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Can Thomas Kwoyelo negate the requisite mens rea by qualifying for any psychological defenses resulting from his adbuction during his childhood by a militant organization?

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MEMORANDUM FOR THE INTERNATIONAL CRIME DIVISION OF THE HIGH COURT OF UGANDA

ISSUE: CAN THOMAS KWOYELO NEGATE THE REQUISITE *MENS REA* BY QUALIFYING FOR ANY PSYCHOLOGICAL DEFENSES RESULTING FROM HIS ADBUCTION DURING HIS CHILDHOOD BY A MILITANT ORGANIZATION?

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I. Introduction

The scope of Thomas Kwoyelo's ("Kwoyelo") criminal liability may be limited to crimes committed within certain time periods due to the circumstances surrounding his induction into the group that may negate the requisite criminal *mens rea*. Under both Ugandan and international law, Kwoyelo fails to satisfy the necessary elements for the various psychological defenses with respect to crimes he committed. He has the requisite criminal intent because he is not legally insane, and he does not qualify for the defenses of following a superior's orders or duress. Therefore, assuming *arguendo* that the prosecution can prove Kwoyelo committed the alleged crimes, he cannot claim any psychological defenses and should be found guilty.

A. Scope

The purpose of this article is to determine which crimes Kwoyelo had the requisite *mens rea* following his unlawful abduction and enslavement as a child soldier by a militant organization in northern Uganda. Various sources of law require that a person have a specific *mens rea* in order to form criminal liability. This article will discuss the psychological defenses that could negate the requisite *mens rea* and rid Kwoyelo of such liability. Specifically, the international prohibition on the use of child soldiers will be discussed in order to determine at which age he legally attained the necessary *mens rea* to participate in hostilities. Further, the defenses of lack of intent, insanity, following the orders of a superior, and duress are discussed with respect to Kwoyelo's crimes throughout his participation in the Lord's Resistance Army ("LRA").

For the purposes of this article, Kwoyelo's life will be divided into three periods. First, the time before he attained the age of eighteen will be referred to as his childhood. Second, in the

period after he attained the age of eighteen, but before he was granted a leadership role in the LRA, he will be referred to as his youth. Finally, the period after attaining the leadership position, but before his arrest, will be referred to as adulthood.

B. Summary of Conclusions

i. The international prohibition on the use of child soldiers in direct conflict negates the *mens rea* of Kwoyelo for crimes committed during childhood.

The Geneva Conventions, the United National Convention on the Rights of the Child, and the Rome Statute all forbid the use of children in warfare they commit because they are not deemed to be at-fault. Although the requisite age of varies by treaty, in order to accord with all relevant sources of law, Kwoyelo should not be charged with any crimes committed during his childhood.

ii. Kwoyelo had the requisite intent, and hence *mens rea*, under both Ugandan and international law.

Kwoyelo had the requisite intent under all relevant sources of law because he exercised his will, was aware that the consequences of his conduct would occur, and had knowledge of the criminality of his conduct. Therefore, unless an affirmative defense is successfully raised, he had the requisite *mens rea*.

iii. Notwithstanding the possibility of post-traumatic stress disorder, Kwoyelo does not qualify for the defense of insanity to negate the requisite *mens rea*.

Kwoyelo cannot successfully claim insanity notwithstanding the possibility that he suffers from post-traumatic stress disorder ("PTSD"). This is because the disease would not have in fact produced the conduct. Rather, the cause of his conduct was the decision to give or follow

the order to attack, depending on the relevant time period. This decision would have been made prior to the experience of symptoms associated with PTSD.

iv. Kwoyelo cannot negate the necessary *mens rea* by qualifying for the defense of superior's orders.

Regardless of whether following the orders of a superior is treated as a complete defense or a mitigating factor, Kwoyelo fails to qualify for the defense. At no point in time did he have a legal duty to act because he was receiving orders from an organization created without lawful authority from the state. Further, Kwoyelo must have had knowledge that his actions were criminal because the conduct is universally unlawful, his constant evasion of law enforcement, and the fact that the organization retreated after every attack.

v. Kwoyelo does not qualify for the defense of duress in order to negate the requisite *mens rea*.

Kwoyelo cannot satisfy all prongs of duress so it need not be decided whether duress constitutes a complete defense or a mitigating factor. Although he did not voluntarily create his situation, he fails the other three prongs of the test. There was no immediate threat, there were adequate means to avert that threat, and the crimes he committed were both disproportionate and the greater of two evils.

II. Factual Background

The International Criminal Court ("ICC") has accused the LRA of crimes against humanity[1] because of its twenty-year-long conflict against the Ugandan government that has

[1] *Public Divided Over Kwoyelo Trial*, DAILY MONITOR, (July 10, 2011), http://www.monitor.co.ug/News/National/688334-1197660-akplj9z/index.html.

spanned across international borders and included abuses against civilians.[2] The organization is classified as a terror organization by the African Union and is on the Terrorist Exclusion List in the United States.[3] The LRA has committed brutal acts such as "the abduction, rape, maiming, and killing of civilians, including children."[4] The group has destabilized northern Uganda, tried to overthrow the government, and targeted government officials as well as humanitarian aid workers,[5] resulting in the displacement of about two million people in northern Uganda.[6] The organization has also abducted children to train as fighters through physical violence, rape, extreme physical exertion, and forcing the children to kill others who tried to escape.[7] Between 1986 and 2005, at least 66,000 children were abducted by the LRA.[8] Thousands of these children were forced to become soldiers and sex slaves.[9]

Kwoyelo was born in Pabbo, Amuru district, in northern Uganda, but was kidnapped by the LRA on his way to school in 1987.[10] After being indoctrinated into the organization, he

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[2] *Uganda: Q&A on the Trial of Thomas Kwoyelo*, HUM. RTS. WATCH, (July 7, 2011, 5:55 AM), https://www.hrw.org/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo.

[3] *The Lord's Resistance Army*, U.S. DEP'T OF ST., (March 23, 2012), http://www.state.gov/r/pa/prs/ps/2012/03/186734.htm.

