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Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals

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DOMINIC ONGWEN AND THE ROTTEN SOCIAL BACKGROUND DEFENSE: THE CRIMINAL CULPABILITY OF CHILD SOLDIERS TURNED WAR CRIMINALS

RAPHAEL LORENZO AGUILING PANGALANGAN*

We must never forget that the record on which we judge these
defendants today is the record on which history will judge us
tomorrow. To pass these defendants a poisoned chalice is to put it to
our own lips as well.

- Chief Prosecutor Robert H. Jackson¹

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1. Benjamin B. Ferencz, *The Nuremberg Precedent and the Prosecution of State-Sponsored Mass Murder*, 11 N.Y.L. SCH. J. INT’L & COMP. L. 325, 326 (1990).

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I. INTRODUCTION

The year was 1988. A nine-year old boy was on his way to school when he was abducted by the Lord's Resistance Army (LRA).² That boy, once described to be shy and innocent,³ would go on to spend the rest of his adolescent life as a soldier; forced to commit unfathomable atrocities both in numbers and in agony; not only in scale, but in severity.

Thirty years later, that boy would come to be known as Dominic Ongwen—the Brigadier General of the LRA and member of the core leadership responsible for devising and implementing attacks upon civilian populations.⁴ Currently, he is charged before the International Criminal Court (ICC) with seventy counts of crimes

2. Andrew Green, *To Forgive a Warlord*, FOREIGN POL'Y (Feb. 6, 2015, 9:00 AM), <http://foreignpolicy.com/2015/02/06/ongwen-uganda-icc-joseph-kony-international-justice/>.

3. *Id.*

4. See OPEN SOCIETY JUSTICE INITIATIVE, THE TRIAL OF DOMINIC ONGWEN AT THE INTERNATIONAL CRIMINAL COURT 2-4 (2016), [https://www.opensocietyfoundations.org/sites/default/files/briefing-ongwen-20161129%20\(2\)1.pdf](https://www.opensocietyfoundations.org/sites/default/files/briefing-ongwen-20161129%20(2)1.pdf).

against humanity and war crimes—the highest number of charges an accused has faced before the Court.⁵

A former child soldier himself, Ongwen is charged with the same crimes of which he was victim. International law expressly prohibits the recruitment and use of children in hostilities.⁶ Other than the risk to their physical well-being, children's participation in armed conflicts causes particularly severe trauma, contributing to their penchant for violence.⁷ A child soldier's active participation in armed hostilities "teaches [them] the rule and culture of violence, disrupts their education and frequently results in gravest traumas, since children are even less capable to deal with the horrors of war than grown adults."⁸ The ICC itself in the case against Congolese warlord Thomas Lubanga Dyilo recognized the omnipresent "environment of terror" that child soldiers are subjected to when abducted.⁹

The protected status of the child is enshrined throughout international law, including the Rome Statute which excludes from the Court's jurisdiction "any person who was under the age of eighteen at the time of the commission of a crime."¹⁰ But note the ultimate irony. While legal doctrine recognizes the child soldier as the victim of war, Ongwen, a former child soldier, is tried as the perpetrator. *Prosecutor v. Ongwen* hence raises novel questions as to the child soldier; as to their status' longevity and potential criminal responsibility. As argued by Ongwen's defense counsel, if "the laws of war were meant to protect children[,] it is inapposite to suggest

5. See INTERNATIONAL CRIMINAL COURT, CASE INFORMATION SHEET THE PROSECUTOR V. DOMINIC ONGWEN (Jan. 2017), <https://www.icc-cpi.int/iccdocs/pids/publications/ongweneng.pdf>.

6. See H. Harry L. Roque, Jr., *The Criminal Nature of Recruitment of Child Soldiers Under International Humanitarian Law*, 1 ASIA PAC. Y.B. INT'L HUMAN. L. 113, 113 (2005).

7. See Stuart Beresford, *Child Witnesses and the International Criminal Justice System: Does the International Criminal Court Protect the Most Vulnerable?*, 3 J. INT'L CRIM. JUST. 721, 724 (2005).

8. See CYNTHIA CHAMBERLAIN BOLAÑOS, CHILDREN AND THE INTERNATIONAL CRIMINAL COURT: ANALYSIS OF THE ROME STATUTE THROUGH A CHILDREN'S RIGHTS PERSPECTIVE 109 (Leiden Univ. ed., 2014).

9. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Opening Statement, 6 (Jan. 26, 2009), https://www.icc-cpi.int/Transcripts/CR2009_00591.PDF.

10. Rome Statute of the International Criminal Court 106, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002) [hereinafter Rome Statute].

that individual criminal liability can then be imposed upon those like [Ongwen] who should have been protected but ended up enslaved[.]”¹¹

The purpose of this Paper is to look at the doctrinal challenges embodied in *Prosecutor v. Ongwen*: A tug-of-war between *liability*, as imposed under international humanitarian law (IHL) and international criminal law (ICL), and *protection*, as embodied throughout international human rights law (IHRL), IHL, and ICL. This Paper seeks to confront the difficult question of holding the child soldier, who climbed the ranks, accountable. Part I will be devoted to establishing the premise of the study. The Paper will look at the factual milieu in which *Ongwen* is based. Part II will delve into possible grounds for excluding criminal responsibility for the child soldier turned alleged war criminal. Distinct from Ongwen’s Defense Counsel’s approach,¹² Part II will advance Ongwen’s “rotten social background”¹³ not as a form of duress,¹⁴ but as a mental defect.¹⁵ Part III will conclude with a caveat addressing the doctrinal repercussions posed in ruling for or against the former child soldier who has come of age.

II. DOMINIC ONGWEN’S ROTTEN SOCIAL BACKGROUND

A. CHILD SOLDIERING IN CONTEXT

Actus me incito factus non est meus actus is a basic tenet of criminal justice meaning: ‘an act done by me against my will is not my act.’¹⁶ For this reason, involuntary actions caused by either

11. Decision on the Confirmation of Charges, *Prosecutor v. Dominic Ongwen* (No. ICC-02/04-01/15), Pre-Trial Chamber, 25 May 2016.

12. *See id.*

13. Richard Delgado, “*Rotten Social Background*”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 L. & INEQ. 9, 11 (1985).

14. Rome Statute, *supra* note 10, at 107-08.

15. *Id.*

16. *See id.* (allowing for a defense before the ICC based on the circumstances being out on one’s control); *see also* Enriquez v. Sandiganbayan, G.R. Nos. 120744-46, 689 Phil. Rep. 75 (S.C., June 25, 2012), http://sc.judiciary.gov.ph/jurisprudence/2012/june2012/120744-46.htm#_ftn130.

external restraints on volition or internal interference with cognition¹⁷ are expressly excluded by the Rome Statute from criminal responsibility.¹⁸

The Rotten Social Background doctrine, in recognizing the relationship between environmental adversity and criminal propensity,¹⁹ advances the theory that a person's criminal behavior may at times be caused by extrinsic factors beyond his or her control.²⁰ Hence, when environmental tensions create a predisposition to commit crime, it would be an injustice to adjudge culpability.²¹

This Part seeks to establish the factual milieu from which *Ongwen* stems. By delving into the details of Ongwen's life as a child soldier turned warlord of the LRA, the author will illustrate not only the factual background of the case but a rotten social background as a possible defense.

