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A Former Child Soldier Perpetrator: The Application of Article 31(1)(a) of Rome Statute

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ABSTRACT : This study will discuss whether the International Criminal Court shall consider the history of an international criminal offender who was once a former child soldier to exclude his criminal responsibility based on Article 31 (1) (1) of Rome Statute. The research method used is normative juridical. The study was conducted by analyzing data obtained from library studies and the study of regulatory international conventions relating to International Criminal Law. The research phase was carried out by means of library research conducted by secondary data including interviews with International Criminal Court Judges using primary, secondary and tertiary legal materials. The results of the study show that the practice of the International Criminal Court never considered the background of the perpetrators of international crimes as ex-child soldiers. However, the International Criminal Court Judge may use provisions outside the Rome Statute under article 21 (3). This is also based on the discretion of judges to decide and try other than those stipulated in the Rome Statute, such as the Case of Omar Khadr.

KEYWORDS: *Child Soldier, Criminal responsibility, Rome Statute, Judgment*Unfortunately*and Sentencing, International Criminal Court*

I. INTRODUCTION

The 1989 United Nations Convention on the Rights of the Child (CRC) affirms that children have rights to be fulfilled by loves and happiness when they grow up.[1] These rights cannot be attained by those who are kidnaped and forced to be at frontline of armed conflict. Children who join or trapped in armed conflict certainly risk their lives and future not for what they should stand for.Children must be protected in the ideal spirit of UN Charter Existence, specifically peace, dignity, tolerance, freedom and equality.[2], Child Soldier International 2018 recorded that there were at least 18 armed conflicts throughout the world where children participated in the fighting, there were around 240 million children live with the existence of armed conflict in their environment, 1900 children were forcibly recruited in South Sudan for the last 6 year, 14.000 children were forcibly recruited in Central African Republic.[3]These were the conditions which showed that the children's future are in danger.

Records provided by The United Nation Children's Fund (UNICEF) state that child victims in armed conflict in the past decades as follows 2 million children died; 4-5 million children became disabled; 12 million children became homeless; more than 10 million children orphaned or separated from their parents' 10 million other children suffered from psychological trauma.[4] The armed conflic historically also shows that children were always in the field of armed conflict as armed forces.[5] Speaking in regards with the children who participated in armed conflict, every one of them had their own stories, some of them tried to escape, some children survived, some managed to get out of the zone but did not fully survive, some ended up executed at rebels' hand, and the rest were forced to obey because of the extraordinary fear of seeing their friends being tortured and executed before their eyes when they did not obey.[6]

One of the story came from Immanuel Jal, He and 400 of his child soldier friends always tried to escape from the ruthless army, but only 16 children survived. This story shows us that trying to escape from armed conflict environment has its own 'price' that certainly may include their life or even worse.[7]In the other hand, Dikembe Muamba from Congo, who was 17 years old in 2014, had become a Captain in the Armed Forces of Democratic Republic of Congo (DRC) and led 50 people consisting of 30 children and 20 adults. He was forced to join DRC by his own uncle who was one o Leaders. Muamba claimed to have joined more than 45 battles, he can not remember how many people he had killed, but one of them was a 6-year-old girl who was also shooting gun at him.[8]All forms of murders committed by Muamba, Ishmael and other child soldiers were carried out when they were not yet 18 years old, thus that they could not be tried by the jurisdiction of the International Criminal Court like their superiors because they are children who should be protected, yet still, their future had faded ever since they put their little fingers to the rifles.

