

**AVOIDING THE THIRD TRAGEDY:
EVALUATING CRIMINAL RESPONSIBILITY OF CHILD
SOLDIERS UNDER INTERNATIONAL LAW**

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ABSTRACT

At the time this Abstract is being written, *Prosecutor v. Dominic Ongwen* is still underway at the International Criminal Court (ICC). Ongwen, a former commander in the Lord's Resistance Army, faces charges of war crimes and crimes against humanity for attacks on civilians he orchestrated in Uganda. What differentiates Ongwen from other ICC defendants is that he has been on both the giving and receiving end of international crimes—he was himself forcibly conscripted into the LRA as a child soldier. This makes him the first victim-perpetrator before the ICC, giving the Court the difficult task of evaluating his criminal responsibility from two perspectives: Is he still Ongwen the child soldier or was his victimhood erased when he became Ongwen the commander? Recognizing that the two cannot be severed, this Comment advances a totality of the circumstances framework, where all bright line rules are eliminated, making a balanced determination of accountability achievable without risking the legitimacy of the ICC.

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I. INTRODUCTION

Just like any other day, Dominic Ongwen was making his way to Koro Abili Primary School in Northern Uganda.¹ It was 1988 and Ongwen was approximately nine years old.² Ongwen's life took an unexpected turn for the worse when members of the Lord's Resistance Army (LRA) converged upon Ongwen and a few classmates, abducting them on their usual walk to school.³ While there had been unrest in Uganda after rebel leader Yoweri Museveni came to power in 1986, further unrest waited on the horizon as the LRA began laying the foundation for a full-blown

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1. Mark A. Drumbl, *Victims Who Victimise*, 4 *LONDON REV. INT'L L.* 217, 236 (2016) ("Ongwen says he was nine when abducted for training by the LRA; he began soldiering several years later at the age of fourteen.").

2. Jacques Kabano, *The Criminal Responsibility of Child Soldier Under International Criminal Law, Case Study: Northern Uganda and Democratic Republic of Congo (DRC)*, 2 *E-J.L.* 15, 25 (2016), <http://e-journaloflaw.org/wp-content/uploads/2017/04/26-46-1-SM.pdf>.

3. Mark A. Drumbl, *A Former Child Soldier Prosecuted at the International Criminal Court*, OUPBLOG (Sept. 26, 2016), <https://blog.oup.com/2016/09/child-soldier-prosecuted-icc-law/> ("Unlike some of his other classmates, he was not wiry or wily enough to avoid the kidnapers.").

governmental resistance.⁴ And on that day in 1988, Ongwen became a brick in that foundation.⁵ He became one of tens of thousands of children who would be forcibly conscripted into the ranks of the LRA under the leadership of Joseph Kony.⁶ This pivotal moment in the life of a young boy is what ultimately puts him before the International Criminal Court (ICC) at The Hague, not as a witness to or as a victim of the LRA's reign of terror, but as a defendant.⁷

Prosecutor v. Ongwen presents an issue of first impression for the ICC—one that has temporarily suspended the comfortable standards that occupy the international criminal law stage.⁸ International criminal law operates in strict binaries: “guilty or not-guilty, persecuted or persecutor, abused or abuser, right or wrong, powerful or powerless,” and victim or perpetrator.⁹ As Mark Drumbl¹⁰ has emphasized, Ongwen fails to fit neatly into any one of these boxes.¹¹ Instead, the child soldier turned LRA commander falls into a “gray zone,” as ICC officials and scholars alike clumsily grapple with his uncertain status.¹² This is because Ongwen himself has suffered from the same crimes of which he now stands accused: “the war crime of cruel treatment, conscription and use as a child soldier, and the crime against humanity of enslavement.”¹³

According to Drumbl, mass atrocities blur these clear cut lines precisely because they give victims the capacity to victimize others, thus perpetuating the cycle of collective responsibility.¹⁴ Because atrocities are not carried out by individuals alone, Drumbl argues that transitional justice mechanisms on the national level provide a more viable solution to international crimes.¹⁵ Thus, he

4. Uganda's Brutal Lord's Resistance Army: Timeline, THE CITIZEN (Apr. 25, 2017, 4:26 PM), <https://citizen.co.za/news/news-africa/1497040/ugandas-brutal-lords-resistance-army-timeline/>.

5. Kabano, *supra* note 2, at 25.

6. Conor Gaffey, *Child Soldiers of Africa: Uganda's Search for Lord Resistance Army Leader Joseph Kony Ends in the Central African Republic*, NEWSWEEK (Apr. 18, 2017, 2:02 PM), <https://www.newsweek.com/joseph-kony-lords-resistance-army-585736> (“Invisible Children estimates that over 30,000 children were forced into the ranks of the LRA.”).

7. See generally *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges (Mar. 23, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02331.pdf.

8. Claire Raissian, *Dominic Ongwen on Trial at the ICC*, U.C. CORK, SCH. L. BLOG: CTR. FOR CRIM. JUST. & HUM. RTS. (Aug. 22, 2017), <http://blogs.ucc.ie/wordpress/ccjhr/2017/08/22/dominic-ongwen-trial-icc/> (“He is the first known person to stand trial in an international court or tribunal, accused of crimes of which he is also a victim.”).

9. Drumbl, *Victims Who Victimise*, *supra* note 1, at 218.

10. See Mark A. Drumbl, WASH. & LEE SCH. L., <https://law.wlu.edu/faculty/full-time-faculty/mark-drumbl> (last visited Aug. 30, 2019), for a discussion on Mark A. Drumbl, who is an expert on the topic of child soldiering and has written and lectured extensively on the interplay of atrocity, victim-perpetrators, and international criminal law.

11. Drumbl, *Victims Who Victimise*, *supra* note 1, at 221.

12. *Id.* at 239–40.

13. *Id.* at 236.

14. See Mark A. Drumbl, *Accountability for System Criminality*, 8 SANTA CLARA J. INT'L L. 373, 373–74 (2010) (describing international crimes as actions of groups, not just individuals).

15. *Id.* at 375–77.

discourages both domestic and international prosecutions of child soldiers.¹⁶ However, Drumbl believes such prosecutions may be valuable when the defendant's victim status is permitted as a mitigating factor in sentencing.¹⁷

Although Drumbl is correct that international criminal law is limited in its ability to describe “[t]he shapeshifting of humanity in times of violent cataclysm,”¹⁸ this Comment advances the view that ICC prosecutions of victim-perpetrators are not completely devoid of value. The legitimacy of the ICC hinges upon its ability to prosecute the most egregious violations of international criminal law.¹⁹ Therefore, Drumbl's recommendations leave the role of the ICC uncertain, undermining its chances of becoming a major player on the international law field. What is needed instead is a framework for prosecution that acknowledges the role of victim-perpetrators, such as Ongwen.

In March 2016, Pre-Trial Chamber II of the ICC confirmed, or permitted to proceed to trial, seventy criminal allegations against Ongwen.²⁰ Pre-Trial Chamber II's Decision on the Confirmation of Charges alluded to a replay of the binary “tale as old as time” that Drumbl denounces as being severely counterproductive.²¹ However, if the ICC were to evaluate the culpability of Ongwen and other child soldiers under a totality of the circumstances framework, the abolition of the bright lines that Drumbl seeks can be achieved without compromising the legitimacy of the ICC.²² Under a totality of the circumstances framework for evaluating criminal culpability, various factors will be considered all at once, with no one factor carrying greater weight than another. With this change, international criminal law can become comfortable with the uncertainty surrounding cases like Ongwen's rather than squeezing defendants into clear cut “boxes” which do not fit the individual facts of their cases.

Ongwen the victim simply cannot be severed from Ongwen the LRA commander—they exist together and simultaneously, leaving the ICC with an unclear path for prosecution. This Comment seeks to alleviate this uneasiness by proposing a totality of the circumstances framework for evaluating the culpability of child soldiers under international law with particular focus on *Ongwen*. Part II

16. Drumbl, *Victims Who Victimise*, *supra* note 1, at 243–44.

17. *Id.* at 244.

18. *Id.* at 219.

19. See Margaret deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L.J. 1400, 1435–36 (2009) (explaining how the gravity of the cases before the ICC helps to legitimize the court itself).

20. Gamaliel Kan, *The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen*, 5 SOAS L.J. 74, 75 (2018).

21. See Drumbl, *Victims Who Victimise*, *supra* note 1, at 241 (“[T]he international legal imagination is beguiled by chronological bright lines . . . that deliver the comfort of simplicity but belie a much coarser reality.”); see generally *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges (Mar. 23, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02331.pdf (confirming all charges against Ongwen and perfunctorily dismissing the defense's arguments grounded in Ongwen's victimhood).

22. See Drumbl, *Accountability for System Criminality*, *supra* note 14, at 375–77 (discussing that transitional justice mechanisms are better suited than international criminal law to address mass atrocity because they address institutional quagmires).

details the prevalence of child-soldiering as a worldwide epidemic, the LRA's role in that epidemic, and Ongwen's tumultuous life story. Part III explains how the arguments of the Prosecution and of the Defense during the Confirmation of Charges process in Ongwen's case retained international criminal law's bright-line binaries. Part IV reflects on how the punishment theories of international criminal law are undermined by the narratives told at the Confirmation of Charges stage. Part V outlines a totality of the circumstances framework for assessing the criminal responsibility of victim-perpetrators such as Ongwen.

II. BACKGROUND

A. *Contemporary Prevalence of Child Soldiering*

A child soldier is a person under the age of eighteen years who is used for any military purpose.²³ Military purposes encompass everything from fighting, to cooking, to sex slavery.²⁴ Only a few countries in the world allow persons under eighteen years of age to voluntarily serve in their armed forces.²⁵ Countries that formally outlaw the practice may still conscript, or forcibly recruit, children into their armed forces or rebel groups through abduction.²⁶ Children are malleable and impressionable due to their age, so commanders find them to be easy targets for manipulation.²⁷ Violence is then used to further break the child down, after which they are forced to commit escalating atrocities that dissolve their moral compass.²⁸ Recruiting child soldiers is essentially a mind game aimed at forcing the children to disassociate with their civilian identity and previous ties, and instead become loyal to their new army family.²⁹

Child soldiering is not a recent epidemic.³⁰ The increasing international acceptance of children as a protected class, especially in times of war, has led to efforts to address the brutal effects of child soldiering on a global level.³¹ Under the

23. *Who Are Child Soldiers?*, CHILD SOLDIERS INT'L, <https://www.child-soldiers.org/who-are-child-soldiers> (last visited Aug. 30, 2019).

24. *Id.*

25. *Id.*

26. *Id.*; Billy Briggs, *10 Countries Where Child Soldiers Are Still Recruited in Armed Conflicts*, THEIR WORLD (Feb. 28, 2017), <https://theirworld.org/news/10-countries-where-child-soldiers-are-still-recruited-in-armed-conflicts>.

27. Jonathan Rozen, *What We Can Learn from Child Soldiers*, INTER PRESS SERV. (Mar. 10, 2014), <http://www.ipsnews.net/2014/03/can-learn-child-soldiers/>.

28. *Dominic Ongwen: Exploited as a Child Soldier, But Not Immune from Prosecution*, CHILD SOLDIERS INT'L, <https://www.child-soldiers.org/news/dominic-ongwen-was-exploited-as-a-child-soldier-but-he-is-not-immune-from-prosecution> (last visited Aug. 30, 2019).

29. Jocelyn Kelly et al., *Abducted Children and Youth in Lord's Resistance Army in Northeastern Democratic Republic of the Congo (DRC): Mechanisms of Indoctrination and Control*, 10 CONFLICT AND HEALTH, 2016, at 1, 2.

30. Eben Kaplan, *Child Soldiers Around the World*, COUNCIL ON FOREIGN REL. (Dec. 2, 2005), <https://www.cfr.org/backgrounders/child-soldiers-around-world>.

31. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 25 (Dec. 10, 1948) (stating, in Article 25, that children are entitled to special care and assistance and that all children shall be protected equally).

Convention on the Rights of the Child (CRC) and the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, whether voluntarily or involuntarily recruited, “an armed child is recognized as a victim whose participation in conflict bears serious implications on their physical and emotional well-being.”³² Recent estimates suggest as many as 250,000 children were involved in twenty conflicts around the world.³³ The abduction, forced recruitment, and violent abuse of children is a practice that has been highly prevalent in contemporary conflicts in Africa and has severely altered the communities therein.³⁴ The genocide in Rwanda and conflicts in Uganda, the Democratic Republic of the Congo, and Somalia have been fueled by tens of thousands of child soldiers who were directly involved in violent attacks on civilians.³⁵ The United Nations has helped to free more than 115,000 child soldiers worldwide since 2000.³⁶ In light of these developments in the fight to end child soldiering, the fate and international status of current and former child soldiers now hangs in the balance, as the world awaits the ICC’s decision in Ongwen’s case.

