Response to Call for Public Submissions for Changes to the 2016 OTP Policy on Children

Dr Windell Nortje[1] and Prof Noëlle Quénivet[2]

1. In light of the second and fifth objectives of the Policy Paper (para 9), we would like to recommend providing further details on 'conscription, enlistment and use of children under the age of fifteen years to participate actively in hostilities' (paras 39 to 43) using the latest case law. In particular, we recommend:

1.1 adding the following sentence in paragraph 40 to explain how a child's age can be determined:

> 'To determine that a child is below the age of 15 years, a variety of sources is used including testimonies from children in armed forces and groups and witnesses who were in contact with children in armed forces and armed groups as well as reports by UN institutions and NGOs (notably those involved in DDR programmes), and, whenever available, videos, documentation and photos.'

Explanation: Adding this sentence shows that the OTP is mindful of the difficulty to establish the age of children in armed forces and groups and will use an array of sources to corroborate information to ensure that the right to a fair trial of the defendant is protected. It is however

[1] Windell Nortje is a Senior Lecturer at the Department of Criminal Justice and Procedure, Faculty of Law, University of the Western Cape (UWC) (South Africa). He holds a LLB from the North-West University, Potchefstroom Campus, and LLM and LLD degrees from UWC. He has published widely in the field of International Criminal Law with a focus on child soldiers. His most recent article examines the International Criminal Law's silence towards the sexual abuse of African boy soldiers.

[2] Noëlle Quénivet is Professor of International Law at the Bristol Law School of the University of the West of England (United Kingdom). She holds a BA from the Institut d'Etudes Politiques of Strasbourg (France), a LLM in International Human Rights Law from the University of Nottingham (UK) and a PhD in Law from the University of Essex (UK). She has widely published in the fields of international humanitarian law, international criminal law, and human rights law, mainly on issues relating to child soldiers, women and sexual violence in armed conflict. Her latest book co-authored with Windell Nortje examines whether child soldiers can invoke duress as a defence under international criminal law.

not necessary to determine the exact age of the child; what is required is to demonstrate 'that the victim is under the age of fifteen years.'[3] The ICC chambers have used testimonies of former child soldiers (about their age and the age of others)[4] and other witnesses who have come in contact with child soldiers.[5] However, they have correctly exercised caution when assessing the credibility of such testimonies. Reports from the United Nations institutions have also been used to support the claim of the prevalence of the use of children in hostilities.[6] Evidence provided by witnesses involved in DDR programmes was also relied upon by the chambers,[7] though they were mindful that such programmes used the Cape Town Principles definition of a child soldier (rather than the one under international criminal law) and attracted children who had not been involved with the armed groups.[8] Videos have also, albeit cautiously, been introduced as evidence that children were visibly below the age of 15 years old.[9] In *Ongwen* the chambers used logbooks of intercepted radio communications to corroborate testimonies.[10]

1.2 adding a paragraph between paragraphs 40 and 41 to explain that the three crimes can be charged separately and are independent of each other:

> 'The crimes of conscription, enlistment, and use of children are three discrete crimes. The acts of enlistment and conscription do not have to be committed

[3] ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo,* Appeal Judgment, Appeals Chamber, ICC-01/04-01/06 A 5, 1 December 2014, para 198 (ICC *Lubanga* Appeal Judgment); Reiterated in ICC, *Situation in Uganda in the Case of the Prosecutor v Dominic Ongwen*, Judgment on the Appeal of Mr Ongwen against the Decision of Trial Chamber IX of 4 February 2021 entitled 'Trial Judgment', Appeals Chamber, ICC-02/04-01/15 A , 15 December 2022, para 882 (ICC *Ongwen* Appeal Judgment).

[4] See e.g., ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Bosco Ntaganda,* Judgment, Trial Chamber VI, ICC-01/4-02/06, 8 July 2019, para 94 (ICC *Ntaganda* Judgment); ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v German Katanga,* Judgment pursuant to Article 74 of the Statute, Trial Chamber II, ICC-01/04-01/07, 7 March 2014, paras 126-129 (ICC *Katanga* Judgment); ICC, *Situation in Uganda in the Case of the Prosecutor v Dominic Ongwen*, Judgment, Trial Chamber, ICC-02/04-01/15, 4 February 2021, paras 299; 301; 322-323; 330-331; 334-340; 345-346 (ICC *Ongwen* Judgment).

