Dignity, Development, and the Gravity of Child Soldiering

1 Introduction

The International Criminal Court (ICC or Court) follows in the legal and philosophical footsteps of the International Military Tribunal at Nuremberg, and the various *ad hoc* tribunals that were established to try perpetrators of grave international crimes. The ICC is designed to prosecute 'unimaginable atrocities' that are held to 'shock the conscience of humanity.'[1] Unlike the *ad hoc* tribunals, which were limited in their jurisdiction to crimes that were committed in the course of particular conflicts, the ICC has permanent jurisdiction over the 'most serious crimes that concern the international community as a whole.'[2] Such crimes have a sort of super status, in that they attack something fundamental about humanity and exploit the human condition, and are wrong regardless of whether states recognize their wrongfulness in domestic law.

The Rome Statute, which is the treaty that created the ICC and serves as its governing law, recognizes four international crimes: genocide, crimes against humanity, war crimes, and crimes of aggression.[3] These core crimes constitute the ICC's subject-matter jurisdiction and are the only crimes that are admissible before the Court.[4] In light of the Court's resource constraints and further limits to its temporal and personal jurisdiction, the Office of the Prosecutor (OTP) cannot investigate all admissible cases under the Rome Statute's subject-matter jurisdiction. The OTP must select which cases to prioritize for the purposes of investigation and prosecution.

The ICC's first Prosecutor, Luis Moreno Ocampo, relied on the concept of gravity to explain his decision to prosecute Thomas Lubanga Dyilo, leader of the Congolese rebel group,

[1] These phrases are used in the Preamble to the Rome Statute, which identifies the ICC's normative commitments.
[2] Ibid. Article 1 of the Statute grants the Court 'power to exercise jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute.'
[3] Article 5 limits the Court's jurisdiction to the 'most serious crimes of concern to the international community as a whole,' and lists genocide, crimes against humanity, war crimes, and aggression.
[4] Article 17 then establishes the Court's subject-matter jurisdiction as a gravity threshold on admissibility.

the Union of Congolese Patriots, for the war crime of conscripting and enlisting children under the age of 15 to actively participate in hostilities, as the ICC's first case.[5] This decision received criticism, including criticism from two leading scholars of international criminal law—William Schabas[6] and Margaret deGuzman[7]—both of whom invoked the notion of *relative gravity* to argue that the war crime of using child soldiers is *less serious* than other admissible crimes the OTP could have prosecuted. Throughout their writings on gravity, both scholars not only argue that Lubanga's use of child soldiers was less serious than other admissible crimes the OTP could have prosecuted—they also question the nature of this crime, and whether the crime of using child soldiers is wrong in itself, like other international crimes involving murder or rape.

In this paper, it is not my intention to argue that the crime of using child soldiers is more serious than (or even as serious as) other international crimes,[8] or to defend Prosecutor Moreno Ocampo's handling of the *Lubanga* case as a whole.[9] Rather, my aim is more modest: to show how both deGuzman and Schabas do not fully appreciate the gravity of the crime of using child soldiers. Furthermore, both situate their claims about the diminished gravity of this crime within the larger debate about whether the ICC is inappropriately targeting Africa, and both suggest that prosecuting the less serious crime of using child soldiers indeed raises concerns about the ICC's legitimacy. Insofar as possible, I aim to disentangle these issues, and show that we can appreciate the heightened gravity of the crime of using child soldiers as an independent normative project.

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[5] *The Prosecutor v. Thomas Lubanga Dyilo,* ICC-01/04-01/06.
[6] William Schabas, 'Complementarity in Practice: Some Uncomplimentary Thoughts' *Criminal Law Forum* 19 (2008): 5-33; William A. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court,' 6(4) *Journal of International Criminal Justice* (2008): 731-761; William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals,* (Oxford University Press, 2012).
[7] Margaret M. deGuzman, 'Gravity and the Legitimacy of the International Criminal Court,' *Fordham International Law Journal* (2009): 1400-1465; Margaret deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court,' 33(2) *Michigan Journal of International Law* (2012): 265-320.
[8] Generally speaking, I find the task of weighing the gravity of international crimes against one another to be problematic, insofar as all international crimes attack dignity of their victims, and it is unclear that dignity should be measured in this respect. For an interesting discussion on balancing dignity, see Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012).
[9] Some criticisms of Ocampo's handling of this case include: mishandling of evidence, delaying the trial, and not investigating other alleged crimes carried out by Lubanga, especially sex crimes.