32. Raphael Lorenzo Aguilin Pangalangan, *Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals*, 33 AM. U. INT’L L. REV. 605, 609 (2018). See generally INTERNATIONAL BUREAU FOR CHILDREN’S RIGHTS, A GUIDE TO INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 324 (updated ed. 2010), <http://www.ibcr.org/wp-content/uploads/2016/06/Guide-international-law-2010-english-1.pdf>; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 33 (entered into force Sept. 2, 1990); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *opened for signature* May 25, 2000, 2173 U.N.T.S. 222 (entry into force Feb. 12, 2002).

33. *Explainer: Child Soldiers*, THEIR WORLD, <https://theirworld.org/explainers/child-soldiers> (last updated Oct. 17, 2016).

34. See Kaplan, *supra* note 30 (reporting that some of the most egregious uses of child soldiers occurred in Burundi, DRC, Liberia, and Uganda); see also *Lasting Wounds: Consequences of Genocide and War for Rwanda’s Children*, HUMAN RIGHTS WATCH (Apr. 3, 2003), <https://www.hrw.org/report/2003/04/03/lasting-wounds/consequences-genocide-and-war-rwandas-children> (describing the devastation to the entire country of Rwanda following the eight years of genocide and war); Anne-Lynn Dudenhofer, *Understanding the Recruitment of Child Soldiers in Africa*, ACCORD (Aug. 16, 2016), <http://www.accord.org.za/conflict-trends/understanding-recruitment-child-soldiers-africa/> (stating that about 40% of all child soldiers globally are active on the African continent).

35. See CHILD SOLDIERS INT’L, CHILD SOLDIERS GLOBAL REPORT 2001 - RWANDA, (2001), <https://www.refworld.org/docid/498805d326.html> (estimating that over 20,000 children took part in the hostilities in Rwanda since 1994); Will Storr, *Tragedy in Uganda: Joseph Kony Massacre Survivors Tell Their Stories*, THE GUARDIAN (Jan. 12, 2014, 2:00 AM), <https://www.theguardian.com/world/2014/jan/12/joseph-kony-uganda-massacres-survivors-stories> (estimating that over 25,000 children have been abducted by the LRA in Uganda since 1987); Conor Gaffey, *Somalia: 5,000 Child Soldiers Involved in Al-Shabab Conflict, Says U.N. Official*, NEWSWEEK (June 17, 2016, 11:43 AM), <https://www.newsweek.com/al-shabab-child-soldiers-somalia-471548> (reporting that as of 2016, 5,000 child soldiers were being utilized by both sides of the Al-Shabab conflict in Somalia); *Children in Armed Conflict: Somalia*, UNITED NATIONS, <https://childrenandarmedconflict.un.org/somalia/> (last visited Aug. 30, 2019) (noting that in 2018, over 2,000 boys and girls were recruited and used in armed conflict in Somalia).

36. *Dominic Ongwen: Exploited as a Child Soldier, But Not Immune from Prosecution*, *supra* note 28.

B. *The Lord's Resistance Army*

The rise of the LRA began in 1988 under the leadership of Joseph Kony.³⁷ Claiming to be religiously inspired, Kony's mission was to overthrow President Yoweri Museveni.³⁸ Through the early 1990s, Kony built up his army through conscripts.³⁹ His regime later began to ambush and abduct children.⁴⁰ Girls were forced into sexual and domestic slavery, often assigned to commanders as "wives," and boys were compelled to take up arms and engage in combat.⁴¹ To brainwash the boys and prevent flight, the LRA members who abducted them often made them beat or kill others soon after their capture.⁴² In order to ensure their loyalty, the boys were continually forced to beat or kill disobedient fellow child soldiers.⁴³

By 1996, the Ugandan government was unable to control the LRA, which had begun to wage war across five countries in east and central Africa.⁴⁴ The rebel group became a household name throughout the world because of its countless human rights violations and war crimes.⁴⁵ Arguably the most atrocious and shocking cruelties were the abduction, manipulation, and murder of Ugandan children.⁴⁶ The rebels forced children to kill, torture, and terrorize civilians.⁴⁷ The LRA specialized

37. *Uganda's Brutal Lord's Resistance Army: Timeline*, *supra* note 4.

38. *Id.* (discussing how the LRA was originally the "Holy Spirit Movement" spearheaded by Kony's cousin Alice Lakwena, who was a priestess).

39. *See generally Profile: The Lord's Resistance Army*, AL JAZEERA (May 6, 2014), <https://www.aljazeera.com/news/africa/2011/10/2011101418364196576.html>; *Uganda's Brutal Lord's Resistance Army: Timeline*, *supra* note 4; Kevin Jon Heller, *LRA Leader Was a Child Soldier Himself*, OPINIO JURIS (July 2, 2007), <http://opiniojuris.org/2007/07/02/lra-leader-was-a-child-soldier-himself/> (noting that LRA commanders and ICC inductees Vincent Otti and Okot Odhiambo joined the LRA freely).

40. *Uganda's Brutal Lord's Resistance Army: Timeline*, *supra* note 4.

41. Jason Burke, *Trial of Ex-Child Soldier Dominic Ongwen to Hear Prosecution Case*, THE GUARDIAN (Jan. 16, 2017, 5:06 PM), <https://www.theguardian.com/law/2017/jan/16/trial-ex-child-soldier-dominic-ongwen-to-hear-prosecution-case-icc-uganda>; *see Profile: The Lord's Resistance Army*, *supra* note 39 ("Female abductees were often forced to become wives of the rebels and some contracted Aids from their 'husbands.'").

42. Pangalangan, *supra* note 32, at 616–19.

43. Kan, *supra* note 20, at 78–79; Michela Wrong, *Making a Murderer in Uganda*, FOREIGN POL'Y (Jan. 20, 2016, 11:36 AM), <https://foreignpolicy.com/2016/01/20/making-a-murderer-dominic-ongwen-uganda-icc/>; *Fear and Trauma: The Need for Healing*, INVISIBLE CHILDREN, <https://invisiblechildren.com/challenge/fear-trauma/> (last visited Sept. 1, 2019).

44. *History of the War*, INVISIBLE CHILDREN, <https://invisiblechildren.com/challenge/history/> (last visited Nov. 16, 2019); *see* Farah Bogani, *The Trial of Dominic Ongwen: When is a Child Soldier Not a Child?*, NATO ASSOCIATION (Jan. 18, 2017), <http://natoassociation.ca/the-trial-of-dominic-ongwen-when-is-a-child-soldier-not-a-child/> (stating that the LRA operated across Central Africa Republic, Democratic Republic of Congo, South Sudan, Sudan, and Uganda).

45. *Profile: The Lord's Resistance Army*, *supra* note 39.

46. *Fear and Trauma: The Need for Healing*, *supra* note 43; *see* Commission on Human Rights Res. 2000/60, ¶ 2 (Apr. 26, 2000) (condemning the LRA specifically for its human rights violations involving children).

47. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Transcript of the Confirmation of Charges, 56 (Jan. 25, 2016), https://www.icc-cpi.int/Transcripts/CR2016_00529.pdf ("[The children] were regularly required to participate not only in the murderous attacks on civilian camps, but in the individual acts of torture and murder designed to convince recently abducted children

in pillaging and brutally massacring villages and refugee camps, raping and impregnating girls and women, and turning children into killing machines.⁴⁸

In 2000, as the LRA's notoriety grew, the United Nations Human Rights Commission condemned its international law violations.⁴⁹ Even after the ICC issued arrest warrants for Kony and other high-ranking LRA officials in 2005,⁵⁰ their terrorizing reign did not taper off.⁵¹ Over the course of about twenty years, the LRA killed more than 100,000 people, abducted between 60,000 and 100,000 children, and displaced 2.5 million people.⁵² Other countries, including the United States, became invested in removing the LRA from power.⁵³ In 2011, the United States sent a unit of special forces to help the Ugandan government combat the LRA, find and capture Kony, and turn him over to the ICC.⁵⁴ Although the LRA has been mostly dismantled and many LRA leaders have been captured or killed, Kony remains free to this day.⁵⁵

With the threat of the LRA largely diminished, Uganda has been slowly healing.⁵⁶ Centers aimed at reintegrating former child soldiers into society were

that they were so steeped in blood that there could be no acceptance for them back in civilian society.”).

48. Kaplan, *supra* note 30; *see* U.N. HUM. RTS. OFF. HIGH COMM., “THE DUST HAS NOT YET SETTLED”, at xii (2011), *available at* <https://www.ohchr.org/Documents/Press/WebStories/DustHasNotYetSettled.pdf> (describing the mass human rights violations committed by the LRA).

49. *See* C.H.R. Res. 2000/60, *supra* note 46, ¶ 2 (“[The Commission on Human Rights] condemns in the strongest terms the Lord’s Resistance Army for the abduction, torture, killing, rape, enslavement and forcible recruitment of children in northern Uganda.”).

50. Press Release, International Criminal Court, Warrant of Arrest Unsealed Against Five LRA Commanders (Oct. 14, 2005), <https://www.icc-cpi.int/pages/item.aspx?name=warrant+of+arrest+unsealed+against+five+lra+commanders>.

51. *See Profile: The Lord’s Resistance Army*, *supra* note 39 (indicating that the LRA continued inflicting violence and abducting children after 2005).

52. JOCELYN KELLY, INDOCTRINATE THE HEART TO IMPUNITY 6 (Harvard Humanitarian Initiative) (Nov. 2015).

53. *See* Gaffey, *Child Soldiers of Africa: Uganda’s Search for Lord Resistance Army Leader Joseph Kony Ends in the Central African Republic*, *supra* note 6 (noting that African Union members Democratic Republic of the Congo, South Sudan, and Central Republic of Africa joined forces with Uganda to eliminate the LRA). In 2010, Congress passed, and President Barack Obama signed, legislation aimed at neutralizing the threat of the LRA and supporting rehabilitation of communities in Uganda. Lord’s Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, Pub. L. No. 111-172, 124 Stat. 1209.

54. Ledio Cakaj & Paul Ronan, *The Lord’s Resistance Army Is Finally Weakening in Central Africa. This Could Dismantle It*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/12/06/uganda-is-about-to-give-up-looking-for-joseph-kony-but-defection-messaging-could-bring-his-army-to-a-halt/?utm_term=.639dd192fac7 (“In October 2011, President Obama sent 100 U.S. Army Special Forces personnel to central Africa to help the Ugandan military pursue the Lord’s Resistance Army (LRA) and its notorious leader, Joseph Kony.”).

55. *See* Kony et al. Case, INT’L CRIM. CT., <https://www.icc-cpi.int/uganda/kony> (last visited Jan. 15, 2020) (noting that Kony remains at large); Drumbl, *A Former Child Soldier Prosecuted at the International Criminal Court*, *supra* note 3 (stating that the LRA has been largely depleted by Uganda’s amnesty policy); Cakaj & Ronan, *supra* note 54 (“From 2011 to 2014, Ugandan troops captured or killed several senior LRA commanders.”).

56. Samuel Okiror, *How the LRA Still Haunts Northern Uganda*, NEW HUMANITARIAN (Feb.

established throughout the country.⁵⁷ In 2000, the Ugandan government passed the Amnesty Act, which offered immunity and resettlement packages to all armed opponents who surrendered their weapons, abandoned their armed group, and renounced involvement in the conflict.⁵⁸ The Act contained no specific provisions on child soldiers but expressly indicated that amnesty would not be granted to LRA commanders or those who would willingly return to an armed group having earlier abandoned it.⁵⁹ From 2000 to 2015, Uganda granted amnesty to 27,000 Ugandans, at least 13,000 of whom were former members of the LRA.⁶⁰ Two rehabilitation centers, the World Vision Reception Centre and the Gulu Support the Children Organization, provided services to approximately 25,000 abductees and former child fighters between 1994 and 2013.⁶¹ These two centers provided not only physical support in the form of clothing, utensils, and mattresses, but also psychological support.⁶² Psychological support services are critical for former child soldiers' reintegration into society, for more than half of them exhibit symptoms of post-traumatic stress disorder and experience social difficulties due to a lack of education and skills.⁶³

C. *Dominic Ongwen's Story*

Describing him as a shy, quiet boy “who liked digging,” Ongwen's family contends that he was simply in the wrong place at the wrong time.⁶⁴ Abducted while

17, 2016), <http://www.thenewhumanitarian.org/analysis/2016/02/17/how-lra-still-haunts-northern-uganda> (discussing social and economic progress in Uganda as well as the remaining problems of inequality, stigmatization, and trauma).

57. See, e.g., Kabano, *supra* note 2, at 29 (explaining the work of rehabilitation centers to reintegrate former child soldiers into society, enabling them to live with family, return to school, or learn a trade).

