

Child Soldiers and the Defence of Duress under  
International Criminal Law

Windell Nortje • Noëlle Quénivet

Child Soldiers and the  
Defence of Duress  
under International  
Criminal Law

palgrave  
macmillan

Windell Nortje  
Faculty of Law  
University of the Western Cape  
Cape Town, South Africa

Noëlle Quéniwet  
Bristol Law School  
University of the West of England  
Bristol, UK

ISBN 978-3-030-20662-8      ISBN 978-3-030-20663-5 (eBook)  
<https://doi.org/10.1007/978-3-030-20663-5>

© The Editor(s) (if applicable) and The Author(s), under exclusive licence to Springer Nature Switzerland AG 2020

This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use. The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG  
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

## PREFACE

The phenomenon of child soldiering is not a new one. From the Crusades in Medieval Europe to the American Civil War and both world wars, children have always been fighting alongside adults. At the time, it was not a controversial issue as the modern conception of childhood being a period of innocence, freedom and playfulness did not exist. Even during the decolonization process, little attention was paid to scores of children fighting with their parents against colonial powers. However, the proliferation of small arms and the increase in forceful recruitment of children by brutal armed opposition groups enmeshed in protracted conflicts have brought to the fore the plight of child soldiers. As scholars painted a gruesome picture of the reality, the international community reacted by adopting a range of international legal instruments. Yet, increasingly a more nuanced portrait of these child soldiers emerged. Whilst they were the victims of horrible crimes at the hands of ruthless armed forces or armed opposition groups, they were also committing crimes, notably against the civilian population. The international community, seemingly unable to conceive that a child could be nothing but innocent, struggled with the fact that they were perpetrators of international crimes. Academic literature followed a similar path, focusing more on the child soldiers as victims than perpetrators. Only recently have more studies (such as the works of Mark Drumbl, Kirsten Fisher and Leonie Steinl) been published on this complex issue of child perpetrators.

Animated by a desire to investigate this situation from a legal viewpoint, we both separately wrote and published in this field. Windell graduated with an LLD (Legum Doctor, or Doctor of Laws) degree at the

University of the Western Cape (South Africa) in 2017 having written a thesis on ‘The Accountability of Juveniles for Crimes under International Law’, whilst Noëlle published an article entitled ‘Does and Should International Law Prohibit the Prosecution of Children for War Crimes’ in the *European Journal of International Law* in 2017. Whilst reading about child soldiers we were both intrigued by what would actually happen to child soldiers if they were to be prosecuted for crimes under international law. Would they indeed be deemed innocent and thus acquitted? Would the judicial system on the national and international level allow them to be primarily considered as victims? Could the judicial system cope with their dual role as victims and perpetrators?

Windell contacted Noëlle exploring the possibility of writing a joint journal article on child soldiers and grounds for excluding criminal responsibility as nothing substantial had been published on the topic. We agreed that as duress was often the defence most mentioned in relation to child soldiers, it should form the basis of our study. As our ideas developed and became more refined, the article became longer and longer to the point where we had to consider turning it into a book. At the annual conference of the British International Studies Association, the authors found out about the possibility to publish shorter books with Palgrave and so seized this amazing opportunity. We have to thank Ms Sarah Roughley for highlighting this innovative feature of Palgrave’s publishing options and giving us this chance to print our work! And, as you can see, this is not such a short book!

We hope that, as much as we enjoyed writing this book, you will enjoy reading it.

Cape Town, South Africa  
Bristol, UK

Windell Nortje  
Noëlle Quénivet

## ACKNOWLEDGEMENTS

Acknowledgements are never easy to write as a book is never just the product of the authors. It would not exist without a myriad of distant and not-so-distant scholars and friends. First, we would like to thank the many scholars who have written on topics such as child soldiers, armed conflict, duress, victims and perpetrators and so inspired us. Second, the book has undoubtedly benefitted from the excellent constructive feedback made on the book proposal by the anonymous reviewers selected by Palgrave and colleagues who have read various drafts. The authors are sincerely grateful for the financial and administrative support of both the University of the Western Cape (South Africa) and the University of the West of England (United Kingdom). This provided the authors with the opportunity to continue discussing their ideas in person and present their work. Last but not least, thank you all, friends and colleagues, for supporting us in so many ways through this journey.

In particular, the authors would like to thank Dr Alison Bisset (University of Reading, UK), Mr Christian Dadomo (University of the West of England), Dr Shane Darcy (National University of Ireland, Galway, Ireland), Ms Sarah Grabham (University of the West of England), Prof Israel Leeman (University of the Western Cape), Prof Nicholas O'Regan (University of the West of England), Dr Suwita Hani Randhawa (University of the West of England) and Ms Shilan Shah-Davis (University of the West of England, UK).