In Section 2, I distinguish between two distinct roles (absolute and relative) played by the concept of gravity under the Rome Statute through a discussion of the case of Thomas Lubanga Dyilo. In Section 3, I critically examine how deGuzman construes relative gravity and its relation to legitimacy, and show that her view would be more coherent and compelling if she highlighted the gravity of the crime of using child soldiers, rather than understating the gravity of this crime. Section 4 introduces Schabas' view as an alternative that reaches a similar conclusion about the diminished gravity of child soldiering, but that has stronger legal and normative support than deGuzman's, insofar as his view rests on a discernible gravity hierarchy within the Rome Statute and deontological moral norms. Still, I challenge Schabas' view by showing how a deontological commitment to protecting the dignity of the developing child can be used to emphasize, rather than understate, the gravity of the crime of using child soldiers. I argue that the crime of using child soldiers is wrong in itself in that it seeks by its nature to undermine the developing child's dignity, where dignity is understood as a person's moral capacity. Lastly, in Section 5, I offer a summary of my argument and some concluding reflections.

2 The Concept of Gravity under the Rome Statute

The concept of gravity plays two distinct roles in ICC jurisprudence. First, gravity serves as an absolute threshold on admissibility before the Court. This is contained in Article 17(d) of the Rome Statute, which states that a case is inadmissible if not of sufficient gravity to justify further action by the Court. In the ICC's case against Lubanga, the Appeals Chamber held that if the ICC's subject-natter jurisdiction is satisfied, the gravity threshold on admissibility is satisfied as well. This means that all cases of genocide, crimes against humanity, war crimes, and crimes of aggression are legally admissible before the Court.

The second role played by gravity is far more important and is the focus of this paper. Gravity, in this second role, is invoked in a relative sense with respect to the seriousness of cases and situations that meet the absolute gravity threshold. Because the Court is unable to prosecute all admissible crimes that fall under its jurisdiction, the OTP must decide which, among these, to prioritize and prosecute. There is no special formula that the Prosecutor can use to make these decisions. To enhance the legitimacy of the Prosecutor's selection decisions, the OTP has issued policy statements on how relative gravity is determined.

According to a December 2018 report from the OTP, gravity includes 'an assessment of the scale, nature, manner of commission of the crimes, and their impact, bearing in mind the potential cases that would likely arise from an investigation of the situation,' and taking into consideration the overall 'interests of justice.'[10] These criteria have remained roughly consistent, though different components have been emphasized as influential in the OTP's different relative gravity determinations. In the scholarly literature, relative gravity has also been held to include both quantitative and qualitative measures, and two broad approaches have emerged: one that focuses on the nature of the crimes, and another that focuses on the impact on the victims.[11]

In the ICC's first case, former Prosecutor Moreno Ocampo explained his decision to prosecute Thomas Lubanga for the war crime of conscripting and enlisting children under 15 years of age to actively participate in hostilities, by appealing to the crime's gravity.[12] This was the only crime for which the OTP charged Lubanga, a decision that was criticized by deGuzman and Schabas. Even further, both accompany their criticism of this decision with claims about the

[10] https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf
[11] Megumi Ochi, 'Gravity Threshold Before the International Criminal Court: An Overview of the Court's Practice,' *International Crimes Database ICD Brief,* January 2016.
[12] More international debate exists on whether children aged 16-17 should be recognized as capable of legally consenting to join armed groups.

diminished *absolute* gravity of the crime of using child soldiers. That is, both scholars challenge the idea that the crime of using child soldiers is a wrong in itself. In this paper, I argue that it is.[13]