All of those children who were explained above might be usually called as "former child soldier" because they no longger serve the armed forces or the they grew up and no longer held the status of a child, then yet some of these former child soldiers might still live in rebellious environment, which some of them had been forced, got intoxicated, indoctrinated, receive threats and tortured during childhood in order to make them commit crimes later when they grow up.[9]It was never easy for them to forget what they did by their own hands, the memory of blood shed yet they knew it was not theirs. This, the authors think that they are no longer them who they were supposed to be. They cannot recognize themselves for they were guilty and scared at the same time. These matters are really important because the writer think that had from the beginning these children were not kidnaped and forced to became soldiers, they would not have become criminals. Their lives and futures should not be only fulfilled with the darkness consisted of guns, blood and armed conflicts.Severe Punishment in Court will only add to suffering they experienced since the first time they live in rebels' environment.

Whilst, let's see one of the former child soldier prepertator case in International Criminal Court, Dominic Ongwen, who has the same background as a child soldier in general, was kidnapped at the age of 9 years, got indoctrinated, intoxicated, and forced to commit a crime.[10]the difference is Ongwen was not as fortunate as his friends who were rescued or escaped from these conditions, he grew and raised in the Lord Resistance Army (LRA) environment and ended up being the leader of the LRA forces. The adult Ongwen has committed the most terrible crimes which were prohibited in the ICC Statute, such as crimes against humanity and war crimes. These crimes make him currently the only former child soldier tried at the International Criminal Court.[11]

The case of Dominic Ongwen and other child soldiers perpetrator have attracted writer's attention to later examined the links of someone who has a background as a kidnapped child soldier, intoxicated, forced indoctrinated, and forced to commit a crime which then after they become adults commits crimes as taught to them when they were still children with their criminal responsibility before theCourt with their mentality as human being in order to find the fault with present laws to give justice not only the victims of these kind of perpetrators, but also them as the victims in another crime. The main problem is regarding their responsibility when they commit crimes after they are 18 years old. The facts show that those who are under the authority of the rebels always follow the orders of their superiors to spread terror to civilians ranging from murder, rape, slavery, and other crimes such as war crimes and even genocide. These terrible crimes were done by them due to coercion and heavy pressure from their commander. If they are not obedient, they will be tortured, enslaved, or even killed in front of their friends, so that they have no other choice to survive.[12]

II. THE OVERVIEW OF CHILD SOLDIER

None of the International Conventions define what is exactly the meaning of child soldier. They only have regulations regarding banning on the use of children in armed conflict and the prohibition of killing children.[13]To make it clearer, International Criminal Court in Lubanga Case's decision defines child soldier as soldiers consisted children under the age of 18.[14]In the sphere of armed conflict, children are often kidnapped and forced to become child soldiers, given forced indoctrination (by violence and threats), taught to commit crimes such as looting and killing, rebellious children and children who tried to escape will be punished in the form of torture or even executed in front of other child soldiers so that there is no other choice for them to survive other than obeying the orders of their superiors.[15] Not only were they involved in armed conflict, female soldiers were also forced to serve their superiors, become sex slaves, or even "concubines" for their children to become soldiers again.[16]

There are two conditions where the children involved in a war crime, namely those who are involved because of their own wishes (voluntary) or by force (involuntary). Alice Schmidt an expert of child soldier in an armed conflict mentions there are some differences between voluntary child soldiers and involuntary child soldiers.

2.1. Voluntary Child Soldier

In some condition, there are underage children who wanted to be a soldier voluntarily. Voluntary child soldier is children who join armed forces by their own consent,[17]but this condition's legality is still a debate among experts, considering that on its implementation or practice, these children's volunteerism still has reasons that they cannot avoid.In advance, in the situation of Sierra Leonewhere some children were survivors of Rebel army's onslaught. The Rebel destroyed their homes and killed their own family. These survivors chose to join the national army to just survive, take revenge, or for other reasons that forced them to join armed force and fight on the battlefield.[18]

2.2. Involuntary Child Soldier

In the other hand, , the involuntary child soldier is those who are forced, even kidnapped from their families to be used as soldiers or servants of an army.[19] Their first duty is usually to kill innocent people or even their own family members, with the feeling of guilt and loss of their family members, eventually they have no other choice to survive other than following the soldiers who brutally take their present and future and call it "home".[20]