B. THE CRIMINAL NATURE OF THE RECRUITMENT AND USE OF CHILD SOLDIERS

A child soldier refers to any person below eighteen years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity.²² Regardless of how they are recruited, the armed child is recognized as a victim²³ whose participation in conflict bears serious implications on their physical and emotional well-being.²⁴ There is a growing body of evidence which reveals a correlation between exposure to war and physical, psychological, and psychosocial effects: the more disturbances to the physiology of a

17. See Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background"*, 2 ALA. C.R. & C.L. L. REV. 53, 55 (2011).

18. Rome Statute, *supra* note 10, at 107-08.

19. See Delgado, *supra* note 13, at 9.

20. See *id.*

21. See *id.*

22. INTERNATIONAL BUREAU FOR CHILDREN'S RIGHTS, CHILDREN AND ARMED CONFLICT: A GUIDE TO INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW 324 (2010).

23. *Id.*

24. *Id.*

victim the larger the scar of psychological disorder.²⁵

For this reason, *inter alia*, IHL prohibits the recruitment of children as combatants.²⁶ Article 77 of the First Additional Protocol to the Geneva Convention expressly confers upon the child a “special respect [which] shall be protected against any form of indecent assault.”²⁷ It obliges “parties to the conflict [to] take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and . . . refrain from recruiting them into their armed forces,” and, in recruiting among those persons who are between fifteen and eighteen years old, parties to the conflict are obliged to “give priority to those who are oldest.”²⁸

These protections are echoed throughout IHL and IHRL instruments alike. The Second Additional Protocol to the Geneva Convention enshrined the protected status of the child as Fundamental Guarantees in Article 4(3).²⁹ Similarly, Article 38 of the Convention on the Rights of the Child obliges state parties to respect and ensure respect for the rules of IHL relevant to the child, to take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities, and to “refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.”³⁰

Subsequently, the minimum age of recruitment was increased to eighteen years through the Optional Protocol to the Rights of the Child,³¹ reflecting International Labor Organization Convention 182, which recognized the recruitment and use of child soldiers as one of

25. *See id.*

26. Roque, *supra* note 6, at 113.

27. INT'L COMM. OF THE RED CROSS, LEGAL PROTECTION OF CHILDREN IN ARMED CONFLICT (2003), https://www.icrc.org/eng/assets/files/other/ang0303_juridiquenewlogo.pdf.

28. *Id.*

29. *Id.*

30. United Nations Convention on the Rights of the Child art. 38, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

31. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict pmb., May 25, 2000, 39 I.L.M. 1286, 2173 U.N.T.S. 222.

the “worst forms of child labour.”³² However, this more lenient threshold has yet to achieve the status of customary international law and was purposely excluded from the Rome Statute.³³

Professor H. Harry L. Roque, a leading Constitutionalist and Public International Law expert of the University of the Philippines, points out that while the recruitment is

indeed prohibited under IHL, it does not appear to criminalize the act:

Proof of this includes the fact that recruitment of children is not among those acts classified by the Geneva Conventions as grave breaches which State Parties to the Conventions are treaty bound to criminalize through domestic penal legislation. Neither is child recruitment among those crimes tried by the Ad Hoc World War II Tribunals, be it in Nuremberg or Tokyo. This failure to prosecute particularly by the Nuremberg Tribunal is a significant indicator that the act has not been criminalized since children were widely recruited as combatants, particularly by Nazi Germany, and yet not a single Nazi was tried for it. The same may be said of the Statutes that created the United Nations War Crimes Tribunals for the Former Yugoslavia and for Rwanda. There is nothing in their respective statutes that granted these tribunals jurisdiction to try individuals for the recruitment of children. Furthermore, even in the human rights treaties that do prohibit the recruitment of child soldiers, there is no duty imposed on State Parties to enact domestic legislation criminalizing the act. As if to highlight the non-criminal nature of child recruitment, the UN Secretary-General included in his 2005 report a recommendation that: “National governments should enact and apply relevant legislation to ensure the protection, rights, and well-being of children and should ensure the protection and rehabilitation of war affected children within their jurisdiction.” This recommendation seems to concede the need to enact domestic penal legislation to criminalize recruitment of children.³⁴

It was not until the Rome Statute that an international treaty

32. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 3, *opened for signature* June 17, 1999, 2133 U.N.T.S. 161 (entered into force Nov. 19, 2000).

33. See GERHARD WERLE, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 332 (T.M.C. Asser Press 2005) (mentioning a comparable treaty that had achieved customary International law status because 191 Member States had ratified the convention).

34. Roque, *supra* note 6, at 118-19.

criminalized the prohibited act of child recruitment.³⁵ During the negotiations of the Preparatory Committee and the Rome Conference, the majority recognized that child soldiering was a “virtually universally accepted prohibition . . . of most serious concern.”³⁶ Article 8(2)(b)(xxvi) of the Rome Statute expressly criminalized “[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”³⁷

It has been argued that the sheer depravity of using children as the pawns of war calls for the criminalization of child soldiering under customary international law.³⁸ Advocates of this opinion cite the Rome Statute to bolster that argument.³⁹ While this is undoubtedly a claim founded on noble convictions, the status of child soldiering as a customary norm cannot be hinged on the Rome Statute alone⁴⁰ absent a showing of state practice and *opinio juris*.⁴¹

As of December 3, 2016, only 124 out of a total of 197 states have ratified the ICC Statute,⁴² albeit already comprising a “majority of all

35. *Cf. id.* (stating that International humanitarian law prohibits child soldier recruitment but does not consider it a crime).

36. Michael Cottier, *Article 8 War Crimes – para. 2(b)(xxvi)*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVERS’ NOTES, ARTICLE BY ARTICLE 466, 468 (Otto Triffterer ed., C.H. Beck, Hart & Nomos 2nd ed. 2008).

37. Rome Statute, *supra* note 10, at 97.

38. WERLE, *supra* note 33, at 331 (outlining the novel law in which child soldier recruitment is criminalized under the ICC statute).

39. *Id.* (citing the dissenting opinion in Prosecutor v. Norman that “non-forcible child recruitment” was not a crime under International law until the 1997 Rome Statute).

40. See U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, ¶ 14, U.N. Doc. S/2000/915 (Oct. 4, 2000) (outlining the incoherence of the Rome Statute on individual criminal liability for war crimes); see also Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, Dissenting Opinion of Justice Robertson, ¶ 47 (Special Ct. for Sierra Leone May 31, 2004), [http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72\(E\)-131.pdf](http://www.rscsl.org/Documents/Decisions/CDF/Appeal/131/SCSL-04-14-AR72(E)-131.pdf) (arguing that the court did not have authority to penalize individual criminal liability for war crimes).

41. See North Sea Continental Shelf Cases (Ger./Den. & Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (explaining the process involved for a state practice to become *opinio juris*).

42. *Rome Statute of the International Criminal Court*, UNITED NATIONS

States, [this] could hardly qualify as ‘virtually uniform’ accession.⁴³ Interestingly, the lack of state practice is evidenced by the fact that the “[s]tates that have not ratified the Rome Statute comprise an overwhelming majority of the world’s population and account for more than two-thirds of the planet’s population.”⁴⁴ As to *opinio juris*, “only a number of countries have enacted domestic legislation criminalizing child recruitment.”⁴⁵

Other than the severe consequences suffered by children in hostilities,⁴⁶ the basis for arguing that child soldiering is criminalized as a customary norm is wanting. Hence the recruitment and use of children remains a treaty-based crime; but this is not to say that it is criminalized through the Rome Statute alone.