58. CHILD SOLDIERS INT'L, CHILD SOLDIERS GLOBAL REPORT 2004 – UGANDA (2004), available at <http://www.refworld.org/docid/49880620c.html>; JUSTICE AND RECONCILIATION PROJECT, JRP FIELD NOTE 7: COMPLICATING VICTIMS AND PERPETRATORS IN UGANDA: ON DOMINIC ONGWEN (2008), available at http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf (noting that the Amnesty Act is a strategy to cull fighters from the bush and resolve the conflict peacefully).

59. See CHILD SOLDIERS INT'L, CHILD SOLDIERS GLOBAL REPORT 2004 – UGANDA, *supra* note 58.

60. Samuel Okiror, *Forgive and Forget? Amnesty Dilemma Haunts Uganda*, NEW HUMANITARIAN (June 12, 2015), <http://www.thenewhumanitarian.org/analysis/2015/06/12/forgive-and-forget-amnesty-dilemma-haunts-uganda>; see generally Gaffey, *Child Soldiers of Africa: Uganda's Search for Lord Resistance Army Leader Joseph Kony Ends in the Central African Republic*, *supra* note 6.

61. *Rehabilitation Centre for Uganda's LRA Returnees to Close*, THE NEW HUMANITARIAN (Jan. 18, 2013), <http://www.thenewhumanitarian.org/news/2013/01/18/rehabilitation-centre-uganda-s-lra-returnees-close>.

62. *Id.*; Kabano, *supra* note 2, at 26 (stating that the Children of War Rehabilitation Center provided guidance, counseling, and training needed to support the productivity and social integration of former LRA combatants).

63. *Rehabilitation Centre for Uganda's LRA Returnees to Close*, *supra* note 61 (“A 2008 study of former LRA child soldiers found that more than half exhibited symptoms of post-traumatic stress distress, concluding that there is an unmet need for psychological services.”).

64. See Drumbl, *Victims Who Victimise*, *supra* note 1, at 236 (describing an account Ongwen's

still just a boy, he was small for his age—so small that the LRA members ordered the other captives to carry Ongwen all the way up to the main military base in order to keep pace.⁶⁵ Once within the clutches of the LRA, his life warped into a cruel story of violence and war typical of many child soldiers.⁶⁶ The LRA conducted his six-month indoctrination process using a complex system of control, alternating between physical and cultural isolation, public violence, and forced complicity in acts of violence.⁶⁷ It is rumored that Dominic Ongwen is not even his real name but rather one he invented when he was kidnapped in order to protect his family.⁶⁸

Ongwen rose through the ranks by distinguishing himself from other fighters with his loyalty and efficiency, eventually becoming the commander of one of the four LRA brigades.⁶⁹ While close ties to Kony meant a higher military rank, greater responsibility, and an increased chance of survival, Ongwen's relationship with Kony was rather tumultuous, placing his life in constant jeopardy.⁷⁰ Kony was always suspicious of Ongwen; Ongwen reluctantly stayed in the LRA to avoid indictment by the ICC, flew under the radar with his brigade by refusing to answer Kony's messages, and was the only commander to protest the execution of Vincent Otti, another high-ranking official.⁷¹ Kony knew Ongwen wanted to be free of the LRA and even threatened to kill him on three separate occasions, sparing him each time only because one of Kony's favorite "wives" happened to be Ongwen's sister.⁷² Eventually, knowing Ongwen was on the verge of absconding from the LRA, Kony ordered him imprisoned and tortured.⁷³ In January 2015, Ongwen managed to escape

family members gave of Ongwen as a child prior to his abduction).

65. Kabano, *supra* note 2, at 25.

66. See JUSTICE AND RECONCILIATION PROJECT, *supra* note 58 (explaining the horrific things child soldiers suffered, watched, and eventually perpetrated themselves); see also Ledio Cakaj, *The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander*, JUSTICE IN CONFLICT (Apr. 12, 2016), <https://justiceinconflict.org/2016/04/12/the-life-and-times-of-dominic-ongwen-child-soldier-and-lra-commander/> ("Under [his commander's] guidance, Ongwen had to punish civilians who did not help the LRA, fight Ugandan soldiers, and abduct more youths to fill the ranks. Refusal brought beatings and death.").

67. See Pangalangan, *supra* note 32, at 617 (depicting gruesome spectacles that composed the standard indoctrination process that child soldiers went through); see Cakaj, *supra* note 66 ("At fifteen Ongwen was exposed to—and allegedly forced to participate in—the massacre of over 300 people in the village of Atiak, masterminded by Vincent Otti, Ongwen's mentor in the LRA.").

68. Drumbl, *Victims Who Victimise*, *supra* note 1, at 235–36 (detailing how Ongwen was ostensibly instructed by his parents to give a false name if he were ever captured).

69. See Farouk Chothia, *Profile: Dominic Ongwen of Uganda's LRA*, BBC NEWS (Jan. 26, 2015), <https://www.bbc.com/news/world-africa-30709581> (describing Ongwen's rise to a position of importance in the LRA); see also Wrong, *supra* note 43 (noting that Ongwen had a public reputation and was described as being a killer, as well as a devoted, courageous, and exceptional fighter).

70. Cakaj, *supra* note 66 (describing Kony and Ongwen's interactions as very political and unfriendly).

71. *Id.* (detailing that Vincent Otti worked voluntarily with Kony from the start and served as a mentor to Ongwen, but was ordered executed in 2007, thus ending peace talks and any possibility of eliminating the ICC arrest warrants).

72. Drumbl, *Victims Who Victimise*, *supra* note 1, at 238; Cakaj, *supra* note 66.

73. Drumbl, *A Former Child Soldier Prosecuted at the International Criminal Court*, *supra* note 3.

and surrendered himself to U.S. Special Forces, who transferred him to ICC custody.⁷⁴

Ongwen faces seventy counts of crimes against humanity, war crimes, and sexual- and gender-based crimes.⁷⁵ The Office of the Prosecutor (OTP) continually highlights that Ongwen is not being prosecuted for any crimes he committed when he was under the age of eighteen because the ICC lacks jurisdiction over minors.⁷⁶ Instead, the majority of the charges against Ongwen focus on his participation in refugee camp attacks, conscription and use in hostilities of children, and perpetration of sexual- and gender- based crimes between July 2002 and December 2005.⁷⁷ As brigade commander, the OTP accuse Ongwen of orchestrating these atrocities.⁷⁸ He faces up to thirty years or life in prison.⁷⁹ He has pled not guilty to all charges.⁸⁰

III. PERPETUATION OF CRIMINAL LAW BINARIES BY THE PROSECUTION AND DEFENSE

Under international law, children are entitled to the same human rights as adults and, in certain instances, are afforded special protection as a vulnerable group.⁸¹ Article 25 of the Universal Declaration on Human Rights (UDHR) expressly gives all children equal social protections.⁸² The UDHR further provides that “children are entitled to special care and assistance.”⁸³

The CRC defines a child as any person under the age of eighteen.⁸⁴

74. *Id.*

75. Press Release, International Criminal Court, ICC Pre-Trial Chamber II Confirms the Charges Against Dominic Ongwen and Commits Him to Trial (Mar. 23, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1202>.

76. Tjitske Lingsma, *Prosecution Experts to Challenge Ongwen’s Mental Incapacity Defense*, INT’L JUSTICE TRIBUNE (Mar. 15, 2018), <https://www.justicetribune.com/articles/prosecution-experts-challenge-ongwens-mental-incapacity-defence>; see *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Transcript of the Confirmation of Charges, 33–34 (Jan. 25, 2016), https://www.icc-cpi.int/Transcripts/CR2016_00529.pdf (“The Defence submits that Dominic Ongwen was born in May 1978. So even on this, the Defence’s best case scenario, Dominic Ongwen was already 24 years old on July 2002, the start of the period of the charges.”); see also Rome Statute of the International Criminal Court art. 26, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

77. See generally *Prosecutor v. Ongwen*, ICC-02/04-01/15, Decision on the Confirmation of Charges (Mar. 23, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02331.pdf.

78. *Id.*

79. Burke, *supra* note 41; Rome Statute, *supra* note 76, art. 77 (“Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”).

80. Press Release, International Criminal Court, Ongwen Trial Opens at International Criminal Court (Dec. 6, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1262>.

81. G.A. Res. 217 (III) A, *supra* note 31, art. 25; see *Children’s Rights*, INT’L JUSTICE RESOURCE CTR., <https://ijrcenter.org/thematic-research-guides/childrens-rights/> (listing the international instruments that afford children with special protections).

82. G.A. Res. 217 (III) A, *supra* note 31, art. 25.

83. *Id.*

84. Convention on the Rights of the Child, *supra* note 32, art. 1.

Additionally, the CRC promotes special consideration of children's rights within the areas of sexual exploitation, labor, armed conflict, and education.⁸⁵ The Optional Protocol to the CRC on the Involvement of Children in Armed Conflict specifically prohibits the compulsory recruitment of children under the age of eighteen and their direct participation in hostilities.⁸⁶

A. Prosecution: The Ruthless Perpetrator

In her opening statement at Ongwen's trial on December 6, 2016, Chief Prosecutor Fatou Bensouda painted the picture of a murderous tyrant, one who laid waste to entire villages as he climbed through the ranks of the LRA.⁸⁷ While the OTP's Pre-Trial Brief "extensively unpacks the hardships endured by child soldiers in Ongwen's brigade, and the brutally coercive nature of the LRA, it is totally (and ironically) silent with regards to the brutalities and coercion that Ongwen himself had endured."⁸⁸ The opening statement briefly touched on the nature of Ongwen's entry into the LRA as a kidnapped, helpless child, before quickly pivoting, stating that, "having suffered victimisation in the past is not a justification or an excuse to victimise others."⁸⁹ As evidence, the Prosecutor presented short accounts from Ongwen's victims, which include former "wives" and child conscripts, and survivors of refugee camp attacks.⁹⁰

Although the Prosecutor agreed that Ongwen was taken as a child and brutally indoctrinated, she insisted that escapes from the LRA were not unheard of and that Ongwen did more than just survive in the LRA; he thrived to the point of acting on his own free will and not as an innocent child any longer.⁹¹ The Prosecutor rebutted the defense of duress by highlighting the personal motivation and impetus Ongwen used to work his way up the ranks in the LRA.⁹²

85. *Id.* arts. 28–29, 32, 34, 38–39.

86. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, *supra* note 32, arts. 2, 4; *see International Criminal Justice and Children*, NO PEACE WITHOUT JUST. & UNICEF INNOCENTI RES. CTR. 12, 15 (Sept. 2002), <https://www.unicef.org/emerg/files/ICJC.pdf> (noting that the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict bans all forms of recruitment and participation of children for non-State armed groups).

87. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Transcript of Trial Hearing, 22–40 (Dec. 6, 2016), https://www.icc-cpi.int/Transcripts/CR2016_25802.pdf.

88. Drumbl, *A Former Child Soldier Prosecuted at the International Criminal Court*, *supra* note 3; *see generally* Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Prosecution's Pre-Trial Brief (Sept. 6, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_06511.pdf.

89. Ongwen, Case No. ICC-02/04-01/15, Transcript of Trial Hearing, at 35–37.

90. *Id.* at 23–24, 30–31, 33–35; *see* Burke, *supra* note 41 (stating that the Prosecution prepared to call more than seventy witnesses at trial).

91. Ongwen, Case No. ICC-02/04-01/15, Transcript of Trial Hearing, at 35–38.

92. *See* Kan, *supra* note 20, at 75–76 ("To counter this narrative [of Ongwen being a victim and thus not responsible for criminal acts], the Prosecution highlighted the organised and hierarchical structure of the LRA, and specifically, how Ongwen ascended the ranks of the LRA through his own initiative."); *see also* Cakaj, *supra* note 66 ("While in the first years of his life as a rebel Ongwen might have acted under duress, he was taught, and likely convinced, that the LRA's struggle was just.").

The OTP also emphasized that they were not charging Ongwen for any actions conducted prior to his eighteenth birthday, in accordance with the Rome Statute,⁹³ but instead focused on his actions as a willing and morally culpable adult.⁹⁴ Towards the end of her opening, the Chief Prosecutor boiled the case down to something too simplistic to do justice in such a complicated case of first impression: “Each human being must be considered to be endowed with moral responsibility for their actions. And the focus of the ICC criminal process is not on the goodness or the badness of the accused person but on the criminal acts which he or she has committed.”⁹⁵

Pre-Trial Chamber II adopted the prosecution’s version of the story that Ongwen was “someone endowed with agency, one capable of making moral choices despite his upbringing in [the LRA].”⁹⁶ Although the devastating effects of child soldiering are well documented, especially in the ICC’s decision in *Prosecutor v. Lubanga*,⁹⁷ Pre-Trial Chamber II distinguished *Lubanga* from Ongwen’s case, departing from its sympathetic stance toward child soldiers.⁹⁸ The defendant in *Lubanga* was not himself a child soldier, but the decision “cast the linkage between the past as a child soldier and the present as a former child soldier as linear and

93. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Transcript of the Confirmation of Charges, 33–34 (Jan. 25, 2016), https://www.icc-cpi.int/Transcripts/CR2016_00529.pdf; Rome Statute, *supra* note 76, art. 26. International law is still unclear on what constitutes the minimum age for criminal responsibility. See S.C. Res. 1315, art. 7 (Aug. 14, 2000) (creating the Special Court for Sierra Leone and giving it jurisdiction over persons who are between fifteen and eighteen years old or were at the time they committed the alleged crimes).