2.3. *Former Involuntary Child as Victim-Perpretator*

*Victim-Perpretator*is a condition where a person who has been a victim of a crime then commits (commonly) the same crime or other crime as a result of a crime committed against him. Presently, child soldier is considered usually as victim by the perspective of the lackness of international instruments in persecuting child soldiers

who have committed crimes even though there is no single international instrument that prohibits such persecution.[21]Save that the Victim Perpretator is not limited to Former child soldiers who commit crimes, these conditions can occur in all types of crimes.[22] The existence of victim-perpetrator is supported by two schools of criminology where crime is studied or forced to be learned.

Crime doer, namely people who commit crimes or often called "criminals". The study of these perpetrators was mainly carried out by positivist criminology with the aim of finding out the reasons for people to commit crime.In finding out thecause of crime, positivist criminology is aware of the basic assumption that criminals are different from non-criminals, the difference is in the biological, psychological and socio-cultural aspects.[23] Therefore, in finding the causes of crime positivist criminology usually tries to observe biological characteristic (biological determinists), cultural aspects (cultural determinists), and indeterminism of prisoner and former prisoner.[24]

2.1. Determinism

Determinism can be interpreted as a doctrine which events in the states occur because of the necessity and certainty at the beginning so that it is inevitable. The Definition of determinism then narrows in "causal determinism", namely that the current event is entirely the result of the previous event. In its continuity, the definition of determinism becomes divided depending on the point of view, for example depending on who initiated the chain of determinism or how 'strong' determinism was.[25] This notion believe that if someone did a crime, it must be caused (determined) by past events.[26]For instance, the writers think that the present condition of the former child soldiers including their state of mind can be strongly caused by the treatment they had in the past. The experts mention there are two kind of determinism.Biological determinism considers that social organizations develop as a result of individuals and their behavior is understood and accepted as a general reflection of biological inheritance.[27] In contrast, cultural determinism considers that human behavior in all its aspects is always related and reflects the values of the socio-cultural world that surrounds it.[28] Cultural world is relatively not dependent of biology, in the sense that one change does not mean corresponding or immediately produce other changes. Cultural change is accepted as working with special or special characteristics of cultural phenomena rather than as a result of mere biological limitations. Thus biology is not a producer of culture, so biological explanations do not underlie cultural phenomenon.[29]

2.2. Indeterminsm

Contrary, the criminology school suggests that someone is not bound, and has the ability to freely choose something to do(free will). Someone can do whatever they want while they are not influenced by anything.[30] Thus, someone's action is not result any external influence. That means human is responsible for their own deed. Thereforeevery person who commits a crime must be convicted.

The writers show these contras so that the readers could understand why the decision making in the International Criminal Court might only see one of the ism mentioned above.

III. THE APPLICATION OF ARTICLE 31 OF THE ROME STATUTE

The Judges of the International Criminal Court, beside considering whether a person's background as a former child soldier (victim), must also consider the possibility regarding the provision of the exception of the criminal liability which owned by the defendant. Article 31 (1) (a) mention the possibility of a person could be excluded from his criminal responsibility through mental illness.

3.1. The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.

Ongwen's Legal Counsel in his defense included this provision, and also included evidence in the form of a letter stating that his client was indeed suffering from a mental disorder due to the forced indoctrination he had experienced while being a child soldier.[31]

This provision has also been applied to the *Delalic* case in the ICTY, that a person who suffer from abnormalities in mind that might disturb his mentality in taking responsibility for his actions should be able to exclude him from his criminal liability.[32]

Diminished responsibility is known in the common law and Anglo-American system, in the United States legislation, Diminished Responsibility must at least be proven by the fulfillment of three elements: (a) there is an abnormality of mind; (b) the abnormality of mind must arise from inside sources, such as mental illness or handicap or other forms of mind; (c) it's must substantially affect the defendant's mental responsibility for his action.[33]