[4] *The Lord's Resistance Army (LRA)*, GLOBAL SECURITY, http://www.globalsecurity.org/military/world/para/lra.htm.

[5] *The Lord's Resistance Army (LRA)*, GLOBAL SECURITY, http://www.globalsecurity.org/military/world/para/lra.htm.

[6] *The Lord's Resistance Army*, U.S. DEP'T OF ST., (March 23, 2012), http://www.state.gov/r/pa/prs/ps/2012/03/186734.htm.

[7] *The Lord's Resistance Army (LRA)*, GLOBAL SECURITY, http://www.globalsecurity.org/military/world/para/lra.htm.

[8] *The Lord's Resistance Army*, U.S. DEP'T OF ST., (March 23, 2012), http://www.state.gov/r/pa/prs/ps/2012/03/186734.htm.

[9] *The Lord's Resistance Army*, U.S. DEP'T OF ST., (March 23, 2012), http://www.state.gov/r/pa/prs/ps/2012/03/186734.htm.

[10] *Thomas Kwoyelo*, TRIAL INT'L, https://trialinternational.org/latest-post/thomas-kwoyelo/.

served as a child soldier and eventually rose through the ranks. At the time of his arrest in March 2009, Kwoyelo was a colonel in the LRA.[11] He is currently being charged under Article 147 of Uganda's Geneva Conventions Act for: (1) willful killing of civilians; (2) taking hostages; (3) extensive destruction of property; (4) causing serious injury to body; and (5) inhumane treatment.[12] The maximum penalty if Kwoyelo is found guilty is life imprisonment plus fourteen years.[13] These charges stem from attacks in the Amuru District of northern Uganda between 1993 and 2005.[14]

The International Crimes Division of the High Court of Uganda is the venue of Kwoyelo's trial, and is not an international court.[15] It is a Ugandan court that has the authority to try "genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime defined in Uganda's Penal Code Act ("UPCA"), the 1964 Geneva Conventions Act, the 2010 International Criminal Court Act ("ICCA"), or any other criminal law."[16] This requires that only Ugandan law will be mandatory while sources of international law

[11] *Frequently Asked Questions on the Trial of Thomas Kwoyelo*, JUSTICE FOR ALL, https://www.jlos.go.ug:442/index.php/document-centre/transitional-justice/kwoyello/201-frequently-asked-questions-on-thomas-kwoyelo/file.

[12] *Frequently Asked Questions on the Trial of Thomas Kwoyelo*, JUSTICE FOR ALL, https://www.jlos.go.ug:442/index.php/document-centre/transitional-justice/kwoyello/201-frequently-asked-questions-on-thomas-kwoyelo/file.

[13] *Uganda: Q&A on the Trial of Thomas Kwoyelo*, HUM. RTS. WATCH, (July 7, 2011, 5:55 AM), https://www.hrw.org/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo.

[14] *Frequently Asked Questions on the Trial of Thomas Kwoyelo*, JUSTICE FOR ALL, https://www.jlos.go.ug:442/index.php/document-centre/transitional-justice/kwoyello/201-frequently-asked-questions-on-thomas-kwoyelo/file.

[15] *Frequently Asked Questions on the Trial of Thomas Kwoyelo*, JUSTICE FOR ALL, https://www.jlos.go.ug:442/index.php/document-centre/transitional-justice/kwoyello/201-frequently-asked-questions-on-thomas-kwoyelo/file.

[16] *Uganda: Q&A on the Trial of Thomas Kwoyelo*, HUM. RTS. WATCH, (July 7, 2011, 5:55 AM), https://www.hrw.org/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo.

are simply persuasive. The UPCA requires that all sections shall be read in accordance with English law, and it is therefore highly persuasive.[17] This will be the first trial under Uganda's 1964 Geneva Conventions Act.[18]

III. Legal Analysis

Uganda's Geneva Conventions Act ("UGCA") defines grave breaches as crimes "involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture of inhuman treatment, … , willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a person to serve in the forces of a hostile Power, … , taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[19] The category of protected persons consists of children; civilians; missing persons; prisoners of war and detainees; refugees and displaced persons; women; and the wounded, sick and shipwrecked.[20]

A. Prohibition on Child Soldiers

[17] *The Penal Code Act 1950*, UGANDA LEGAL INFO. INST., Ch. I, § 1, http://www.ulii.org/ug/legislation/consolidated-act/120/.

[18] *Uganda: Q&A on the Trial of Thomas Kwoyelo*, HUM. RTS. WATCH, (July 7, 2011, 5:55 AM), https://www.hrw.org/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo.

[19] *Geneva Conventions Act 1964*. UGANDA LEGAL INFO. INST., Art. 147. II, http://www.ulii.org/ug/legislation/consolidated-act/363.

[20] *Protected Persons under IHL*. INT'L COMMITTEE OF THE RED CROSS, https://www.icrc.org/en/war-and-law/protected-persons.

Combating the use of child soldiers has been the subject of numerous international treaties. The policy behind this prohibition is that the international community has deemed children unfit for warfare because they are insufficiently psychologically developed to effectively handle the brutality of warfare. For example, even compared to children raised in environments of violence such as warzones, those who are forced to actively participate are much more susceptible to developing psychological disorders.[21] If this prohibition is not enforced, there will be widespread incidents of violence by those who formerly served as child soldiers because they will believe violence is an effective means to achieve their desired result. This would be common, because these children would have been taught to be, and rewarded for being, violent during their service. Therefore, there is a strong public policy against the use of Child Soldier in warfare because they do not have the requisite *mens rea*.

In 1977, Protocols I and II Additional to the Geneva Conventions ("Protocols") were adopted to provide some protections to children, including an outright ban on the use of children less than fifteen years old.[22] In 1989, the United Nations Convention on the Rights of the Child ("UNCORC")[23] was adopted which provided an affirmative duty for states to prevent those under fifteen from taking a "direct part" in hostilities,[24] prohibits recruitment into the army of

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[21] *Enduring Scars: Child Soldiers and Mental Health*, Irish Forum for Global Health (2012), http://globalhealth.ie/enduring-scars-child-soldiers-and-mental-health/.