94. See Kan, *supra* note 20, at 76–79 (discussing how the Prosecution insists that Ongwen had ample opportunity to desert the LRA, or at the very least, order his troops to lay down arms or stop raping women); see also Bogani, *supra* note 44 (mentioning victims’ accounts of Ongwen’s enthusiastic participation under Kony’s orders to commit rape and pillage communities).

95. Ongwen, Case No. ICC-02/04-01/15, Transcript of Trial Hearing, at 37; see also Drumbl, *Victims Who Victimise*, *supra* note 1, at 218 (“Victims are to be pure and ideal; perpetrators are to be unadulterated and ugly. International criminal law hinges upon these antipodes which, in turn, come to fuel its existence. Contrived as they are, these binaries nonetheless undermine international criminal law’s ability to speak in other than a crude register, in particular when it comes to the collective nature of mass atrocity.”).

96. Kan, *supra* note 20, at 77; *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Decision on the Confirmation of the Charges (Mar. 23, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02331.pdf.

97. Case No. ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Statute (Mar. 14, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.pdf; see Elisabeth Schauer & Thomas Elbert, *The Psychological Impact of Child Soldiering*, in TRAUMA REHABILITATION AFTER WAR & CONFLICT 311, 314, 332 (Erin Martz ed., 2010), available at <https://www.usip.org/sites/default/files/missing-peace/The%20psychological%20impact%20of%20child%20soldiering%20-%20Schauer.pdf> (finding that the experiences of child soldiers have a long-lasting negative impact on their development and the trauma makes them susceptible to psychological disorders).

98. Ongwen, Case No. ICC-02/04-01/15, Decision on the Confirmation of the Charges, ¶150; see Drumbl, *Victims Who Victimise*, *supra* note 1, at 242 (“[In *Lubanga*,] the child soldiering experience was constructed as ongoing and assured: it rendered the children as victims damaged for life, with their reality today as derivative of their previous suffering.”); see also Mark A. Drumbl, *Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering*, JUSTICE IN CONFLICT (Apr. 20, 2016), <https://justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of-child-soldiering/> (noting the sharp differences between how the ICC approached child soldiering in *Lubanga* and *Ongwen*).

continuous.”⁹⁹ In fact, it was essential to the *Lubanga* decision that the child soldier was contemplated in continuity—once someone was a child soldier, they would always be considered a child soldier through and through.¹⁰⁰ Pre-Trial Chamber II implied that the effects of child soldiering do not apply to Ongwen in the same way.¹⁰¹ In fact, the psychological effects “had either stopped or had become negligible once Ongwen became an adult.”¹⁰² In dismissing his victimhood, Pre-Trial Chamber II separated the suffering child soldier from the soldier Ongwen eventually became, effectively deciding that he will be treated as a voluntary member of the LRA.¹⁰³ In doing so, it most notably pointed out that if Ongwen “could not have avoided accepting . . . forced wives, he could have avoided raping them, or, at the very least, he could have reduced the brutality of the sexual abuse.”¹⁰⁴

B. Defense: The Helpless Victim

In order to defend Ongwen, his counsel looked directly to the Rome Statute.¹⁰⁵ Article 31 of the Rome Statute, titled “Grounds for excluding criminal responsibility,” lays out the internationally recognized defenses that defendants before the ICC may raise in cases within the Court’s jurisdiction.¹⁰⁶ Article 31 articulates two theories that the Defense used to argue that Ongwen should not be found criminally responsible for any of the seventy counts of war crimes and crimes against humanity he was charged with.¹⁰⁷ The first theory is the defense of mental defect and takes into account the consequences of Ongwen’s life in a brutalized environment.¹⁰⁸ The second theory is the defense of duress, which highlights

99. See Drumbl, *Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering*, *supra* note 98.

100. *Id.* See generally Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Statute (Apr. 5, 2012), https://www.icc-cpi.int/CourtRecords/CR2012_03942.pdf.

101. Kan, *supra* note 20, at 77.

102. *Id.*; see Drumbl, *Victims Who Victimise*, *supra* note 1, at 240 (“[O]ther former child soldiers, insist that Ongwen ‘went overboard’ . . . having pursued extreme violence and sadism as a way to achieve power, status and influence within the LRA.”).

103. Kan, *supra* note 20, at 77; see Pangalangan, *supra* note 32, at 630–31 (describing how the ICC differentiated between Ongwen’s role as an abductee versus an abductor); see also Joshua A. Romera, *The Special Court for Sierra Leone and the Juvenile Soldier Dilemma*, 2 NW. J. INT’L HUM. RTS. 1, 2 (2004) (explaining how, in the Special Court for Sierra Leone, a significant number of voluntary child soldiers ages fifteen to eighteen received the same treatment as those of the same age who had been forcibly conscripted, and all were sentenced to rehabilitative and reconciliation mechanisms, regardless of the level of culpability tied to their voluntariness).

104. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges, ¶ 155 (Mar. 23, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02331.pdf. *But see* Drumbl, *Victims Who Victimise*, *supra* note 1, at 238 (noting that Ongwen allowed several of his “wives” to flee, often bringing his children along with them).

105. Tom Maliti, *Ongwen’s Lawyers Ask Judges to Rule on Evidence Required to Prove Mental Disease and Duress Defense*, INTERNATIONAL JUSTICE MONITOR (Feb. 13, 2019), <https://www.ijmonitor.org/2019/02/ongwens-lawyers-ask-judges-to-rule-on-evidence-required-to-prove-mental-disease-and-duress-defense/>.

106. Rome Statute, *supra* note 76, art. 31.

107. *Id.* art. 31(1)(a), (d).

108. *Id.* art. 31(1)(a); see Clare Frances Moran, *To Be Responsible for Ourselves: Dominic*

Ongwen's subordinate role as a child soldier and the threats he received during that time.¹⁰⁹ Although the Defense has chosen to primarily argue duress, evidence of Ongwen's time in the LRA has been presented in a manner that often conflates the two defenses.

1. Mental Defect

Article 31(1)(a) allows a person to be relieved of any criminal responsibility if they can demonstrate that they suffer from a mental disease or defect that destroys their ability 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."¹¹⁰ This generally encompasses impairments of cognition and volition.¹¹¹ Article 31(1)(a) is analogous to the defense of insanity used in American criminal law.¹¹² To make out the mental defect defense, one of two tests must be satisfied: "either the accused did not know what he or she was doing as a consequence of mental disease or a defect in perception, or they lacked the control to conform to the criminal law that can be expected of the average person, again as a consequence of the defect or disease."¹¹³

From the vulnerable and impressionable age of ten, Ongwen's exposure to gore, massacres, and dehumanization, is far from the "norm" for children in their most formative years.¹¹⁴ This suffering was so severe that as a consequence, Ongwen's frame of mind was substantially altered to the point that his mental state is essentially defective.¹¹⁵ Thus, "he cannot possibly be expected to control his behaviour following a lifetime of appalling treatment which may have resulted in psychological damage."¹¹⁶ The Defense submitted that Ongwen, who entered the LRA as a child soldier, remained a child soldier until the day he surrendered and that his actions

Ongwen and Defences Before the International Criminal Court, OPINIOJURIS (Dec. 19, 2016), <http://opiniojuris.org/2016/12/19/to-be-responsible-for-ourselves-dominic-ongwen-and-defences-before-the-international-criminal-court/> ("As a consequence [of the LRA's brutal environment], it may be impossible to expect [Ongwen] to conform to the normative strictures which apply to most individuals, based on the impact on him of the treatment he encountered from such a young age.").

109. Rome Statute, *supra* note 76, art. 31(1)(d); *see* Kan, *supra* note 20, at 76 ("The Defence argued Ongwen did not voluntarily commit the alleged crimes, with his actions having been the result of the forced adaption to the LRA's brutal environment and indoctrination.").

110. Rome Statute, *supra* note 76, art. 31(1)(a).

111. Pangalangan, *supra* note 32, at 625.

112. *See* 18 U.S.C. § 17 (1984) ("It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.").

113. Moran, *supra* note 108.

114. *See* Kelly et al., *supra* note 29 (explaining that children exposed to violence during their formative years lose opportunities for emotional and intellectual development); *see also* Briggs, *supra* note 26 ("As many as 300,000 children are believed to be serving as soldiers in armed conflicts around the world - depriving them of a normal childhood and education.").

115. *See* Pangalangan, *supra* note 32, at 624-29 (arguing that Ongwen's "rotten social background" cultivated by his time in the LRA rendered him incapable of understanding the unlawfulness of his own actions).

116. Moran, *supra* note 108.

directly correlate with this tragic point of entry.¹¹⁷ “[T]he crime of conscription of child soldiers is a *continuous crime*” that does not end simply because the victim, Ongwen, turned eighteen.¹¹⁸ Therefore, he should not be held criminally responsible because he is only a product of the global community’s failure to protect him as a child entrenched in conflict and susceptible to forced conscription.¹¹⁹

2. Duress

Under Article 31(1)(d), a person may be relieved of criminal responsibility if they can demonstrate that they acted under “duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm” and acted “reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.”¹²⁰ The threat must either “be made by other persons” or “constituted by other circumstances beyond that person’s control.”¹²¹

Child soldiers are threatened with torture and death from the point of conscription, either directly by superiors or indirectly through performative demonstrations against those who try to escape or disobey.¹²² The Defense argued that Ongwen’s entire time in the LRA constantly consisted of imminent threats to himself, his family, and his village.¹²³ Thus, Ongwen did not voluntarily commit the alleged crimes because his actions were “the result of the forced adaptation to the LRA’s brutal environment and indoctrination.”¹²⁴ Detailing the “all-knowing” and “all-seeing” nature of Kony’s reign, the Defense described how Kony instilled institutional fear to the point that there were only two choices for recruits: compliance or death.¹²⁵ The Defense argued that by choosing compliance, Ongwen chose the most natural and instinctual survival tactic for a child looking to LRA commanders as replacement caretakers.¹²⁶ He “was simply surviving in an

117. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Transcript of the Confirmation of Charges, 44 (Jan. 25, 2016), https://www.icc-cpi.int/Transcripts/CR2016_00529.pdf; Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Third Public Redacted Version of Defence Brief for the Confirmation of Charges Hearing, ¶ 46 (May 26, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_03711.pdf; Kan, *supra* note 20, at 75; Drumbl, *Victims Who Victimise*, *supra* note 1, at 241.

118. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Third Public Redacted Version of Defence Brief for the Confirmation of Charges Hearing, ¶ 45–46 (May 25, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_03711.pdf.

119. *Id.* ¶ 5.

120. Rome Statute, *supra* note 76, art. 31(1)(d).

121. *Id.* art. 31(1)(d)(i)–(ii).

122. See Pangalangan, *supra* note 32, at 616–18 (describing the LRA’s traumatic indoctrination process, which included the killing of attempted runaways in front of other child soldiers).

123. Ongwen, Case No. ICC-02/04-01/15, Third Public Redacted Version of Defence Brief for the Confirmation of Charges Hearing, ¶¶ 53–56.

124. *Id.*; Kan, *supra* note 20, at 76.

125. Ongwen, Case No. ICC-02/04-01/15, Third Public Redacted Version of Defence Brief for the Confirmation of Charges Hearing, ¶ 4; see Pangalangan, *supra* note 32, at 622 (“An alleged spirit medium, Kony utilized religious indoctrination to rule with complete and unfettered power.”).

126. Ongwen, Case No. ICC-02/04-01/15, Third Public Redacted Version of Defence Brief

environment which enslaved him.”¹²⁷ Survival chances were best for those who obeyed orders to kill and were promoted into officer ranks because “low-level fighters were the first to die from bullets or pervasive shortages of food.”¹²⁸ Just because Ongwen chose to survive “better” than other LRA recruits, did not make him any less subject to the duress from Kony, especially since there is evidence of their less-than-friendly relationship.¹²⁹

In theory, this treatment of Ongwen by Kony and the LRA constitutes the serious threat by others envisioned by Article 31 of the Rome Statute.¹³⁰ In theory, the duress defense should work here. However, the strong language of the section, the qualifications of necessary and reasonable reaction, and the proportionality requirement make a successful pleading of duress essentially impossible, rendering duress under the Rome Statute “something of a façade.”¹³¹ Indeed, the defense of duress has never been successful in any case before the ICC.¹³²

The only time a duress defense prevailed in international law was in *Prosecutor v. Erdemović*, a case heard in the International Criminal Tribunal for the Former Yugoslavia (ICTY).¹³³ As a member of the Bosnian Serb Army in the early 1990s during the conflict that led to the dissipation of the Yugoslavian state, Dražen Erdemović participated in the killing of close to 1,200 Bosnian Muslim civilians.¹³⁴ The civilians were not armed, and Erdemović killed approximately 100 himself.¹³⁵ In 1996, he was indicted by the ICTY where he pled guilty to one count of murder as a crime against humanity.¹³⁶ Erdemović claimed he should not be found

for the Confirmation of Charges Hearing, ¶¶ 54–56.