3.1.1. Abnormality of Mind

Mental disorders are different psychological conditions where other 'normal' people will see it as someone who has a disorder because they are different among other people. This situation can only be proven in court, in

practice in the United States, after medical evidence is given at the trial, the jury will determine whether the perpetrator actually has a psychiatric disorder or not.[34]

3.1.2. the abnormality of mind must arise from inside sources, such as mental illness or handicap or other forms of mind

Abnormalities possessed by the offender must result from something that is attached to him or induced by illness or injury. This means that this disorder is not only due to intoxication, or drug users, unless intoxication and drug use contribute to the damaged mindset of the perpetrator.

In the case of Tandy in 1989,[35] the perpetrator who was an alcoholic who shortly before strangled his 11-year-old son drank a full bottle of Vodka. The perpetrator claimed that he did not drink on his own behalf but because he was in a state of sexual violence by his own husband. The judge then decided that the perpetrators still had the choice not to drink, and mental disorders must come from within, even because the perpetrator was an alcoholic, it was necessary to prove that the disorder did arise because the perpetrator was an alcoholic.

Like the Egan 1992 case,[36]Egan was not given a criminal exemption for diminished responsibility after he killed a 79-year-old woman after he drank a large amount of alcohol (15 bottles of beer, and several bottles of strong medicine). The perpetrator was not an alcoholic, yet indeed there is evidence that the perpetrator suffered from mental retardation, psychological disorders. The jury decided to rule out that alcohol could be the cause of his mental illness and questioned that he would not kill if he did not drink.

3.2.3. it's must substantially affect the defendant's mental responsibility for his action

The difficulty faced by the defendants is that the abnormality of his mind must be substantively greater than that experienced by people in general. In the Simcox case in 1964,[37]there must be medical evidence to support this opinion. In general, the jury will accept the evidence.

In Sanders 1991,[38] The jury continued to punish the defendant even though there were two psychiatrists who stated that the defendant had a reactive depression, this was based on the jury that the perpetrator had written a letter saying that he would commit suicide to the Household.

In a study conducted by S. Vindevogel*et.al* in Uganda stating that among those former child soldiers, most of them were brutally forcibly recruited by the LRA, they faced challenges by living in armed conflict and the impact of the conflict to these child soldiers.[39] Regardless of the methods used in examining the consequences for these child soldiers, researchers found a high prevalence of psychological suffering experienced by Ugandan child soldiers even shortly after they left the LRA. The study focused on symptoms of post-traumatic stress disorder (PTSD) and has been identified up to 97% of the samples found including depression (20%), anxiety (13%), nightmares (37%), general emotional and behavioral difficulties (53%).[40]

Variable	*n* (%)
Sociodemographic variables	
Gender	
Male	298 (70.28)
Female	126 (29.72)
Age at follow up (10–23 years)[a]	15.21 (2.45)
Time since return (30–1160 days)[a]	813.91 (272.51)
0–1 year	47 (11.08)
1–2 years	69 (16.27)
2–3 years	256 (60.38)
> 3 years	52 (12.26)
Child-soldiering related variables (intake)	
Age at abduction (5–18 years)[a]	12.84 (2.30)
Duration of captivity (1–3693 days)[a]	381.20 (517.03); 241.50[b]
Participation in hostilities	297 (72.97)
Number of different war-related experiences (1–15 experiences)[a]	7.99 (2.98)
Post-child soldiering variables (follow-up)	
Presence of parents	
Father dead	108 (25.65)
Mother dead	47 (11.19)
Both parents dead	33 (7.78)
Displacement	327 (84.30)
School attendance	326 (76.90)
Number of meals a day	
One	129 (31.08)
Two	251 (60.48)
Three	35 (8.43)
Insults	226 (48.58)
Professional support	194 (46.08)

