

183 Our research did not yield any results.

184 No author, 'Garwood Trial Offers Lok (sic) at Harsh Life of P.O.W.'s', *New York Times,* 23 November 1980.

185 Robinson, *supra* note 138, p. 67.

186 Gary D. Solis, *Marines and Military Law in Vietnam: Trial by Fire* (US Marine Corps, Washington DC, 1989), pp. 218 and 221.

187 *See* No author, *supra* note 174, pp. 769–771.

188 *See ibid.*, p. 770. Nolan III however explains that this case 'was not a judicial ruling'. Nolan, *supra* note 173, p. 440 fn 27.

189 *See* No author, *supra* note 174, pp. 769–770 and Merton and Kinscherff, *supra* note 175, p. 8. *See e.g., U.S.* v. *Fleming*, 19 C.M.R. 438 (1955), aff'd, 23 C.M.R. 7 (1957), pp. 20–21.

190 *See* No author, *supra* note 174, pp. 770–771.

191 Merton and Kinscherff, *supra* note 175, p. 5.

the Korean and Vietnam conflicts.[192] Garwood's (Vietnam) defence essentially centred upon his lack of mental responsibility owing to the brutality of his initial captivity,[193] contending that as 'a victim of coercive persuasion [he] could not be held responsible for [the acts]'.[194] Reference was made to the rotten social defence, explaining that, when enlisted, Garwood was 'a shy and immature teenager temporarily placed in a detention home for juveniles' and that, as a 19-year-old person, he was particularly vulnerable to indoctrination.[195] Dubbed the White VC, he had not only participated in the guarding, indoctrination and questioning of American POWs[196] but also taken part in combat against American forces.[197] Even when allowed to leave, he did not. His trial revealed the long-lasting effects of coercive persuasion in such settings.[198]

However, these cases are of limited use to drafting a new coercive-environment-based defence in international criminal law. First, the majority of cases did not involve criminal acts of the type found in international criminal law.[199] Only two POWs[200] held in Korea were prosecuted for such types of crimes: Gallagher was found guilty of mistreating two fellow prisoners but acquitted on another similar charge,[201] and Floyd was found guilty of assaulting

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192 Nolan, *supra* note 173, pp. 439–440 and fns. 27-28. The brainwashing defence was raised for the first time in *U.S.* v. *Dickenson,* 17 C.M.R. 438, 443 (C.M.A. 1954). *See* Fred L. Borch, 'The Trial of a Korean War "Turncoat": The Court-Martial of Corporal Edward S. Dickenson', *Army Law.* (January 2013) 1–4.

193 Solis, *supra* note 186, p. 228.

194 Merton and Kinscherff, *supra* note 175, p. 5.

195 *Ibid.*, p. 7. *See also* Pasley's study of the background of the 21 American POWs who stayed in Korea. Virginia Pasley, *21 Stayed: The Story of the American GIs who Chose Communist China: Who they Were and Why they Stayed* (Farrar, Straus and Cuhahy, New York, 1955).

196 Solis, *supra* note 186, p. 224.

197 *Ibid.*, p. 226.

198 Merton and Kinscherff, *supra* note 175, p. 6.

199 For Korea, *see* No author, *supra* note 174, pp. 709–794; for Vietnam, *see* Solis, *supra* note 186, pp. 218–230.

200 One could add Batchelor who at a trial in the POW camp had recommended another POW to be shot. He was however only charged with collaboration and sentenced to 20 years. *U.S.* v. *Batchelor*, 19 C.M.R. 452 (1955), aff'd, 22 C.M.R. 144 (1956), 7 USCMA 354.

201 No author, *supra* note 174, p. 758.

fellow prisoners but acquitted of the murder of another prisoner.[202] Garwood was convicted of communicating with the enemy and assaulting a POW,[203] the assault being 'a backhanded slap to the ribs of one man'.[204] Second, the great variety of defences attempted (and rejected)[205] does not enable ascertaining the contour of a single defence. Moreover, the common denominator would be close to the defence of mental disease as most defendants seemed to rely solely on the mental element of the coercive environment. Third, even in the case of Garwood, the coercive persuasion defence was not accepted either as a standalone defence or in combination with a plea of insanity.

In conclusion, as the coercive persuasion defence did not work for American prisoners who perpetrated crimes against their fellow prisoners, it cannot be classed as an established defence under national law, let alone a general principle of law.

6.2 *Kapos*

Another potential source for a defence against criminal acts committed in coercive environments is the trials of Kapos[206] who were prisoners in concentration or labour camps and given supervisory functions by the Nazi administration of the camps.[207] They were given various tasks, including taking part in the 'selection of prisoners for extermination, beatings,

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202 *See* No author, *supra* note 174, p. 761 (referring to *U.S.* v. *Floyd*, 18 C.M.R. 362 (1954); *U.S.* v. *Floyd*, 19 C.M.R. 413 (1955)).

