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## Victim or villain: exploring the possible bases of a defence in the Ongwen case at the International Criminal Court

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### Abstract

The reality of child soldiers who join rebel forces once they reach adulthood presents complex legal questions in the face of contemporary international criminal law principles which, on the one hand, afford protection to all children, and on the other, unequivocally call for the prosecution and punishment of those who are guilty of committing serious crimes. Currently, the case of Dominic Ongwen before the ICC raises contentious issues, including whether or not international criminal law permits the consideration of factors, such as the impact of the experiences as a child soldier on future conduct, when he is prosecuted for allegedly committing crimes during adulthood. This article specifically examines whether Ongwen's experiences as a child soldier could serve as a possible defence and/or as a mitigating factor.

### Keywords

Dominic Ongwen – child soldiers – international criminal court – defence, mitigating factors – victims – indoctrination – forcible recruitment

### Introduction

On 6 January 2015, Dominic Ongwen surrendered at an American base in the Central African Republic.<sup>1</sup> It had been 10 years since the International Criminal Court (ICC) issued warrants for the arrest of Ongwen and other Lord's Resistance Army (LRA) leaders, including Joseph Kony, who is still at large.<sup>2</sup> The arrest warrant for Ongwen included several charges of crimes against humanity and war crimes committed in Uganda in 2004.<sup>3</sup> Ongwen has also been charged with the war crime of recruiting child soldiers under Article 8(2) (b) (xxvi) of the ICC Statute. The case of Ongwen is especially

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<sup>1</sup> Serge Brammertz, 'The Impact of Criminal Prosecutions on Compliance with ihl: Challenges and Perspectives on the Way Forward', 39 *University of Western Australia Law Review* (2015) 4–28, p. 18; Luke Moffett, 'icc can still hold Ongwen's trial in Northern Uganda', *Daily Monitor*, 15 January 2015, online at [www.monitor.co.ug/OpEd/Commentary/ICC-can-still-hold-Ongwen-s-trial-in-northern-Uganda/-/689364/2589236/-/g7b4u7z/-/index.html](http://www.monitor.co.ug/OpEd/Commentary/ICC-can-still-hold-Ongwen-s-trial-in-northern-Uganda/-/689364/2589236/-/g7b4u7z/-/index.html), 27 July 2015. Ongwen is known as the "White Ant" since "Ongwen" means 'born at the time of the white ant'. See Farouk Chothia, 'Profile: Dominic Ongwen of Uganda's Lra', *bbc News*, 26 January 2015, online at <[www.bbc.com/news/world-africa-30709581](http://www.bbc.com/news/world-africa-30709581)>, 21 January 2016. See also New Vision 'Prosecutors to Seek War Crimes Trial for Dominic Ongwen', 20 January 2016, online at [www.newvision.co.ug/new\\_vision/news/1415260/prosecutors-seek-war-crimes-trial-dominic-ongwen](http://www.newvision.co.ug/new_vision/news/1415260/prosecutors-seek-war-crimes-trial-dominic-ongwen), 21 January 2016. Ongwen is also known as "Odomi" and "Wai Wai". See *The Prosecutor v. Dominic Ongwen*, icc (Pre-Trial Chamber ii) Decision on the confirmation of charges hearing against Dominic Ongwen, icc-02/04-01/15, 23 March 2016, online at [www.icc-cpi.int/CourtRecords/CR2016\\_02331.PDF](http://www.icc-cpi.int/CourtRecords/CR2016_02331.PDF), 28 March 2016.

<sup>2</sup> See International Criminal Court, 'Case Information Sheet: The Prosecutor v. Dominic Ongwen', 15 January 2016, online at [www.icc-cpi.int/iccdocs/PIDS/publications/Ongwen\\_Eng.pdf](http://www.icc-cpi.int/iccdocs/PIDS/publications/Ongwen_Eng.pdf), 30 January 2016.

<sup>3</sup> See *The Prosecutor v. Dominic Ongwen*, ICC (Pre-Trial Chamber ii) Warrant of Arrest, icc-02/04, 8 July 2005, online at

intriguing since he was a small boy when he was abducted by LRA guerrillas.<sup>4</sup> He was therefore used as a child soldier in the same army of which he would later become a rebel commander and commit serious crimes.

Child soldiers, till this day, form an integral part of the LRA and its odious existence, led by Kony. Moreover, Ongwen may have, and in all probability did, commit crimes under international law as a child soldier himself, given the fact that most child soldiers are forced by rebels to fight.<sup>5</sup> Nonetheless, the ICC has no jurisdiction to prosecute persons under the age of 18,<sup>6</sup> and he has never been charged by any domestic court for the crimes he committed as a child soldier.

Most child soldiers in Uganda have never been prosecuted for their crimes, mainly due to the amnesty granted to child soldiers.<sup>7</sup> The question whether Ongwen should be granted amnesty as a rebel commander of the LRA still persists to this day, yet the Government of Uganda stands firm behind its decision not to grant amnesty to him, instead referring the situation to the ICC. This intention by Uganda stands as a clear indication that they view Ongwen as a perpetrator of crimes under international law, a “villain”, and not a “victim”. This article will be presented as follows. First, the author looks at the life of Ongwen as a child soldier and a victim, and in general, the life of a child soldier within the LRA. Here the author examines the factors which could have been significant in the development of his character and the impact of such factors on the commission of the crimes for which he is being prosecuted. Then, the article comprehensively sketches an overall picture of the LRA and Ongwen’s position as a brigade commander and perpetrator. It is important to examine how Ongwen was transformed from a child soldier into a commander and why he committed the atrocities for which he is being prosecuted. Lastly, this article looks at the individual criminal responsibility of Ongwen at the ICC and whether his past as a child soldier can be regarded as a possible defence and/ or as a mitigating factor.<sup>8</sup>

## 1 A Victim of the LRA

Studies involving child soldiers are largely based on interviews with former child soldiers, albeit mostly sensational, while the evidence base is still developing.<sup>9</sup> Blattman and

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[www.icc-cpi.int/CourtRecords/CR2006\\_01112.PDF](http://www.icc-cpi.int/CourtRecords/CR2006_01112.PDF), 16 November 2015.

<sup>4</sup> See Kirsten J. Fisher, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict Contexts* (Palgrave Macmillan, Basingstoke, 2013) pp. 56, 164; Wojciech Jagielski, *The Night Wanderers: Uganda’s Children and the Lord’s Resistance Army* (Seven Stories Press, New York, 2012) p. 44.

<sup>5</sup> Sonja C. Grover, “‘Child Soldiers’ as ‘Non-Combatants’: The Inapplicability of the Refugee Convention Exclusion Clause”, 12 *The International Journal of Human Rights* (2008) 53–65, p. 57. See also Shannon Bosch, ‘Targeting and Prosecuting ‘Under Aged’ Child Soldiers in International Armed Conflicts, in Light of the International Humanitarian Law Prohibition Against Civilian Direct Participation in Hostilities’, 45 *The Comparative and International Law Journal of Southern Africa* (2012) 324–364, p. 359.