127. *Id.* ¶ 56; see Cakaj, *supra* note 66 (“The world that Ongwen-the-soldier inhabited was different to the one Ongwen-the-child left behind. Being alive was contingent on killing others.”).

128. Cakaj, *supra* note 66.

129. Ongwen, Case No. ICC-02/04-01/15, Third Public Redacted Version of Defence Brief for the Confirmation of Charges Hearing, ¶ 4; (“[Ongwen’s] so-called rank was demonstrative of one thing: that he was surviving better than others while under duress.”); see Drumbl, *Victims Who Victimise*, *supra* note 1, at 238, 241–42 (explaining that Ongwen escaped the LRA only after Kony had Ongwen detained and tortured).

130. Rome Statute, *supra* note 76, art. 31(1)(d)(i)–(ii); Moran, *supra* note 108.

131. Moran, *supra* note 108.

132. See Maliti, *supra* note 105 (noting that Ongwen is the first defendant to raise the defense of duress at the ICC).

133. See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 16 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996), <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf> (concluding that analysis of all the facts make it appropriate to grant to Erdemović the benefit of regarding duress as a mitigating circumstance).

134. *Id.* ¶ 79; *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Indictment, ¶ 12 (Int’l Crim. Trib. for the Former Yugoslavia May 22, 1996), <http://www.icty.org/x/cases/erdemovic/ind/en/erd-ii960529e.pdf>; *Drazen Erdemovic*, TRIAL INT’L: TRIAL WATCH DATABASE (May 31, 2016), <https://trialinternational.org/latest-post/drazen-erdemovic/>.

135. Erdemović, Case No. IT-96-22-T, Indictment, ¶ 12; Press Release, Int’l Crim. Trib. for the Former Yugoslavia, Dražen Erdemović Sentenced to 5 Years of Imprisonment (Mar. 5, 1998) [hereinafter Press Release, Dražen Erdemović Sentenced to 5 Years of Imprisonment], <https://www.icty.org/en/press/drazen-erdemovic-sentenced-5-years-imprisonment>.

136. Erdemović, Case No. IT-96-22-T, Indictment; Press Release, Dražen Erdemović Sentenced to 5 Years of Imprisonment, *supra* note 135.

criminally responsible because he had no choice: “If I had refused, I would have been killed together with the victims.”¹³⁷ He further contended that he did what was reasonable to protect his wife and nine-month-old son.¹³⁸ The Appeals Chamber determined that “duress does not afford a complete defence to [crimes] involving the killing of innocent human beings.”¹³⁹ On remand, the presence of duress acted as a mitigating factor when it came to Erdemović’s resentencing: “[t]he evidence reveals the extremity of the situation faced by [Erdemović]. The Trial Chamber finds that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed.”¹⁴⁰ The ICTY accepted Erdemović’s guilty plea and sentenced him to just five years of imprisonment.¹⁴¹

This ICTY jurisprudence is not binding on the ICC, leaving no precedent guaranteeing Ongwen’s claim of duress will be dispositive in any way. In fact, Pre-Trial Chamber II determined early on that “there exists no evidence indicating a threat of imminent death or continuing or imminent serious bodily harm against Dominic Ongwen (or another person) at the time of his conduct.”¹⁴² Pre-Trial Chamber II also found that the Defense “failed to establish that Ongwen’s acts were either necessary, in terms of absence of alternatives, or reasonable, to the end that the harm sought to be avoided outweighed the harm caused.”¹⁴³ Pre-Trial Chamber II went even further to denounce the duress defense, explaining that Article 31 cannot be interpreted to “provide blanket immunity to members of criminal organisations which have brutal systems of ensuring discipline.”¹⁴⁴ Given Pre-Trial Chamber II’s Decision on the Confirmation of Charges, the considerable number of charges and testifying victims, and the gender and sexual-based allegations, the odds are against Ongwen’s duress defense being successful.¹⁴⁵

137. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 10.

138. *Id.* ¶¶ 10, 80; Press Release, Dražen Erdemović Sentenced to 5 Years of Imprisonment, *supra* note 135.

139. Erdemović was originally sentenced to 10 years imprisonment. The Trial Chamber found that Erdemović’s account of duress had not been corroborated by evidence independent of his testimony. He appealed, seeking acquittal or a lesser sentence, on grounds that the Trial Chamber failed to adequately consider his duress arguments. Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment ¶¶ 1, 10–12, 19 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997), <https://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf>.

140. Prosecutor v. Erdemović, Case No. IT-96-22-Tbis, Sentencing Judgment ¶ 17 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998), <https://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts980305e.pdf>.

141. *Id.* ¶ 23.

142. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges, ¶¶ 153–56 (Mar. 23, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02331.pdf (“The evidence demonstrates that escapes from the LRA were not rare. Also, [Ongwen] could have chosen not to rise in hierarchy and expose himself to increasingly higher responsibility to implement LRA policies.”).

143. Pangalangan, *supra* note 32, at 623.

144. Ongwen, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges, ¶ 153.

145. Pangalangan, *supra* note 32, at 623. In light of Judge Cassese’s dissenting opinion in Erdemović, it is possible that the Trial Chamber in Ongwen’s case could take into account Ongwen’s position in the LRA’s military hierarchy when considering the various elements of the

IV. COMPETING NARRATIVES OF VICTIM-PERPETRATORS UNDERMINE GOALS OF THE ICC

Since its inception in 2002, the ICC has been tasked with making sense of the most egregious and gruesome crimes that terrorize the world.¹⁴⁶ Its creation was a response to the heinous crimes committed during conflicts that left a stain on the state of humanity during the twentieth century,¹⁴⁷ including the Holocaust, the ethnic cleansing in the former Yugoslavia, and the Rwandan genocide.¹⁴⁸

Under the Rome Statute, the ICC has jurisdiction over the gravest international crimes that “threaten the peace, security and well-being of the world.”¹⁴⁹ The Rome Statute specifically includes war crimes, genocide, crimes against humanity, and the crime of aggression.¹⁵⁰ However, despite the limited range of crimes expressly listed, ICC judges are given “significant discretion to determine which crimes are serious enough to merit the Court’s attention.”¹⁵¹ In part, this is due to the gravity threshold for admissibility articulated in Article 17 of the Rome Statute.¹⁵² Article 17 states that any cases that are “not of sufficient gravity” shall be deemed inadmissible.¹⁵³ The Rome Statute includes this threshold to reconcile the need for universal protection of human rights with the preservation of state sovereignty and national jurisdiction.¹⁵⁴

However, the ICC grapples with further limitations. Although actions within a state may fall into one of the four categories of crimes, the ICC may intervene only “where a State is unable or unwilling genuinely to carry out the investigation and

duress defense. *Id.* at 623–24; *see* Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 51 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf> ([T]he lower rank of a serviceman the greater his propensity to yield to compulsion, [thus] the Trial Chamber, in determining whether or not Appellant acted under duress, should take into account his military rank.”); *see also* Cakaj, *supra* note 66 (“[Ongwen] never was a top commander, certainly not on par with those who had joined Kony from the start, like Kenneth Banya, Vincent Otti, or Okot Adhiambo.”).

146. *See generally* Rome Statute, *supra* note 76, art. 1.

147. INT’L CRIMINAL COURT, UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 3, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf> (last visited Aug. 30, 2019).

148. *Id.*; *see* Margaret M. deGuzman, *The International Criminal Court’s Gravity Jurisprudence at Ten*, 12 WASH. U. GLOBAL STUD. L. REV. 475, 477 (2013) (noting that even the states most concerned about protecting national jurisdiction were willing to cede jurisdiction to the ICC for crimes as grave as those committed during the Holocaust, the Rwandan genocide, and conflict in the former Yugoslavia).

149. Rome Statute, *supra* note 76, pmb1.

150. *Id.* art. 5.

151. deGuzman, *The International Criminal Court’s Gravity Jurisprudence at Ten*, *supra* note 148, at 475–76.

152. Rome Statute, *supra* note 76, art. 17(1)(d); deGuzman, *The International Criminal Court’s Gravity Jurisprudence at Ten*, *supra* note 148, at 476.

153. Rome Statute, *supra* note 76, art. 17.

154. *See* deGuzman, *The International Criminal Court’s Gravity Jurisprudence at Ten*, *supra* note 148, at 476–77 (describing the competing interests of states that gave rise to the gravity threshold in Article 17 of the Rome Statute).

prosecute the perpetrators.”¹⁵⁵ Like other systems of criminal justice, the decisions and limitations of the ICC can be evaluated under differing theories of punishment to gauge its legitimacy by highlighting the effect it has on the international community.¹⁵⁶ The ICC operates under both forward-looking and backward-looking theories of punishment: utilitarianism and retributivism.¹⁵⁷

A. Utilitarianism

The theory of utilitarianism not only encapsulates benefits to society but also advances such benefits as being the hallmark of criminal punishment.¹⁵⁸ Utilitarian theory asserts that without some societal benefit, there should be no punishment to perpetrators.¹⁵⁹ One of the main benefits to a society that utilitarian theory contemplates is deterrence.¹⁶⁰ If those who commit crimes are punished, then society as a whole will know and heed the consequences of criminal activity, in addition to the perpetrators themselves being deterred from committing further offenses.¹⁶¹

Deterrence of international crimes is one of the primary missions of the ICC.¹⁶² Lacking enforcement mechanisms of its own, the ICC relies on its ability to sentence the defendants that appear before as its most powerful tool.¹⁶³ However, the Court remains weak when it comes to deterring the crimes under its jurisdiction.¹⁶⁴ The decision regarding Ongwen’s fate will have serious implications on the legitimacy of the Court by showing which of its goals it is more heavily aligned with, as the

155. INT’L CRIM. CT., *supra* note 147, at 1.

156. *See, e.g.*, IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 147–49 (1989) (comparing retributive and utilitarian theories of punishment).

157. *See* Drumbl, *A Former Child Soldier Prosecuted at the International Criminal Court*, *supra* note 3 (“The ICC channels the outrage of the international community. Its point is retribution and, also, deterrence; its goal is to end impunity.”).

158. *See* Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 116 (2000) (explaining that under utilitarian theory, punishment is permissible only when it furthers one main societal benefit: reducing future crime).

159. *Id.*; *see* David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1656 (1992) (“[Utilitarian theorists] truly ‘respect’ the criminal by acknowledging that inflicting pain on him is, in itself, *bad*, and not to be done unless it can be outweighed by its good consequences.”).

160. *See* Binder & Smith, *supra* note 158, at 116 (stating that deterrence, along with incapacitation and reform, are traditional focuses of utilitarian theories of punishment).

161. *See* Dolinko, *supra* note 159, at 1626, 1631–32.

162. *See* Rome Statute, *supra* note 76, pmb1. (“The State Parties to this Statute [are] . . . [d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”); *see also* deGuzman, *Gravity and Legitimacy of the International Criminal Court*, *supra* note 19, at 1461 (“The court’s purpose is not simply to punish those most responsible for the worst crimes, but to transmit a message regarding crimes that have not always received adequate moral and legal condemnation.”).

163. *See* INT’L CRIM. CT., *supra* note 147, at 19, 32 (noting that the ICC does not have its own police force, and that enforcement of orders and sentences of the Court rests with member states).

164. *See* Eric Posner, *The Absurd International Criminal Court*, WALL STREET J. (June 10, 2012, 5:57 PM), <https://www.wsj.com/articles/SB10001424052702303753904577452122153205162> (detailing the political constraints and operational slowness limiting ICC efficacy when it comes to deterrence); *see* deGuzman, *Gravity and Legitimacy of the International Criminal Court*, *supra* note 19, at 1408 (discussing how the ICC’s gravity threshold for admissibility undermines the Court’s deterrent capacity).