[5] ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo,* Judgment Pursuant to Article 74 of the Statute, Trial Chamber, ICC-01/04-01/06, 14 March 2012, paras 663, 668, 688 and 708 (ICC *Lubanga* Judgment); ICC *Ntaganda* Judgment, *supra* note 4, para 362 fn 1000.

[6] ICC *Katanga* Judgment, *supra* note 4, para 1052; ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v German Katanga and Mathieu Ngudjolo Chui,* Decision on the Confirmation of Charges, Pre-Trial Chamber I, ICC-01/04-01/07, 30 September 2008, para 260 (ICC *Katanga/Chui* Confirmation of Charges), para 254 fn332.

[7] ICC *Lubanga* Judgment, *supra* note 5, para 656; ICC *Katanga* Judgment, *supra* note 4, para 1054.

[8] ICC *Katanga* Judgment, *supra* note 4, paras 1054-1057.

[9] ICC *Ntaganda* Judgment, *supra* note 4, para 388; ICC *Lubanga* Judgment, *supra* note 5, para 644.

[10] ICC *Ongwen* Appeal Judgment, *supra* note 3, paras 891 and 911.

with the purpose of use in the hostilities. Likewise, the crime of use in the hostilities is not intrinsically linked to having been previously conscripted or enlisted into the armed force or group.'

Explanation: Adding this sentence clarifies that the three crimes can be charged separately.[11] The ICC chambers have unequivocally rejected the view that the acts of conscription and enlistment are for the purposes of active participation in the hostilities.[12] Likewise, the chambers stressed that the crime of use was 'not dependent on the individuals concerned having been earlier conscripted or enlisted into the relevant armed force or group.'[13] For example, Katanga was only charged with using children in hostilities.[14] That these are separate crimes is also demonstrated by the fact that, if the Court finds a conviction on the basis of conscription or enlistment, it still can prosecute the individual for the crime of use of child soldiers.[15]

1.3 adding a sentence in paragraph 41 to explain the continuing nature of the crimes of enlistment and conscription:

'Enlistment, conscription and use of children in hostilities are crimes of continuing nature in the sense that the crime is being committed until either the child is released from the armed forces or armed groups or the child turns fifteen years of age.'

Explanation: Adding this sentence specifies the continuing nature/character of the crimes that was highlighted by the chambers in several cases in relation to enlistment and conscription[16] and conscription and use.[17] It also better reflects the gravity of the crime. As the chambers explained in *Ongwen* '[t]he physical and psychological violence and coercion were therefore not limited to the act of conscription through abduction and subsequent

[11] ICC *Lubanga* Judgment, *supra* note 5, para 609; ICC *Katanga* Judgment, *supra* note 4, para 1041.
[12] ICC *Lubanga* Judgment, *supra* note 5, para 609; ICC *Ntaganda* Judgment, *supra* note 4, para 110.
[13] ICC *Lubanga* Judgment, *supra* note 5, para 620.
[14] ICC *Katanga/Chui* Confirmation of Charges, *supra* note 6, para 253; ICC *Katanga* Judgment, *supra* note 4, para 1038.
[15] ICC *Lubanga* Judgment, *supra* note 5, para 619. See also SCSL, *Prosecutor v Moinina Fofana and Allieu Kondewa*, SCSL, Appeals Chamber, SCSL-04-14-A, 28 May 2008, para 139 (SCSL *Fofana/Kondewa* Appeal Judgment).
[16] ICC *Lubanga* Judgment, *supra* note 5, paras 248 and 618; ICC *Ntaganda* Judgment, *supra* note 4, para 1104.
[17] ICC *Ongwen* Judgment, *supra* note 4, para 2771.

initiation rituals but extended uninterrupted throughout the relevant period in a continuing manner.'[18]

1.4 adding a sentence in paragraph 41 that conscription does not require to show that individuals join the armed forces or armed groups against their will:

> 'The crime of conscription does not require to demonstrate that children below the age of 15 years joined the armed forces or armed groups against their will.'

Explanation: Adding this sentence would have two consequences. First, it would stress that conscription of children below the age of 15 by way of the mere application of a law that imposes a legal obligation to serve (i.e., military draft) is a crime.[19] Whilst most of the law relating to the recruitment of children tends to focus on their involvement with armed groups, this sentence would be a clear signal to armed forces, i.e. States, that drafting children under the age of 15 years old is a crime that can be prosecuted by the ICC. Second, it would highlight that the focus is on the conduct of the perpetrator rather than on that of the child.[20]

1.5 adding a sentence in paragraph 41 to explain that a child's consent is not a valid defence but can be used at the sentencing or reparations phase.