3 DeGuzman's View

In her writings on gravity, DeGuzman states that gravity-based selection decisions by the ICC Prosecutor are fundamentally subjective and discretionary because they are not determined by legal process in the Rome Statute.[14] In other words, because the Statute does not provide a legal formula for ranking the relative gravity of crimes within the Court's jurisdiction, this means that no selection decision that the Prosecutor can make (among admissible cases) is *legally* more legitimate than another. Moreover, deGuzman argues that because there is no objective way to rank the moral gravity of such crimes, no decision can be shown to be more *morally* legitimate than another. DeGuzman concludes from this that the ICC's normative legitimacy 'generally will not depend on the Prosecutor's relative gravity decisions.'[15] In light of this, deGuzman suggests that the OTP should make selection decisions in light of reasonable expectations about how each decision will impact how relevant audiences *perceive* the legitimacy of the decision, which concerns the Court's sociological legitimacy. She identifies relative audiences as: global society, states, and affected populations.[16]

In charging Lubanga with the recruitment of child soldiers, deGuzman writes,

> [T]he Prosecutor appears to have prioritized the impact of the crime---the use of child soldiers is a widespread and under-addressed problem—over the nature of the crime—murder and rape are

[13] Granted, child soldiering is not a monolithic phenomenon, and there is no paradigm case, 'The Child Soldier.' Recent anthropological work with former child soldiers highlights these differences and records experiences of children inside armed conflict in their own voice. In this paper, I aim to make a moral argument about the gravity of the crime of using child soldiers, and, to this end, I am largely concerned with legal standards and moral theory. I aim to show that the crime of using child soldiers is wrong in itself, notwithstanding the various reasons former child soldiers under 15 offer for why they became involved in armed groups..

[14] DeGuzman, 'Gravity and the Legitimacy of the International Criminal Court,' pp. 1442-1443.

[15] Ibid., p. 1440.

[16] Ibid., pp. 1444-45.

> presumably more serious. In fact, the recruitment of child soldiers has not always been a crime under international law, and remains legal in some domestic systems.[17]

Here, deGuzman implies that the nature of rape and murder are presumably more serious than the nature of child soldiering. My concern with this statement is that she does not (here, or in her other work on the subject) explain what the nature of the crime of using child soldiers actually is. Based on deGuzman's larger view, there are two ways that we can interpret her statement: either as a statement of her subjective judgment that cannot be grounded in any deeper legal or moral standard, or as a sociological report of what relevant audiences think about the gravity of child soldiering relative to that of rape and murder.

If deGuzman is expressing her subjective judgment on the relative gravity of the crime of using child soldiers that cannot be grounded in any deeper legal or moral standard, a reader who might not happen to share her intuition is left with little reason to be persuaded by her. If we interpret her statement as a sociological report of what relative audiences think about the relative gravity of child soldiering compared with murder and rape, then we would want to know which relevant audiences she has in mind. She notes that it has not always been an international crime to use child soldiers and that some states still maintain this practice, so perhaps she is concerned with relevant state audiences. However, states that continue to reportedly use child soldiers under 15 years of age include 'persistent objector states' like Sudan, Syria, Iraq, Yemen, and Myanmar, who are not the appropriate moral authorities on the issue, making it problematic consider such states the relevant state audiences that the OTP should attend to in making gravity judgments and selection decisions.

In addition to state audiences, deGuzman identifies two other audiences that are relevant to the sociological legitimacy of the Prosecutor's selection decisions: global society and affected populations. Within neither of these audiences, however, do we find consensus in the judgment

[17] Ibid., p. 1461.

that the crime of using child soldiers is less serious than other international crimes. For example, global society identifies anyone under 18 years of age as a child, and imposes duties on states to take efforts to ensure that no child is recruited into the armed forces. The 2000 Optional Protocol to the Convention on the Rights of the Child (OPAC), which has been ratified by 167 of 197 UN member states, prohibits the conscription and enlistment of children 15 years of age and under into state and non-state armed forces.[18] Moreover, even while the Prosecutor's decision to charge Lubanga and handling of his case was criticized, the *Lubanga* Trial Chamber judgment itself was in fact welcomed by international experts as a landmark decision.[19]

With respect to affected populations, the ICC has charged 45 individuals under the Rome Statute, nearly all of them African nationals, and several of them have been charged with the war crime of using child soldiers under the age of 15. Former Prosecutor Ocampo held that the cases that he prosecuted were the gravest under the ICC's jurisdiction at the time, but deGuzman notes that some affected populations prefer amnesties, truth commissions, and local justice to criminal prosecutions, thereby suggesting that affected populations do not prefer prosecutions (or perceive them as legitimate) in these cases.[20] Although affected populations prefer local justice for crimes committed *by* child soldiers, it is unclear that a similar preference exists for perpetrators of the crime of recruiting children under 15 into armed groups. Even if affected populations prefer local justice over international prosecutions for those who recruit children under 15 into armed groups, this preference would not necessarily show they consider this crime of diminished gravity.