# CONTENTS

<b>1</b>	<b>Introduction</b>	<b>1</b>
<b>2</b>	<b>Duress as a Defence Under International Criminal Law</b>	<b>21</b>
<b>3</b>	<b>The Application of the Requirements of Duress to Child Soldiers</b>	<b>49</b>
<b>4</b>	<b>Limits of, and Exclusions from, the Defence of Duress</b>	<b>87</b>
<b>5</b>	<b>Duress as an Excuse Defence for International Crimes</b>	<b>109</b>
<b>6</b>	<b>Conclusion</b>	<b>145</b>
	<b>Index</b>	<b>155</b>

## ABOUT THE AUTHORS

**Windell Nortje** received his LLD at the University of the Western Cape in Cape Town, South Africa. His doctoral studies focused on the accountability of juveniles for crimes under international law, with a special emphasis on child soldiers. He was the former project coordinator of the Deutscher Akademischer Austauschdienst (DAAD) South African-German Centre for Transnational Criminal Justice. He is an Associate Lecturer at the Law Faculty of the University of the Western Cape where he teaches constitutional law, criminal law, criminal procedure law and international criminal law. His most recent publications focus on international criminal law, South African criminal procedure and anti-corruption law.

**Noëlle Quénavet** is an Associate Professor in International Law at the University of the West of England, United Kingdom. She teaches and has taught public international law, international humanitarian law, international criminal law and human rights law to undergraduate and postgraduate students, humanitarian workers and military legal advisers. She has published and edited books as well as written journal articles in the field of international humanitarian law, international criminal law and human rights law, mainly on issues relating to children and women in armed conflict. Her most recent publications focus on the prosecution of child soldiers.



## ABBREVIATIONS

A.H.R.L.J.	African Human Rights Law Journal
A.J.I.C.L.	African Journal of International and Comparative Law
A.J.I.L.	American Journal of International Law
A.P.J.H.R.L.	Asia-Pacific Journal on Human Rights and the Law
Acta Jr. Hung.	Acta Juridica Hungarica
Afr.J.Confl.Resolut.	African Journal on Conflict Resolution
Afr.Stud.Rev.	African Studies Review
Afr.Yrbk Int'l L.	African Yearbook of International Law
Alb.Gov.L.Rev.	Albany Government Law Review
Am.J. Community Psychol.	American Journal of Community Psychology
Am.U.Int'l L.Rev.	American University International Law Review
Am.U.L.Rev.	American University Law Review
Anthropol.Q.	Anthropological Quarterly
BMC Int. Health Hum. Rights	BMC International Health and Human Rights
Brook.J.Int'l L.	Brooklyn Journal of International Law
C.J.I.C.L.	Cambridge Journal of International and Comparative Law
C.L.Q.	Criminal Law Quarterly
C.L.R.	Criminal Law Review
C.S.L.R.	Cambridge Student Law Review
Cal.W.Int'l L.J.	California Western International Law Journal
Cardozo J.Int'l & Comp.L.	Cardozo Journal of International and Comparative Law
Cardozo L. Rev.	Cardozo Law Review

Child Psychiatry Hum.Dev.	Child Psychiatry and Human Development
Children’s Leg. Rights J.	Children’s Legal Rights Journal
Chinese J.I.L.	Chinese Journal of International Law
Colum.Hum.Rts.L.Rev.	Columbia Human Rights Law Review
Colum.L.Rev.	Columbia Law Review
Cornell Int’l L.J.	Cornell International Law Journal
Crim.L.F.	Criminal Law Forum
CUP	Cambridge University Press
Duke L.J.	Duke Law Journal
E.J.I.L.	European Journal of International Law
Eur.J.Crime Cr.L.Cr.J.	European Journal of Crime, Criminal Law and Criminal Justice
Eur.J.Int.Relat.	European Journal of International Relations
Ge.J.Int’l & Comp.L.	Georgia Journal of International and Comparative Law
Geo.J.Int’l L.	Georgetown Journal of International Law
H.R.B.	Human Rights Brief
H.R.L.Rev.	Human Rights Law Review
Harv.Int’l L.J.	Harvard International Law Journal
Hum.Rts.Q.	Human Rights Quarterly
HUP	Harvard University Press
I.J.H.R.	International Journal of Human Rights
I.J.T.J.	International Journal of Transitional Justice
I.R.R.C.	International Review of the Red Cross
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
Ind.Int’l & Comp.L.Rev.	Indiana International and Comparative Law Review
Ind.L.J.	Indiana Law Journal
Int. Political Sociol.	International Political Sociology
Int.C.L.R.	International Criminal Law Review
Int.Crim.J.Rev.	International Criminal Justice Review
Int.J.L.C.	International Journal of Law in Context
Int’l J. Child Rts.	International Journal of Children’s Rights
ISIS	Islamic State in Iraq and the Levant
Isr.L.Rev.	Israel Law Review
J. Genocide Res.	Journal of Genocide Research