> 'A child's consent to enlistment or conscription is not a valid defence; however, establishing consent might be taken into consideration at the sentencing or reparations phase, as appropriate.'

Explanation: As explained under 1.4, the child's lack of will/consent is not an element of the crime of conscription. The ICC[21] and the Special Court for Sierra Leone[22] have explained that

[18] ICC, *Situation in Uganda in the Case of the Prosecutor v Dominic Ongwen*, Sentence, Trial Chamber, ICC-02/04-01/15, 6 May 2021, para 360 (ICC *Ongwen* Sentence).
[19] ICC *Lubanga* Appeal Judgment, *supra* note 3, para 301; ICC *Ntaganda* Judgment, *supra* note 4, para 1106.
[20] ICC *Lubanga* Appeal Judgment, *supra* note 3, para 302.
[21] ICC, *Situation in the Democratic Republic of the Congo Prosecutor v Thomas Lubanga Dyilo,* Decision on the Confirmation of Charges, Pre-Trial Chamber I, ICC-01/04-012/06-803, 29 January 2007, para 247; ICC *Lubanga* Judgment, *supra* note 5, para 617; ICC *Lubanga* Appeal Judgment, *supra* note 3, para 302; ICC *Ntaganda* Judgment, *supra* note 4, para 1107.
[22] SCSL, *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Judgment, Trial Chamber II, SCSL-2004-16-T, 20 June 2007, para 735 (SCSL *Brima/Kamara/Kanu* Judgment); SCSL *Fofana/Kondewa* Appeal Judgment, *supra* note 15, para 140.

in all circumstances of recruitment, a child's consent is not a valid defence. The chambers adduced two reasons for refusing to accept consent as a defence. First, they agreed with expert witnesses that under the age of 15 years, a child is not able to give genuine and informed consent to enlist in an armed group or force.[23] Second, they stressed that the Statute aimed to protect 'vulnerable children, including when they lack information or alternatives'.[24] That being said, consent could be used 'at the sentencing or reparations phase, as appropriate'.[25]

1.6 adding a sentence at the end of paragraph 42 to explain that children need to be used for military rather than combat purposes:

> 'This link can be demonstrated by highlighting the military purpose of the activity for which the child is used.'

Explanation: Whilst the word 'combat' is indeed used in *Lubanga*[26] and *Ntaganda*[27] the word 'hostilities' appears in *Ongwen.*[28] Although the chambers have refused to provide further abstract guidance,[29] they explained in *Ongwen* that 'to "participate actively in hostilities" ranges from direct participation in hostilities to other supporting combat-related activities'.[30] Moreover, the jurisprudence reveals that what is required is a solid connection to be made between the activity and its military purpose: 'in light of the military purpose of these activities that have a connection with military operations'.[31] For example, in *Ntaganda,* the chambers explained that gathering intelligence information about opposing forces is closely related to military operations and thus qualifies as active participation in hostilities.[32] In contrast, simply guarding detainees and patrolling are not deemed to be taking an active part in the hostilities activities unless it can be proven that these activities have a military

[23] ICC *Lubanga* Judgment, *supra* note 5, para 613.
[24] *Ibid.* para 617.
[25] *Ibid.* para 617.
[26] ICC *Lubanga* Appeal Judgment, *supra* note 3, para 335.
[27] ICC *Ntaganda* Judgment, *supra* note 4, paras 1108-1109.
[28] ICC *Ongwen* Sentence, *supra* note 18, para 2770.
[29] ICC *Lubanga* Appeal Judgment, *supra* note 3, para 335.
[30] ICC *Ongwen* Sentence, *supra* note 18, para 2770.
[31] ICC *Ntaganda* Judgment, *supra* note 4, para 1130.
[32] *Ibid.* para 1130.

purpose.[33] If carrying out patrolling was aimed at preventing the commission of ordinary crimes, it cannot be viewed as active participation in hostilities.[34]

1.7 remove in paragraph 43 the phrase 'such as domestic chores' and 'for instance, the prohibitions against enslavement':

> 'The Office recognises that some activities may not be deemed to constitute "us[e] … to participate actively in hostilities" within the meaning of the Statute. In such cases, the Office will consider charging and prosecuting such acts pursuant to other provisions of the Statute, where applicable.'