<sup>6</sup> Article 26 of the ICC Statute provides: ‘The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime’. See also The Office of the Prosecutor of the International Criminal Court, ‘Draft Policy on Children’, June 2016, online at [https://www.icc-cpi.int/iccdocs/otp/22.06.2016-Draft-Policy-on-Children\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/22.06.2016-Draft-Policy-on-Children_ENG.pdf), 14 July 2016.

<sup>7</sup> See generally *News and Noteworthy*, ‘Uganda’s Amnesty Commission in Final Phase of Issuing Resettlement Packages to Ex-Combatants’, 18 May 2006, online at [www.mdrp.org/PDFs/N&N\\_12\\_06.pdf](http://www.mdrp.org/PDFs/N&N_12_06.pdf), 20 December 2015; *Refugee Law Project*, ‘Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation’, Working Paper No. 15, February 2005, online at [www.refugeelawproject.org/files/working\\_papers/RLP.WP15.pdf](http://www.refugeelawproject.org/files/working_papers/RLP.WP15.pdf), 20 December 2015. For a critical discussion of the amnesty process in Uganda, see generally Stella Yarbrough, ‘Amnesty or Accountability: The Fate of High-Ranking Child Soldiers in Uganda’s Lord’s Resistance Army’, 47 *Vanderbilt Journal of Transnational Law* (2014) 531–568.

<sup>8</sup> The trial is scheduled to begin at the ICC on 6 December 2016.

<sup>9</sup> Blattman and Annan state: ‘With interview accounts, moreover, one worries that the most sensational rather than the most common experiences find their way into discourse. In the absence of representative data within and across conflicts, we have little

Annan warns that ‘sensational claims and popular beliefs regarding young combatants appear to drive not only fundraising and advocacy but program interventions as well’.<sup>10</sup> That being said, the case of Ongwen is well-documented except for the fact that not a lot is known about his time as a former child soldier, apart from interviews with his family regarding his abduction. It is crucial to discuss the available information concerning Ongwen as this forms the basis of one of the defences that the Defence formulated during the confirmation of charges hearing at the ICC.

Ongwen grew up in difficult circumstances.<sup>11</sup> He was the first child in a family of four brothers.<sup>12</sup> When his father abandoned them and his mother died, he and his brothers then stayed with his aunt in the small village of Olwal, near Gulu.<sup>13</sup> Ongwen had to work in the fields to support his family.<sup>14</sup> One day, he and a few other boys returned from the fields, only to run into LRA fighters.<sup>15</sup> Ongwen was abducted at the age of 10;<sup>16</sup> the fighters abducted him because he was a strongly built boy and did not cry like the other boys who were being abducted.<sup>17</sup>

He is one of thousands of children that have been abducted by the LRA.<sup>18</sup> The LRA abducted between 25,000 and 38,000 children and young adults between 1986 and 2006.<sup>19</sup>

Because of its iniquitous reputation, the LRA is a rebel group that does not attract many adult fighters into its ranks; hence it forcibly recruits boys and girls.<sup>20</sup> Child soldiers are also easier to control than adult soldiers.<sup>21</sup> Child soldiers in the LRA have to abide by certain rules and customs, including drawing a cross with oil on their foreheads, chest and

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sense of the proportionality and generalizability of any findings’. See Christopher Blattman and Jeannie Annan, ‘Child Combatants in Northern Uganda: Reintegration Myths and Realities’, in Robert Muggah (ed.), *Security and Post-Conflict Reconstruction: Dealing with Fighters in the Aftermath of War* (Routledge, Abingdon, 2008) pp. 103–26.

<sup>10</sup> *Ibid.*

<sup>11</sup> As mentioned in the text, there is little information available regarding Ongwen’s youth. See generally Mark A. Drumbl, ‘Victims Who Victimize’, *London Review of International Law* (2016) 1–30.

<sup>12</sup> Jagielski, *supra* note 4.

<sup>13</sup> *Ibid.*, Gulu is a town located in northern Uganda, a region well-known for LRA attacks.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> See Erin K. Baines, ‘Complex Political Perpetrators: Reflections on Dominic Ongwen’, 47 *Journal of Modern African Studies* (2009) 163–191, p. 163. Ongwen said that he was 14 years old when he was later taken into the bush by the LRA. See *bbc News*, ‘LRA Commander Dominic Ongwen Appears before ICC in The Hague’, 26 January 2015, online at [www.bbc.com/news/world-africa-30976818](http://www.bbc.com/news/world-africa-30976818), 20 July 2015. Ongwen’s “bush wife” reported that Ongwen told her on numerous occasions that he was a little boy when he was abducted by the LRA. See Chothia, *supra* note 1.

<sup>17</sup> Jagielski, *supra* note 4.

<sup>18</sup> Blattman and Annan notes that ‘In Uganda, LRA recruitment was large-scale, involuntary and (most important of all) indiscriminate-so much so that abduction appears to be a chance event’. See Blattman and Annan, *supra* note 9.

<sup>19</sup> See Phuong N. Pham, Patrick Vinck and Eric Stover, ‘The Lord’s Resistance Army and Forced Conscription in Northern Uganda’, 30 *Human Rights Quarterly* (2008) 404–411, p. 404. These figures vary. Farouk Chothia of *bbc News* reported that the LRA has abducted over 60 000 children since its inception. See Chothia, *supra* note 1. See also Blattman and Annan, *supra* note 9. For a detailed study of the number of females that were abducted by the LRA, see generally Jeannie Annan *et al.*, ‘Civil War, Reintegration, and Gender in Northern Uganda’, 55 *Journal of Conflict Resolution* (2011) 877–908.

<sup>20</sup> See Susan McKay and Dyan Mazurana, *Where are the Girls: Girls in Fighting Forces in Northern Uganda, Sierra Leone and Mozambique: Their Lives During and After War* (International Centre for Human Rights and Democratic Development, Montréal, 2004) p. 28. For a detailed overview of the eight phases of the liminal transformation of the LRA’s child recruits into child soldiers, see Opiyo Oloya, *Child to Soldier* (University of Toronto Press, Toronto, 2013) p. 78–95; see also *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 142.

<sup>21</sup> See *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 142.

shoulders, as well as one's gun, in preparation for battle.<sup>22</sup>

Child soldiers also become exceedingly violent in their behaviour and patterns. There are various factors associated with this behaviour, including being forced to kill a relative or a friend immediately after recruitment.<sup>23</sup>

They are also subjected to various methods of indoctrination.<sup>24</sup> The uninterrupted indoctrination of a child soldier often leads them losing all hope of returning home and consequently accepting the armed group as their new home.<sup>25</sup> Child soldiers, furthermore, consume large volumes of drugs and alcohol, especially before they go into battle.<sup>26</sup> A combination of these factors makes them extremely dangerous.