Source: Global Public Health

Variable	I *n* (%)	FU *n* (%)	I:0/FU: 0[a]	I:1/FU: 0[a]	I:1/FU: 1[a]	I:0/FU: 1[a]
Sensitivity	72 (19.1)	230 (61.0)	121 (32.2)	25 (6.6)	45 (12.0)	185 (49.2)
Fear	245 (64.3)	146 (38.3)	86 (22.6)	149 (39.1)	96 (25.2)	50 (13.1)
Nightmares	152 (40.1)	136 (35.9)	144 (38.0)	99 (26.1)	53 (14.0)	83 (21.9)
Suicidal thinking	7 (1.9)	25 (6.7)	342 (91.7)	6 (1.6)	1 (0.3)	24 (6.4)
Withdrawn	161 (42.9)	21 (5.6)	200 (53.2)	155 (41.2)	6 (1.6)	15 (4.0)

[a]I, intake; FU, follow-up; 0–0 = no occurrence at both assessments (no manifestation of the symptom over time), 0–1 = only occurrence at follow-up assessment (manifestation of the symptom since returning to the community), 1–0 = only occurrence at intake assessment (disappearance of the symptom over time) and 1–1 = occurrence at both assessments (persistent manifestation of the symptom).

The research shows that the psychological stress experienced during being a child soldier can cause things that make them have psychological disorders, including those who had experience like Ongwen did. There is no provision that this mental illness must be permanent (incurable), it is enough to prove that the defendant's capacity to commit a crime is 'broken' or a condition where the defendant cannot see right and wrong when committing a crime.[41]

However, in the case of Vasiljević[42] stated that Diminished mental capacity was not a defense, but that it would only be considered when the sentence would be given to the defendant. In the Ongwen case, there are also testimonials from psychiatrists and evidences in the form of statements that Ongwen suffered from a psychology which caused him to be unable to judge good and right deeds, yet it cannot exclude him from his criminal deeds.[43]

Besides the diminished mental responsibility, there are other terms that are still related to psychology or other mental illnesses, namely insanity.[44]Theoretically insanity is one of the more specific forms of diminished mental responsibility, diminished mental responsibility speaks of the drivers or causes of someone doing something. Insanity basically is also a reason for someone to do something. The difference is in insanity, the perpetrator is not aware of what he is doing, even if he knows, he does not know that it is prohibited.[45]

Insanity is the only defense whose burden of proof is given to the defendant along with his attorney.[46] If someone is in detention, but it is clearly certain that they are 'insane' then it would be unwise to take him to the trial table. In M'Naghten 1843 (subsequently becoming M'naghten Rules) there are three stages in proving the defense of madness:

3.2.1. The defendant must prove that he has a disability from a reason

The defect in question is a defect as a whole, not just confusion or confusion. In the case of Clarke 1972,[47]the perpetrator was accused of stealing a bottle of coffee, a packet of butter and minced meat which he transferred from the basket to his bag. During the trial he claimed that he had a senile illness caused by depression, shortly after the Judge stated that he had plead for insanity he had replaced for a guilty plea. The judge then found guilty because the defendant was not 'insane' and the rules regarding exclusion because of insanity could not be applied to him because it could only be applied to those who lost their full awareness, while the perpetrators did not show this

3.2.2. The defect must be caused by disease

It needs to be understood that the disease in question is not a mere brain disease, but a disease of 'mind'. *'is not concerned with the brain but with the mind, in the sense that 'mind' is ordinally used, the mental faculties of reason, memory and understanding'* [48]

In Kemp 1957,[49] the perpetrator did something that causes serious bodily injury to his wife by beating her using a hammer for no reason, in the trial there was an evidence that he is a person who is patient and not so irritable and a good husband. He claimed that he lost consciousness at the time of the act due to his suffering from arteriosclerosis which caused blood clots in the brain, and the defense was accepted by the judge. The perpetrator did not know what he was doing, even if he knew, he did not know the act was a violation to the law. Firstly, this element accommodates the situation as in the case of Kemp above, where he lost consciousness when committing a crime. Also confirmed Burgess 1991[50] where the perpetrator claims that he was sleeping thus he did not know the good deeds or the consequences of his actions.