Explanation: The example of 'such as domestic chores' conveys the impression that 1) very few activities carried out by children in armed forces and armed groups fall outside the remit of 'use to participate actively in hostilities' and 2) such activities are limited to tasks completely unrelated to the military activities of the group. The application of the jurisprudence mentioned in Point 1.6, however, means that not only domestic chores, but a wide range of activities undertaken by children under the age of 15 years do not fall within the purview of Articles 8(2)(b)(xxvi) and 8(2)(e)(vii). For example, children who are carrying looted goods, guarding mines,[35] manning checkpoints,[36] making trails or finding routes[37] are not necessarily covered. Many tasks, deemed essential for the survival of the forces or group and the continuation of the fighting, fall outside the remit of the abovementioned legal provisions. As a result, the use of these children cannot be prosecuted. Yet, children are often recruited to support the war effort.

Whilst it is possible to prosecute perpetrators for their enlistment or conscription separately (see Point 1.2), the treatment they suffer at the hands of the armed forces or groups goes unpunished. The current text's reference to prosecuting their use under 'enslavement' as a crime against humanity places the prosecution bar rather high. We thus suggest expanding the *Ntaganda* jurisprudence to enable prosecution under Article 8 (war crimes). In *Ntaganda,*

[33] *Ibid.* paras 1131-1132.
[34] *Ibid.* para 1132.
[35] SCSL *Brima/Kamara/Kanu* Judgment, *supra* note 22, para 1267.
[36] SCSL, *Prosecutor v Charles Ghankay Taylor,* Judgment, Trial Chamber II, SCSL-03-01-T, 18 May 2012, para 444 (SCSL *Taylor* Judgment).
[37] *Ibid.* para 444.

the chambers stated that when children associated with armed forces and groups are subject to sexual violence, they cannot be at the same time taking part in the hostilities as 'the sexual character of these crimes […] involve elements of force/coercion or the exercise of rights of ownership'.[38] That treatment 'took place during training at one of the [...] camps'.[39] The same can be stated of children who are beaten, whipped, ill-treated, etc who cannot be taking part in the hostilities whilst they are being ill-treated. There is no reason why this jurisprudence could not apply to all children associated with armed forces and armed groups who are subjected to various acts involving elements of force/coercion (see Point 2 of this submission). Such an interpretation is supported by general statements of the chambers: 'children under the age of 15 years lose the protection afforded by IHL only during their direct/active participation in hostilities'[40] and 'the Chamber notes that active participation in hostilities is temporary in nature under IHL and that individuals cease to actively participate when not engaged in combat related activities'.[41] Accordingly, these acts could be prosecuted under the war crimes provision of the ICC Statute and notably Articles 8(2)(a)(ii), 8(2)(a)(iii), 8(2)(b)(xxi), 8(2)(c)(i) and 8(2)(c)(ii).

2. In light of the second and fifth objectives of the Policy Paper (para 9), we would like to recommend adding a paragraph on the coercive environment in which child soldiers live and the long-lasting effect of child soldiering:

> 'From the moment children under the age of 15 years enter the force or group until they leave it, their experience remains traumatic and often violent. They live in a coercive environment which severely limits their ability to make decisions. Although the crime of enlisting and conscripting children ends when the child reaches 15 years of age or leaves the force or group, child soldiering has devastating long-term effects.'

Explanation: The Policy ought to recognise formally the coercive environment in which child soldiers live and the long-term effects child soldiering has on individuals. In fact, all ICC bodies

[38] ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Bosco Ntaganda,* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, Pre-Trial Chamber II, ICC-01/04-02/06, 9 June 2014, para 79 (ICC *Ntaganda* Confirmation of Charges).
[39] ICC *Ntaganda* Judgment, *supra* note 4, para 984.
[40] ICC *Ntaganda* Confirmation of Charges, *supra* note 38, para 79.
[41] ICC *Ntaganda* Judgment, *supra* note 4, para 1113.

have recognised these facts and the Policy would thus only reiterate and summarise previous statements. The benefit of specifically referring to the coercive environment and the long-term effects is that such a statement could be relied on by all ICC institutions as a matter of fact and by national mechanisms dealing with alleged perpetrators of the crimes of enlistment, conscription or use of child soldiers.