[22] Nina H. B. Jørgensen, *Child Soldiers and the Parameters of International Criminal Law*, 11 CHINESE J. OF INT'L L. 657, 658 (2012).

[23] Nina H. B. Jørgensen, *Child Soldiers and the Parameters of International Criminal Law*, 11 CHINESE J. OF INT'L L. 657, 658 (2012).

[24] *Convention on the Rights of the Child*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER. Art. 38(2) (1989), http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

those under fifteen,[25] and requires "protection and care of children who are affected by an armed conflict."[26]

The Rome Statute was the first treaty to prohibit the "enlistment, conscription, and use of children in hostilities" by making it a war crime.[27] It also limits jurisdiction to those who were over the age of eighteen when the crime was committed.[28] Additionally, the Paris Principles state that "[c]hildren who are accused of crimes under international law allegedly committed while they were associated with armed forces or armed groups should be considered primarily as victims of offences against international law; not only perpetrators."[29] Moreover, Former United Nations Secretary-General has suggested that "anyone under eighteen should be exempt from prosecutions"[30] and several International Non-Governmental Organizations argue that "a judicial process for anyone under eighteen would hinder his or her rehabilitation."[31]

The UPCA does not designate an age at which a child is able to form the *means rea* required to commit a crime. However, under English law, there is a test that proscribes criminal

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[25] *Convention on the Rights of the Child*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER. Art. 38(3) (1989), http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

[26] *Convention on the Rights of the Child*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER. Art. 38(4) (1989), http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

[27] Nina H. B. Jørgensen, *Child Soldiers and the Parameters of International Criminal Law*, 11 CHINESE J. OF INT'L L. 657, 658 (2012).

[28] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 19 (2013).

[29] *The Paris Principles*, INT'L COMMITTEE OF THE RED CROSS, §3.6 (2007), https://www.icrc.org/eng/assets/files/other/parisprinciples_en[1].pdf.

[30] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 16-17 (2013).

[31] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 17 (2013).

liability for minors. In England, children under seven cannot form criminal intent, while children over fourteen can form full criminal capacity.[32] For children between seven and fourteen, there is a rebuttable presumption of a lack of capacity.[33]

It is clear from the evidence that Kwoyelo was kidnapped as a child and forced to serve as a child soldier in violation of several international agreements. In accordance with international law, Kwoyelo should only be charged with crimes he committed after becoming legally able to participate in armed conflict. Therefore, he should not be charged with crimes committed in the time period between his abduction and when he was legally able to participate in the war. The issue is at which age did Kwoyelo become a legal participant.

While Ugandan law does not specify the legal age of participation in conflict, the law of the United Kingdom specifies the age of fourteen for a presumption of criminal capacity.[34] Yet, it takes a much higher level of psychological development to successfully conduct warfare than to commit a crime. This is indicated by the nearly universal prohibition on the use children under fifteen while the age of criminal capacity of generally lower. However, Kwoyelo was forced into this environment by his abductors at a young age. Therefore, it would be unjust to punish him for crimes he committed before he was legally allowed to commit a crime or fight in the war.

In order to give Kwoyelo the presumption of innocence, and account for the higher level of psychological development required to handle warfare, Kwoyelo should not be charged with

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[32] Kathryn White, *A Chance for Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT'L L. 191, 211 (2010).

[33] Kathryn White, *A Chance for Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT'L L. 191, 212 (2010).

[34] Kathryn White, *A Chance for Redemption: Revising the "Persecutor Bar" and "Material Support Bar" in the Case of Child Soldiers*, 43 VAND. J. TRANSNAT'L L. 191, 212 (2010).

crimes he committed during his childhood. This is in accordance with the Principles that children should be considered primarily as victims, and not only perpetrators.[35] It also respects all, and increases most, of the age limits to liability under the Rome Statute, the UGCA, and the UNCORC. Since crimes committed by Kwoyelo during his childhood did not have the requisite *mens rea*, the remainder of this article will only discuss his youth and adulthood.

B. Psychological Defenses

i. Lack of Intent

In order to be successfully convicted, the prosecution must show that Kwoyelo had the requisite intent, and hence *mens rea*, to commit the crimes in question at the time he committed them. The policy behind the requirement of criminal intent is to ensure the defendant has the necessary *mens rea* to be convicted. If this was not a requirement, defendants could be held criminally liable for simply causing an accident.

The UPCA states that "a person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will or for an event which occurs by accident."[36] It disregards whether or not a certain result was intended, or the motive behind it, unless it is an express element of the offense.[37] This is contrary to UK law, where crimes such as

[35] *The Paris Principles*, INT'L COMMITTEE OF THE RED CROSS, §3.6 (2007), https://www.icrc.org/eng/assets/files/other/parisprinciples_en[1].pdf.

[36] *The Penal Code Act 1950*, UGANDA LEGAL INFO. INST., Ch. III, §8(1), http://www.ulii.org/ug/legislation/consolidated-act/120/.

[37] *The Penal Code Act 1950*, UGANDA LEGAL INFO. INST., Ch. III, §8(2-3), http://www.ulii.org/ug/legislation/consolidated-act/120/.

these are classified as specific intent crimes and the prosecution is required to prove that the defendant actually intended to cause the consequences of the crime.

Further, international law does not require an intention of the consequences. Rather, the Rome Statute qualifies intent as either intention of the consequences, or awareness that they will occur.[38] However, it does require that the person mean to engage in conduct.[39] The International Criminal Tribunal for the former Yugoslavia ("ICTY") describes criminal intent as requiring:

> [the] possib[ility] for an individual to determine *ex ante*, based on the facts available to him, that the conduct is criminal. At a minimum, then, to convict an accused of a crime, he must have had knowledge of the facts that made his or her conduct criminal.[40]

The ICTY allows this to be proven by either direct intent or a substantial likelihood of the crime.[41] For example, in *Boškoski & Tarčulovski*, the Court held the parties had the required intent because he "was required to have the direct intent or the awareness of the substantial likelihood that the crimes would be committed in the execution of his plan, instigation and order."[42]

Assuming *arguendo* that Kwoyelo did not intend to commit the crimes, and rather only intended to spare himself, he would still be convicted under both Ugandan and international law.