Consequently, child soldiers are likely to end up in a situation filled with violence, fear and hopelessness.<sup>27</sup> There are, however, cases where child soldiers were more fortunate, for example, where they made a decision to leave, or escape from the armed groups.<sup>28</sup> In turn, there have also been instances where child soldiers have had the opportunity to flee, but decided to stay.<sup>29</sup> This raises the question whether child soldiers should always be regarded as victims of war.<sup>30</sup> However, many scholars have pointed out that child soldiers rarely have a choice when it comes to making their own decisions.<sup>31</sup> Child soldiers also witness and commit some of the most egregious crimes under international law. This has a definite impact on the psychological development of the child. In addition, as a result of intense indoctrination, the armed group becomes a home to these children, and one which, over time, would become harder to leave. It also becomes part of who you are. It becomes your family. Child soldiers are also threatened with their lives if they dare to escape, a situation that Ongwen as a little boy was all too familiar with.<sup>32</sup>

But why are child soldiers placed in this situation in the first place? Yes, they are forcibly recruited, although sometimes they voluntarily join an armed group due to various social factors, such as war, poverty and lack of education, to name a few. It is first and foremost the duty of the State to protect its children from being recruited into these groups.<sup>33</sup> It is

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<sup>22</sup> Minot, *supra* note 23, p. 153.

<sup>23</sup> See Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, Oxford, 2012) pp. 6–7; Michael G. Wessells, *Child Soldiers: From Violence to Protection* (Harvard University Press, Cambridge, ma, 2006) p. 144. See also Jimmie Briggs, *Innocents Lost: When Child Soldiers go to War* (Basic Books, New York, 2005) p. 4; Peter W. Singer, *Children at War* (Pantheon Books, New York, 2005) pp. 91–2.

<sup>24</sup> See, e.g., Diane M. Amann, 'Calling Children to Account: The Proposal for a Juvenile Special Court for Sierra Leone', 29 *Pepperdine Law Review* (2001) 167–185, p. 171; Leora Kahn (ed.), *Child Soldiers* (Powerhouse Books, Brooklyn, 2008) 100; Krijin Peters and Paul Richards, 'Why We Fight: Voices of Youth Combatants in Sierra Leone', 68 *Journal of the International African Institute* (1998) 183–210, p. 186; Wessells, *supra* note 23, p. 79.

<sup>25</sup> See, e.g., Peters and Richards, *ibid.*; Wessells, *supra* note 23, p. 79.

<sup>26</sup> See Amann, *supra* note 24, p. 170; Singer, *supra* note 23, p. 81.

<sup>27</sup> Fisher, *supra* note 4, pp. 58–59.

<sup>28</sup> *Ibid.*, p. 59. Also see Mark A. Drumbl, 'Children, Armed Violence and Transition: Challenges for International Law and Policy', 43 *Georgia Journal of International and Comparative Law* (2014–2015) 623–627, p. 624.

<sup>29</sup> See generally Rachel Brett, 'Adolescents Volunteering for Armed Forces or Armed Groups', 85 *International Review of the Red Cross* (2003) 857–866.

<sup>30</sup> Fisher, *supra* note 4, p.59. See also Bosch, *supra* note 5, pp. 325–329.

<sup>31</sup> See generally Bosch, *ibid.*; Brett, *supra* note 29.

<sup>32</sup> See, e.g., Charles London, *One Day the Soldiers Came: Voices of Children in War* (HarperCollins, New York, 2007) p. 167; Rialize Ferreira, 'Child Soldiers in African Wars', 7 *Commonwealth Youth and Development* (2009) 37–50, p. 43.

<sup>33</sup> Sheikh Musa Kilil, of the Acholi Religious Leaders Peace Initiative, referring to the case of Dominic Ongwen, argues that 'the Government, the army, the police, the community, the parents, the school, all different groups or categories who failed to protect

also the duty of the State to prosecute the individual who conscripted the child soldier, even if the child soldier committed crimes. Drumbl importantly points out that child soldiers should not be prosecuted for the crimes committed as part of an armed group, because: 'When the child inflicts horror, responsibility passes entirely to the adult abductor, enlister, recruiter or commander'.<sup>34</sup> Article 39 of the Convention on the Rights of the Child (CRC) provides: 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim'.<sup>35</sup> In some cases, child soldiers are also released and returned to their communities and subjected to a cleansing ceremony to cleanse them of their sins, one of many restorative justice mechanisms prevalent in recent times.<sup>36</sup> Ongwen was never released back to his community, reintegrated or rehabilitated. His childhood experience was taken away from him by the LRA as he was transformed from an innocent victim into a ruthless perpetrator.

## 2 A Perpetrator in the LRA

The LRA is an insurgent group carrying out a rebellion against the Government of Uganda and the Ugandan Army, known as the Ugandan People's Defence Force, and local defence units, since 1987.<sup>37</sup> The LRA has been involved in a brutal cycle of violence ever since, which resulted in an established pattern of crimes that include murder, sexual enslavement, mutilation, abduction of children, and many other atrocities.<sup>38</sup> The LRA is notorious for cutting off the ears, lips and noses of civilians.<sup>39</sup> Also, approximately 2,8 million people have been displaced as a result of LRA attacks.<sup>40</sup> Although the LRA is currently largely depleted and spent, why have its forces not been defeated?

The terrain in which the LRA moves largely consists of dense forest and jungle.<sup>41</sup> Its fighters evade capture by moving in small groups and only leave the sanctuary of the

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this child from abduction are liable'. See *Refugee Law Project*, 'Ongwen's Justice Dilemma: Perspectives from Northern Uganda', 26 January 2015, online at [www.iccnw.org/documents/Ongwens\\_Justice\\_Dilemma.pdf](http://www.iccnw.org/documents/Ongwens_Justice_Dilemma.pdf), 27 July 2015, p. 5.

<sup>34</sup> Drumbl, *supra* note 23, p. 18.

<sup>35</sup> Nagle rightly points out that 'In some places of the world the rehabilitation of child soldiers proceeds without the benefit of trained professionals. The child soldier's emotional, behavioural, cognitive, physical, and social milestones that are necessary for human development are often severely disrupted'. See Luz E. Nagle, 'Child Soldiers and the Duty of Nations to Protect Children from Participation in Armed Conflict', 19 *Cardozo Journal of International and Comparative Law* (2011) 1–58, p. 46.

<sup>36</sup> Cleansing ceremonies are often used post-war in afflicted areas when offenders return to their former communities, and are aimed at cutting the child soldier's link with the past, and in particular, the war or conflict. See Edward C. Green and Alcinda M. Honwana, 'Indigenous Healing of War-Affected Children in Africa', *Paper for the World Bank, IK Notes*, July 1999, online at

[www.worldbank.org/afr/ik/iknt10.pdf](http://www.worldbank.org/afr/ik/iknt10.pdf), 16 January 2015, p. 3. See also Singer, *supra* note 23, p. 193. Walgrave explains:

'Restoration is achieved by a process and its outcome. The possible reparative outcomes include a wide range of actions such as restitution, compensation, reparation, reconciliation, apology. They may be direct or indirect, concrete or symbolic. Depending on the nature of the victimisation under consideration, they may be addressed to the concrete victim, to his intimates, to a community or even a society'. See Lode Walgrave, 'Not Punishing Children, but Committing Them to Restore', in Ido Weijers and Antony Duff (eds.), *Punishing Juveniles: Principle and Critique* (Hart Publishing, Portland, 2002) p. 104.