Second, this element protects people who are aware of their actions, but do not know that what they did violated the law (wrong). This may be more difficult to prove. In the case of the Codere 1916,[51] the judge made it clear that the perpetrator could not rely on his feelings in doing something he considered not wrong, if he knew he would not kill prostitution in violation of the law. This was also confirmed in the 1952 Windle case.[52]

The Rome Statute in this case also confirms that these factors must "destroy" the capacity of the actor to know his actions, not just "reduce".[53]AlbinEser added that what is meant by this provision is '... completely exclude the person 'awareness of acting as such ...'.[54]

Dominic Ongwen, according to the authors, did not fulfill the elements of insanity or in this case a person suffering from mental illness or disability which destroys his capacity to do something, and Ongwen actually knew that his actions were wrong. In simple terms this can be proven by the fact that he voluntary surrendered in Central Africa. Thus article 31(1)(a) of the Rome Statute does not accommodate an international criminal offender who has a history of being a former child soldier to exclude criminal liability. Even so the International Criminal Court must not immediately decide Ongwen guilty, due to his status as a victim attached in another case (Joseph Kony).

Cases like this caused the International Criminal Court to a dilemma in considering the background of the defendant and also to determine the sentence. In the dilemma the authors will try to explain some considerations that might support and complicate with the defendant.[55]

In Congo in 2000, 8 children around 14 years were executed, and the rest were released. In 2001 there were 4 children between the ages of 14 and 16 who were sentenced to death, but fortunately there were interventions from Human Rights Watch. Nevertheless, there are also reports of children being sentenced to death as in the Sudanese Special Court.[56]

Both as perpetrators of crime or as victims, Ongwen or every individual who had history like him is still a former child soldiers who needs justice.[57] In the viewpoint of international law, the application of retributive justice is in line with the nature of the International Criminal Court whose application applies a retributive justice approach. Even so, within the scope of transnational justice, these individuals must be punished as perpetrators of crime. Nevertheless, transnational justice provides a solution other than accountability between purely criminal or judicial forms.[58] The aim is to punish their cruel deeds and provide an opportunity to return to society and become part of the community again. thus, even though the Public Prosecutor saw Ongwen as an international criminal, the Court would assess and should consider Ongwen's position as a former child soldier, in other words, as a victim of international crime as well. [60]

Basically, children have the right not to be recruited to such things according to international law.[61] However, Ongwen had been recruited (forcibly, kidnapped) as an army (child) by the LRA, and his rights as a child have been violated which made him a victim of the LRA. Based on this, the Court must pay attention that Ongwen is someone who was once a victim who turned into a criminal.[62] The Court must also look at Ongwen's background, such as how his recruitment as a child soldier, which made his childhood deprived of the LRA, both as a defense and as a mitigating matter in the decision. Keep in mind that every child soldier must bear a series of indoctrination, killing exercises, coercion for intoxication, and also unbearable pressure.

Ongwen's conditions as a child soldier was very likely to be shaken by such environmental conditions. As a result, he grew into a criminal, but on the other hand, he regretted his development to the people he injured. He often releases prisoners, children, even his forced wife. He experienced psychological dilemma as long as he was a criminal, as well as a victim. Thus, it is possible that the Ongwen subconscious was not trained to commit crimes while he was at the LRA. That made Ongwen's actions in the LRA a way of life,[63]Ongwen never knew what it was like to grow and develop as a normal child. Instead, he was in a terrible life as a rebel soldier from an early age with an abnormal lifestyle that had been described as traumatized, violent and anti-social. The situation could be considered by the Court to reduce Ongwen's sentence. The fact that ongwen surrendered itself was a very essential factor, he chose to surrender compared to other LRA members. So, the court should see this fact as a relief for Ongwen's punishment.