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[18] Child Soldiers International, 'International laws and child rights,' accessed on 5 March 2019 at https://www.child-soldiers.org/international-laws-and-child-rights.

[19] Sylvain Vite, 'Chapter 4: Between Consolidation and Innovation: The International Criminal Court Judgment in the *Lubanga* Case,' Yearbook of International Humanitarian Law (2012), p. 62. The view of global society has been challenged in the last decade by recent work in anthropology, which relies on interviews with former child soldiers to argue that children exercise agency inside armed groups, and are not the passive victims depicted in the narrative of global society. Mark Drumbl calls that narrative part of the 'international legal imagination' in *Reimagining Child Soldiers in International Law and Policy* (New York, NY: Oxford University Press), 2012.

[20] DeGuzman, 'Gravity and the Legitimacy of the International Criminal Court,' pp. 1446-47.

This brings us back to the nature of the crime of using child soldiers. Rape and murder are wrong in themselves, and by claiming that these crimes are presumably more serious than the crime of using child soldiers, deGuzman suggests that using child soldiers is not wrong in itself. She may hold this view because the crime of using child soldiers does not only extend to those who conscript or enlist children under 15 for direct participation in combat. The Trial Chamber in *Lubanga* held that it extends to children who are recruited to serve other roles, such as spies, porters, and even cooks, on the grounds that, through such supporting roles, children become targets in armed conflict.[21]

Perhaps deGuzman's view of the diminished relative gravity of the crime of using child soldiers depends on an implicit judgment that it is not inherently wrong to recruit a child under 15 years of age for supporting positions. Yet, there is good reason for her to embrace the broad construction given to the phrase 'active participation in hostilities' in the *Lubanga* judgment: it offers greater protection to girls who are also often the unfortunate victims of armed conflict. In a recent paper, deGuzman argues that the ICC should prioritize sex crimes in its work.[22] One common misconception about child soldiering is that child soldiers are exclusively boys, when, in fact, the global number of child soldiers, especially girls, who have been recruited has greatly increased in the last few years.[23] When we consider the fact that many young girls enter armed groups through supporting roles as cooks, and are often forced to fight or are taken as 'wives' (i.e., sex slaves) of the leaders,[24] we can appreciate the intertwined experiences of boys and girls inside many armed groups.

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[21] *The Prosecutor v. Thomas Lubanga Dyilo,* Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842.
[22] Margaret deGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes,' *Temple University Legal Studies Research Paper No. 2012-41.* Downloaded from the SSRN, Accessed February 21, 2019.
[23] Ellen Wulfhorst, 'Global count finds cases of child soldiers more than doubling,' *Thomas Reuters Foundation News*, 12 February 2019, Accessed on 12 March 2019 at http://news.trust.org/item/20190212194825-j32lv/.
[24] Kirsten J. Fisher, 'Distinctly Girl Soldiers,' in Kirsten J. Fisher, *Transitional Justice for Child Soldiers* (Springer Rethinking Peace and Conflict Studies, New York, NY: Palgrave MacMillan, 2013), pp. 169-188.

Given the substantial overlap in the empirical manifestation of the international crimes affecting young boys and young girls, deGuzman does not fully appreciate the implications of her own commitments. Her view would be more coherent and compelling if she expressed norms that protect vulnerable populations of children as a whole. In sum, I challenge her claim that rape and murder are presumably more serious than the crime of using child soldiers. Either this claim is meant as a sociological report of what some relevant audience thinks about the gravity of this crime, or a subjective statement of her relative gravity judgment, neither of which she adequately defends. Moreover, I am unconvinced by her claim that gravity judgments cannot be evaluated in light of any intelligible legal or moral standard, and now turn to consider an alternative approach.