The coercive environment is explained in the following manner. First, there is the trauma directly related to recruitment as children are separated from their relatives, stop school and are thrown into an environment dominated by violence and fear.[42] Second, violence and coercion are pervasive in this context.[43] The Prosecution in *Lubanga* acknowledged the existence of this coercive environment, referring to the omnipresent 'environment of terror'.[44] The chambers not only recognised the coercive environment of training camps in *Ntaganda* ('institutionalised coercive environment')[45] but also the fact that commanders took advantage of this environment.[46] Third, the children's young age and underdeveloped morality make them susceptible to indoctrination and other psychological abuse. 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.'[47] Fourth, violence becomes normal and is internalised.

Although the crime of enlisting and conscripting children 'ends only when the child reaches 15 years of age or leaves the force or group'[48] 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.[49] The chambers in *Lubanga* upheld testimonies by expert witnesses who emphasised the 'devastating long-term consequences' of child soldiers who have

[42] ICC *Lubanga* Judgment, *supra* note 5, para 605.
[43] *Ibid.* paras 32 and 883-889; ICC *Ntaganda* Judgment, *supra* note 4, para 377.
[44] ICC, *Situation in Uganda in the Case of the Prosecutor v Dominic Ongwen*, Opening Statement of Moreno-Ocampo, ICC-01/04-01/06, 26 January 2009, p 6 lines 8-11.
[45] ICC *Ntaganda* Judgment, *supra* note 4, para 1112.
[46] *Ibid.* para 1195.
[47] *Ibid.* para 818.
[48] ICC *Lubanga* Judgment, *supra* note 5, para 618.
[49] *See ibid.* paras 40-41 referring to Schauer (expert witness).

'experienced or witnessed acts of violence'.[50] The Prosecutor, commenting on Lubanga's sentencing, stressed that '[t]he harm produced by this cruel treatment continue [sic] even after demobilization. Those who didn't die as soldiers, they have permanent physical effects or they have ongoing psychological trauma, all them still suffer.'[51] In *Ongwen* the chambers repeated that '[i]t is clear that the impact of the crime on the victims was devastating'.[52] Whilst the physicality of the coercive environment might have disappeared once child soldiers have left the group, the group's values and beliefs linger. When child soldiers stay as adults in the group, the coercive environment might seem 'normal' to them as they have integrated all the group's values, principles, and habits.

3. In light of the second and fifth objectives of the Policy Paper (para 9), we would like to recommend adding a subsection on the prosecution of former child soldiers under Section VI (Prosecutions). The first paragraph would stress that alternative mechanisms to prosecution before the ICC ought to be sought whilst the second would underline the legal means to consider the defendant's past.

> 'The OTP will consider alternative mechanisms to prosecution where the investigation of a case reveals that the defendant was a former child soldier. In particular, the OTP will meet with national authorities to determine the availability of alternative mechanisms to prosecution in such cases including the use of traditional justice mechanisms. If alternative mechanisms are not available then prosecution at the national level will be considered. The OTP will start proceedings only as a measure of last resort and in two instances: (1) where it is believed that standards applicable in the national judicial system do not comply with human rights norms or (2) where the crimes committed by the defendant are of extreme gravity.'

[50] ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Thomas Lubanga Dyilo,* Decision on Sentence Pursuant to Article 76 of the Statute, Trial Chamber I, ICC-01/04-01/06, 10 July 2012, para 39.
[51] 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.
[52] ICC *Ongwen* Sentence, *supra* note 18, para 366.

> 'The coercive environment in which child soldiers grow up and live does not amount to duress under Article 31(1)(d) ICC Statute. Currently, under international criminal law, no alternative grounds for excluding criminal responsibility are available to former child soldiers based on their experience. Therefore, the OTP will account for this experience and the devastating consequences of child soldiering in the sentencing phase as mitigating circumstances. In particular, the following elements will be taken into consideration: the age at which the defendant joined the forces or group, the years the defendant stayed in the forces or group, the structure of the forces or group, the possibility to leave the forces or group, the possibility to act with the outside world and the type and severity of the abuse suffered by the defendant at the hands of the forces or group.'