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[38] *Rome Statute*, INT'L CRIM. CT., Art. 30(2) (1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[39] *Rome Statute*, INT'L CRIM. CT., Art. 30(2) (1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[40] *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-A (May 19, 2010), at para. 66.

[41] *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-A (May 19, 2010), at para. 68.

[42] *Prosecutor v. Boškoski & Tarčulovski*, Case No. IT-04-82-A (May 19, 2010), at para. 68.

While Kwoyelo would satisfy the test used in the United Kingdom because his only intention was survival, the UPCA merely requires an "exercise of will," regardless of the result intended. As a young adult, notwithstanding any alleged duress, Kwoyelo exercised his will at the time of the acts because he did so knowing that they would be committed in the pursuit of self-preservation. Even though the result he desired was the prevention of his own death, he purposely committed these crimes in order to achieve it. Furthermore, during adulthood Kwoyelo began exercising his will on his subordinates and forcing them to commit additional crimes, indicating that he approved of the results. At this stage, he also took a more active role in the planning and execution of these attacks indicating that he indeed intended the consequences.

Moreover, Kwoyelo satisfies the two-pronged test under the Rome Statute. As discussed *supra*, throughout his life Kwoyelo meant to commit these crimes despite his reasons for doing so. Furthermore, as an adult, he was at the very minimum aware that his subordinates would follow his orders and that these crimes would be committed because he himself followed the same orders during his youth. However, it is more likely that he intended the consequences because, if not, he could have, at the very least, given orders to his men to spare as many people as possible.

With respect to the ICTY, Kwoyelo must have known that the conduct is criminal for several reasons. First, violations of the relevant provisions of the UGCA are universally considered criminal. The crimes of murder, rape, and kidnapping constitute criminal conduct around the world. Second, Kwoyelo was constantly hiding from government officials because he had knowledge of a warrant issued for his arrest by the international community. This is evidence that, even if he was too young to learn right from wrong at the time of his kidnapping,

Kwoyelo knew that the international community considered his conduct as criminal. Finally, after each attack the LRA forces would retreat. This indicates that the organization, including Kwoyelo, did not see itself as establishing a new government or protecting a certain group of people. Rather, it indicates that the organization knew that it was inherently criminal and had no right to occupy the territory. Therefore, Kwoyelo satisfies all relevant tests of criminal intent and has the requisite *mens rea*.

ii. Insanity

Relevant sources of law provide the affirmative defense of insanity. The rationale behind this is the same as intent, to ensure the defendant has the requisite *mens rea* to have criminal capacity. If the disease caused the defendant to not know what he is doing, or that he ought not do it, he cannot have criminal intent to commit the crime. If the defense was not available, defendants could be convicted as a result of a disease instead of conscious decisions and, hence, without criminal *mens rea*.

Under the UPCA, a person is not liable for a crime if they have "any disease affecting his or her mind" making them "incapable of understanding what he or she is doing or of knowing that he or she ought not to do the act or make the omission" unless "that disease does not in fact produce upon his or her mind one or other of the effects mentioned in this section in reference to that act or omission."[43] There is a presumption of sanity unless proved otherwise.[44] Similar to the UPCA test, the M'Naghten test used in the United Kingdom requires that, at the time of the

[43] *The Penal Code Act 1950*, UGANDA LEGAL INFO. INST., Ch. III, §11, http://www.ulii.org/ug/legislation/consolidated-act/120/.

[44] *The Penal Code Act 1950*, UGANDA LEGAL INFO. INST., Ch. III, §10, http://www.ulii.org/ug/legislation/consolidated-act/120/.

criminal act, the defendant had a "disease of the mind as not to know the nature and quality of the act he was doing, or that it was wrong."[45]

Here, there is no evidence that Thomas Kwoyelo has ever had any "disease affecting his or her mind." However, it is possible that he could claim he suffers post-traumatic stress disorder stemming from his time as a child soldier. In that case, it would be necessary for him to prove that the disease in fact caused him to not know what he was doing or that he should not do it.

The relevant symptom associated with PTSD is re-experiencing.[46] Re-experiencing consists of experiencing "flashbacks," which may cause "intense feelings of fear, helplessness, and horror" as if the traumatizing event was re-occurring.[47] Thus, Kwoyelo could argue that because he experienced flashbacks during occasions of violence as a result of the disease, he subjectively believed he was acting in self-defense and therefore could not know that he "ought not to do the act." He could also argue that these flashbacks cause a violent response as a natural reaction, and therefore he could not know what he was doing.

However, as a youth, these flashbacks would not have commenced until after the violence started. This would have been much later than Kwoyelo's decision to follow the order and attack the target. Hence, the PTSD would not have in fact produced the criminal acts. Rather, it was caused by his decision to follow the orders of his superiors. Furthermore, as an adult, it is not likely that Kwoyelo would have experienced these symptoms at all because, as a commander,

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[45] Sanford H. Kadish. *The Decline of Innocence*, 26 CAMBRIDGE L. J., 273, 275 (1968).

[46] *Post Traumatic Stress Disorder*, THE NEB. DEP'T OF VETERANS' AFF., http://www.ptsd.ne.gov/what-is-ptsd.html.