Through United Nations Security Council (UNSC) Resolutions 1261 (1999),⁴⁷ 1314 (2000),⁴⁸ 1379 (2001),⁴⁹ 1460 (2003),⁵⁰ and 1539 (2004),⁵¹ child soldiering was expressly recognized as a war crime.⁵² While the law-making function of the UNSC was not intended to be a source of international law *per se*,⁵³ it is “today recognized as a distinct source of obligation,”⁵⁴ which member nations of the UN are bound to “accept and carry out.”⁵⁵ Hence, while the criminal nature of the recruitment and use of children has yet to crystalize as customary international law, there is sufficient legal basis to forward its criminalization beyond the four corners of the Rome Statute.⁵⁶

TREATY MATTERS, <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsgno=XVIII-10&chapter=18&clang=en> (last visited Jan. 3, 2018) (showing that the Rome Statute had not garnered sufficient state practice or adoption since it was enacted).

43. Roque, *supra* note 6, at 121.

44. *Id.*

45. *Id.*

46. WERLE, *supra* note 33, at 331.

47. S.C. Res. 1261, ¶ 2 (Aug. 25, 1999).

48. S.C. Res. 1314, ¶ 1 (Aug. 11, 2000).

49. S.C. Res. 1379, ¶ 1 (Nov. 20, 2001).

50. S.C. Res. 1460, pmb1. (Jan. 30, 2003).

51. S.C. Res. 1539, ¶ 1 (Apr. 22, 2004).

52. *Id.*

53. Roque, *supra* note 6, at 129.

54. *Id.*

55. *Id.*

56. *Cf.* Roque, *supra* note 6, at 121 (concluding that the Rome Statute is yet to

C. THE LORD'S RESISTANCE ARMY

The conflict in northern Uganda began soon after President Yoweri Museveni's National Resistance Army (NRA) took power in 1986.⁵⁷ The Holy Spirit Movement (HSM), a Ugandan rebel group and predecessor to the LRA, was established under the leadership of Alice Auma, a self-proclaimed spiritual medium.⁵⁸ Allegedly directed by divine instruction, the HSM sought to "organize a war against evil forces that had come to plague the Acholi" and to "restore stature in northern Ugandan politics, and lead a cleansing of Acholi society."⁵⁹

The HSM launched several successful attacks against Yoweri's NRA, falling within 100 kilometers of the capital city, Kampala, in 1987.⁶⁰ The HSM ultimately faded into history when its leader Alice Auma fled to seek refuge in neighboring Kenya.⁶¹ It was from the remnants of the HSM that Joseph Kony formed what has now come to be known as the LRA.⁶²

Similar to the HSM, the LRA is dedicated to the overthrow of the Ugandan government.⁶³ Its vision for Uganda is based on extreme interpretations of Christian beliefs founded upon Biblical Millennialism—the coming of a golden age.⁶⁴ Under the leadership

get wide-spread adoption but its strict enforcement under the United Nation gives it sufficient credence to be binding on member states).

57. See *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 3 (stating that the main objective of the Ugandan rebel group was to usurp power from the incumbent government).

58. See OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 4, at 3 (mentioning that the leader of the LRA formed the group from a spiritual movement: Holy Spirit Movement).

59. ANDRE LE SAGE, COUNTERING THE LORD'S RESISTANCE ARMY IN CENTRAL AFRICA 3-4 (Inst. for Nat'l Strategic Studies, Strategic Forum 2011).

60. *Id.*

61. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 4, at 3.

62. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Prosecution's Pre-Trial Brief, ¶ 11 (Sept. 6, 2016) (outlining the relationship between the Holy Spirit Movement and Lord's Resistance Army rebel groups in Uganda).

63. *Id.*

64. E. Mallonga, *The Protection of Children in International Armed Conflict Recovering*, in CHILDREN IN ARMED CONFLICT: ROUNDTABLE DISCUSSION 39, 42 (Elizabeth Aguilin-Pangalangan & H. Harry L. Roque Jr. eds., U. Phil. Law Ctr.-Inst. of Int'l & Legal Studies 2006).

of Kony, who is an alleged spirit medium like Auma before him, the LRA would go on to eclipse the other armed groups operating in northern Uganda,⁶⁵ becoming one of Africa's most brutal militia forces.⁶⁶

The ICC proceedings confirm that the LRA was an organized group capable of committing widespread and systematic attacks against civilian populations.⁶⁷ It is recognized by all three sides of the argument—the Office of the Prosecutor, Defense Counsel, and the Office of the Public Counsel for Victims (“OPCV”)—that the LRA is not a run-of-the-mill guerilla force but a well-organized rebel group bound by hierarchical structures and internal policies.⁶⁸ The LRA had both military and tactical ability. They had an inflow of weapons and ammunition and “followed a regular pattern in implementing its policies of persecuting, murdering, pillaging, torturing, enslaving, raping and otherwise committing sexual and gender-based crimes, inflicting cruel or inhumane treatments, and abducting children.”⁶⁹

The LRA used children as a vital resource,⁷⁰ continuously abducting children to join their ranks.⁷¹ Children “were easily malleable to whatever purpose Kony wanted and were quick to obey [his] orders.”⁷² As argued by the OPCV, “children copy exactly what they learn during training. They don’t pretend.”⁷³ As of 2006, the LRA had abducted an estimated 25,000 children into its ranks.⁷⁴

As it stands, the LRA remains one of Africa's most brutal militia

65. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 4, at 3.

66. SAGE, *supra* note 59, at 1.

67. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 62.

68. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 3, 6 (Jan. 25, 2016), https://www.icc-cpi.int/Transcripts/CR2017_00900.PDF.

69. *Id.* at 6.

70. *Id.* at 13.

71. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 4, at 4.

72. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 13.

73. *Id.*

74. UNICEF, UGANDA UNICEF HUMANITARIAN ACTION IN 2007, <https://www.unicef.org/har07/files/Uganda.pdf>.

forces⁷⁵ though its roster has dwindled.⁷⁶ Attributed to effective military operations and a successful defection campaign, LRA troops have greatly declined from the thousands in the late 1990s and early 2000s to a reported 150-200 core combatants.⁷⁷ Unfortunately, at least a half of that roster is believed to be composed of abductees.⁷⁸

D. DOMINIC ONGWEN INDOCTRINATED

In 1988, Dominic Ongwen, then only a nine-year-old boy, was abducted by the LRA. Stolen from his family and community, Ongwen was taken to an LRA training area where “his abductors beat, tortured and subjected him to constant acts of violence and forced him to perform the same on others”—acts that no person, let alone a child, should undergo.⁷⁹

Ongwen would go on to spend the rest of his adolescent life as a child soldier, forced to commit unfathomable atrocities in both scale and severity. In Ongwen’s own words, he entered the LRA “blind and deaf.”⁸⁰ Like any child of tender age, he was greatly impressionable, acquiring ideas and ideologies from his environment, particularly from his elders.⁸¹ It is well to take note that international law recognizes a child’s tractability and serves as a rationale behind the prohibition on child soldiering.⁸²

75. SAGE, *supra* note 59, at 1.

76. *Id.* at 7.