The Rome Statute as the basis for the formation of the International Criminal Court makes it possible for judges to transform the defense delivered (exception to criminal liability) into consideration to be used as a mitigating matter.[64] This supports that whatever is brought by the legal counsel in the defendant's defense including a person's history as a child soldier, the Judge will consider it, nor does it exclude the defendant's criminal, the judge will still consider it to be a mitigating matter.

The Judges, in order to judge someone who is a suspect of international criminal who was previously a victim of international crime, the judge will see it in the form of different conditions. The first condition is when and how he became a victim of other international crimes, while judge also gave his rights as a victim. In another condition, the Judge saw him as a criminal suspect in general.In this case, the author concluded that according to him the existence of a former child soldier who commits a crime does not make it a reason that he only has the status of a victim, so in addition to fulfilling his rights as a victim, he must also be seen as a perpetrator as in general.

IV. CONCLUSION

The provisions in article 31(1)(a) of the Rome Statute cannot accommodate someone who had a history of ex-child soldiers to exclude criminal responsibility. By all means, Ongwen and other former child soldiers out there will not be able to escape punishment with crimes they commit on the basis of coercion, brainwashing, and training.

On the other hand, even though Article 31 of the Rome Statute has definite provisions, it needs to be clarified from the outset that the title of this article is incomplete.[65]When speaking about "the basis of exclusion of criminal responsibility" in general, the aim should be to provide all possibilities for all defenses that lead to the exclusion of criminal responsibility. This impression, leads to two conflicting results. Firstly, as can be concluded from paragraph 1, article 31 is not the only article in the Rome Statute where the provisions regarding the exclusion of criminal responsibility exist. In this case, the provision has a supplementary function that there are other provisions regarding the exclusion of criminal liability in the Rome Statute which is not yet known by the International Criminal Court, namely in article 32 and other provisions outside the Rome Statute.

The provisions set out in article 31 concerning the exclusion of criminal responsibility are not complete, where the first paragraph only mentions four provisions, namely: incapacity, intoxication, duress, and self-defense.[66] However, the deficiencies contained in paragraph 1 can be supplemented by the provisions in paragraph 3, wherein the International Criminal Court Judge can use the other exclusion provisions outside the Rome Statute as long as they are in accordance with Article 21 of the Rome Statute.[67]This supports the author to then examine the practices in national law and other international law which pertain to the conviction of someone who has a history as a former child soldier.[68]

Article 21 of the Rome Statute describes legal products that can be used at the International Criminal Court, besides the Rome Statute and RPE, in paragraph 1 letters b and c also recognize applicable agreements, principles and regulations of international law, including the principles of applied international law regarding armed disputes; If that fails, the general legal principles adopted by the National Law-based Court of the world legal system include, where appropriate, national laws from States that normally exercise jurisdiction over crimes, provided that they do not conflict with this Statute and with international law and internationally recognized norms and standards.

According to paragraph 2, the Court can apply the principles and rules of law as interpreted in its previous decisions, and paragraph 3. The application and interpretation of the law in accordance with this article must be in accordance with the principle of human rights that are internationally recognized, and must be without reverse differentiation built on such as gender, as stipulated in article 7 (3), age, race, color, language, religion or belief, political or other views, national, ethnic or social origin, wealth, birth or other status.