<sup>37</sup> See *The Prosecutor v. Dominic Ongwen*, *supra* note 3, para. 5. Apuuli notes that in addition to the conflict between the LRA and the Ugandan Army, another root cause of the conflict is the tension between the Acholi LRA and the wider Acholi population, as well as animosity between Uganda and Sudan. Apuuli, as does Oloya, furthermore argues that the principal reason for the conflict was the ill-disciplined behaviour of the 35th battalion of the National Resistance Army who fought against the Museveni government in 1986 and committed atrocities, like murder, rape and looting, when they reached the northern region of Uganda. See Kasaija P. Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', 4 *Journal of International Criminal Justice* (2006) 179–187, pp.180–81. See also Oloya, *supra* note 20, p. 41.

<sup>38</sup> See *The Prosecutor v. Dominic Ongwen*, *supra* note 2, para. 5. See also Apuuli, *ibid.*, p. 182.

<sup>39</sup> See Chothia, *supra* note 1; see also *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 3.

<sup>40</sup> See *Refugee Law Project*, *supra* note 33, p. 3.

<sup>41</sup> International Crisis Group, 'The Lord's Resistance Army: End Game?', *Africa Report No. 182*, 17 November 2011, online at [www.crisisgroup.org/~media/Files/africa/central-africa/182%20The%20Lords%20Resistance%20Army%20-%20End%20Game.pdf](http://www.crisisgroup.org/~media/Files/africa/central-africa/182%20The%20Lords%20Resistance%20Army%20-%20End%20Game.pdf), 23 July 2015.



jungle for food, clothes and recruiting new members, predominantly children.<sup>42</sup> Furthermore, the LRA has been an ever-moving quarry, having fled to South Sudan, Central African Republic and the Democratic Republic of Congo.<sup>43</sup> Above all, the leadership of the LRA demands only the best of its soldiers, including a debilitating blend of military obedience and spiritual devotion.<sup>44</sup> It is a spiritualist rebel group that has also been referred to as an ‘army of God’.<sup>45</sup> Kony once noted that he would rule Uganda according to the Ten Commandments.<sup>46</sup> He usually ordered an attack to be carried out if his spirit told him to do so.<sup>47</sup>

Nonetheless, despite claiming to be a spiritual group, the LRA has gone on a rampage of committing serious crimes. Axe and Hamilton note that ‘the LRA no longer has any identifiable politics. They pillage, kidnap and kill – because that’s what they’ve always done’.<sup>48</sup> It is in this milieu that Ongwen flourished as a brigade commander. Ongwen was the brigade commander of the Sinia Brigade and was furthermore part of the core leadership of the LRA, known as ‘Control Altar’, who reported directly to Kony.<sup>49</sup>

Ongwen earned the reputation of emerging from dangerous battles with few casualties among his fighters.<sup>50</sup> He was one of the most feared and cruellest commanders in the LRA.<sup>51</sup> During the confirmation of charges hearing, details emerged of the violent attacks which he led, resulting in hundreds of murders, rapes and other atrocious crimes.<sup>52</sup>

The testimony of one of Ongwen’s former “bush wives” illustrates how cruel Ongwen was:

She testified that she had been abducted by LRA fighters under Dominic Ongwen’s command in approximately April 2005. She was then placed in Dominic Ongwen’s household, where she remained until her escape in December 2010, closely guarded and under the threat of being brutally beaten if she had attempted to escape. Soon after her abduction, she became Dominic Ongwen’s so-called “wife”. Throughout her stay in Dominic Ongwen’s household, she was repeatedly forced to have sex with him and forced to perform domestic duties.<sup>53</sup>

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<sup>42</sup>*Ibid.*, see also Apuuli, *supra* note 37, p. 182; Nagle, *supra* note 43, p. 26.

<sup>43</sup> International Crisis Group, *ibid.*; see also *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 3.

<sup>44</sup> International Crisis Group, *ibid.*; see also Apuuli, *supra* note 37, p. 182.

<sup>45</sup> Pham, Vinck and Stover, *supra* note 19, p. 405. For a detailed discussion of the spiritual foundation of the LRA, see generally David Axe and Tim Hamilton, *Army of God: Joseph Kony’s War in Central Africa* (PublicAffairs, New York, 2013).

<sup>46</sup> See Apuuli, *supra* note 37, p. 182. The LRA also claims to fight for a biblical state. See Chothia, *supra* note 1.

<sup>47</sup> See McKay and Mazurana, *supra* note 20, p. 75. See also, e.g., *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 56.

<sup>48</sup> See Axe and Hamilton, *supra* note 45, p. 28. Jimmie Briggs summarises the rule of the LRA as follows: ‘The history of the Lord’s Resistance Army is punctuated by innumerable abductions and civilian attacks of unimaginable savagery, which truly means something in a nation that endured Idi Amin’. See Briggs, *supra* note 23, p. 115.

<sup>49</sup> See *The Prosecutor v. Dominic Ongwen*, *supra* note 2, para. 10. Baines notes that Ongwen ‘became so efficient and fearlessly loyal to his superiors that he was eventually ‘promoted’ to the ‘inner circle’ of the LRA’. See Baines, *supra* note 16. The Sinia Brigade is one of four operational units within the LRA. The others are Gilva, Trinkle and Stockree. See *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 56. Ongwen’s role in the LRA was confirmed by various sources, including victims of LRA attacks, radio broadcasts and other sources. See *The Prosecutor v. Dominic Ongwen*, *supra* note 2, para. 10.

<sup>50</sup> See Chothia, *supra* note 1.

<sup>51</sup> Jagielski, *supra* note 4, p. 45; see also, e.g., *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 68.

<sup>52</sup> See, e.g., *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 72.

<sup>53</sup> *Ibid.*, para. 118. See also *The Prosecutor v. Dominic Ongwen*, ICC (Trial Chamber ix) Pre-Trial Brief on Behalf of Victims Represented by the Common Legal Representative, ICC-02/04- 01/15, 6 September 2016, online at [www.icc-cpi.int/CourtRecords/CR2016\\_06500.PDF](http://www.icc-cpi.int/CourtRecords/CR2016_06500.PDF), 10 October 2016.

Ongwen is also charged with the use of child soldiers under the age of 15. The abduction of child soldiers 'was a systematic practice and a policy choice of the LRA'.<sup>54</sup> Ongwen frequently engaged in the practice of abducting children, supervising their military training, and deploying LRA units that included children under the age of 15.<sup>55</sup> The evidence confirming the use of child soldiers by Ongwen is staggering. LRA members who were former child soldiers themselves, ex-child soldiers, as well as civilians testified that Ongwen conscripted and used child soldiers under the age of 15 between 1 July 2002 and 31 December 2005.<sup>56</sup> The sad reality is that Ongwen himself was once conscripted and used as a child soldier.