Court continues to establish its place as a permanent outlet for “channel[ing] the outrage of the international community.”¹⁶⁵

According to Mark Drumbl, victim-perpetrators such as Ongwen should not be prosecuted by the ICC, or any justice system.¹⁶⁶ Drumbl draws parallels between the child soldiers in the LRA and survivors of the Holocaust, noting that mass atrocity is a catalyst for situations where victims are pitted against each other and inflict pain upon one another at the hands of those who are actually responsible.¹⁶⁷ The U.N. International Children’s Fund (UNICEF) agrees, declaring that “[f]orcing children to commit atrocities during an armed conflict is itself a war crime, resulting in severe psychological harm, and is a violation of their rights. Child perpetrators are thus victims of criminal policies for which adults are primarily responsible.”¹⁶⁸

These views raise a serious question that implicates the application of deterrence to Ongwen’s situation: How can a victim, or someone who became a perpetrator as a result of their victimhood, be deterred? If the voluntary adult members of a group are the ones who are ultimately responsible, would it be true that they are the only ones who can be truly deterred? It can be argued that Ongwen himself will specifically be deterred from committing further crimes as a commander.¹⁶⁹ However, he had already left the LRA after wanting to escape Kony’s grip for at least a decade prior to his capture.¹⁷⁰ Additionally, since the majority of children enter into armed forces involuntarily, most child soldiers will not be deterred by punishing Ongwen.¹⁷¹ This is because deterrence does not adequately affect individuals who do not exercise their own free will, and becoming a child soldier is often not a choice.¹⁷² Thus, the actions which follow from involuntarily becoming a child soldier would also be without choice. Even the Ugandan government itself has recognized this and focused its resources on

165. Drumbl, *A Former Child Soldier Prosecuted at the International Criminal Court*, *supra* note 3.

166. *Id.*; Drumbl, *Victims Who Victimise*, *supra* note 1 (arguing that criminal proceedings are not equipped for the ethical complexity of a victim-victimizer).

167. *See, e.g.*, Drumbl, *Victims Who Victimise*, *supra* note 1.

168. *International Criminal Justice and Children*, *supra* note 86, at 34.

169. *See deGuzman, The International Criminal Court’s Gravity Jurisprudence at Ten*, *supra* note 148, at 479 (implying that, in limiting admissibility to senior leaders only, the ICC deters only those perpetrators and not perpetrators more generally). *But see* Drumbl, *A Former Child Soldier Prosecuted at the International Criminal Court*, *supra* note 3 (implying that, because some child soldiers are known to display compassion and others display continued violence, it is impossible to truly predict if a former child soldier would continue to perform violent acts after being liberated from the LRA).

170. *See* Cakaj, *supra* note 66 (describing Ongwen’s desire to leave the LRA in the early 2000s, his imprisonment in 2014, and subsequent departure from the LRA through surrender).

171. *See* Darija Marković, *Child Soldiers: Victims or War Criminals?*, REGIONAL ACAD. U.N. 4, 8 (Dec. 14, 2015), http://www.ra-un.org/uploads/4/7/5/4/47544571/paper__2_.pdf (noting that most child soldiers are forcibly recruited and commit crimes because they have been ordered to do so).

172. *See* Binder & Smith, *supra* note 158, at 211 (indicating that voluntariness determines whether a wrongdoing is deterrable); *see* Marković, *supra* note 171, at 4, 8 (explaining how principles of deterrence are often not applicable to child soldiers).

promoting rehabilitation and developing amnesty programs rather than prisons.¹⁷³

B. Retributivism

On the other hand, the ICC handles the gravest crimes known to man, and the accusations against Ongwen are of commensurate severity.¹⁷⁴ Is there value in punishment due solely to the gravity of the crime committed, regardless of the circumstances in which it was committed? Addressing this question requires crossing over from utilitarianism and delving into the retributive goal of the ICC.¹⁷⁵ Pure retributive theory posits that “punishment is just when it is deserved, and it is deserved by the commission of an offense. The offense committed is the sole ground of [a court’s] right and duty to punish”¹⁷⁶ Additionally, retributive theory contemplates that the severity of the punishment should be proportionate to the seriousness, or gravity in the case of the ICC, of the crime—no more and no less.¹⁷⁷

As the law has evolved, retributivism has become closely associated with victims’ rights and the idea that punishment is compensation for their pain and suffering.¹⁷⁸ The importance placed on victims of international crimes is apparent in the Rome Statute. Article 68 protects victims who choose to be witnesses and agree to participate in the proceedings; Article 75 addresses reparations for victims; the preamble emphasizes that during the twentieth century, “millions of children, women and men [had] been victims of unimaginable atrocities that deeply shock the conscience of humanity.”¹⁷⁹

Both sides agree that the evidence presented against Ongwen is reliable.¹⁸⁰ Under pure retributive theory, his guilt is reason enough to punish him in a way that is proportional to the crimes he admits committing.¹⁸¹ However, the ICC does not

173. See Kabano, *supra* note 2, at 26–27 (describing rehabilitative programs for returning LRA combatants); see CHILD SOLDIERS INT’L, *supra* note 58, at 107 (describing amnesty and demobilization procedures in Uganda); see JUSTICE AND RECONCILIATION PROJECT, *supra* note 58, at 5–6 (discussing Ugandan amnesty efforts and their shortcomings with regard to victim-victimizers).

174. Drumbl, *A Former Child Soldier Prosecuted at the International Criminal Court*, *supra* note 3.

175. See *id.* (recognizing that the ICC’s purpose is partially retributive).

176. PRIMORATZ, *supra* note 156, at 148.

177. *Id.*; Jon’a F. Meyer, *Retributive Justice*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/retributive-justice> (last visited Aug. 30, 2019).

178. See Meyer, *supra* note 177 (“Victims were to be compensated for the intentional and unintentional harms they suffered, and offenders were to be punished because they had done wrong.”).

179. Rome Statute, *supra* note 76, arts. 68, 75; *id.* at pmb.; see HUMAN RIGHTS WATCH, WHO WILL STAND FOR US?: VICTIMS’ LEGAL REPRESENTATION AT THE ICC IN THE ONGWEN CASE AND BEYOND 7 (Aug. 2017), https://www.hrw.org/sites/default/files/report_pdf/ijongwen0817_web.pdf (“At the ICC, victims are permitted to participate in criminal proceedings in their own right, that is, to make their views and concerns known to the judges on matters that concern them, rather than be involved simply as witnesses.”).

180. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges, ¶ 51 (Mar. 23, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_02331.pdf.

181. PRIMORATZ, *supra* note 156, at 148.

have the authority to impose death or torture as a sentence.¹⁸² Would imprisonment be enough to satisfy the retributive purpose of the ICC in this case? It is possible, but that uncertainty is precisely why the voices of the victims to Ongwen's violence have been put at center stage. Over 4,000 victims are participating in Ongwen's case, either through their legal representatives or as witnesses testifying about their experiences regarding Ongwen and his role in the LRA.¹⁸³ The victims include members from communities that Ongwen's brigade attacked as well as "wives" and child soldiers formerly under his control.¹⁸⁴ Under retributive theory, a guilty verdict and a sentence of life imprisonment could best serve these victims by giving them something to help alleviate their pain and suffering while upholding the ICC's purpose and presence.¹⁸⁵

However, there is countervailing evidence that retributive justice is not what the people of Uganda want or need at this stage in their healing.¹⁸⁶ Although the ICC's involvement "may well have helped persuade rebels to temporarily lay down their arms[,] . . . the refusal to withdraw its indictments has so far interfered with attempts to make peace with the rebels, who demand amnesty."¹⁸⁷ Additionally, it is documented that Ongwen allowed "several of his concubines to escape with his many children," with one of his "wives" even expressing her desire for him to come home and be afforded a chance at obtaining amnesty.¹⁸⁸ She is not alone in her views on what should become of Ongwen.¹⁸⁹

The belief that Ongwen should be given amnesty and be allowed to participate

182. See INT'L CRIM. CT., *supra* note 147, at 31 ("[The ICC] cannot impose a death sentence."); see Rome Statute, *supra* note 76, art. 77 (omitting mention of a death or torture penalty in its statement of penalties).

183. See Ongwen, Case No. ICC-02/04-01/15, Decision on the Confirmation of Charges, ¶¶ 46–47 (listing the various witnesses statements and testimonies the prosecution presented at the Confirmation of Charges hearing).

184. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Prosecution's Pre-Trial Brief, ¶¶ 31–32 (Sept. 6, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_06511.pdf.

185. See Lino Owor Ogora, *To Punish or to Pardon? Perspectives on Accountability and Forgiveness in the Case of Dominic Ongwen*, INT'L JUST. MONITOR (Mar. 30, 2017), <https://www.ijmonitor.org/2017/03/to-punish-or-to-pardon-perspectives-on-accountability-and-forgiveness-in-the-case-of-dominic-ongwen/> (reporting that some Ugandan people believe justice can only prevail with a trial). But see Oryem Nyeko & Harriet Aloyocan, *Community Perceptions on Dominic Ongwen: Situational Brief*, JUST. & RECONCILIATION PROJECT, 5 (May 2015), <http://justiceandreconciliation.com/wp-content/uploads/2015/05/Community-Perceptions-on-Dominic-Ongwen-2015-05-20.pdf> (detailing that even in the regions most devastated by Ongwen's troops, a primary concern is not Ongwen's punishment, but rather receiving monetary compensation for their losses and suffering).

186. See Posner, *supra* note 164 (reporting that Ugandan rebels want amnesty and ICC prosecution has impeded peace talks); Drumbl, *Victims Who Victimise*, *supra* note 1, at 239–40 (describing support for offering amnesty to Ongwen and calls for reconciliation and transitional justice).

187. Posner, *supra* note 164.

188. See Drumbl, *Victims Who Victimise*, *supra* note 1, at 238 ("She says he was, just like her, taken into the LRA at a 'tender age.' Accordingly, again, just like her and thousands of others, he should be amnestied and forgiven.").

189. See *id.* at 239 (describing widespread support for offering amnesty to Ongwen in Uganda, especially in his home region).

in reintegration mechanisms, like thousands of others have, is strongest in his home region, but exists elsewhere in Uganda as well.¹⁹⁰ Many people do not blame Ongwen or even the LRA, but rather chastise the Ugandan government “for the violence, for forcible resettlement, for not controlling the LRA, and for not protecting communities.”¹⁹¹ In fact, some Ugandans wonder why Ongwen has been selected by the ICC to be the face for the entirety of the LRA, while those who are more culpable have either not been captured, or are now dead and unable to answer for their crimes.¹⁹² It is because of the ICC’s selectivity that amnesty is completely out of reach for Ongwen; only if he was being prosecuted in Uganda would there be some chance for him to obtain amnesty.¹⁹³ Ongwen surrendered himself believing he would be able to make his case before the Ugandan government as other former child soldiers have done, but because of then President Museveni’s selective referral to the ICC in the early 2000s, Ongwen was stripped of that opportunity.¹⁹⁴

In light of these differing victims’ perspectives, the pure retributive nature of the ICC will almost certainly be served by a finding of guilt and the imposition of a sentence of life imprisonment. This would also serve, at the very least, those victims who simply wish to gain some semblance of vengeance for their losses from their participation in the trial. However, it is fair to observe that many Ugandans just want to move on from the days of the LRA through amnesty, rehabilitation, and reconciliation, and wish to be compensated via reparations for their suffering.¹⁹⁵ Thus, either way, there is something left unfulfilled for Uganda under the retributive function of the ICC.

V. PROPOSED TOTALITY OF THE CIRCUMSTANCES FRAMEWORK

In a perfect world, bright-line rules would exist for every legal issue, allowing decisions to be made with little difficulty and possibly eliminating the need for courts altogether. However, legal issues, and people for that matter, are too complex for such clear-cut solutions. Dominic Ongwen’s case before the ICC embodies a myriad of complexities that simply will not—and cannot—be reduced to bright-line

190. *Id.*; Lino Owor Ogora, *Perspectives from Coorom: Community Members Ready to Accept and Welcome Ongwen if Acquitted, Relatives Say*, INT’L JUST. MONITOR (Apr. 17, 2019), <https://www.ijmonitor.org/2019/04/perspectives-from-coorom-community-members-ready-to-accept-and-welcome-ongwen-if-acquitted-relatives-say/> (detailing interviews with Ongwen’s family members who expressed their views that he should not be prosecuted).

191. Drumbl, *Victims Who Victimise*, *supra* note 1, at 240.

192. *Id.*; see Cakaj, *supra* note 66 (“Opiyo Sam, another LRA commander who returned to Uganda [in 2014], claimed he does not know or understand why Ongwen was singled out by the ICC.”).

193. Drumbl, *Victims Who Victimise*, *supra* note 1, at 239.

194. *Id.* at 239; see Press Release, International Criminal Court, President of Uganda Refers Situation Concerning Lord’s Resistance Army (LRA) to the International Criminal Court, U.N. Press Release AFR/821-L/3055 (Jan. 29, 2004), <https://www.un.org/press/en/2004/afr821.doc.htm> (reporting that upon his referral to the ICC, President Museveni made clear his intention to exclude LRA leadership from amnesty efforts).