77. See Statement of General David M. Rodriguez, Commander of U.S. Africa Command, Before the Senate Armed Services Committee 19 (Mar. 26, 2015), https://www.armed-services.senate.gov/imo/media/doc/Rodriguez_03-26-15.pdf; see also U.N. Secretary-General, *Report of the U.N. Secretary-General on the Situation in Central Africa and the Activities of the United Nations Regional Office for Central Africa*, ¶¶ 16-19, U.N. Doc. S/2015/339 (May 14, 2015), http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2015_339.pdf.

78. SAGE, *supra* note 59, at 7.

79. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 56.

80. Moses Akena, *Ongwen Speaks Out on Why He Quit LRA*, DAILY MONITOR (Jan. 19, 2015), <http://www.monitor.co.ug/News/National/Ongwen-speaks-out-on-why-he-quit-LRA/688334-2593818-pdgo8vz/index.html>.

81. See ELIZABETH PROTACIO-MARCELINO ET AL., TORTURE OF CHILDREN IN SITUATIONS OF ARMED CONFLICT: THE PHILIPPINE EXPERIENCE 78 (2000) (describing how children develop politically).

82. WERLE, *supra* note 33, at 332.

Indoctrination of newly abducted children into the LRA is executed via a complex system of control.⁸³ The six-month process is described as brutal at minimum⁸⁴ and includes control mechanisms such as physical, linguistic, or cultural isolation; public violence; forced complicity; and an “assignment” to a family structure.⁸⁵

The methods employed by the LRA range from the unacceptable to the outlandish. Children were “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 that they were so steeped in blood that there could be no acceptance for them back in civilian society.”⁸⁶ If not on the receiving end of the blow, it was common for the LRA to force children to witness or commit violent acts against their fellow abductee.⁸⁷ On the other hand, “young recruits were made to taste the blood of the dead child after such a killing or eat with bloodied hands while sitting atop a dead body.”⁸⁸

The brutality of the LRA’s indoctrination process is encapsulated by the testimony of Moses, a former child soldier who was abducted at the age of ten:

It takes time, about six months, to brainwash the new abductees totally. What they do first is, when you are still new, beat you about 500 times. But if you are lucky it is only 200. Then they force you to watch terrible

83. Jocelyn TD Kelly, Lindsay Branham & Michele R. Decker, *Abducted Children and Youth in Lord’s Resistance Army in Northeastern Democratic Republic of the Congo (DRC): Mechanisms of Indoctrination and Control*, CONFLICT & HEALTH, May 18, 2016, at 4, <https://conflictandhealth.biomedcentral.com/articles/10.1186/s13031-016-0078-5> (noting that the LRA preferred children over adults because children were more vulnerable and easier to control).

84. HUMAN RIGHTS WATCH, COERCION AND INTIMIDATION OF CHILD SOLDIERS TO PARTICIPATE IN VIOLENCE 11-12 (2008), <https://www.hrw.org/sites/default/files/relatedmaterial/2008.04ChildSoldiers.pdf>.

85. Kelly, Branham & Decker, *supra* note 83, at 4.

86. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 56.

87. NADIA GRANT, DURESS AS A DEFENCE FOR FORMER CHILD SOLDIERS? DOMINIC ONGWEN AND THE INTERNATIONAL CRIMINAL COURT 7 (Int’l Crimes Database, Brief 21, 2016), <http://www.internationalcrimesdatabase.org/upload/documents/20161209T155029-ICD%20Brief%20Nadia%20Grant%202.pdf>.

88. *Id.* at 8.

things. We were abducted as a group of students. One of us was brought in front of us and killed there so that we could see. Those are the things they do. They force us to do it. Then, second, anyone among you who tries to escape will be killed the same way. So, as this might be the first time you see a person being killed, this will traumatise you and make you very afraid.⁸⁹

But this is not to say that the internal atrocities of the LRA are isolated to the child soldier alone. The relationship of both the abductee and ranked officer with the LRA is comparable to that of a dog and its master; “When you tell a dog to do something, it will act as instructed.”⁹⁰ In the LRA, that master was Kony.⁹¹ Everything—the attacks, the ambushes, the abductions—was an execution of his will. Dissatisfaction would be answerable by death.⁹²

It is in this context that Ongwen climbed the ranks to become the Brigadier General of the LRA.⁹³ On July 8, 2005, Pre-Trial Chamber II of the ICC issued warrants of arrest against him.⁹⁴ It was only about ten years later that Ongwen surrendered to U.S. military personnel stationed in the Central African Republic. He was eventually transferred to the ICC detention center in The Hague on January 21, 2015.⁹⁵ In his capacity as Brigade Commander of the Sinia Brigade of the LRA, he was charged before the ICC with seventy counts of crimes against humanity⁹⁶ and war crimes.⁹⁷

Prosecutor v. Ongwen is a case of many firsts for the ICC. Not only is Ongwen the first member of the LRA to appear before the ICC, but he is also the first former child soldier to be prosecuted before an international tribunal. Notably, he is likewise the first person charged by an international tribunal for committing crimes of

89. Ariadne Asimakopoulos, *Justice and Accountability: Complex Political Perpetrators Abducted as Children by the LRA in Northern Uganda* 31 (Aug. 13, 2010) (unpublished Master’s thesis, Utrecht University) (on file with Utrecht University Repository), <https://dspace.library.uu.nl/handle/1874/179214>.

90. *Id.*

91. *Id.*

92. *Id.*

93. OPEN SOCIETY JUSTICE INITIATIVE, *supra* note 4, at 2.

94. *Id.* at 3.

95. INTERNATIONAL CRIMINAL COURT, *supra* note 5.

96. *Id.*

97. *Id.*

which he himself was victim.⁹⁸

III. CRIMINAL RESPONSIBILITY OF THE HUNTED WHO BECAME THE HUNTER

Children are but the pawns of war.⁹⁹ On one hand, thousands of young boys and girls are used as puppets in the conflicts of men; they are abducted and beaten into submission, and exploited as couriers, sex slaves, and menials.¹⁰⁰ On the other hand, children are also sought out as victims to heighten the propaganda value of existing power brokers, becoming unfortunate but expendable casualties of war.¹⁰¹

Whether the child pulls the trigger or is but caught in the crossfire, international law recognizes children in armed conflict for what they truly are: victims.¹⁰² The dangers posed to children are not isolated to physical well-being alone, but psychosocial difficulties that greatly affect their development.¹⁰³ This is because the “experiences of children derive from their environment are the primary factors that determine their physical, emotional, social, and cognitive progress or delay.”¹⁰⁴ Considering the severe consequences suffered by children in hostilities alone, it has been submitted that customary international law comprehensively criminalized the recruitment and use of child soldiers.¹⁰⁵

Ongwen hence raises novel questions as to the victim status of the child soldier. While international law recognizes the child soldier’s protected status, *Ongwen*, a former child soldier himself, is tried as the perpetrator. But surely the hunted does not *ipso facto* become the

98. GRANT, *supra* note 87, at 1.

99. A. Pierre Casiraghi, Remarks in Areas of Armed Conflict (Aug. 24, 2006), in CHILDREN IN ARMED CONFLICT: ROUNDTABLE DISCUSSION 63 (Elizabeth Aguilin-Pangalangan & H. Harry L. Roque Jr. eds., U. Phil. Law Ctr.-Inst. of Int’l & Legal Studies 2006).