Why did Ongwen commit this and other crimes? Was he transformed from a child into a monster?<sup>57</sup> Even though Ongwen committed mass atrocities, there are many confirmed accounts of him showing empathy towards victims.<sup>58</sup> Ongwen often released child soldiers from the LRA at a considerable risk to his own rank and safety, while he also once said that civilians should not be attacked since they pose no threat to the LRA.<sup>59</sup> Ongwen even allowed one of his forced wives, Florence Ayot, with whom he also has two children, to escape.<sup>60</sup> It is almost as if he was caught in two minds at times, one resembling that of an innocent little boy, while the other resembled a mind of a rebel committed to the hideous ideologies of the LRA. Former rebels also note that it had become increasingly difficult to assess Ongwen's character as he would often change from a good to a bad mood in an instant.<sup>61</sup>

As a result, and particular after it was announced that the ICC issued an arrest warrant for his arrest in 2005, Ongwen contemplated escaping from the LRA.<sup>62</sup> Since he was isolated from the high command Ongwen met with a few local civilians and leaders in Gulu to get more information about the ICC's investigation.<sup>63</sup> He asked them many questions, including the public opinion about him, whether he would be sent to The Hague if he would surrender or whether he would also receive amnesty like some of his fellow commanders who surrendered.<sup>64</sup> The group informed him of a recent radio programme which stated that Ongwen would be transferred to the ICC if caught.<sup>65</sup> In 2006 he met with Ugandan army commanders and religious leaders in the north, who allegedly promised him safe passage into Sudan.<sup>66</sup> However, later in 2007 he crossed the border to rejoin Kony's battalion.<sup>67</sup>

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<sup>54</sup> *Ibid.*, para. 142.

<sup>55</sup> *Ibid.*, para. 143.

<sup>56</sup> *Ibid.*, para. 141.

<sup>57</sup> See Baines, *supra* note 16, p. 181.

<sup>58</sup> See *ibid.*, p. 172.

<sup>59</sup> See *ibid.*

<sup>60</sup> Mark Schenkel, 'Uganda: The Thin Line between Victim and Perpetrator', *Mail and Guardian*, 16 February 2015, online at [www.mg.co.za/article/2015-02-16-uganda-the-thin-line-between-victim-and-perpetrator](http://www.mg.co.za/article/2015-02-16-uganda-the-thin-line-between-victim-and-perpetrator), 24 September 2016.

<sup>61</sup> See Baines, *supra* note 16, p. 175.

<sup>62</sup> See *ibid.*

<sup>63</sup> See *ibid.*, p. 176.

<sup>64</sup> See *ibid.*

<sup>65</sup> See *ibid.*

<sup>66</sup> See *ibid.*

<sup>67</sup> See *ibid.*

In another dramatic turn of events after his surrender, Ongwen opened up about his relationship with Kony. Ongwen said that he participated in the two-decade long rebellion because Kony would kill him if he refused or escaped.<sup>68</sup> His relationship with Kony seriously deteriorated in 2012 when it came to Kony's attention that Ongwen and some of the other commanders wanted to defect from the LRA.<sup>69</sup> Kony ordered one of his commanders, called Aligac, to arrest and torture Ongwen while in Sudan.<sup>70</sup> After nine days in detention, one of Kony's escorts released Ongwen.<sup>71</sup> Ongwen fled and subsequently surrendered.

In short, Ongwen faced a unique dilemma. If he escaped when he was still a young commander, he not only risked being charged by the ICC, but also the safety of his family and friends, as Kony would not take kindly to the news of Ongwen's escape, as seen above. The sole question then remains: will his role as a victim and perpetrator under international criminal law cross paths at the ICC, if at all?

### **3 Individual criminal responsibility and a possible defence**

Dominic Ongwen is the youngest individual ever to be indicted by the ICC, while he is also the first person to be convicted for a crime of which he was a victim himself.<sup>72</sup> This poses vexing questions concerning Ongwen's fate as a "victim" or "villain". He was a victim of crimes under international law for the duration of his tenure as a child soldier in the LRA until he turned 18. Since then, he has become a perpetrator, a feared man across Uganda.

He currently finds himself stranded between these juxtapositions. Yet, is Ongwen neither a "victim" nor a "villain"? Is it necessary to label him? His meteoric rise up the ranks of the LRA along with the commission of mass atrocities is widely published and has cemented his status as a "villain". In turn, the fact that he was a child soldier in the LRA has not only challenged the view of regarding Ongwen solely as a perpetrator of crimes under international law, but was also one of the grounds that were raised by his Defence.

This can be contributed to the protection and promotion of the rights of child soldiers over the last three decades. The human rights of child soldiers are protected by a plethora of international instruments, like the ICC Statute and the Convention on the Rights of the Child. The bulk of child soldier research focusses on the reintegration and rehabilitation of former child soldiers affirming their status as victims of warfare. As a result, Ongwen has been labelled a victim of the LRA when he was a child soldier, but it remains to be seen whether this heinous detail of Ongwen's life carry any legal significance for crimes committed as an adult perpetrator.

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<sup>68</sup> See *Daily Monitor*, 'Ongwen Feared Kony Would Kill Him, says Lawyer', 27 January 2016, online at [www.monitor.co.ug/News/National/Ongwen-feared-Kony-would-kill-him--says-lawyer/688334-3050116-2mvjjh/index.html](http://www.monitor.co.ug/News/National/Ongwen-feared-Kony-would-kill-him--says-lawyer/688334-3050116-2mvjjh/index.html) , 25 September 2016.

<sup>69</sup> See Moses Akena, 'Ongwen Speaks Out on Why He Quit LRA', *Daily Monitor*, 19 January 2015, online at [www.monitor.co.ug/News/National/Ongwen-speaks-out-on-why-he-quit-LRA/688334-2593818-pdgo8vz/index.html](http://www.monitor.co.ug/News/National/Ongwen-speaks-out-on-why-he-quit-LRA/688334-2593818-pdgo8vz/index.html) , 26 September 2016. Also see Scott Ross, 'Dominic Ongwen and the Search for Justice', *Warscapes*, 2 March 2016, online at [www.warscapes.com/opinion/dominic-ongwen-and-search-justice](http://www.warscapes.com/opinion/dominic-ongwen-and-search-justice) , 26 September 2016.

<sup>70</sup> See Akena, *ibid.*

<sup>71</sup> See *ibid.*

<sup>72</sup> See Baines, *supra* note 16, p. 164; Chothia, *supra* note 1.



With its decision to confirm the charges of Ongwen, the ICC indirectly challenges the global narrative that all child soldiers who committed crimes should be freed from prosecution, as has been the case in Sierra Leone and many other conflicts. The ICC does not regard Ongwen as a former child soldier, but as an adult perpetrator who has been charged with committing various crimes under international law. In this case, the restorative and rehabilitative theories of punishment, which would apply in the case of Ongwen as a child soldier, are in direct contrast with the retributive nature of the ICC.

While the ICC dealt with child soldiers as victims of crimes under international law in *Lubanga*, the ICC sees Ongwen, a former child soldier, as a perpetrator.<sup>73</sup>

Criminal law is so transfixed with the defendant that it results in the victim being overlooked at times. The prosecution of Ongwen as being individually criminally responsible is hard to comprehend if you take into account that he was once conscripted as a child soldier, a crime for which Lubanga was prosecuted at the ICC. However, the evidence against Ongwen is damning as he made certain choices to commit and plan large scale atrocities, choices other child soldiers and rebels did not make.<sup>74</sup> That being said, the fact that the ICC places such a low premium on Ongwen as a victim of crimes under international law is concerning.