Explanation: While we understand that the ICC is a Court that prosecutes individuals in a formal court setting based on the theories of retribution and punishment, the Policy should reconsider its approach when prosecuting a former child soldier. When investigating a situation and the OTP finds an alleged perpetrator to be a former child soldier, then it should first consider contacting national authorities and seek alternative mechanisms of justice. If such alternative mechanisms of justice are not available or deemed unsuitable, then prosecution by the national authorities should be considered. Prosecution by the ICC ought to be viewed as a measure of last resort. This would be in line with the principle of complementary which, in the preamble of the Statute, specifies that the 'International Criminal Court [...] shall be complementary to national criminal jurisdictions'.[53] The Defence in the *Ongwen* case argued that Ongwen was victimised and punished twice, firstly as a child soldier and secondly by the ICC.[54] Two exceptions to that rule may arise. First, the OTP needs to verify that national judicial authorities (prosecution, courts, etc) comply with human rights standards. Indeed, if the national authorities have a poor human rights record, especially with regard to the protection offered to defendants (e.g., right to a fair trial, independence of the judiciary), then the ICC ought to initiate proceedings against the alleged perpetrator. Second, the gravity of the acts committed by the defendant might warrant prosecution by the ICC.

[53] ICC Statute, preambular para 10.

[54] ICC *Ongwen* Sentence, *supra* note 18, para 18.

This would be in line with the ICC policy to focus on those most responsible for the most serious crimes. In this instance, the Prosecution by the ICC might highlight the particularly severe nature of a crime (e.g., forced marriage, as in *Ongwen*) and thus send a message not only to potential perpetrators but, most importantly, to various legal mechanisms which, in turn, shape debate and discourse on legal norms. A strength of the ICC is, undoubtedly, its contribution to expressive justice. Moreover, usually, acts of a grave nature (e.g. genocide) require expertise not available at the national level.

In cases where the ICC prosecutes a former child soldier, it should be noted that although duress is a ground for excluding responsibility often mentioned in academic circles as well as by Ongwen's Defence[55] as the most relevant one to cover child soldiers' experience, its definition under the ICC Statute is too narrow to cover acts committed in a coercive environment. As the chambers correctly ascertained in *Ongwen*, duress cannot in this context be used as a ground for excluding criminal responsibility[56] in the context of a general coercive environment. Since the defence of duress is inadequate to exclude responsibility for crimes committed in such an environment, alternative defences must be explored since, according to Article 31(3) ICC Statute, the ICC is not limited to the defences expressly listed therein but can also use other grounds for excluding criminal responsibility: 'where such a ground is derived from applicable law as set forth in article 21.' We carried out research to ascertain whether alternative defences can be found in national law and be deemed general principles of law and concluded that 1) there are no available defences in national law that justify or excuse acts committed in a coercive environment or as a result of having been subjected to a coercive environment and 2) consequently, there is no relevant ground for excluding criminal responsibility under the general principles of law.[57] To draw this conclusion we have analysed the case law and doctrine relating to the rotten social background defence and the brainwashing or indoctrination defence as well as the defences used by prisoners of war (in Korea and Vietnam) and the Kapos (in WWII). Against this backdrop, we argue that the experience of former child soldiers needs to be considered at the sentencing stage.[58] First, national courts have, in the aforementioned cases, considered the coercive environment as a

[55] ICC *Ongwen* Judgment, *supra* note 4, para 2586.
[56] *Ibid.* para 2670; ICC *Ongwen* Appeal Judgment, *supra* note 3, para 1452.
[57] Paper submitted for publication (on file with authors).
[58] Paper in progress (on file with authors).

mitigating circumstance. Second, the ICC has accepted that past experience can be taken into account as a mitigating factor.[59] In *Ongwen,* the chambers extensively dealt with the defendant's childhood in the LRA[60] and stated that his 'personal history and circumstances of his upbringing, since his young age, in the LRA – in particular his abduction as a child, the interruption of his education, the killing of his parents, his socialisation in the extremely violent environment of the LRA – must be given a certain weight in the determination of the length of each individual sentence.'[61] It is however unclear which weight the chambers have given to these circumstances. Bearing in mind that consistency, predictability and justice are key to any sentencing criteria, we suggest, based on national case law and research in sociology and psychology, that the following (including but not limited to) elements be taken into account by all ICC bodies: the age at which the defendant joined the forces or group, the years the defendant stayed in the forces or group, the structure of the forces or group, the possibility to leave the forces or group, the possibility to act with the outside world and the type and severity of the abuse suffered by the defendant at the hands of the forces or group.