100. *Child Recruitment and Use*, OFF. SPECIAL REPRESENTATIVE SECRETARY-GEN. CHILDREN & ARMED CONFLICT, <https://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/child-soldiers/> (last visited Jan. 25, 2018).

101. Casiraghi, *supra* note 100, at 62.

102. *Id.*

103. PROTACIO-MARCELINO ET AL., *supra* note 81, at 59.

104. *Id.*

105. WERLE, *supra* note 33, at 331. *Contra* Casiraghi, *supra* note 101.

hunter upon his eighteenth birthday. Indeed, if the laws were meant to protect the child, it is inapposite to suggest that individual criminal liability can then be imposed by the sheer passage of time.¹⁰⁶ Having established the factual milieu from which *Ongwen* stems, the following segment will entertain Ongwen's rotten social background as a ground of exculpation.

A. ARTICLE 31: GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

Exculpating circumstances played a marginal role in the early history of international law.¹⁰⁷ Notably, no grounds for excluding criminal responsibility were provided under the Nuremburg Charter, nor the in the statutes of the Yugoslavia or the Rwanda Tribunals. In this respect *inter alia*, the Rome Statute makes "great strides in the direction of a fully-developed system of criminal law."¹⁰⁸ Article 31 reads in part:

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

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

...

(d) 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:

106. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 56.

107. WERLE, *supra* note 33, at 138.

108. *Id.* at 139.

- (i) Made by other persons; or
- (ii) Constituted by other circumstances beyond that person's control.¹⁰⁹

The following segment seeks to address the liability of the child soldier under the defenses of duress and mental defect. Because the Court directly addresses issues of duress in the *Decision on the Confirmation of Charges Against Dominic Ongwen*,¹¹⁰ emphasis will be placed on the Rotten Social Background defense as a mental defect under Article 31(1)(a).

1. Duress: The Devil's Choice

As emphasized by Ongwen's Defense Counsel, "it is not open to debate that [Ongwen] suffered all [the] vagaries of life" as a child soldier of the LRA.¹¹¹ All three sides of the argument—the Defense, Prosecutor, and OPCV—agree that Ongwen was abducted and brutally indoctrinated by the LRA.¹¹² Certainly not even the most eloquent argument can separate Ongwen the victim from Ongwen the commander. Indeed, the child who suffers from the soldiering cannot be separated from the soldier he grew up to become. The defense counsel argues that this is true considering the LRA victimized Ongwen during his formative years:¹¹³

Look at a small boy, a child who has been brought in the bushes and has not had the opportunity to relate with common society, common decent society, a boy who has no hope at all of ever returning to normal society, a boy who has no governmental protection to which to return or to report for protection, a boy whose only protection and guarantee to life was compliance, compliance or death. That is what I earlier on said, he was left with "the devil's choice." Your Honours, what do we mean by the devil's choice? [I]n a decision in the Ugandan court . . . dictator Idi Amin directed a certain woman to sell her property to the embassy of Somalia.

109. Rome Statute, *supra* note 10, at 107 (emphasis added).

110. WERLE, *supra* note 33, at 139 (recognizing the Court has allowed defenses of duress); *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on Confirmation of Charges, ¶ 151.

111. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 60-61.

112. *Id.* at 61.

113. PROTACIO-MARCELINO ET AL., *supra* note 81, at 78.

The woman was left with no choice but to sell the property. When Idi Amin was overthrown, this lady went to court, but the defendant brought the sale agreement and said, "But you signed this document selling your property." And the decision was as to whether she voluntarily consented to sell her property. Their Lordships in that case, your Honours, said no, that was not consent. Given the dictatorship of Idi Amin and his propensity to kill anybody who stood in his way, the lady was left with no choice but the devil's choice. . . . Your Honours, we submit that in everything that Dominic Ongwen did, he was left with the devil's choice.¹¹⁴

Ongwen's defense counsel argues that "throughout the turns and twists in the armed conflicts between the government of Uganda and the LRA, [Ongwen] lived his life under duress."¹¹⁵ The "all-knowing and all-seeing Joseph Kony instilled institutional ethos that required complete compliance and discipline."¹¹⁶ An alleged spirit medium, Kony utilized religious indoctrination to rule with complete and unfettered power.¹¹⁷ Throughout "the rest of [Ongwen's] life and until surrendering to the U.S. Special Forces, [Ongwen] remained under the apprehension of fear of imminent death, especially if he were to flee."¹¹⁸ Hence, Ongwen had only the devil's choice.

As opined by the Court in the *Decision on Confirmation of Charges*, duress would exclude criminal responsibility when:

- (i) the conduct of the person has been caused by duress resulting from a threat (whether made by other persons or constituted by circumstances beyond the person's control) of imminent death or of continuing or imminent serious bodily harm against that person or another person; and
- (ii) 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.¹¹⁹

114. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 49.

115. *Id.* at 57.

116. *Id.*

117. *Id.* at 56.

118. *Id.* at 57.

119. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 152.

The Pre-Trial Chamber ruled that the defense failed to establish that Ongwen's acts were either *necessary*, in terms of an absence of alternatives, or *reasonable*, to the end that the harm sought to be avoided outweighed the harm caused.¹²⁰ As to the first element, there was no showing that the perceived "threat of death" was imminent.¹²¹ The court ruled that such an interpretation would dangerously "provide a blanket immunity to members of criminal organisations which have brutal systems of ensuring discipline."¹²²

As to the second element of duress, otherwise referred to as the choice-of-lesser-evil approach, an act is proportionate if "the crime committed under duress [is], on balance, the lesser of two evils."¹²³ It remains unclear how Ongwen's conduct would be necessary and reasonable to avoid the alleged threat and satisfy "the required intent of proportionality for those crimes committed against the civilian population."¹²⁴ Considering the number of charges alone, which include various attacks on internally displaced persons camps in Pajule, Odek, Lukodi, and Abokl,¹²⁵ as well as sexual and gender based crimes,¹²⁶ Ongwen faces an uphill battle in arguing duress to escape criminal responsibility.¹²⁷ This is further bolstered by the fact

120. Albin Eser, *Article 31 Grounds for Excluding Criminal Responsibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVERS' NOTES, ARTICLE BY ARTICLE 863, 871 (Otto Triffterer ed., C.H. Beck, Hart & Nomos 2nd ed. 2008).

121. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 153.

122. *Id.* (holding that the Statute would not allow duress to be used if members of criminal organizations claim involuntary involvement).

123. Shane Darcy, *Defenses to International Crimes*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 231, 235 (William A. Schabas & Nadia Bernaz eds. 2010) (citing *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Appeals (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 2007)) (noting separate and dissenting opinions by Judge Cassese).

124. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 155.

125. *Id.* ¶¶ 65-85 (findings of crimes committed).

126. *Id.* ¶¶ 86-140; INTERNATIONAL CRIMINAL COURT, *supra* note 5 ("War crimes: attack against the civilian population; murder and attempted murder; rape; sexual slavery; torture; cruel treatment; outrages upon personal dignity; destruction of property; pillaging; the conscription and use of children under the age of 15 to participate actively in hostilities.").