Nonetheless, Ongwen has been a primary target of the ICC for years. Even though he was only apprehended in 2015, the situation of the LRA at the ICC emerged in 2003. On 16 December 2003, the Attorney General of the Republic of Uganda sent a letter of referral to the ICC, in which it referred the situation regarding the LRA in Northern and Western Uganda.<sup>75</sup> This referral by Uganda, as a State Party to the ICC Statute, was carried out in accordance with Article 14 of the ICC Statute.<sup>76</sup> Consequently, the Prosecutor of the ICC investigated the situation and issued an arrest warrant in 2005 for the leadership corps of the LRA, including Ongwen.<sup>77</sup>

It has been Uganda's intention from the outset to ensure that Ongwen is prosecuted at the ICC. However, is Ongwen's case of such a complex nature that it is simply not intelligible to be heard at the ICC? The limits of the ICC will surely be tested in this case. The retributive qualities of the Court will also be challenged if the Court is to consider Ongwen as a victim of crimes under international law, while at the same time prosecuting him for the commission of mass atrocities. Drumbl is of the view that the criminal law's ability to

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<sup>73</sup> See, e.g., Baines, *ibid.*, p. 182.

<sup>74</sup> See *ibid.*

<sup>75</sup> See *The Prosecutor v. Dominic Ongwen*, *supra* note 2, para. 18.

<sup>76</sup> Article 14(1) of the ICC Statute provides: 'A State may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes'. Article 14(2) furthermore states that 'as far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation'.

<sup>77</sup> The unsealed arrest warrant was issued by the ICC on 13 October 2005. The other rebel leaders wanted by the ICC are Joseph Kony and Vincent Otti. On 6 February 2015, the ICC decided to separate the proceedings against Dominic Ongwen from the case of *Prosecutor v. Joseph Kony and Vincent Otti*, *icc-02/04-01/05*. Since Kony and Otti were still at large, the ICC decided to continue with its proceedings against Ongwen. After consultation with the Prosecutor, Pre-Trial Chamber ii decided not to start with proceedings against Kony and Otti *in absentia*. See International Criminal Court, *supra* note 2.

deal with Ongwen is rather thin.<sup>78</sup> He further asserts that ‘If we focus exclusively on courtrooms and jailhouses, we are hewing to a very narrow approach instead of engaging with the pluralistic possibilities that the law has to offer’.<sup>79</sup>

Amnesty was one such alternative to justice which could have been considered in Ongwen’s case, however, because of the sheer scale and brutality of Ongwen’s crimes, coupled with the ICC’s arrest warrant, amnesty was never a plausible outcome. This has also been the case in Uganda with the trial of Thomas Kwoyelo, a former child soldier and commander of the LRA, who is being prosecuted for war crimes and crimes against humanity at the International Crimes Division in Uganda.<sup>80</sup> It is submitted that Uganda missed a golden opportunity to grant amnesty to Ongwen and Kwoyelo whose circumstances are so unique, amnesty would have been a viable alternative.

The argument concerning the granting of amnesty in the Ongwen case gathers further steam considering the fact that neither the ICC, nor any other international court for that matter, have any experience in dealing with a case of this nature. Unlike Lubanga and Bemba, and even Al Mahdi, Ongwen does not represent a typical defendant at the ICC. He should rather be viewed as a victim turned perpetrator, who was an unfortunate victim of circumstance. That being said, how should Ongwen be held accountable? Because Ongwen was part of the leadership corps of the LRA and one of those individuals most responsible for the commission of crimes as set out in the ICC arrest warrant against Ongwen, the ICC will prosecute Ongwen. He faces a mountain of charges at the ICC.

After Ongwen’s arrest in 2015, the confirmation of charges hearing occurred between 21 and 26 January 2016 and the charges were confirmed on 23 March 2016.<sup>81</sup> Ongwen was initially charged with four counts of war crimes and three counts of crimes against humanity.<sup>82</sup> These crimes were allegedly committed in Gulu, Uganda, in May 2004.<sup>83</sup> However, after the confirmation of charges hearing in 2016, the total amount of charges rose to 70 counts of crimes under international law, including war crimes and crimes against humanity.<sup>84</sup> The Prosecution is of the view that there is sufficient evidence to prove that Dominic Ongwen is individually criminally responsible for the crimes with which he is charged.<sup>85</sup>

The Defence raised two key defences. First, the defence of duress was raised.<sup>86</sup> They argued that Ongwen was threatened to perform certain orders, otherwise various

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<sup>78</sup> Drumbl, *supra* note 11, p. 5.

<sup>79</sup> Drumbl, *supra* note 28, pp. 625–626.

<sup>80</sup> *International Justice Monitor*, ‘Kwoyelo Trial Postponed (Again) in Ugandan Court: Causes and Ramifications’, 22 July 2016, online at [www.ijmonitor.org/2016/07/kwoyelo-trial-postponed-again-in-ugandan-court-causes-and-ramifications/](http://www.ijmonitor.org/2016/07/kwoyelo-trial-postponed-again-in-ugandan-court-causes-and-ramifications/), 26 September 2016.

<sup>81</sup> There were 2,026 victims who participated in the proceedings. See *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 7.

<sup>82</sup> The counts of war crimes include murder (Article 8(2) (c) (i)), cruel treatment of civilians (Article 8(2) (c) (ii)), intentionally directing an attack against a civilian population (Article 8(2) (e) (i)) and pillaging (Article 8(2) (e) (v)). The counts of crimes against humanity include murder (Article 7(1)(a)), enslavement (Article 7(1)(c)) and inhumane acts of inflicting serious bodily injury and suffering (Article 7(1)(k)).

<sup>83</sup> See *The Prosecutor v. Dominic Ongwen*, *supra* note 2, para. 30.

<sup>84</sup> For a discussion of all the charges, see *The Prosecutor v. Dominic Ongwen*, *supra* note 1, paras. 69–144.

<sup>85</sup> *Ibid.*, paras. 13, 157.

disciplinary measures would follow.<sup>87</sup> However, the Court said that there was no threat of imminent death or serious bodily harm against Ongwen, as required in Article 31(1) (d) of the ICC Statute, that deals with the defence of duress.<sup>88</sup> Also, Ongwen's stay with the LRA was not beyond his control as he could have escaped.<sup>89</sup> Instead, he chose to become one of the senior leaders of the LRA and commit offences in accordance with the LRA's ideologies.<sup>90</sup> Ongwen committed atrocities as an adult offender, and was acutely aware of the consequences of his actions. It is submitted that the defence of duress would not be considered by the Court during the trial, as seen in the confirmation of charges. However, what about the duress of Ongwen as a child soldier?