203 Solis, *supra* note 186, p. 228.

204 Merton and Kinscherff, *supra* note 175, p. 7.

205 *E.g.,* 'mental psychosis induced by Communist pressures and propaganda' (*U.S.* v. *Batchelor*, *supra* note 200, p. 360), 'induced political psychosis', 'atypical dissociative reaction' and 'post-traumatic stress syndrome' (Merton and Kinscherff, *supra* note 175, pp. 5 and 8).

206 Singer explains that these judgments are 'a valuable source for customary international law and international criminal law jurisprudence'. I.M. Singer, '*Reductio ad absurdum:* The *Kapo* Trial Judgements' Contribution to International Criminal Law Jurisprudence and Customary International Law', 24 *Crim. L. F.* (2013) 235–258, p. 240.

207 *See* Michael J. Bazyler and Julia Y. Scheppach, 'The Strange and Curious History of the Law Used to Prosecute Adolf Eichmann', 34 *Loy. L. A. Int'l & Comp. L. Rev.* (2012) 417–461, p. 419. Individuals who collaborated with the Nazis in the ghettos or in other circumstances are not examined here.

theft, humiliation',[208] 'escorting condemned prisoners to execution sites, or killing them',[209] in exchange for which they received increased portions of food, better accommodation and warmer clothes.[210] Even in that 'privileged' position, they were under immense pressure.[211] Whilst some mistreated their fellow prisoners as a survival strategy, others used their position to help them.[212]

After World War II, several Kapos were prosecuted in various States.[213] Israel's 1950 Nazi and Nazi Collaborators (Punishment) Law Israel allowed for the prosecution of Jews accused of persecution of their Jewish brethren,[214] allegations mostly 'concern[ing] the excessive use of violence and cruelty in exercising their disciplinary functions',[215] though no one was charged with or found guilty of causing death.[216] For example, Tarnek who hit female inmates with her hands and forced prisoners to kneel was found guilty of assault and battery.[217] Enigster who was violent towards inmates[218] was charged with grave and

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208 Michael J. Bazyler and Frank M. Tuerkheimer, *Forgotten Trials of the Holocaust* (New York, New York University Press, 2015), p. 197.

209 Nikolaus Wachsmann, *KL. A History of the Nazi Concentration Camps* (Little, Brown, London, 2015), p. 513.

210 Bazyler and Scheppach, *suDemjanjuk's trial, butpra* note 207, pp. 419-420.

211 Adam Brown, *Judging 'Privileged' Jews. Holocaust Ethics, Representation and the 'Grey Zone'* (New York, Berghahn, 2018), p. 12; Babafemi Akinrinade, 'Judging the Impossible: Kapos and Justice after the Holocaust', *Reflections - Auschwitz Jewish Center Annual Alumni Journal* (2017) 9–17, pp. 14-15.

212 Rosa Ana Alija-Fernández, 'Justice for No-Land's Men? The United States Military Trials against Spanish Kapos in Mauthausen and Universal Jurisdiction' in Kevin Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, Oxford, 2013) 103–121, p. 105. Drumbl, *supra* note 70, p. 219.

213 Akinrinade, *supra* note 211, pp. 10–11.

214 Bazyler and Scheppach, *supra* note 207, p. 418; Drumbl, *supra* note 70, p. 229. Very little is known about these trials as the records are sealed (Bazyler and Scheppach, *supra* note 207, p. 429). One of the few cases available is the trial of Demjanjuk but, as he was acquitted based on incorrect charges, this paper does not discuss his case.

215 Orna Ben-Naftali and Yogev Tuval, 'Punishing International Crimes Committed by the Persecuted', 4 *J. I. C. J.* (2006) 128–178, p. 153.

216 Bazyler and Tuerkheimer, *supra* note 208, p. 209.

217 *Ibid.*, pp. 211–212.

218 *Ibid.*, pp. 212–213.

deliberate bodily harm.[219] His claim for duress, based on Article 10 of the Law,[220] was rejected because there was no threat of immediate death, the position had not been forced upon him and the judges found it difficult to believe that he thought he was averting more serious consequences.[221] As Segev explains, judges 'had to decide whether a man could refuse to accept the post of *kapo* and to what extent the job required cruelty. They tended not to punish a person for simply being a k*apo,* only for not having been a decent one.'[222] The court stressed that Tarek was placed in charge, did not volunteer[223] and did not identify with the Germans;[224] she was, in Ben-Naftali and Yuva's words, a 'reasonable kapo'.[225] Even in the case of Enigster, who had not been coerced into the post,[226] the court found that, as he did not identify with the Nazis,[227] a line had to be drawn between the Germans and the Jewish prison-functionary.[228] Whether other defences were used in these trials is unknown.