4 Schabas' View

Unlike deGuzman, William Schabas discerns a clear gravity hierarchy of international crimes within the Rome Statute itself: genocide and crimes against humanity are more serious than war crimes:

> With respect to the Rome Statute, it contains certain indicators suggesting a hierarchy in crimes. For example, article 124 allows States to opt out of jurisdiction over war crimes, but not crimes against humanity or genocide. Similarly, the Statute is more tolerant of the defences of superior orders and defense of property when only war crimes are involved. These are small signs in and of themselves, but they tend to confirm that there is indeed a hierarchy of crimes, and that war crimes follows genocide and crimes against humanity.[25]

In light of this hierarchy, Schabas criticized Prosecutor Ocampo's decision to prosecute Lubanga for the war crime of using child soldiers for two reasons. First, he argues that the crime of using child soldiers is not as serious as other crimes that the OTP could have prosecuted. In particular, the OTP elected *not* to investigate approximately 20 alleged willful killings by British soldiers in Iraq, and instead prioritized the Lubanga case.[26] Secondly, Lubanga was already detained in his

[25] Schabas, 'Complementarity in Practice,' p. 26.
[26] Ibid., p. 30-1; Schabas, 'Prosecutorial Discretion,' p. 741.

home state, the Democratic Republic of the Congo (DRC), where he faced charges of crimes against humanity and genocide, when the OTP had him transferred to the Hague to face charges for using child soldiers at the ICC. In response to this decision, Schabas states that, 'arguably, the justice system of the Democratic Republic of Congo was doing a *better* job than the Court itself, because it was addressing crimes of greater gravity.'[27]

Moreover, Schabas claims that 'child soldier recruitment' is 'arguably closer to the *mala prohibita* than the *mala in se* end of the spectrum.'[28] The distinction between *mala prohibita* versus *male in se* is used to distinguish between crimes that are wrong because prohibited by law and crimes that are inherently wrong, or wrong in themselves. Another way of putting this is that *mala prohibita* crimes are crimes 'whose wrongfulness consists in the breach of a regulation that serves some aspect of the polity's common good' whereas in *mala in se* crimes, 'the object of criminalization is precisely and properly the wrong done to the victim.'[29] The distinction draws an evaluate judgment about a crime's nature, so by claiming that the crime of using child soldiers is closer to *malum prohibitum,* Schabas suggests that this crime does not do the requisite harm to the child victim to warrant full recognition as a *malum in se* crime.

In his book *Unimaginable Atrocities*, Schabas evaluates the crime of using child soldiers as follows:

> A single murder is not an international crime, yet it seems *objectively more serious* than the act of recruiting an adolescent into the armed forces, something that is included in article 8 of the Rome Statute. Inevitably, however, there is great subjectivity in these determinations. Advocates of the rights of children consider recruitment and enlistment to rank high on the list of *mala in se*. Others might question this on the grounds that *it does not threaten fundamental human values*, such as the right to life.[30]

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[27] Ibid., p. 25; Schabas, 'Prosecutorial Discretion,' pp. 743-44. Some scholars have noted that the DRC was planning to release Lubanga to defend the decision to transfer him to the Hague.
[28] Schabas, 'Prosecutorial Discretion,' p. 760.
[29] R.A. Duff and S.E. Marshall, 'Crimes, Public Wrongs, and the Civil Order,' p. 12. Accessed on 8 March 2019 at https://www.researchgate.net/profile/Robin_Duff/publication/323380332_Crimes_Public_Wrongs_and_Civil_Order/links/5a952cf0a6fdccecff077acd/Crimes-Public-Wrongs-and-Civil-Order.pdf.
[30] Schabas, *Unimaginable Atrocities,* p. 46 (emphasis added).

While Schabas does not explicitly embrace the view that the crime of using child soldiers does not threaten fundamental human values, he does not need to for it to be apparent that he endorses this view more than the view attributed to advocates of the rights of children.