This question is raised in the second defence related to the fact that Ongwen was abducted as a child soldier. The Defence contended that Ongwen's individual criminal responsibility should be excluded on the basis that he was a victim of a crime under international law, when he was forcibly conscripted as a child soldier by the LRA, and that he enjoyed this protection up until the day he surrendered.<sup>91</sup> Unfortunately, this defence is not discussed in any detail in the confirmation of charges, apart from the Court's ruling below:

The Defence has raised several times an argument that circumstances exist that exclude Dominic Ongwen's individual criminal responsibility for the crimes that he may otherwise have committed. One side of this argument is that Dominic Ongwen, who was abducted into the LRA in 1987 at a young age and made a child soldier, should benefit from the international legal protection as child soldier up to the moment of his leaving of the LRA in January 2015, almost 30 years after his abduction, and that such protection should include, as a matter of law, an exclusion of individual criminal responsibility for the crimes under the Statute that he may have committed. However, this argument is entirely without legal basis, and the Chamber will not entertain it further.<sup>92</sup>

It is submitted that the Court based the above-mentioned ruling particularly on the fact that Ongwen's abduction was not of a recent nature. In other words, can Ongwen's criminal responsibility be excluded solely on the basis that he was forced to become a child soldier almost 30 years ago? The time that elapsed between Ongwen's abduction and him committing atrocities as an adult commander is very long. The Court's thinking

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<sup>86</sup> *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 151.

<sup>87</sup> *See ibid.*, para. 153.

<sup>88</sup> *Ibid.*, paras. 151–53. Article 31(1)(d) of the ICC Statute provides: 'The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control'.

<sup>89</sup> *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 154. *See also Sunday Vision*, 'Why Ongwen is Facing Trial at the Hague', 2 February 2015, online at [www.newvision.co.ug/new\\_vision/news/1320051/ongwen-facing-trial-hague](http://www.newvision.co.ug/new_vision/news/1320051/ongwen-facing-trial-hague), 25 September 2016.

<sup>90</sup> *See The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 154. Moreover, the Defence was unable to answer how Ongwen's commission of crimes under international law with the LRA was necessary to avoid the alleged threats of the LRA. The Court argued that Ongwen could have avoided, for example, accepting forced wives and brutally raping them. Thus, the defence of necessity was also struck down by the Court; *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 155.

<sup>91</sup> *Ibid.*, para. 150.

<sup>92</sup> *Ibid.*

was probably that Ongwen's criminal responsibility could not be excluded by the fact that he was a child soldier, as there is no legal nexus between the two situations. They are just too far removed from each other.

The Defence based its argument on the protection given to child soldiers under the age of 15. Additional Protocol ii to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflict, did criminalise the conscription and use of child soldiers under the age of 15 in non-international armed conflicts, at the time that Ongwen was forcibly abducted.<sup>93</sup> Hence, there can be no question that Ongwen was initially a victim of a crime under international law. It is submitted that the Defence was of the opinion that the protection that Ongwen received as a victim, acted as a shield against any crimes that Ongwen subsequently committed. It is again difficult to establish a conceivable nexus between Ongwen's protection as a child soldier and the commission of crimes as an adult. One aspect that counts against Ongwen is that he never intended to leave the LRA, but instead, he wanted to gain more power, which resulted in him committing further crimes under international law.<sup>94</sup>

The following passage emphasises Ongwen's desire to stay with the LRA:

As commander, Dominic Ongwen was aware of the powers he held, and he took sustained action to assert his commanding position, including by the maintenance of a ruthless disciplinary system, abduction of children to replenish his forces, and the distribution of female abductees to his subordinates as so-called "wives".<sup>95</sup>

This is further evidence that he did not show any remorse for what he did. He ignored the cries of the victims, a situation with which he was all too familiar when he was abducted as a child soldier. It is submitted that the criminal responsibility of Ongwen cannot be excluded solely on the basis that he was a child soldier. The ICC charged Ongwen with various crimes under international law on the grounds that the Court was able to establish that the objective elements of the crimes were fulfilled by the evidence brought before it.<sup>96</sup> However, another argument that the Defence could raise is that Ongwen's abduction as a child influenced his ability to form the criminal capacity to commit an offence. Criminal capacity, a legal concept that is widely used in common law jurisdictions, deals with the question whether a person is criminally capable of committing a crime. Criminal capacity is established before the objective elements of the crime (*actus reus* and *mens rea*) are considered.<sup>97</sup> Someone is criminally capable of committing a crime when that person is

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<sup>93</sup> Article 4(3)(c-e) of the Additional Protocol ii to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflict, provides: '(c) Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; (d) The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured; (e) Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being'.

<sup>94</sup> *The Prosecutor v. Dominic Ongwen*, *supra* note 1, para. 154.

<sup>95</sup> *Ibid.*, para. 59.

<sup>96</sup> *See, e.g., ibid.*, para. 74.

<sup>97</sup> *See, e.g.,* Jonathan M. Burchell, *Principles of Criminal Law*, fourth edition (Juta, Cape Town, 2013) p. 250; Gerhard Kemp, *et al.*, *Criminal Law in South Africa*, second edition (Oxford University Press Southern Africa, Cape Town, 2015) p. 152; cr Snyman, *Criminal Law*, sixth edition (LexisNexis, Durban, 2014) p. 155.

able to distinguish between right and wrong at the time of the commission of the crime and act in accordance with such understanding.<sup>98</sup> Youth, mental illness, intoxication and provocation are some of the defences that might exclude the criminal capacity of the accused, as is the case in South Africa, for example.<sup>99</sup>

Ongwen was isolated from his parents at a very young age. He was not able to finish school. Instead of developing as a child in a community where he would have been loved by his parents and friends, he grew up in an armed group. Instead of playing with his friends, he ended up playing with a real gun. The above comparisons emphasise the fact that Ongwen never knew what it was like to grow up as a normal child.<sup>100</sup> Rather, he was subject to the abominable life of a rebel soldier from a very young age, a life so abnormal, such youth has been described as traumatized, violent and social pariahs.<sup>101</sup>

The question arises whether Ongwen has ever been able to distinguish between right and wrong and act in accordance with such understanding, if he never knew what the right thing to do was. Also, did he have the opportunity to develop the capacity to distinguish between right and wrong, in the legal, not moral, sense?

It is difficult to imagine how confused Ongwen must have been when he was abducted at the age of 10. Surely, at the age of 10, he would have known that it is wrong to commit a crime, but a ten-year-old boy is also easy to manipulate. As noted earlier, child soldiers also have to endure intense levels of indoctrination. If Ongwen was manipulated and indoctrinated at the age of 10, such indoctrination would result in severe trauma. The question that arises then is whether Ongwen has ever been in a position to legitimately distinguish between right and wrong, even though he committed the alleged crimes as an adult.

However, Ongwen possibly had enough time after he turned 18 to realise that committing a criminal offence is wrong, not to mention the atrocious crimes for which the LRA is infamously known. It would thus be premature to argue that Ongwen did not have the criminal capacity to know that it is wrong to commit crimes under international law.

However, hypothetically, due to the very traumatic experiences that Ongwen had to endure during his childhood, an argument could be raised in favour of diminished criminal capacity, but this is not a defence.