4. In light of the third and fourth objectives of the Policy Paper (para 9), we would like to recommend providing further details on 'interactions with children' (para 89), aligning it with the OTP Policy Paper on Sexual and Gender-Based Crimes, 2014 (SGBC Policy Paper). In particular, we recommend adding the following sentence in paragraph 89 to explain the importance of strengthening the OTP expertise to deal with sexual and gender-based crimes committed against girls and boys:

> 'Children who are victims of sexual and gender-based crimes require special consideration and questioning. The Office recognises the need to strengthen its in-house expertise on sexual and gender-based crimes relating to girls and boys, both in conflict and non-conflict situations. The Office recognises how difficult it must be for girls and boys to speak about sexual and gender-based violence and such questioning must be treated with extreme sensitivity and

[59] In *Ntaganda* the chambers accepted the traumatic impact on the defendant but rejected it in the given circumstances (ICC, *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v Bosco Ntaganda,* Case No ICC-01/04-02/06, Trial Chamber VI, Sentencing Judgment, 7 November 2019, para 210).
[60] ICC *Ongwen* Sentence, *supra* note 18, paras 70-83.
[61] *Ibid.* para 87.

privacy. The Office will continue to recruit persons with the required expertise and experience in this field.'

Explanation: Children who have been victims of sexual and gender-based crimes require additional sensitivity and protection during their interactions with representatives of the Office.[62] This was included in the SGBC Policy and aspects of that section are included in our recommendation above.[63] Children may react differently as opposed to adults when questioned about sexual crimes. Girls and boys may also react differently in terms of how they react to certain questions concerning sexual crimes. The SGBC Policy 'acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys.'[64] We recognise that children and particularly child soldiers are often victims of sexual and gender-based crimes and there is a need to bridge the gap between this Policy on Children and the SGBC Policy.[65]

Whilst in *Katanga* it acknowledged that 'the passage of time explains why [it might be difficult to provide] a coherent, complete and logical account',[66] it also specified that it would rule on the probative value of the testimonies, focusing on the witnesses' capacity and quality of recollection.[67] In relation to testimonies of individuals who were children at the time of the events, the Court accepted to 'make appropriate allowance for imprecisions or contradictions.'[68] Similarly, the Trial Chamber in *Ongwen* explained that because of the violent nature of the armed conflict as well as the context of abduction and captivity in the LRA, 'it is understandable that some witnesses struggle to keep track of the time they spent in the bush and to recall it with precision these many years after their escape from the LRA. Indeed, it is reasonable that witnesses in captivity in the bush, particularly those who were children when they were abducted, have lost their attachment to the very concept of time.'[69]

---

[62] *See* ICC, Office of the Prosecutor Strategic Plan June 2012-2015, <www.legal-tools.org/doc/954beb/pdf>, accessed 25 May 2023, para 60.

[63] *See* ICC Policy Paper on Sexual and Gender-Based Crimes, <www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>, accessed 25 May 2023, para 115.

[64] *Ibid.*, para 15.

[65] *See* ICC *Situation in Uganda in the Case of the Prosecutor v Dominic Ongwen*, Prosecution's Sentencing Brief, Trial Chamber IX, ICC-02/04-01/15, 1 April 2021, para 155.

[66] ICC *Katanga* Judgment, *supra* note 4, para 83.

[67] *Ibid.*, para 87; *See* also ICC *Ongwen* Judgment, *supra* note 4, paras 255-260.

[68] ICC *Ongwen* Judgment, *supra* note 4, para 258.

[69] *Ibid.,* para 328.

The Trial Chamber also explained that victims will often rush through the sensitive parts of the testimony related to sexual crimes and add unnecessary details which are indicative of a personal experience.[70] This becomes more pronounced when children are being questioned, hence the need for further protection in the Policy.

[70] *Ibid.,* para 395.

Annex

III. The Regulatory Framework

(a) Conscription, enlistment and use of children under the age of fifteen years to participate actively in hostilities

39. The Statute is the first international criminal law instrument to criminalise the recruitment or use of children in international or non-international armed conflicts. It recognises the reality that children are present, both in armed forces of some states and in non-state armed groups.

40. The Statute prescribes a certain age–fifteen years–below which children shall not be recruited. This is an element of the war crimes of child recruitment and use that fall within the jurisdiction of the Court. To determine that a child is below the age of 15 years, a variety of sources is used including testimonies from children in armed forces and groups and witnesses who were in contact with children in armed forces and armed groups as well as reports by UN institutions and NGOs (notably those involved in DDR programmes), and, whenever available, videos, documentation and photos.