195. Natalia Ojewska, *Can Ugandans Overcome Trauma of LRA’s Violent Crimes?*, AL JAZEERA (Sept. 25, 2017), <https://www.aljazeera.com/indepth/features/2017/08/ugandans-overcome-trauma-lra-violent-crimes-170829071931893.html>.

rules and binaries. Everyone knows this: the Prosecutor, Ongwen's defense team, and esteemed international law scholars all acknowledge that there are limits to how the law can address this child soldier conundrum. These limits are put in place by international law and manifest in ordinary criminal law narratives. Such limits undermine the very aspirations that led to the signing of the Rome Statute—a collective decision that seemingly created a new dawn of international accountability. This closed-mindedness—the fact that “we cannot help but see these perpetrators as monsters,”—is what keeps international law from sufficiently addressing what leads to mass atrocities like those in Uganda.¹⁹⁶

International criminal law will continue to fall short of preventing the next tragedy, the very purpose the ICC was created for, if it continues to treat “[o]ne person [as] a stand-in for all of the perpetrators connected to the same tragedy.”¹⁹⁷ Harsh judgments but light sentencing using mitigating factors are unconstructive.¹⁹⁸ No prosecution at all leaves the ICC without a legitimate presence on the international stage.¹⁹⁹ Thus, the Court must take a more holistic approach that addresses the full complexities of humanity, and especially the situation of child soldiers. In the case of Ongwen and future child soldiers tried before the ICC, the Court should adopt a totality of the circumstances framework for evaluating culpability: one that abandons bright-line rules and takes all factors of a case into account, balancing them equally.

A. Bright Line Rules Prescribed by Law Turned into Factors

International law is inherently complex, with nuance after nuance making it difficult to discern what outcomes or solutions will or should result from any given case. Even if a crime in one country seems facially similar to one in another country, the surrounding circumstances and individual perpetrators themselves are often wildly dissimilar.²⁰⁰ Bright line rules embedded in the Rome Statute do not facilitate accurate or fair fact-finding because they fail to accommodate all the nuances that come with child soldier defendants. Thus, a totality of the circumstances test is

196. Saira Mohamed, *Of Monsters and Men: Perpetrator Trauma and Mass Atrocity*, 115 COLUM. L. REV. 1157, 1161 (2015).

197. *Id.* at 1160–61.

198. See Drumbl, *Victims Who Victimise*, *supra* note 1, at 232–33, 244 (noting the paradox of judges in the Kapo trials using harsh language to denounce the criminal behavior, but then expressing mercy and empathy during sentencing). Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996) <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf> (sentencing Erdemović to only five years imprisonment for killing innocent people after considering duress as a mitigating factor).

199. See Mark A. Drumbl, *Child Pirates: Rehabilitation, Reintegration, and Accountability*, 46 CASE W. RES. J. INT'L L. 235, 273–74 (2013) (noting that a lack of prosecutorial power undermines the deterrence goal of international courts).

200. Compare *The Holocaust*, UNITED TO END GENOCIDE, <http://endgenocide.org/learn/past-genocides/the-holocaust/> (last visited Sept. 29, 2019) (describing how the Nazi's used political mechanisms to gain power and the Nazis who performed killings were formal political and military officials), with *The Rwandan Genocide*, UNITED TO END GENOCIDE, <http://endgenocide.org/learn/past-genocides/the-rwandan-genocide/> (last visited Sept. 29, 2019) (describing how the genocide started during a sudden civil war, and civilian militias perpetrated the killings).

necessary, which will require amending the Rome Statute. For the purposes of Ongwen's case, the ICC should amend Article 26, which addresses the age limitation,²⁰¹ and Article 31, which provides grounds for excluding criminal responsibility.²⁰² Such amendments will enable the ICC to holistically evaluate future cases of child soldiers similarly situated to Ongwen.

1. Age as a Factor

Article 26 of the Rome Statute precludes the ICC from exercising jurisdiction over "any person who was under the age of 18 at the time of the alleged commission of a crime."²⁰³ In order to comply with this provision, the OTP charged Ongwen with crimes he participated in after he turned eighteen. While Ongwen had unquestionably committed international crimes while he was a child soldier in the LRA, and although the Prosecutor expressed familiarity with the well-documented experiences of child soldiers,²⁰⁴ the Prosecutor and Pre-Trial Chamber II essentially severed Ongwen's life into two parts. They disregarded his experiences prior to reaching eighteen years old and focused only on his adult actions.²⁰⁵

This bright-line age limitation is an arbitrary benchmark, especially when considered alongside the child soldier conscription provisions in Article 8 of the Rome Statute, human rights law, and other criminal tribunals:

Until they reach the age of 15, ICC suspects like Dominic Ongwen are potential child soldier victims pursuant to Article 8 of the Rome Statute. Then from the age of 15 through 17 they have no status as child soldier victims or as potential perpetrators . . . However, according to the Rome Statute's legal fiction, the moment Ongwen turned 18 he became a potential perpetrator . . . since this is the earliest age a person can be prosecuted before the Court.²⁰⁶

There is no universal consensus on the youngest age in which criminal responsibility attaches, with ranges varying from no minimum at all, to eighteen years old.²⁰⁷ In fact, "[i]nternational human rights law does not bar juveniles from facing criminal

201. Rome Statute, *supra* note 76, art. 26.

202. *Id.* art. 31.

203. *Id.* art. 26.

204. See Moran, *supra* note 108.

205. See Drumbl, *Victims Who Victimise*, *supra* note 1, at 242 ("[T]he Pre-Trial Chamber elided Ongwen's status as a former child soldier. It's as if he lost that status, or ceded it.").

206. Danya Chaikel, *The ICC's Child Soldier Provisions: Time to Close the Three-Year Gap*, INT'L JUST. MONITOR (Aug. 18, 2015), <https://www.ijmonitor.org/2015/08/the-iccs-child-soldier-provisions-time-to-close-the-three-year-gap/>; Rome Statute, *supra* note 76, art 8(2)(b)(xxvi), (e)(vii).

207. See *Minimum Ages of Criminal Responsibility in the Americas*, CHILD RTS. INT'L NETWORK, <https://archive.crin.org/en/home/ages/Americas.html> (last visited Sept. 29, 2019) (outlining disparities in the age limits for criminal responsibilities in the Americas); *The Minimum Age of Criminal Responsibility Continues to Divide Opinion*, THE ECONOMIST (Mar. 15, 2017), <https://www.economist.com/graphic-detail/2017/03/15/the-minimum-age-of-criminal-responsibility-continues-to-divide-opinion> (providing a descriptive map and graph of varying minimum ages of criminal responsibility per country).

prosecution” at all.²⁰⁸ Additionally, international criminal tribunals have allowed for prosecution of individuals under the age of eighteen.²⁰⁹

The age limitation also overlooks the reality that there are truly culpable individuals under eighteen years old. Motivated by economic goals, patriotism, and the appeal of a militarized life, around two-thirds of child soldiers join of their own volition.²¹⁰ Child pirates provide another example, where harsh economic circumstances result in juveniles willingly and independently participating in international crimes, rather than joining after forced conscription.²¹¹ The “false simplicity of categorizing age” fails to take into account the physiological similarities among teenagers and young adults,²¹² mostly that the difference between a sixteen- or seventeen-year-old and nineteen- or twenty year-old is little to none.²¹³

Ongwen’s life is one continuous stream of events, one flowing into the other, creating the tumultuous current that has brought him ashore at The Hague. In order to understand his violent life, the judge’s panel must see the entire picture of Ongwen’s story, including both the crimes he committed and the experiences he had as a child soldier. The totality of the circumstances framework presents a more complete picture by eliminating the bright-line age limitation and allowing all alleged crimes Ongwen committed as a child, and the circumstances surrounding them, to be considered by the Court as factors. The age limitation rule is arbitrary, has little grounding in international or domestic law, and fails to promulgate the goals of the ICC when it comes to child soldiers.²¹⁴ To fully grasp the underlying nuances of child soldiering and Ongwen’s case, the Court must take a holistic look at Ongwen’s life and not only focus on the parts it wishes. Thus, an amendment should be made to Article 26 to eliminate the age limitation for ICC jurisdiction.

2. Defenses as Factors

Article 31 of the Rome Statute provides more bright-line rules, which function as complete bars to criminal responsibility under certain circumstances.²¹⁵ In the context of child soldiers, a totality of the circumstances test would apply duress and mental defect as factors rather than bright-line defenses.

208. Drumbl, *Child Pirates: Rehabilitation, Reintegration, and Accountability*, *supra* note 199, at 258.

209. *See* S.C. Res. 1315, *supra* note 93, art. 7 (“The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime.”); *see also* S.C. Res. 995, art. 6 (Nov. 8, 1994) (creating the International Criminal Tribunal for Rwanda and leaving out an age restriction in the court’s jurisdiction).

210. P.W. Singer, *Child Soldiers: The New Faces of War*, AM. EDUCATOR (Winter 2005-2006), <https://www.aft.org/periodical/american-educator/winter-2005-2006/child-soldiers>.

211. Drumbl, *Child Pirates: Rehabilitation, Reintegration, and Accountability*, *supra* note 199, at 267.

212. Mark A. Drumbl, *Children, Armed Violence and Transition: Challenges for International Law & Policy*, 43 GA. J. INT’L & COMP. L. 623, 626 (2015).

213. *Id.*

214. *See* Chaikel, *supra* note 206 (noting how the ICC’s criteria for age has resulted in the ICC falling behind the rest of the international community regarding the classification of child soldiers).

215. Rome Statute, *supra* note 76, art. 31.

Under Article 31, the ICC can acquit a defendant if it finds they acted under duress.²¹⁶ However, domestic courts and other criminal tribunals typically view duress as a mitigating factor during sentencing rather than a complete bar to prosecution.²¹⁷ Neither a mitigating factor nor an acquittal approach can accurately encompass the full range of events and the various facets that encompass duress—the gravity of the type of duress being administered, the surrounding circumstances and duration of the threat, coercion, and pressure, the type of force used, and the effect on the particular individual.²¹⁸ Allowing either a complete bar or a reduction in sentencing does not get to the bottom of why a particular defendant acted in the manner they did and what international law can do to change that pattern of behavior.

In the context of the LRA, the indoctrination tactics used on children were brutal both physically and physiologically,²¹⁹ resulting in fear of imminent death or serious bodily harm, which Article 31 specifically contemplates.²²⁰ However, even if the gravity of such pressures is lower, that does not negate the fact that their effect on the individual is not the same or greater when considered with surrounding circumstances. Inherent to membership in the LRA is a sense of being “in” rather than “out” which is in itself coercive—if knowing being “out” means joining the thousands already dead, this could constitute an indirect threat of death or serious bodily injury.²²¹ Additionally, a relationship like that between Kony and Ongwen can create a situation where the political and hierarchical pressure that Kony exerted onto Ongwen over the course of his time with the LRA constitutes duress.²²² Again, if Ongwen was not “in,” he was “out,” and not following orders or staying in communication with Kony would be enough to make that happen even if there was no direct imminent threat.

A duress claim contains many nuances and deserves greater consideration and attention than a simple determination of guilty or not guilty, or more or less prison time.²²³ Thus, duress should only be one factor in a totality of the circumstances

216. *Id.* art. 31(1)(d).

217. See Drumbl, *Victims Who Victimise*, *supra* note 1, at 232–33, 241–42 (noting occasions when courts have recognized duress to mitigate sentences while rejecting duress as a complete defense).

218. See Claire Oakes Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 *ARIZ. L. REV.* 251, 253–257 (1995) (outlining general circumstances and factors relevant to a duress claim); see generally Marcus Joyce, *Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse*, 28 *LEIDEN J. INT'L L.* 623 (2015) (Neth.).

219. Kelly et al., *supra* note 29, at 8–9.

220. Rome Statute, *supra* note 76, art. 31.

221. See Nadia Grant, *Duress as a Defence for Former Child Soldiers? Dominic Ongwen and the International Criminal Court*, 21 *INT'L CRIMES DATABASE* 1, 8 (“[P]ractices of forced violence and killing, in turn, generate a feeling of guilt and fear among the children and send a strong message as to their fate if they ever attempt escape or disobey rules themselves.”).

222. See *id.* at 10 (noting even commanders of the LRA lived in perpetual fear of retaliation or violence from Kony).

223. See Finkelstein, *supra* note 218, at 253–57 (describing how each facet of a duress claim has nuances and different interpretations that can affect the outcomes of a case); see also Grant, *supra* note 221, at 5–18 (criticizing the four-factor duress test of Article 31 for conflating elements of different defense claims).

determination, not a bright-line rule as it currently is. The same can be said for the mental defect defense.