In a book co-edited by Margaret deGuzman, *Arcs of Global Justice: essays in honour of William A. Schabas*, deGuzman herself defends Schabas' view on child soldiers in the course of explaining how his work as a whole 'reveals a clear normative agenda' but 'does not rest on a unitary philosophical perspective.'[31] She explains that Schabas's work aims to (a) limit the reach of international criminal law to maintain the primacy of national criminal law, and (b) prioritize genocide, which for Schabas, is the 'crime of crimes.'[32] She then quotes *Unimaginable Atrocities* where Schabas writes, 'Underpinning the concept of genocide is the idea that the survival of national, ethnic, racial, and religious groups is not only a right of the victims themselves but also a value of profound importance to humanity as a whole.'[33] Here, Schabas articulates a normative orientation by focusing on the rights of victims to the survival of their group, which reveals his commitment to deontological moral norms. Yet, I now turn to show how deontological moral norms and a commitment to protecting dignity can be used to emphasize rather than understate the gravity of the crime of using child soldiers.

According to Kant, rational beings are capable of acting morally, which is the source of the rational being's dignity.[34] As rational beings, we are capable of acting autonomously, setting the moral law as a law for ourselves, and acting against our instinctual animal nature.[35] Children who are recruited into armed groups, however, are necessarily restricted from freeing themselves

[31] Margaret deGuzman, 'Criminal Law Philosophy in William Schabas's Scholarship,' in Margaret M. deGuzman and Diane Marie Amann eds., *Arcs of Global Justice: essays in honour of William A. Schabas* (Oxford University Press, 2018), p. 157.
[32] Ibid., p.157, 163, 165-6.
[33] Schabas, *Unimaginable Atrocities,* p. 113 (cited by deGuzman, ibid., p. 165.)
[34] Immanuel Kant, *Grounding for the Metaphysics of Morals: On a Supposed Right to Lie because of Philanthropic Concerns,* 3rd ed., Translated by James W. Ellington (Indianapolis/Cambridge, Hackett Publishing Company), 1981.
[35] For supporting ideas, see Eric Entrican Wilson, 'Kantian Autonomy and the Moral Self,' 62(2) *Review of Metaphysics* (2008): 355-381.

from their animal nature. In extreme cases, children who are recruited into armed groups become victims of deliberate moral dystrophy, but even in less extreme cases, children are deliberately kept at a stage of moral immaturity. Someone who takes a child under 15 years of age and places that child in an armed group that relies on internal discipline and external violence to advance ideological or political aims, hijacks and paralyzes the developing child's capacity to rationally reflect on the morality of armed conflict. This is especially true where children are trained for combat, as 'military training takes as a primary objective the inculcating of reflexive obedience to superior orders,'[36] but is also true where children are exploited to serve supporting positions.

Armed groups provide external factors, including rewards and punishments, as reasons for action, and restrict a person's ability to think for herself as a rational, autonomous individual. While adults who have attained the age of reason may be presumed to be capable of making the responsible decision to join or support an armed group (a choice that entails a forfeiture of other rights), a child under the age of 15 cannot be presumed to be capable of making this decision. Conscripting or otherwise forcibly recruiting children under 15 years of age into armed groups is among the gravest violations to the dignity of the developing child, but it also violates the dignity of the developing child to enlist children of this age who 'volunteer' for service.

A person who recruits children under 15 years of age into the armed forces commits a crime that seeks by its nature to hijack and paralyze the child's developing rational and moral capacities, even if the concrete intentions of those who engage in this conduct are also to offer the child protection. Insofar as a person's moral capacity is the source of his or her dignity, and placing a child in an armed group necessarily requires hijacking and paralyzing the developing child's capacity to rationally reflect on the morality of armed conflict, this means that using child

[36] John M. Doris and Dominic Murphy, 'From My Lai to Abu Ghraib: The Moral Psychology of Atrocity,' *Midwest Studies in Philosophy* (2007): 25-55.

soldiers necessarily violates the dignity of the developing child. It does so by coercively shaping the child's will, which is true regardless of whether the child serves as a direct or indirect role.