127. INTERNATIONAL CRIMINAL COURT, *supra* note 5 ("Dominic Ongwen is accused, pursuant to articles 25(3) (a) (direct perpetration, indirect perpetration and

that Ongwen is charged not only as a direct and indirect perpetrator but under command responsibility as well.¹²⁸ In determining the limits on duress and necessity, “the perpetrator’s position in the military hierarchy must be taken into account.”¹²⁹

2. *Insanity: The Rotten Social Background*

In the Open Session of the Confirmation of Charges, the defense argued that Ongwen “was so obfuscated and befuddled by the hard experience [as a child soldier with the LRA] and the . . . devil’s choice he was left with.”¹³⁰ As to why the Defense Counsel sought to incorporate Ongwen’s rotten social background as duress rather than as a form of mental incapacity remains to be seen. This segment will entertain this latter thought.

Article 31(1)(a) of the Rome Statute excludes from criminal responsibility persons who suffer “from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct[.]”¹³¹ This provision embodies the “well-established principle of national criminal justice systems that incapacity or legal insanity serves as a categorical exclusion of criminal responsibility.”¹³² For a successful defense of insanity, the defense must establish:

1. That, at the time of the person’s conduct, the person suffers from a

indirect co-perpetration), 25(3)(b) (ordering), 25(3)(d)(i) and (ii) and 28(a) (command responsibility) of the Rome Statute, for the following crimes against humanity and war crimes. . . .”); WERLE, *supra* note 33, at 148 (citing *Prosecutor v. Erdemović*, Case No. IT-96-22-A, ICTY Appeals Chamber Judgment, Separate Opinion of Judge Cassese, ¶ 51 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997)); K. AMBOS, *DER ALLGEMEINE TIL DES VOLKERSTRAFRECHTS* 856 (2002); G-J. KNOOPS, *DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW* 68 (2001).

128. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges, ¶ 72.

129. WERLE, *supra* note 33, at 331.

130. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 56.

131. Rome Statute, *supra* note 10, at 107.

132. Eser, *supra* note 121, at 873 n.50 (citing GERHARD WERLE, *VÖLKERSTRAFRECHT* ¶ 375 n.245 (2003)); *Prosecutor v. Mucić*, Case No. IT-16-21-A, Judgment, ¶ 582 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

mental disease or defect; and

2. That the disease or defect destroys the person's "capacity to appreciate" the unlawfulness of his conduct or the "capacity to control" his conduct.¹³³

The first element concerns the *kind* of impairment, i.e. a "mental disease or defect."¹³⁴ Due to the ambiguity of these terms, what conditions among an array of infirmities falling within the ambit of "mental disease or defect" are not settled.¹³⁵ However, the mental defects contemplated in Article 31 generally refer to both impairments of cognition, i.e. awareness and understanding,¹³⁶ and volition, i.e. uncontrollable, irresistible impulses.¹³⁷ Indeed, as forwarded by Professor Albin Eser, it is both unnecessary and impracticable to interpret Article 21 as referring only to either cognition or volition because psychiatric distinction is in constant flux.¹³⁸

Notably, the term "insanity", let alone "clinical insanity", is not mentioned within the four corners of the Rome Statute. Rather, an obscure and malleable standard of "mental disease or defect" was adopted, which encompasses "any mental defect that achieves a degree of severity and permanence and can disrupt the perpetrator's ability to appreciate or control his or her conduct."¹³⁹ This excludes merely temporary states of exhaustion or excitement,¹⁴⁰ as well as emotional disturbances such as deep sorrow or blind rage.¹⁴¹ Only

133. Rome Statute, *supra* note 10, at 107.

134. *Id.*

135. *Id.*

136. WILLIAM WILSON, CRIMINAL LAW: DOCTRINE AND THEORY 231 (I.H. Dennis et al. eds., 2nd ed. 2003).

137. Delgado, *supra* note 13, at 11 (citing ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 936-1015 (3d ed. 1982)); Eser, *supra* note 121, at 871 (citing Peter Krug, *The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation*, 94 AM. J. INT'L L. 317, 324 (2000)).

138. WERLE, *supra* note 33, at 159 (citing Eser, *supra* note 121); GEERT-JAN ALEXANDER KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 114 (Martinus Nijhoff Publishers ed., 2nd ed. 2001).

139. See *Prosecutor v. Mucić*, Case No. IT-16-21-A, Judgement, ¶ 582 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

140. WERLE, *supra* note 33, at 159.

141. *Id.*

“mental disturbances that destroy the perpetrator’s capacity to appreciate” the unlawfulness of one’s own conduct can lead to the exclusion of responsibility.¹⁴²

Under the second element, one’s ability must not only be impaired, but also destroyed.¹⁴³ To avoid an unrealistic interpretation of the law, scholars opine that only substantial, rather than absolute, impairment of cognitive or volitional abilities suffice.¹⁴⁴

It is submitted that an actor’s rotten social background may constitute a mental disturbance that destroys his capacity to appreciate the unlawfulness of his own conduct.¹⁴⁵ Rotten Social Background evidence consists of contextual elements such as the subject’s childhood, squalor, or abuse.¹⁴⁶

The Rotten Social Background defense was first raised by Judge Bazelon of the United States Court of Appeals for the District of Columbia in his dissent in *United States v. Alexander*.¹⁴⁷ The defendant, Murdock, shot and killed a Marine who called him a “black bastard.”¹⁴⁸ Although the defense failed to establish clinical insanity, expert testimony showed that Murdock’s “rotten social background conditioned him to respond to certain stimuli in a manner most of us would consider flagrantly inappropriate.”¹⁴⁹ Notwithstanding, the trial judge instructed the jury to disregard testimony, resulting in a finding of guilt which resulted in a twenty years to life sentence.¹⁵⁰ In his dissent, Judge Bazelon argued that the evidence of Murdock’s Rotten Social Background should have been considered while adjudging criminal

142. Rome Statute, *supra* note 10, at 107.

143. Sander Janssen, *Mental Condition Def. in Supranational Criminal Law*, 4 INT’L CRIM. L. REV. 83, 84 (2004).

144. WERLE, *supra* note 33, at 159.

145. Mythri A. Jayaraman, *Rotten Social Background Revisited*, 14 CAP. DEF. J. 327, 328-29 (2002) (referring to Judge Bazelon’s dissent stating that the defendant was not able to use the Rotten Social Background evidence to show he lacked moral responsibility for the murder).

146. *Id.* at 327.

147. *Id.* at 327-28. *See generally* *United States v. Alexander*, 471 F.2d 923 (D.C. Cir. 1973) (Bazelon, CJ., dissenting).

148. *United States v. Alexander*, 471 F.2d at 929.

149. *Id.* at 960.