(new) 41. The crimes of conscription, enlistment, and use of children are three discrete crimes. The acts of enlistment and conscription do not have to be committed with the purpose of use in the hostilities. Likewise, the crime of use in the hostilities is not intrinsically linked to having been previously conscripted or enlisted into the armed force or group.

42. Enlistment, conscription and use of children in hostilities are crimes of continuing nature in the sense that the crime is being committed until either the child is released from the armed forces or armed groups or the child turns fifteen years of age. "Enlistment" means "to enrol on the list of a military body", while "conscription" means "to enlist compulsorily", for example, by means of abduction. The element of compulsion necessary for the crime of conscription can be established by demonstrating that the child joined the armed force or group due to, inter alia, a legal obligation, brute force, threat of force or psychological pressure amounting to coercion. The crime of conscription does not require to demonstrate that children below the age of 15 years joined the armed forces or armed groups against their

will. A child's consent to enlistment or conscription is not a valid defence; however, establishing consent might be taken into consideration at the sentencing or reparations phase, as appropriate.

43. In relation to what constitutes "using ... to participate actively in hostilities", each activity must be considered on a case-by-case basis, and it is necessary to analyse the link between the activity for which the child is used and the combat in which the armed force or group of the perpetrator is engaged. This link can be demonstrated by highlighting the military purpose of the activity for which the child is used.

44. Children in armed forces and groups may perform an array of tasks, including those of combatant, sexual slave, cook, porter, spy or scout. The experiences endured may differ on account of a child's sex or gender. The Office recognises that some activities~~, such as domestic chores,~~ may not be deemed to constitute "us[e] … to participate actively in hostilities" within the meaning of the Statute. In such cases, the Office will consider charging and prosecuting such acts pursuant to other provisions of the Statute~~, for instance, the prohibitions against enslavement~~, where applicable.'

(new) 45. From the moment children under the age of 15 years enter the force or group until they leave it, their experience remains traumatic and often violent. They live in a coercive environment which severely limits their ability to make decisions. Although the crime of enlisting and conscripting children ends when the child reaches 15 years of age or leaves the force or group, child soldiering has devastating long-term effects.

VI. Prosecutions

(a) *Selection of charges*

88. […]

(new) 89. The OTP will consider alternative mechanisms to prosecution where the investigation of a case reveals that the defendant was a former child soldier. In particular, the OTP will meet with national authorities to determine the availability of alternative mechanisms to prosecution in such cases including the use of traditional justice mechanisms. If alternative mechanisms are not available then prosecution at the national level will be

considered. The OTP will start proceedings only as a measure of last resort and in two instances: (1) where it is believed that standards applicable in the national judicial system do not comply with human rights norms or (2) where the crimes committed by the defendant are of extreme gravity.

As such the coercive environment in which child soldiers grow up and live does not amount to duress under Article 31(1)(d) ICC Statute. Currently, under international criminal law, no alternative grounds for excluding criminal responsibility are available to former child soldiers based on their experience. Therefore, the OTP will account for this experience and the devastating consequences of child soldiering in the sentencing phase as mitigating circumstances. In particular, the following elements will be taken into consideration: the age at which the defendant joined the forces or group, the years the defendant stayed in the forces or group, the structure of the forces or group, the possibility to leave the forces or group, the possibility to act with the outside world and the type and severity of the abuse suffered by the defendant at the hands of the forces or group.'

(b) *Interactions with children*

89. In the process of selecting witnesses to testify, the Office will bear in mind the attributes a child may possess, including his or her vulnerabilities, capabilities and resilience, as well as the relevance of the evidence the child can provide. It will take into account considerations relating to any psycho-social and security assessments, as well as any possible healing effect which may be associated with providing evidence. The Office recognizes that certain child witnesses may want to testify in support of judicial proceedings, and may regard testimony as a component of their own recovery process. The Office will give careful consideration to whether taking evidence will be of benefit or harm to a child. Engagement with children will be conducted by staff members with expertise relating to vulnerable witnesses, including children. 'Children who are victims of sexual and gender-based crimes require special consideration and questioning. The Office recognises the need to strengthen its in-house expertise on sexual and gender-based crimes relating to girls and boys, both in conflict and non-conflict situations. The Office recognises how difficult it must be for girls and boys to speak about sexual and gender-based violence and such questioning must be treated with

extreme sensitivity and privacy. The Office will continue to recruit persons with the required expertise and experience in this field.