The conditions referred to by the author here are other decisions which almost resemble the Ongwen case as someone who had a background as a former child soldier, as explained in the consideration of the previous judge that Omar Khadr was also a former child soldier when allegedly committing international crimes.[69]In the decision of the United States Military Tribunal the Khadr was sentenced to 12 years in prison, but this was not considered an appropriate punishment by the Canadian Government who later requested extradition and then made Khadr free from his sentence.[70]

Therefore, the International Criminal Court should consider the case of Canada v. Omar Khadr as one of the cases that has similarities with the current condition of Dominic Ongwen. However, the author is well aware that the Canadian court ruling v. Omar Khadr did not bind the International Criminal Court Judge for later use in the Ongwen case or other cases involving a former child soldier such as Ongwen. The author's analysis is based on the existence of Article 21 paragraph (1) letter C of the Rome Statute that if letters (a) and letters (b) do not regulate this matter then they can use this provision which among other things accommodates the existence of "general principle of law prerived by the Court from the National Laws of the legal system of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the Crime ".

Article 21 of the Rome Statute provides space for those who wish that the Court can directly use national law and those who believe that general legal principles should be separated from all references originating from national law. The inclusion of paragraph 1 letter (c) is still essential that the Court will consider not only principles derived from natural law or human conscience, but also from national law.[71]

The International Court of Justice has clarified the duties of international judges in using general legal principles of national law throughout the world. The judge does not have to use the concrete rules of the law in national law, but the basic principles of the rule.[72]Thus, Article 21 (1) letter (c) of the Rome Statute requires the judge of the Court not to use national law, but rather the principle underlying the 'legal system of the world'.[73]

The ICTY judge used his analysis in the Erdemovic case. The two judges describe their duties as follows:[74]

> *'Our approach will necessarily not involve a direct comparison of the specific rules of each of the worlds's legal system, but will instead involve a survey of those jurisdiction whose jurisprudence is, as practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal'*

The formers of the Statute of the International Court of Justice explained the role of article 38 with provisions concerning general principle of law is about to avoid *non-liquet* situations.[75]Paragraph (1) letter C together with references related to paragraph (1) letter b, are both facilitating to overcome the unavoidable gaps in

international criminal law. As a developing legal entity, international criminal law does not provide answers to legal problems that often appear in the court. For example, the reasons for the exclusion of criminal responsibility are still unclear in the perspective of international law.[76] For this reason, at the time the Rome Statute elaborated the article 31, it also gave the specification that 'the Court may consider the ground for excluding criminal responsibility other than those which are set forth in article 21 "In the development of international criminal law related to defense, it is important for the Court to be permitted to use the principles of criminal law drawn from the national legal system. Paragraph (1) letter (c) then encourages this matter to improve the ability of the Court to fill lacunae in international criminal law.[77]

Article 21 provides a large discretionary space for judges in determining which national law contains 'general legal principles'. Article 38 of International Court of Justice Statute limits the principles relevant to "recognized by civilized nations". This provision may initially refer to the most 'developed' countries, even though currently it is intended for all countries.[78]The same regulation stated in the article 21 of the Rome Statute which does not limit any country whose national law is used as a reference. However, it is clear that the principle that can be used does not need to be unanimously accepted by the entire legal system in the world,[79]but it is sufficient that there is evidence that the principle is accepted by a representative majority, including the principle of the existing legal system.[80]

In identifying general legal principles, the International Criminal Court judge must be able to participate in conducting the analysis of comparative laws to identify which national laws are used in the analysis, but remain at their discretion.[81]Article 21 of the Rome Statute also allows judges to determine, appropriately, the laws of states that exercise jurisdiction over crimes in order to use or reduce the applied general principles of law. Judges have discretion to determine when they recognize the consideration of these principles.

Thus, the authors see that by the judge's discretion which provided by article 21 of the Rome Statute that they can use national law including the Canadian court's decision. The author is well aware that one case is the only case and has not even been called a Landmark Case which often quoted by other Judges in other courts, plus the consideration of Canadian judges is also not based on national legal rules which clearly stated that a person with a history as a former child soldier can be excluded from his criminal responsibility. However, accordingly, the International Criminal Court's ruling on Ongwen, the Victim-Perpetrator, will determine the other former child soldiers in the future because he will be the first case of a person who has a history as a former child soldier and 'considered' in the International Criminal Court

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