J.Adolesc.	Journal of Adolescence
J.Affect.Disord.	Journal of Affective Disorders
J.Aggres.Maltreat. Trauma	Journal of Aggression, Maltreatment and Trauma
J.Trauma. Stress	Journal of Traumatic Stress
J.C.L.	Journal of Criminal Law
J.Epidemiol. Community Health	Journal of Epidemiology and Community Health
J.I.C.J.	Journal of International Criminal Justice
J. Marshall L.Rev.	John Marshall Law Review
J.Mod.Afr.Stud.	Journal of Modern African Studies
L.J.I.L.	Leiden Journal of International Law
LLD	Legum Doctor (or Doctor of Laws)
Lond.Rev.Int. Law	London Review of International Law
Merkourios—Utrecht J.Int'l & Eur.L.	Merkourios—Utrecht Journal of International and European Law
Mil.L.Rev.	Military Law Review
MUP	Manchester University Press
N.I.L.Q.	Northern Ireland Legal Quarterly
N.I.L.R.	Netherlands International Law Review
N.S.E.R.	New School Economic Review
N.Z.J.P.I.L.	New Zealand Journal of Public and International Law
New Crim.L.Rev.	New Criminal Law Review
Notre Dame L.Rev.	Notre Dame Law Review
O.J.L.S.	Oxford Journal of Legal Studies
Osgoode Hall Rev.L.Pol'y	Osgood Hall Review of Law and Policy
OUP	Oxford University Press
Pace Int'l L.Rev.	Pace International Law Review
Peace Confl.	Peace and Conflict: Journal of Peace Psychology
Pep.L.Rev.	Pepperdine Law Review
Perth Int'l L.J.	Perth International Law Journal
Psychiatry Res.	Psychiatry Research
Queen's L.J.	Queen's Law Journal
R.G.D.	Revue Générale de Droit
S.Ac.L.J.	Singapore Academy of Law Journal
S.Afr.J.Psychol.	South African Journal of Psychology
S.Cal.L.Rev.	Southern California Law Review
SAIS Review	School of Advanced International Studies Review
SCSL	Special Court for Sierra Leone
St John's L.Rev.	St John's Law Review
Stud.Confl.Terror.	Studies in Conflict and Terrorism
Suffolk Transnat'l L.Rev.	Suffolk Transnational Law Review

SUP	Stanford University Press
Sw.J.Int'l L.	Southwestern Journal of International Law
Syracuse L.Rev.	Syracuse Law Review
T.W.Q.	Third World Quarterly
Temp.Int'l & Comp.L.J.	Temple International and Comparative Law Journal
Terror. Political Violence	Terrorism and Political Violence
TIAS	Texts of International Agreements to which the US is a Party
Trinity C.L.Rev.	Trinity College Law Review
U.C.Davis J.Int'l L. & Pol'y	University of California Davis Journal of International Law and Policy
U. La Verne L.Rev.	University of La Verne Law Review
UCP	University of Chicago Press
UK	United Kingdom of Great Britain and Northern Ireland
UNCRC	United Nations Convention on the Rights of the Child
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations International Children's Emergency Fund
UNSG	United Nations Secretary-General
UNSR	United Nations Special Representative of the Secretary-General on Children and Armed Conflict
UNTAET	United Nations Transitional Administration in East Timor
UNTS	United Nations Treaty Series
US	United States of America
Va.J.Int'l J.	Virginia Journal of International Law
Vand.J.Transnat'l L.	Vanderbilt Journal of Transnational Law
Vill.L.Rev.	Villanova Law Review
Wayne L.Rev.	Wayne Law Review
Willamette J.Int'l L. & Disp.Resol.	Willamette Journal of International Law and Dispute Resolution
Y.I.H.L.	Yearbook of International Humanitarian Law
Yale L.J.	Yale Law Journal
Z.a.ö.R.V.	Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht
Z.St.W.	Zeitschrift für die gesamte Strafrechtswissenschaft