150. *Id.* at 927.

responsibility.¹⁵¹

The Rotten Social Background defense is analogous to that of coercive indoctrination—the changing of a person’s values or beliefs through forceful means.¹⁵² As opined by Professor Paul H. Robinson of the University of Pennsylvania:

[W]here a child’s development is under conditions that inevitably normalize the child to see violence and deceit as acceptable and indeed necessary methods of negotiating the challenges of daily life . . . [o]ne could argue that such conditions are analogous to a process of coercive indoctrination and can render an offender blameless[.] Thus, a defendant who would not have committed the offense in question were he the “old self” might claim that he should get a defense since he acted only because of new beliefs and values forcibly imposed on him, for which he ought not be held accountable.¹⁵³

Involuntariness contemplates not only external restraint on volition but also internal interference with cognition and control.¹⁵⁴ According to Professor Richard Delgado, the relationship between environmental adversities and criminal behavior may be so vigorous that external factors create a propensity to commit crime.¹⁵⁵ Indeed, there is no culpability when a defendant’s criminal behavior is caused by factors beyond his control.¹⁵⁶ If only to give life to the basic tenet of criminal justice *actus me incito factus non est meus actus*, an act done against one’s will, whether by external or internal restraint, should not be imputed as one’s own act.¹⁵⁷

The long-term effects of child soldiering are recognized not only as a matter of fact but as policy enshrined in various sources of law.¹⁵⁸ The ICC itself recognized in *Lubanga* the “environment of

151. *Id.* at 960.

152. Robinson, *supra* note 17, at 53.

153. *Id.* at 54-55.

154. Delgado, *supra* note 13, at 16.

155. *Id.* at 55-56.

156. *Id.* at 16.

157. See *United States v. Ah Chong*, G.R. No. L-5272 (S.C., Mar. 19, 1910) (Phil.), http://www.lawphil.net/judjuris/juri1910/mar1910/gr_l-5272_1910.html; Rome Statute, *supra* note 10, at 107.

158. See generally G.A. Res. 54/263 (Mar. 16, 2001).

terror” that child soldiers were incessantly subjected to.¹⁵⁹ It is universally understood that children are a protected class who must be guarded from exploitation.¹⁶⁰ In international law, it is no mystery that children’s participation in armed conflicts “teaches [them] the rule and culture of violence, disrupts their education and frequently results in gravest traumas, since children are even less capable to deal with the horrors of war than grown adults.”¹⁶¹ Again, IHRL, IHL, and ICL prohibit the recruitment and use of children in hostilities for the protection of their physical, psychological, and psychosocial well-being.¹⁶²

Ongwen was undoubtedly subject to the brutalities of war. At the young and impressionable age of nine years old, the LRA abducted and subjected him to the vagaries of coercive indoctrination;¹⁶³ a brutal process where the child is “brainwashed”¹⁶⁴ to abandon well-known social paradigms and adopt a war-themed philosophy: kill or be killed.¹⁶⁵ In a revealing interview with the ICC prior to his incarceration, Ongwen states, “In my mind, I thought war was the best thing. Even up to now, I dream about war every night. But if they don’t want to forgive me, I leave it in their hands. I have become like a lice, which you remove from your hair or waist and

159. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Opening Statement at 6.

160. *25th Anniversary of the Convention on the Rights of the Child*, HUM. RTS. WATCH (Nov. 17, 2004), <https://www.hrw.org/news/2014/11/17/25th-anniversary-convention-rights-child>.

161. Cottier, *supra* note 36, at 467.

162. *Id.*; PROTACIO-MARCELINO ET AL., *supra* note 81, at 59.

163. Robinson, *supra* note 17, at 70-72 (stating that Tree Frog, Alex’s captor, put Alex through psychological debilitation by reducing his food, which in turn gave Tree Frog extensive control over Alex).

164. Asimakopoulos, *supra* note 89, at 31 (stating that the LRA forced its abductees to watch one of their own be killed to show that if they try to escape they too will be killed).

165. *See Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 57 (testifying that in the bush it was survival of the fittest); *see also* Mark A. Drumbl, *Victims Who Victimize: Transcending International Criminal Law’s Binaries*, WASHINGTON & LEE PUBLIC LEGAL STUDIES RESEARCH PAPER SERIES 8 20-21 (Jan. 29, 2016) [hereinafter, Drumbl, *Victims Who Victimize*] (describing how Ongwen rose from child soldier to commander where he became the abuser).

kill without any resistance.”¹⁶⁶

Ongwen’s values and beliefs were molded by his environment while he was a child soldier. The LRA precisely executes a six-month indoctrination process to inculcate abductee of its values, or lack thereof. Because Ongwen is incapable of appreciating the unlawfulness of his own conduct,¹⁶⁷ it may be argued that he is excluded from criminal responsibility under Article 31(1)(a).

Trauma is neither suffered nor alleviated in a social vacuum. Ongwen, having spent his formative years and adult life with the LRA, inculcates the disvalues of the same—a species of Social Darwinism where only the most fit survive.¹⁶⁸ Certainly it is difficult to separate the child who suffered from soldiering from the soldier he eventually became. Ongwen, the Brigadier General, carries with him the same traumas and values formed by Ongwen the child soldier. The former is but the necessary product of the latter. For the Court to turn a blind eye to this reality runs the risk of failing to give life to the rights of the child the law so vehemently seeks to protect.

IV. PASSING THE POISONED CHALICE: DOCTRINAL REPERCUSSIONS OF *ONGWEN*

It is said that the greatest dangers to liberties “lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”¹⁶⁹ This Part will address the doctrinal repercussions of ruling for or against the rotten social background as a defense of the victim turned perpetrator.

A. CHILD SOLDIERS: VICTIM IN LAW, PERPETRATOR IN PRACTICE

Pursuant to Article 26 of the Rome Statute, any person under the age of eighteen at the commission of a crime is excluded from the

166. See Green, *supra* note 2.

167. See also Prosecutor v. Ongwen, ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 56 (testifying that Ongwen was forced to commit heinous acts that no child should even witness).

168. See *id.* at 35-36 (stating that Ongwen, although initially an abductee transitioned into a LRA commander who abused others with his new-found power).

169. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting); Rome Statute, *supra* note 10, at 106.

ICC's jurisdiction.¹⁷⁰ A *verba legis* appreciation of this provision suggests that in the eyes of the law, upon the child soldier's eighteenth birthday, he *ipso facto* sheds the protected status of victim, and dons the role of perpetrator.¹⁷¹ There is an apparent incongruity in protecting the rights of the child only to subsequently try him upon his coming of age. As Ongwen's Defense Counsel forwarded in the Court's Open Session, if the body of international law truly seeks to defend the child soldier, it would be antithetical to that purpose to impose criminal liability upon the unfortunate many whom the law failed to protect.¹⁷²

It has been argued that to indict Ongwen is to indict all of the child soldiers in the world,¹⁷³ as the Court's decision determines not only Ongwen's fate but the narrative international law will shoulder in dealing with the child soldier who has come of age. Ongwen's Defense Counsel was quick to point out that as the Court sits, present-day child soldiers await to hear what would happen to them if they risked to escape.¹⁷⁴

The ICC has taken a favorable stance to the child soldier in the past.¹⁷⁵ The case of *Lubanga* recognized that the experience of the child soldier is ongoing as it renders the child damaged for life. Who they are today is but a derivative of their previous sufferings.¹⁷⁶ Indeed, "[o]nce a child soldier in fact, always a child soldier in mind, body, and soul."¹⁷⁷ Yet the Court seems to have taken a different

170. GRANT, *supra* note 87, at 10 (debating whether it is appropriate to hold a former child soldier responsible for crimes he then commits as an adult).

171. Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 15-16.

172. GRANT, *supra* note 87, at 17.

173. *But see* Drumbl, *Victims Who Victimize*, *supra* note 166, at 23-24 (arguing that Ongwen went far beyond the abuse rendered by other child soldiers who gained power and therefore he should be punished).