[47] *Post Traumatic Stress Disorder*, THE NEB. DEP'T OF VETERANS' AFF., http://www.ptsd.ne.gov/what-is-ptsd.html.

he would have no longer been on the front lines. Therefore, assuming *arguendo* that Kwoyelo did suffer from PTSD, the disease did not in fact make him commit the act or prevent him from knowing what he was doing or that he should not do it. This evidence, along with the UPCA's presumption of sanity placing the burden of proof on Kwoyelo, make it unlikely that he will successfully raise the defense of insanity and negate *mens rea*.

iii. Superior's Orders

International law provides the affirmative defense of following a superior's order to negate *mens rea*, although it generally treats it only as a mitigating factor for sentencing. For example, Article 8 of the International Military Tribunal ("IMT") specifically rejected superior's orders as a complete defense, and chose to consider it as a mitigating factor.[48]

Article 33 of the Rome Statute permits the defense of Superior's Orders despite a presumption against it, explicitly excluding actions of "manifest illegality" including crimes against humanity and genocide.[49] To successfully raise the defense, there must be: (1) a legal duty to act; and (2) knowledge of the illegality of the act by the party raising the defense.[50] The policy supporting this is that, if a person has a legal duty to act and no knowledge of its illegality, he cannot have had the *mens rea* to commit the crime.

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[48] *Charter of the Nuremberg Tribunal*, INT'L COMMITTEE OF THE RED CROSS, Ch. II, Art. 8 (1945), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=B6F3BDFFC4F28932C12563CD00519C28.

[49] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 25-6 (2013).

[50] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 26-7 (2013).

The first requirement is a legal duty to act.[51] For example, there is a legal duty to act when a governmental entity such as a military orders a subordinate to carry out a lawful act. The policy supporting this is that if a person were not required to prove a legal duty to act, he would be able to claim the defense anytime anyone tells him to do anything. This would theoretically allow any criminal who is not the head of an organization could claim the defense. Rather, the defense should only be available to those who would face state-sanctioned consequences if they refuse.

The UPCA, by implication, negates any legal duty to act when a persons takes an oath to "obey the orders … of any committee … not lawfully constituted, or of any leader … not having authority by law."[52] Furthermore, some scholars argue that this element necessarily requires the person to be in a state army, because a person in a non-state army does not have a legal duty to act.[53]

If the order is illegal, the prosecution must then prove the soldier's knowledge of illegality with a reasonable person test.[54] This is required because, if knowledge of illegality were irrelevant, a person may lawfully commit heinous crimes as long as a superior order him to

[51] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 26 (2013).

[52] *The Penal Code Act 1950*, UGANDA LEGAL INFO. INST., Ch. VI, §46, http://www.ulii.org/ug/legislation/consolidated-act/120/.

[53] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 27 (2013).

[54] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 27 (2013).

do so. Rather, the defense is only available to a person who thinks the conduct is lawful, and therefore does not have the requisite *mens rea*.

Kwoyelo cannot claim the defense of Superior's Orders during his youth or adulthood because he had no legal duty to act. In accordance with Ugandan law, he did not have a legal duty to act as a part of a non-state organization that was "not lawfully constituted." Hence, his superiors had no lawful authority to give these orders and he had no legal duty to act. Therefore, the prosecution must prove Kwoyelo's knowledge of the illegality based on a reasonable person test. As discussed *supra*, Kwoyelo must have known that he was engaging in criminal activity because: (1) the conduct is universally illegal; (2) his constant evasion of law enforcement agencies; and (3) the inherent criminality of the organization. Therefore, Kwoyelo knowingly committed an illegal act in response to an unlawful order and has the requisite *mens rea*.

If the Court determines there was a legal duty to act and no knowledge of the illegality and that he qualifies for the defense of superiors orders, it must then determine whether or not Kwoyelo satisfies the "moral choice test." During the Nuremberg trials, the IMT used the test in relation to Article 8 of the IMT Charter concerning superior orders.[55] "The true test … is not the existence of the order, but whether moral choice was in fact possible."[56] For example, if a defendant could not defy the order without being killed, he cannot make a moral choice.[57] If a

[55] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 624 (2015).

[56] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 624 (2015).

[57] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 625 (2015).

moral choice was in fact possible, acting according to a superior's order does not negate responsibility.[58]

Kwoyelo likely satisfies the moral choice test in relation to superior orders. He did in fact receive an order by those in a position superior to his own, and if he did not comply he would surely be killed. Therefore, if the court determines that Kwoyelo had a legal duty to act and had no knowledge of the illegality of his conduct, he qualifies to use superior's orders as a mitigating factor. However, this is highly unlikely considering the circumstances discussed above.

iv. Duress

Justifiable conduct is that which is morally appropriate; while excusable conduct is not morally appropriate but the person is not deemed to be blameworthy.[59] "Whether described as justification or excuse, the defence, when successfully raised, results simply in a verdict of not guilty."[60] There are several legal consequences, however they are irrelevant in the instant case. Therefore, in line with the IMT[61] and Rome Statute,[62] this article will not differentiate between duress as justification and duress as excuse.

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[58] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 624-5 (2015).

[59] Kent Greenwalt, *Distinguishing Justifications from Excuses*, 49(3) DUKE L & CONTEMP. PROBS., 89, 91 (1986).

[60] John. C. Smith. *Justification and Excuse in the Criminal Law* 7 (The Hamlyn Lectures, 40th Series, 1989).

[61] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 626 (2015).

[62] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 489 (2014).

Various sources of law provide for the defense of duress. If a person commits a crime that he did not desire, in response to a sufficient threat, their intent was to avert the harm threatened rather than to commit the crimes and, hence, they do not have the requisite *mens rea*. The court in *Einsatzgruppen* stated that "there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns."[63] However, the defense is strictly limited so that people cannot lawfully commit unnecessary crimes in response to an insufficient threat.

Under the UPCA, if multiple offenders commit the act in question and the person is compelled to do it by threats "instantly to kill [them] or do [them] grievous bodily harm if [they] refuse, the person is not criminally liable."[64] The Rome Statute also requires a threat of imminent death or serious bodily harm, and further requires the person necessarily and reasonably avoids the threat.[65] Furthermore, it requires the defendant must "not intend to cause a greater harm than the one sought to be avoided"[66] The IMT focused on whether defendant's free will made criminal liability unjust.[67] Under customary international law, there are four requirements for a claim of duress:

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[63] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 627 (2015).