Contrary to the view that child recruitment does not threaten fundamental human values, I argue that it threatens the fundamental value and right of the child to dignity, by depriving the child of the conditions for ordinary moral development. Despite the resilience of children, many who are used by armed groups suffer deep and lasting harm to their moral development. I argue that using child soldiers necessarily seeks to undermine the dignity of the developing child, and as such, the crime of using child soldiers is of heightened gravity, and a *malum in se* crime that is wrong in itself. There are other threats to dignity that exist, but threats to a rational being's *moral* dignity are the most fundamental. What is perhaps most concerning, is that it is reasonable to expect that a person whose moral dignity is deeply harmed during development grows up unable to make the kinds of moral distinctions that come naturally to ordinary adults.

Consider the contemporary example of former-child-soldier-turned-leader of the Lord's Resistance Army (LRA), Dominic Ongwen.[37] Ongwen was abducted by the LRA on his way to school when he was around 13 years old, after which he was placed in the household of LRA leader, Vincent Otti, and trained to be a soldier. The LRA is known to have used brutal methods of initiation and coercive socialization to transform children into soldiers. The LRA forced and encouraged children to attack innocents, and even rewarded such behavior. The group also punished children for showing weakness and compassion at the suffering of their victims. For Ongwen, survival inside the LRA meant following LRA rules and embracing the values of the group, and as an adult, he is now facing trial at the ICC for the same crimes of which he was a victim.[38]

[37] Renee Nicole Souris, 'Child Soldiering on Trial: An Interdisciplinary Analysis of the Lord's Resistance Army,' 13(3) *International Journal of Law in Context* (2017): 316-335.
[38] So far, the judges in Ongwen's trial seem rather unconcerned with his experiences as a child inside the LRA, and one cannot help but wonder whether this is an indirect result of the recent trend that tries to argue children are

Ongwen's case exposes the brutal nature of the crime of using child soldiers, and the heightened gravity of this crime. He is both the epitome of a 'good child soldier' insofar as he followed the rules to become an integrated member of the LRA, and an extreme example of how child soldiering damages the developing child's dignity. The crime of using child soldiers is wrong in itself, and the most egregious instance of this crime occurs when it is also widespread in scale, its manner of commission is forcible, and its harmful impact (personal and communal) is long-lasting and deep.[39] In light of Schabas' commitment to deontological moral norms, he can appreciate the heightened gravity of the crime of using child soldiers, which seeks by its nature to undermine the dignity of the developing child. Moreover, insofar as our dignity is the basis of our humanity, the crime of using child soldiers is a crime against humanity in the deepest sense, and efforts should be made to recognize it as such.[40]

5 Conclusion

In this paper, I critically examined the views of deGuzman and Schabas on the gravity of the crime of using children under 15 years of age in the armed forces, and I argued, contrary to their claims about the diminished gravity of this crime, that using child soldiers is a *malum in se* crime of heightened gravity, insofar as it seeks by its nature the undermine the dignity of the developing child. I have not argued, nor do I intend my conclusions necessarily to suggest, that using child soldiers is more serious than all other international crimes. Rather, I have shown that the ICC is normatively legitimate in prosecuting this crime, even if it is the only crime for which

responsible for their conduct inside armed groups. See, especially, Drumbl's influential book, *Reimagining Child Soldiers in International Law and Policy.*

[39] To recall, scale, nature, manner of commission, and impact are the criteria of the OTP's gravity assessments.

[40] For a similar argument, see Shawn Tock, 'Recruiting and Using Children as Soldiers: The Case for Defining the Offence as a Crime Against Humanity,' *Dalhousie Journal of Legal Studies*,' Vol 13 (2004).

a person is charged. To promote its sociological legitimacy, it is reasonable that the Court should focus on more egregious instances of this crime, in Africa and elsewhere.

My argument highlighted the gravity of the crime of using child soldiers. The metaphor of gravity is appropriate as it evokes the heaviness of the experiences of armed conflict on youth. Recent scholars use interviews with former child soldiers to highlight the agency that children are capable of inside armed groups, and argue that children may be responsible for their conduct inside armed groups. I find this problematic, especially as applied to children under 15 years of age. While children exercise agency in one sense of the word, they do not exercise the kind of mature agency of which adults are capable. In light of this, I propose we move the conversation from asking whether children are capable of making choices inside armed groups, to asking what choices, under what circumstances, it is reasonable and fair to expect them to make. To do this, we need to fully appreciate the gravity of child soldiering on the developing child's dignity.