Other States also prosecuted Kapos but information on defences raised is very sparse.[229] One of the few publicly available trials is that of five Spanish Kapos taken prisoners by Germany.[230] All were accused of a range of instances of ill-treatment of prisoners, often leading to the death of their fellow prisoners.[231] Their defences included denying being

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219 *Ibid.*, p. 213.

220 Ben-Naftali and Tuval, *supra* note 215, p. 138. For a discussion on the defence of duress under Art. 10(a) and 10(b), *see* Singer, *supra* note 181, p. 253.

221 Drumbl, *supra* note 70, p. 232; Singer, *supra* note 181, p. 253.

222 Tom Segev, *The Seventh Million: The Israelis and the Holocaust* (Farrar, Straus and Giroux, New York, 2019), p. 262.

223 Bazyler and Tuerkheimer, *supra* note 208, p. 211.

224 *Ibid.*, p. 212.

225 Ben-Naftali and Tuval, *supra* note 215, p. 170.

226 Bazyler and Tuerkheimer, *supra* note 208, p. 213.

227 Ben-Naftali and Tuval, *supra* note 215, p. 155; Jonathan M. Wenig, 'Enforcing the Lessons of History: Israel Judges the Holocaust', in Gerry J. Simpson and Timothy McCormack (eds), *The Law of War Crimes: National and International Approaches* (The Hague, Springer, 1997) 103–122, p. 119.

228 Bazyler and Tuerkheimer, *supra* note 208, p. 213.

229 *See ibid.*, p. 199 and cases in Akinrinade, *supra* note 211, pp. 12–13.

230 Alija-Fernández, *supra* note 212, p. 104.

231 General Military Government Court, *U.S.A.* v. *Navas et al.,* Review and Recommendations, 000-50-5-25, 14 January 1948; General Military Government Court, *U.S.A.* v. *Espinosa,* Review and Recommendations, US National Archives M-1217 RG 0338 No. 00003, 000-Mauthausen-19, 29 January 1948.

present or having committed the said acts[232] and having themselves suffered ill-treatment.[233] The latter could be understood as a form of defence relating to the coercive environment. Alija-Fernández states that the judgment did not contemplate the fact that 'their conduct was arguably the result of a combination of self-preservation and brutalization'.[234]

In conclusion, Kapo trials do not uncover much about alternative defences relating to crimes committed in a coercive environment.

7 Conclusion

As much as it is well recognised that child soldiers grow up and live in a coercive environment and that child soldiering has long-term effects on them, the crimes they commit cannot be exculpated on the ground of duress under the ICC Statute. It is clear that a person's traumatic experience in a coercive environment cannot be raised as a ground for excluding criminal responsibility. Further, situations of a 'general' coercive environment where the harm is not immediate or continuing and/or based on a defendant's (real or perceived) apprehension based on their past experience do not constitute duress either.

Moreover, the analysis of alternative defences indicates that none of them is well-anchored in national law, notably because they are highly controversial in society. This brief survey reveals that neither the law nor society excuses or justifies crimes committed in such a situation. The law only allows a defence that falls within a clearly defined category in which

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232 *U.S.A.* v. *Espinosa, supra* note 231, p. 5; *U.S.A.* v. *Navas et al., supra* note 231.
233 *U.S.A.* v. *Espinosa, supra* note 231, p. 5.
234 Alija-Fernández, *supra* note 212, p. 120.

choice is virtually inexistent. It is expected that, when faced with adverse conditions, humans will stand by the society's principles and moral precepts. They cannot flinch. Some form of heroism is demanded as the bar has been set rather high. One would have expected some understanding (i.e., an excuse) for crimes perpetrated in a coercive environment like a POW or a concentration camp when individuals are at the hands of the enemy and the survival rate is very low. Yet, none was shown. These alternative defences are not accepted as defences in law and thus cannot even be considered to qualify as general principles of law to become eventually a source of ICC law. Whether explicitly or implicitly, the ICC Statute does not recognise a defence for crimes committed in a coercive environment.

Nonetheless, this article has importantly highlighted the fact that defendants have put forward such claims, often in conjunction with established claims such as duress and insanity and that courts have grappled and even struggled with such claims. Verdicts often squirm with disquiet about the task given to judges. The crime cannot be excused or justified but at the same time, human frailty is acknowledged. Feeling somehow uncomfortable with the situation, national courts have pushed the discussion into the realm of mitigation. And that is probably where claims relating to the coercive environment sit better in international criminal law too.