[64] *The Penal Code Act 1950*, UGANDA LEGAL INFO. INST., Ch. III, §14, http://www.ulii.org/ug/legislation/consolidated-act/120/.

[65] *Rome Statute*, INT'L CRIM. CT., Art. 31(d) (1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[66] *Rome Statute*, INT'L CRIM. CT., Art. 31(d) (1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[67] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 626-27 (2015).

> (1) the act charged is done under an immediate threat of severe and irreparable harm to life or limb; (2) there is no adequate means of averting such evil; (3) the crime committed is not disproportionate to the evil threatened …; (4) the situation leading to duress must not have been voluntarily brought about by the person coerced.[68]

a. Immediate Threat of Severe and Irreparable Harm

The elements of severity and imminence are required to raise the defense of duress. The element of severity is required because, if the threat is not severe, the commission of the crime is more blameworthy than the threatened harm. If it was not required, people could lawfully commit crimes in response to the slightest threat. For example, someone could lawfully commit a crime in response to another threatening to trip him.

Imminence is required because there must be no other alternatives to the commission of the crime. If the threat is not imminent, later developments could create an opportunity to avert the threatened harm without the commission of a crime. If imminence was not required, people could commit crimes today in order to avoid any possible harm at some point in the future. For example, a person could lawfully rob a bank today in order to prevent his threatened execution in one year. This would go against policy because within that time frame many opportunities for escape could arise. For example, he may go home after receiving the threat and call the police, a way of averting the harm without committing the morally blameworthy crime.

[68] Magali Maystre. *The Interaction Between International Refugee Law and International Criminal Law with respect to Child Soldier*, 12 J. OF INT'L CRIM. JUST., 975, 991-92 (2014).

The UPCA requires threats "instantly to kill [them] or do [them] grievous bodily harm"[69] and the Rome Statute requires "a threat of imminent death or serious bodily harm." [70] Threats of future harm are insufficient.[71] The threat must be severe enough that a "reasonable man would succumb to the threat."[72] However, neither the Rome Statute nor the UPCA specifies whether the threat must be explicit.[73] Some scholars argue that an omnipresent threat is sufficient using a "totality of the circumstances" approach,[74] despite the fact that the threat is implicit.[75] For example, Jennifer Bond and Meghan Fougere argue that a person qualifies for the defense of duress if they had a "genuine and reasonable belief" that the threat existed.[76] This means the actor must subjectively believe in the existence of the threat, and that belief must be objectively reasonable.

The subjective belief requirement ensures that the crime is in fact a response to the duress and not just a convenient excuse to commit a crime. If this is not required, a person could lawfully commit a crime in response to a threat of which he is not aware or one that he knows is not credible.

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[69] *The Penal Code Act 1950*, UGANDA LEGAL INFO. INST., Ch. III, §14, http://www.ulii.org/ug/legislation/consolidated-act/120/.

[70] *Rome Statute*, INT'L CRIM. CT., Art. 31(d) (1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

[71] *The Penal Code Act 1950*, UGANDA LEGAL INFO. INST., Ch. III, §14, http://www.ulii.org/ug/legislation/consolidated-act/120/.

[72] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 625 (2015).

[73] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 487 (2014).

[74] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 493 (2014).

[75] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 473 (2014).

[76] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 473 (2014).

For example, someone could break a window of a store that he does not realize is in flames in order to steal and claim duress as a result of the unknown fire. The objectively reasonable requirement ensures that the defense is not dependent upon particular susceptibilities of the defendant. For example, a person with arachnophobia will subjectively believe that a spider infestation in an office building is a sufficient reason to commit arson. However, this would not be protected under duress because it would not be objectively reasonable. Therefore, both subjective belief and objective reasonability should be required to rely on an omnipresent threat.

In the United Kingdom, an implicit threat may be relied upon if "the threat could reasonably be construed as a threat of the required kind."[77] There is also precedence for such a determination in international case law. In *Abdul-Hussain*, one defendant participated in the hijacking of an airplane to prevent being sent to Iraq because he believed he would face execution by the government, despite the fact that he never received a direct threat.[78] The court concluded that there is no distinction between the defendants who had received direct threats and the one who hadn't.[79]

As a child, Kwoyelo was likely the victim of direct and explicit threats. Starting from the day of his abduction, Kwoyelo was threatened with punishment including death if he did not comply with the orders of his captors. This is certainly a credible and direct threat because children who refused could be killed as an example. It would also prevent any reasonable child from trying to escape or otherwise undermine the organization.

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[77] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 496-97 (2014).

[78] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 497 (2014).

[79] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 498 (2014).

However, it is highly doubtful that Kwoyelo was explicitly threatened before each criminal offense for most of his time in the organization. Rather, he would have to claim an omnipresent threat created by the circumstances. Because of the extreme level of violence used on non-complying members of the organization, it is possible that Kwoyelo would have been severely injured or killed if he had defied orders from his superiors. The fact that Kwoyelo knew this would create a subjectively genuine belief that the threat existed. Furthermore, these circumstances would cause an objectively reasonable person to succumb to such a threat. Therefore, Kwoyelo would have suffered from an objectively reasonable subjective belief of an omnipresent threat.

In addition, the threat against Kwoyelo was more direct than the one in *Abdul-Hussain*, because here Kwoyelo had constant contact with those who would carry out the threatened harm. Whereas in *Abdul-Hussain,* the defendant simply believed that someone from the government would execute him without knowing any details. Therefore, it is likely that Kwoyelo suffered from a sufficient threat of death or serious bodily harm to constitute duress.