Article 30 of the Rome Statute requires a mental element for criminal responsibility: “a person shall be criminally responsible and liable for punishment for a crime . . . only if the material elements are committed with intent and knowledge.”²²⁴ A mental defect or disease negates this intent and therefore the criminal responsibility of such condition “destroys that person’s capacity to appreciate the unlawfulness or nature of [the] conduct, or capacity to control [their] conduct to conform to the requirements of law.”²²⁵ However, similar to the duress defense, “there exists a general reluctance to consider such grounds because of the specific nature of [international] crimes.”²²⁶ Although the Defense decided against using the mental defect defense before the ICC, international precedents show that mental defect would likely be treated the same as the duress defense—either disregarded or only used as a mitigating factor during sentencing.²²⁷

Although perpetrators of international crimes are often ordinary people acting within extraordinary circumstances,²²⁸ an individual can develop symptoms of mental illness due to victimhood, the surrounding circumstances in a context of mass atrocity, and the trauma of being a perpetrator themselves.²²⁹ These facets create a perfect storm of violence that the ICC must parse through to understand the cause of this violence in order to further prevent it.

The ICC has extensively documented the victim trauma that child soldiers undergo.²³⁰ “During their association with an armed force or armed group, child

224. Rome Statute, *supra* note 76, art. 30(1).

225. *Id.* art. 31.

226. Anne-Sofie Stockman, Individual Criminal Responsibility in International Criminal Law. The Quest for Diminished Responsibility as a New Defence Mechanism with Regard to Victim-Perpetrators (Dec. 14, 2016) (unpublished Master in Law thesis, Ghent University) (on file with the Ghent University Library), ¶ 52.

227. *See, e.g.*, Prosecutor v. Zejnil Delalić, Case No. IT-96-21-T, Judgement, ¶ 1186 (Int’l Trib. for the Former Yugoslavia Nov. 16, 1998), https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (acknowledging the existence of a personality disorder, it rejected it as a mitigating factor in establishing diminished responsibility); Prosecutor v. Erdemović, Case No. IT-96-22-Tbis, Sentencing Judgement, ¶ 16 (Int’l Trib. for the Former Yugoslavia March 5, 1998), <https://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts980305e.pdf> (discussing Erdemović’s remorse and experiences of post-traumatic stress); Prosecutor v. Erdemović, IT-96-22-A, Judgement, ¶¶ 10(b), 19 (Oct. 7, 1997), <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf> (rejecting duress as a complete defense while considering duress as a mitigating factor).

228. Alette Smeulers & Wouter Werner, *The Banality of Evil on Trial*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 24, 32 (Carsten Stahn and Larissa van den Herik eds., 2010); Alette Smeulers, *Perpetrators Of International Crimes: Towards A Typology*, in SUPRANATIONAL CRIMINOLOGY: TOWARDS A CRIMINOLOGY OF INTERNATIONAL CRIMES 233, 233–35 (Alette Smeulers and Roelof Haveman eds., 2008).

229. *See* Stockman, *supra* note 226, at ¶ 65–69 (outlining the different types of mental trauma that can emerge from taking part in an atrocity).

230. *See, e.g.*, Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Prosecution’s Pre-Trial Brief, ¶¶ 122, 125 (Sept. 6, 2016), https://www.icc-cpi.int/CourtRecords/CR2016_06511.pdf; *see generally* LEONIE STEINL, CHILD SOLDIERS AS AGENTS OF WAR AND PEACE: A RESTORATIVE

soldiers suffer immensely from psychological as well as physical violence: They are, in many cases, threatened, beaten, tortured, mutilated, sexually victimized, exploited, enslaved, or killed.”²³¹ Thus, trauma most often manifests itself in the forms of post-traumatic stress disorder,²³² but also in more nuanced ways because no two child soldiers will experience exactly the same psychological or social consequences of their horrific experiences.²³³ “[C]oping mechanisms, identity formation, internalised standards of right and wrong, mechanisms for modulating aggressive impulses and neurobiological growth” are all areas directly affected by the victim trauma that child soldiers undergo through experiences and socialization in an armed group while they are still developing.²³⁴ Thus, how Ongwen was traumatized and how that trauma interfered with his development during his most formative years is unique to him—a blanket generalization of child soldiering trauma is too stringent a standard to rest a complete defense on.

Trauma does not end once the child soldier becomes an adult. In fact, another facet of the trauma, called perpetrator trauma, happens simultaneously with their victim trauma. Perpetrator trauma is “the idea that *perpetrators can experience their crimes as trauma* . . . that commission of the crime itself causes a psychological injury to the perpetrator, which can result in particular adverse physical, social, or emotional consequences.”²³⁵ The strict boxes of international criminal law lack an understanding that the perpetrators are often real, ordinary people who go about their lives as neighbors to those who were their victims after the atrocities have faded.²³⁶ Perpetrators, even child soldiers, must internally wrestle with their crimes and learn to cope in a number of ways. Some rationalize their acts under the circumstances and some ask for forgiveness and show remorse, while others may regret their acts or simply regret that they were caught.²³⁷ Others may embrace them, either by feeling as if they had no choice or by taking full responsibility for not having the courage to make a choice.²³⁸

Ongwen has experienced victim and perpetrator trauma, both of which have undoubtedly helped chart the path that eventually led him to The Hague. His psychological development and mental state during his time as a child soldier and onward are issues in the case before the ICC, but they should not be the determinative factor of his criminal responsibility. The Rome Statute focuses on intention; however, intention is a product of circumstance, experience, and the unique individual in which it manifested, if the intent actually manifested at all.²³⁹

TRANSITIONAL JUSTICE APPROACH TO ACCOUNTABILITY FOR CRIMES UNDER INTERNATIONAL LAW 19 (Gerhard Werle et al. eds. vol. 14 2017).

231. STEINL, *supra* note 230, at 19.

232. Stockman, *supra* note 226, ¶ 97.

233. *See id.* ¶¶ 96–97 (“The precise psychological consequences of these horrible experiences are difficult to generalise because child soldiers do not form a homogeneous group.”).

234. *Id.* ¶ 96.

235. Mohamed, *supra* note 196, at 1162.

236. *Id.* at 1165.

237. *Id.* at 1178–85.

238. *Id.* at 1185–86.

239. Rome Statute, *supra* note 76, art. 30.

Thus, the criminal responsibility of Ongwen and other victim-perpetrators cannot hinge on mental defect alone; instead, it must be considered as only one factor in the totality of the circumstances framework rather than a complete bar or unproductive mitigating factor.

B. Other Factors

Although Ongwen's status as a former child soldier and the purported defenses seem to take center stage in the case, under this proposed framework, they are simply some factors among many. Relevant to Ongwen's case is what the Ugandan people, both victims and non-victims, want as an outcome.²⁴⁰ There are those in Uganda who believe that due to the nature of how Ongwen joined the LRA, amnesty and reintegration are preferable alternatives to imprisonment.²⁴¹ However, the Ugandan Supreme Court has refused to grant amnesty to LRA officials who committed international crimes against civilians.²⁴² So it is likely his prospects there would have been bleak, which is something the Court should also consider.

Although gravity is a prerequisite for ICC jurisdiction generally, the comparative nature of the crimes committed is relevant. The violent attacks and conscription of child soldiers may have a more direct link to Ongwen's experiences and trauma than the sexual violence he inflicted or vice versa. The fact that he surrendered himself, that he planned to leave the LRA for a while, that he was avoiding Kony, and that he expected amnesty upon surrendering all must be considered as factors too.²⁴³ There are countless other factors and every single case involving a child soldier is different, but it is up to the judges to come to an understanding of what is relevant and how to balance it in a way that provides a nuanced decision-making process for assessing culpability.

C. Effect on the Goals and Legitimacy of the ICC

The selectivity of the ICC has come under scrutiny since its inception.²⁴⁴ Its focus on developing African countries has not gone unnoticed,²⁴⁵ and its tendency to hold one person accountable for the actions of thousands has become common

240. See *Reblog // To Punish Or To Pardon? Perspectives On Dominic Ongwen*, INVISIBLE CHILDREN, <https://invisiblechildren.com/blog/2017/04/05/to-punish-or-pardon-dominic-ongwen/> (last visited Oct. 9, 2019) ("Some people recommended that Ongwen's dual status as a victim and perpetrator should be taken into consideration during sentencing in the event that he is found guilty by the court.").

241. Ogora, *To Punish or to Pardon? Perspectives on Accountability and Forgiveness in the Case of Dominic Ongwen*, *supra* note 185 (noting there are those who believe Ongwen can apologize, atone and ultimately be reintegrated into society); Drumbl, *Victims Who Victimise*, *supra* note 1, at 239; Posner, *supra* note 164.

242. Drumbl, *Victims Who Victimise*, *supra* note 1, at 239.

243. Drumbl, *A Former Child Soldier Prosecuted at the International Criminal Court*, *supra* note 3.

244. Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 271 (2012).

245. *Id.* at 266, 271–72.

practice.²⁴⁶ Mark Drumbl addresses this problem, but one of his solutions is to avoid prosecution entirely.²⁴⁷

The totality of the circumstances framework provides for a prosecution that balances the need for accountability while making sure that child soldier defendants have a fair trial, as the Court will consider their relative role and complete experiences as some of the many factors used to determine culpability. This will better deter similar criminal activity while also solving the selectivity problem. A better understanding of victim-perpetrators and why they take the actions they do through the totality of the circumstances approach also creates the opportunity to hold more people accountable for their actions.

The other solution Drumbl puts forth is using victimhood as a mitigating factor in sentencing.²⁴⁸ However, “criminologists have long shown that it is the likelihood of getting charged, rather than the severity or the lenity of the sentence, that most affects *ex ante* decisions whether to partake in criminal activity.”²⁴⁹ Once again, understanding the root of the actions rather than simply negating them through mitigating factors, can accomplish two things: (i) give the ICC the opportunity to charge more people for their actions as child soldiers; or (ii) recognize the warning signs of mass atrocity and stop the development of child soldiering all together.²⁵⁰ Drumbl also recommends transitional justice, but that option leaves the ICC with no teeth.²⁵¹ People affected by mass atrocity need closure, and although one person cannot heal an entire country, a totality approach will ensure that the truth behind a child soldier defendant’s actions will come forward and be justly dealt with, serving a retributive function but only when truly deserved.

Ultimately, Drumbl’s recommendations perpetuate the same cycle that has failed to address the realities of mass atrocities, and the role of child soldiers, in particular. The ICC must have some teeth in order to garner support for its justice-seeking function. This totality approach falls somewhere in the middle. In Ongwen’s case, the judgment should be made with all factors taken into consideration, not just whether he should be considered victim or perpetrator. Maybe he is more one than the other, but that is for judges to decide after looking at all of the factors in the totality without any bright line rules. The Court must approach a truly multifaceted case involving a truly complex defendant with a similarly complex approach in order to effectively seek the truth.

246. See Drumbl, *Victims Who Victimise*, *supra* note 1, at 240 (“It is also lost on some observers why Ongwen should be indicted and prosecuted, rather than other commanders. While selectivity remains an inherent foible of international criminal law, the shadow it casts over the Ongwen proceedings seems to be particularly long.”).

247. *Id.* at 222.

248. See *id.* at 244 (“The ‘rotten social background’ of a convict could be advanced as a mitigating factor in sentencing in a fashion that depicts victim–perpetrator concatenation”).

249. Drumbl, *Child Pirates: Rehabilitation, Reintegration, and Accountability*, *supra* note 199, at 273.

250. See Drumbl, *Victims Who Victimise*, *supra* note 1, at 244 (emphasizing the importance of understanding why individuals commit atrocities in order to prevent future atrocities).

251. See Mohamed, *supra* note 196, at 1162 (recommending that attention be paid to the trauma that perpetrators of crime experience).

V. CONCLUSION

They say tragedies come in threes. The life of Dominic Ongwen has seen two thus far—the first being his abduction and indoctrination into the LRA as a young boy and the second being the indiscriminate violence he inflicted on countless others. A third tragedy is just upon the horizon—the ICC failing to venture outside its preconceived boxes and chart a new path. If built, that path would give the world a chance to understand victim-perpetrators and learn from the mistakes that create them.

In her 1983 book “Sudden Death,” mystery novelist Rita Mae Brown wrote: “[i]nsanity is doing the same thing over and over again but expecting different results.”²⁵² Time and time again, one person takes the fall for the actions of many and the world cheers because there has been “justice.” However, time and time again, mass atrocities continue to be unleashed, and time and time again, the world is stunned. Child soldiers play a large role in this cycle, but victim-perpetrators of all kinds make up the largest part. Lost in the shuffle of chaos and violence, their lives often boil down to a choice between either “in” or “out.” Dominic Ongwen had “in” chosen for him, and he knew nothing other than “in” his entire life. What the ICC and the world must digest and contemplate is not just how, why, or when victim-perpetrators become “in,” but rather why there even is an “in” at all.

252. RITA MAE BROWN, *SUDDEN DEATH* 68 (1983).