Diminished responsibility, however, is a defence under customary international law. The defence is not included in the ICC Statute.<sup>102</sup> However, it can be raised as a defence according to Article 31(3) which provides that other grounds for excluding criminal responsibility derived from applicable law as provided in Article 21 of the ICC Statute,

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<sup>98</sup> Burchell, *ibid.*, p. 247; Kemp, *ibid.*, p. 153; Snyman, *ibid.*, p. 155.

<sup>99</sup> See Burchell, *ibid.*, p. 251; Kemp, *ibid.*, p. 155; Snyman, *ibid.*

<sup>100</sup> For a detailed analysis of the consequences of warfare on child soldiers in Uganda as opposed to youth who were not involved in conflict, see generally Christopher Blattman and Jeannie Annan, 'The Consequences of Child Soldiering', 92 *The Review of Economics and Statistics* (2010) 882–898.

<sup>101</sup> See *ibid.*, p. 882.



may be considered by the Court.<sup>103</sup> In the case of England, for example, diminished responsibility is a partial defence in a case where the accused was suffering from an abnormality that substantially impaired his ability to control his action at the time of the commission of the offence.<sup>104</sup> Ongwen might be able to raise this defence if he can prove that his time as a child soldier caused severe trauma which resulted in him not being able to control his actions when he committed the offences as an adult. However, it could also be argued that the supposed trauma that Ongwen would have suffered as a child would not have prevented him from trying to escape from the LRA, or committing the atrocious crimes.

In short, while it has now been confirmed that Ongwen will be prosecuted, it will be interesting to see how the Defence structures their case, however, it is likely that they will fail. As with punitive approaches, the prosecutor will not shy away from portraying Ongwen as a ruthless and merciless rebel commander. Considering the fact that Ongwen was a child soldier, forced to kill, tortured by Kony and indoctrinated into a cult, what message will the prosecution of Ongwen send out? Would an acquittal be as empty as a conviction? As stated before, some Ugandans are of the opinion that Ongwen's prosecution would have no impact on the situation back in Uganda as they feel that he should rather be subjected to traditional justice mechanisms. Ongwen cannot be defined solely on the basis of being a violent criminal.<sup>105</sup> Instead, it is important to also consider that he was only a little boy when his life took a turn for the worst. Should the ICC turn a blind eye towards this matter? These reflections cast a serious doubt about whether the ICC is in a position to hold Ongwen individually criminally responsible while at the same time considering his dramatic past. It is hoped that this aspect will be raised during the mitigation of sentence.

#### **4 Mitigation of Sentence**

Has there been any justice for Ongwen as a victim?<sup>106</sup> At the moment, in a pure legal sense, retributive justice is being served with the scheduled ICC trial of Ongwen's as a perpetrator of crimes under international law. However, what about the justice that was withheld from Ongwen as a victim and child soldier? The only conceivable avenue of justice for Ongwen if he is convicted appears to be the mitigation of his sentence. It is submitted that there are a number of mitigating factors which could be argued in this case.

First, the fact that Ongwen surrendered to us forces, when he could have remained with the LRA, is a very important mitigating factor. Secondly, child soldiers are psychologically scarred due to the violent methods used by armed groups.<sup>107</sup> These include indoctrination, forced intoxication and duress. Ongwen's period as a child soldier was

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*See* Article 31 of the ICC Statute for the list of defences contained in the Statute. <sup>102</sup>

<sup>103</sup> Article 31(3) of the ICC Statute provides: 'At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence'.

<sup>104</sup> *See* Section 52(2)(1) of the Coroners and Justice Act 2009.

<sup>105</sup> *See* Baines, *supra* note 16, p. 186.

<sup>106</sup> *See* *ibid.*, p. 168.

<sup>107</sup> *See, e.g.*, Singer, *supra* note 23, p. 42; Wessells, *supra* note 23, pp. 220–21.

possibly riddled with similar circumstances. In addition, the countless situations of duress that Ongwen had to endure as an adult soldier moulded him into a ruthless killer.

This coupled with the possibly that Ongwen's mind was not fully developed due to the human rights violations he was forced to commit as a child induced a certain amount of trauma throughout his stay at the LRA.<sup>108</sup> As a result, committing these senseless crimes became a way of life for Ongwen.

Thirdly, the Ugandan community are not all in favour of prosecuting Ongwen.<sup>109</sup> Recently, George William Ecodu, a former LRA abductee, asked and pleaded for Uganda and the ICC to forgive Ongwen for the crimes he committed when he said: 'the Bible says "we must forgive"'.<sup>110</sup> Furthermore, many of the Acholi people, where most of the LRA crimes in Uganda were committed, are not in favour of Ongwen being prosecuted.<sup>111</sup>

They argue that the LRA chapter can only be closed by forgiving and reconciling with those who committed the crimes, as well as bringing the remaining abductees (including former child soldiers) back to their communities.<sup>112</sup> They also said that Ongwen should participate in a cleansing ceremony upon his return from imprisonment in the Netherlands, a process that would foster reconciliation between Ongwen and the victims of LRA atrocities.

There are many other factors which the Defence can raise in mitigation of sentence. Ongwen should be held accountable for his actions, but his accountability is mitigated by the circumstances which gave rise to his status as a victim of crimes under international law. It is thus very important for the Court to consider these factors if Ongwen is sentenced. The ICC will send a wrong message in the promotion of international criminal justice if it refuses to mitigate Ongwen's sentence. This is a unique opportunity for the Court to showcase its ability to acknowledge the voices and concerns of former victims turned perpetrators.

## 5 Conclusions

Dominic Ongwen was a victim of crimes under international law until he started his rise up the ranks of the LRA, and subsequently faces a barrage of charges before the ICC.

Ongwen committed egregious crimes under international law, but even so, the fact that he was taken from the loving arms of his parents resulting in him becoming a child soldier, is of paramount importance in his defence. Fisher notes: 'There is a complex relationship under international (and national) law between the non-responsibility of child soldiers and the responsibility that is attributed to former child soldiers who cross the invisible line to become responsible adult agents'.<sup>113</sup> This cross-over from being a victim to

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<sup>108</sup> See Baines, *supra* note 16, p. 178.

<sup>109</sup> See *Refugee Law Project*, *supra* note 33.

<sup>110</sup> *Daily Monitor*, 'Former lra Abductee Pleads Forgiveness for Ongwen', 20 January 2016, online at [www.monitor.co.ug/News/National/Former-LRA-abductee-pleads-forgiveness-for-Ongwen/-/688334/3048274/-/yykxpz/-/index.html](http://www.monitor.co.ug/News/National/Former-LRA-abductee-pleads-forgiveness-for-Ongwen/-/688334/3048274/-/yykxpz/-/index.html), 2 February 2016.

<sup>111</sup> See Schenkel, *supra* note 60.

<sup>112</sup> See *ibid.*

<sup>113</sup> Fisher, *supra* note 4, p. 56.

becoming a perpetrator of crimes under international law under these unique circumstances should not be brushed aside by the ICC, thereby ensuring that Ongwen's rights as both a victim and perpetrator of crimes under international law can be dealt with legitimately.