However, this threat was not necessarily imminent. In the prosecution of another LRA leader, the ICC held that the possibility of later disciplinary measures is not an imminent threat sufficient to constitute duress.[80] For example, no punishments would have been carried out until after the organization had retreated, creating many opportunities for escape. Further, defying an order would not have necessarily lead to death. There likely would have been a gradually escalating ladder of punishment that would be dispensed in an attempt for compliance before he would have

[80] *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red (23 March 2016) at para. 153.

been killed. Therefore, although Kwoyelo was under a sufficient threat of death or serious bodily harm, it was not sufficiently imminent to satisfy this prong of duress.

b. No Adequate Means of Averting Such Evil

Duress requires that the actor have "no adequate means of averting such evil" besides complying with the demand. If the party under duress can avert the threat without committing the crime, it is better to do so. For example, if the option exists, it is less morally blameworthy to try and escape from a threatening assailant than to avert the harm threatened by committing a criminal act. In the United Kingdom and United States, there must have been no reasonable alternative to compliance.[81] In an environment such as the one in northern Uganda, the only reasonable alternative to compliance would have been to escape from the control of the organization.

As a young adult, Kwoyelo would not have had much opportunity to escape. He would have likely been under the constant supervision of his superior's to ensure that there would be no dissent. During this time his schedule would have been tightly controlled and he would have been given very little, if any, freedom. This, in addition to the fact that he was abducted at such a young age, would have meant that Kwoyelo had very little idea about the world around him. Furthermore, due to being forced to commit heinous crimes against members of his community when he was abducted, he would not have been able to return to his old village. Hence, as a youth, Kwoyelo had no reasonable alternative than to comply with the orders of his captors and remain in the organization.

[81] *Duress and Undue Influence*, 25. Am. Jur. 2d. § 24 (2016).

However, as an adult, Kwoyelo rose through the leadership of the LRA and his claim of coercion gradually weakened. This is because he would have gradually gained more freedom and would have had an increasingly better opportunity to defect from the organization and work with the government in exchange for protection. The *Ongwen* court even determined that escapes from the LRA were common.[82] He would have also had a better awareness of the areas of eastern Africa and, hence, any attempt at escape would have been much more likely to succeed. By the time he was arrested, Kwoyelo undoubtedly had numerous reasonable opportunities to escape the organization. Therefore, it is unlikely that Kwoyelo can satisfy this prong of duress as an adult.

c. Crime is Not Disproportionate to the Evil Threatened

Duress requires that the criminal act is the "lesser of two evils" and is "proportionate to the evil threatened."[83] This is because, if the commission of a crime is more morally blameworthy than the threatened harm, it is better to accept that harm than to commit the crime. The lesser of two evils test requires a balancing test between the harm to the immediate victim and the potential harm to the person under duress.[84] To be proportional, "the harm caused by obeying the illegal order [must] not [be] disproportionally greater than the harm which would result from not obeying the illegal order."[85]

The lesser of two evils test requires an evaluation of priorities. According to English Law, the sanctity of life requires an absolute ban on duress for charges of murder, even if the

[82] *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red (23 March 2016) at para. 154.

[83] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 625 (2015).

[84] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 625-26 (2015).

[85] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 627 (2015).

taking of one life would save multiple lives.[86] However, the dissent in *Erdemović* attempted to create an exception that "where – on the facts – it is highly probable, if not certain, that if the person acting under duress had refused to commit the crime, the crime would in any event have been carried out by persons other than the accused."[87] For example, the evil threatened to Erdemović's life was certainly not greater than the evil he caused through his participation in a mass execution. However the dissent would have excused his actions because if he had refused to do it, the victims would have still been killed.

Proportionality requires that the defendant must only use actions that are "strictly required to offset the threat to them."[88] For example, in *Einsatzgruppen*, the court held that the defendants could not claim compulsion because they had taken active steps and went beyond actions that were strictly required to offset the threat to them, indicating that he approved the order.[89] Furthermore, in *Flick et al*, the court held that a defendant could not claim duress because he had taken "active steps" to procure prisoners of war from the Nazi Regime for use in his manufacturing business. [90]

In order to satisfy the "lesser of two evils" test, Kwoyelo must show that his death would have been a greater evil than the commission of the crimes he is charged with. According to

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[86] Thomas Weigend, *Kill or Be Killed*, 10 J. OF INT'L L CRIM. JUST., 1219, 1228 (2012).

[87] Thomas Weigend, *Kill or Be Killed*, 10 J. OF INT'L L CRIM. JUST., 1219, 1229 (2012).

[88] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 628 (2015).

[89] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 628 (2015).

[90] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 494-95 (2014).

English law, the crime of murder can never be the lesser of two evils. However, in line with the dissent in *Erdemović*, someone else would have killed Kwoyelo's victims if he had defied the orders. Therefore, if the argument were accepted, it would have been a greater evil to die himself because it simply would have increased the body count by one. While this seems logical, it is narrow in scope because the argument assumes a single, distinct event. However, when taken as a whole, Kwoyelo's life-long participation and leadership in a terrorist organization is a greater evil than if he had simply accepted his own death.

This perspective also makes the decision disproportionate. For example, by obeying the illegal orders, Kwoyelo has waged a war in four countries across East Africa. Meanwhile, the organization that has killed, raped, and kidnapped thousands of people.[91] Furthermore, lifelong participation in the organization was not strictly required to offset the harm. The court in *Ongwen* even claimed that he "could have chosen not to rise in hierarchy and expose himself to increasingly higher responsibility."[92] It also stated that "if Dominic Ongwen could not have avoided participating as commander in the attacks on civilians in IDP camps, he should have been able to take some action to reduce harm to civilians."[93] Moreover, as an adult, Kwoyelo began taking active steps by planning and ordering the attacks. Therefore, during both his youth and adulthood, Kwoyelo fails both the lesser of two evils proportionality prongs of duress.

d. Situation Must Not Have Been Voluntarily Brought by the Person Coerced

[91] *The Lord's Resistance Army*, U.S. DEP'T OF ST., (March 23, 2012), http://www.state.gov/r/pa/prs/ps/2012/03/186734.htm.

[92] *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red (23 March 2016) at para. 154.

[93] *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red (23 March 2016) at para. 155.

The defense is not available where the defendant is "responsible for the existence or execution of such order or decree."[94] If the defendant voluntarily joins an organization with a command structure that depends on violence and threats of it, it is foreseeable to the defendant that he would eventually be threatened with severe harm if he does not commit an unlawful act. For example, one scholar, in discussing the blameworthiness of the actor as a factor for duress, stated that "a man who knowingly joins a group of terrorists under the leadership of a manic radical will not be excused if the leader at some point threatens to kill the actor if he does not carry out a terrorist attack planned by the group."[95]

Kwoyelo did not voluntarily enter the situation. As a child, he was abducted and indoctrinated into the organization. Furthermore, as he grew older the omnipresent threat maintained his presence in the situation. Therefore, it is highly likely that Kwoyelo satisfies this prong of the test.

e. Affirmative Defense v. Mitigating Factor

In case the Court determines that Kwoyelo does in fact qualify for the defense of duress, it must then determine whether to treat it as a complete defense or rather a mitigating factor. Most common law systems, such as the United Kingdom and the United States, provide that duress is not a defense to murder but is only a mitigating factor.[96]

[94] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 629 (2015).

[95] Thomas Weigend, *Kill or Be Killed*, 10 J. OF INT'L L CRIM. JUST., 1219, 1235 (2012).

[96] Magali Maystre. *The Interaction Between International Refugee Law and International Criminal Law with respect to Child Soldier*, 12 J. of Int'l Crim. Just., 975, 992 (2014).

International law has generally taken a similar approach. For example in *Erdemović*, estimates indicate that over one thousand civilians were brought to a field and executed by a firing squad conducted by the Bosnian Serb Army and Police.[97] Erdemović was a Serbian soldier who personally killed seventy civilians due to the threat that if he did not follow the order, he would be killed as well.[98] In that case, the ICTY found that duress is not a complete defense for a soldier charged with war crimes or crimes against humanity.

The tribunal in *Erdemović* unanimously held that "where duress is unavailable as a complete defence, the coercion faced by an actor should still be considered a strong mitigating factor during sentencing."[99] (*See Id.* "[T]he majority of the Appeals Chamber finds that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings."[100]). The IMT has similarly decided that duress could only be used to mitigate the sentence when the crime of murder is involved.[101]

One scholar suggests that "[t]he duty to protect adolescents should create a heightened proportionality standard, in terms of harm threatened versus harm inflicted."[102] Therefore, she argues, "when it can be established that an adolescent has been forcibly recruited, duress should,

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[97] *Prosecutor v. Erdemović*, Case No. IT-96-22-A (Oct. 7, 1997), at paras. 4-12.

[98] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 630 (2015).

[99] Jennifer Bond, Meghan Fougere. *Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law*, 14 INT'L CRIM. L. REV., 471, 485 (2014).

[100] *Prosecutor v. Erdemović*, Case No. IT-96-22-A (Oct. 7, 1997), at para. 19.

[101] Marcus Joyce. *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 LEIDEN J. OF INT'L L. 623, 624 (2015).

[102] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 34 (2013).

provided the finding is supported by the facts, be permissible as a complete defense."[103] Some also argue, consistent with the dissent in *Erdemović*, that "if the victims would have died regardless, duress should provide a full defense."[104]

In line with the approach in the United Kingdom, international law, as well as the majority in *Erdemović*, duress should not be considered a complete defense for murder. Rather, it should simply be a mitigating factor. The sanctity of life argument that supports this position claims that "the law rightly attaches special sanctity to innocent human life."[105] Assuming that both parties are completely innocent, as required for the defense of duress, the criminal responsibility associated with the commission of the act would make the third party slightly more innocent even if the party under duress is not so guilty as to be deemed punishable under the law. Therefore, the sanctity of life principle should be upheld and duress should only provide a mitigating factor for sentencing.

Whether duress is treated as a complete defense or a mitigating factor, Kwoyelo fails to qualify for the defense. While he was involuntarily under a sufficient threat of death or severe harm, it was insufficiently imminent to constitute duress. Further, in line with international case law, Kwoyelo had adequate means of averting the threatened harm. Moreover, the crimes

[103] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 34 (2013).

[104] Maria Achton Thomas, *Malice Supplies the Age? Assessing the Culpability of Adolescent Soldier*, 44 CAL. W. INT'L L. J., 1, 35 (2013).

[105] *Murder, Manslaughter and Infanticide*. L. COMMISSION 304, 1, 121 (2006), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228782/0030.pdf.

committed were gravely disproportionate, and the greater evil, to the threatened harm. Therefore, Kwoyelo cannot claim the defense of duress as a way to negate the requisite *mens rea*.

IV. Conclusion

Under both Ugandan and international law, Kwoyelo has the requisite *mens rea* to be criminally convicted of the crimes for which he is charged. Notwithstanding his abduction and indoctrination into a militant organization at a young age, Kwoyelo fails to satisfy the requisite elements for the various psychological defenses with respect to crimes he committed.

Various sources of international law forbid the conviction of children for crimes they committed because they are not deemed to be “at-fault." While the requisite age to have criminal liability varies among sources, in order to accord with all relevant sources of law, Kwoyelo should not be charged with any crimes committed during his childhood. However, Kwoyelo should be charged with all crimes committed after the age of eighteen because he satisfies the various legal definitions of intent, and does not qualify for the defenses of insanity, superior’s orders, or duress.

Kwoyelo had the requisite intent under both Ugandan and international law because he exercised his will, was aware that the consequences of his conduct would occur, and had knowledge of the criminality of his conduct. Furthermore, he cannot successfully claim insanity notwithstanding the possibility that he suffers from PTSD, because the disease would not have in fact produced the conduct. Similarly, regardless of whether following superior’s orders is treated as a complete defense or not, Kwoyelo fails to qualify for the defense. Finally, he cannot satisfy all prongs of duress because the threat was not imminent, he likely had adequate means of averting the threat over his lifetime and the crimes he committed was disproportionate to the

threat. Therefore, assuming *arguendo* that the prosecution can prove Kwoyelo committed the alleged crimes, Kwoyelo had the requisite *mens rea* to be convicted.