174. *See* GRANT, *supra* note 87, at 21 (stating that it is imperative to set precedent).

175. *See* Drumbl, *Victims Who Victimize*, *supra* note 166, at 25 (differentiating Ongwen's case with *Lubanga*).

176. Report of Ms. Schauer (CHM-0001), The Psychological Impact of Child Soldiering, ICC-01/0401/06-1729-Anx1 (EVD-CHM-00001).

177. *See* Mark A. Drumbl, *Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering*, JUST. CONFLICT (April 20, 2016), <https://justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of->

approach in *Ongwen*, treating Ongwen's respective roles as abductee and abductor as separate and distinct, rather than one of cause and effect.¹⁷⁸

It is the opinion of the author that, rather than drawing a fine line at the age of adulthood,¹⁷⁹ Ongwen must be adjudged in light of the circumstances of the case in its totality. Such would be most in line with the modern theory of criminal law, which recognizes "crime as essentially a social and natural phenomenon."¹⁸⁰ Thus, the accused cannot be "treated and checked by the application of abstract principles of law . . . fixed and determined a priori, but rather through the enforcement of individual measures in each particular case after a thorough, personal and individual investigation[.]"¹⁸¹

Through the course of the proceedings, the ICC will bear the burden of balancing the conflicting demands of criminal liability on one end, and human rights protections of the child on the other. Indeed, excusing Ongwen based on the circumstances of his past may sow the seeds of our own future degradation;¹⁸² yet in that same breath, perhaps the best reason to acknowledge Ongwen's rotten social background is that it would be the height of injustice to ignore it.¹⁸³

child-soldiering.

178. See *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges Against Dominic Ongwen, ¶¶ 150-51 (Mar. 23, 2016) (arguing that Ongwen was not criminally liable because he was an abductee and was under duress).

179. See Rome Statute, *supra* note 10, at 106.

180. LUIS B. REYES, CRIMINAL LAW 24 (18th ed. 2012).

181. *Id.*

182. Orde Coombs, 'Speak! Black Thugs Are Not Victims', *Essence*, January 1984, 116:

It is evident that such spurious thinking must end, for it has led us as a community to abandon old values, to excuse unconscionable wrongs. . . . [I]n the excuses we make for the misconduct of our young people . . . we sow the seeds of our own future degradation. Those of us who work hard owe it to our-selves and to other Blacks to refuse to put up with the current landscape of Black hooliganism and self-contempt.

183. See Delgado, *supra* note 13, at 79 (summarizing the reasons for why

B. OPENING THE FLOODGATES TO A BLANKET DEFENSE

Ongwen's case may set precedent in more ways than one. While others believed that ruling against liability will have serious repercussions on the former child soldier, Ongwen's acquittal also poses a danger to the structure of ICL. Similar to the *ratio decidendi* of the Court on duress, adopting the Rotten Social Background defense would open the floodgates "to a blanket immunity to members of criminal organizations which have brutal systems of ensuring discipline."¹⁸⁴

Arguing against the Rotten Social Background defense, Professor Stephen Morse emphasized that "all environments affect choice, making some choices easy and others hard."¹⁸⁵ While external circumstances, such as poverty, may indeed create a propensity to commit crime, rarely does it completely eliminate a person's power of choice.¹⁸⁶ While Professor Morse conceded to the correlation between environment and crime, he denied any causal relationship between the two.¹⁸⁷

Professor Morse's contentions are inapplicable to *Ongwen*. First, the illusion of free will finds no room for application. The child soldier is not given an easy or difficult choice but only the devil's choice.¹⁸⁸ Coercively indoctrinated as a minor into the LRA, the LRA compelled Ongwen to either suffer or carry out the suffering. Through these acts he inculcated the values of the LRA, which he carried with him through his adult life. Again, to argue against the continuing nature of trauma and psychological burdens borne by the former child soldier who has come of age is not only contrary to reason but incompatible with the overarching objectives of

ignoring a rotten social background would be unfair).

184. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges ¶ 153.

185. Stephen Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1252 (1976).

186. *See id.* at 1267-68 (stating that power of choice is a basic human capability).

187. *See id.* at 1260 (finding a correlation but not a causation between poverty and crime).

188. *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Transcript of the Confirmation of Charges, 49.

international law on the rights of the child.

Second, the poverty and crime analogy is incompatible with the paradigm of a child soldier. As earlier established, IHRL, IHL, and ICL prohibit the recruitment and use of child soldiers to avoid the very situation where the child is exploited and coercively indoctrinated by his captors.¹⁸⁹ Unlike child soldiers who are deemed victims in the eyes of the law, the penury does not enjoy a similar status as casualties of economic circumstance.

Third, assuming that most are able to withstand internal restraints engendered by external factors, that fact alone would not dictate the Court's proceedings. Indeed, the issue is not whether people in general are capable of overcoming their rotten social background. Instead, the question is whether the rotten social background of the defendant was a causative factor in the commission of the crime.

It is not the role of the court to rule on hypotheticals.¹⁹⁰ The Rome Statute itself expressly mandates the Trial Chamber to "base its decision only on evidence submitted and discussed before it at the trial[.]"¹⁹¹ rather than mere potentialities.¹⁹² While the obvious danger of opening the insanity defense to more liberal psychic affections is a legitimate concern, neither the Statute nor Rules of Procedure and Evidence give doctrinal repercussions value when weighing the scales of justice.¹⁹³

Put differently, to rule on Ongwen's liability based on a probable effect rather than deciding on the record *per se* could run afoul basic tenets of due process and principles of fair play.¹⁹⁴ Yet, perhaps, doctrinal repercussions are but an inevitable consideration of

189. See also *International Standards, CHILD SOLDIERS INT'L*, <https://www.child-soldiers.org/international-standards> (last visited Mar. 8, 2018) (stating that IHL sets the limit at age 15).

190. See Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. INT'L L. 537, 570-71 (2009) (arguing that the court should be hesitant when fact-finding).

191. Rome Statute, *supra* note 10, at 134.

192. See *id.* (stating that the decision should be based on the totality of the evidence).

193. See *id.* at 130-31 (discussing the rules of evidence).

194. See *id.* at 104 (asserting the applicable law); see also *id.* at 129-31 (describing the rules of evidence and the rights of the accused).

adjudication, lest we forget that the record on which the Court judges Ongwen today is the record on which history will judge the child soldier tomorrow.¹⁹⁵

V. CONCLUSION

There is ample basis to argue that Ongwen's dreadful past as a child soldier may blur the line of discernment. Because this is a question of fact and not of law, it would be best adjudged on the evidence presented in the course of the trial rather than legal precept alone. Considering that the threshold of Article 31(1)(a) is the degree of impairment, i.e. that it be more than a temporary mental defect but a substantial disturbance of some duration, through the use of expert testimony¹⁹⁶ the Court is capable of making an objective determination on whether Ongwen's rotten social background destroyed his capacity to appreciate the nature of his conduct. It must be emphasized that the Rome Statute does not require "insanity" *per se* to exclude criminal responsibility. Rather, the ground adopted by the Statute is purposely made obscure to encompass any "mental disease or defect" that destroys the capacity to appreciate the nature of one's conduct.

The Court in *Ongwen* faces the difficult task of determining where the realm of the victim ends and that of the perpetrator begins. It would be naive to suggest that the very traumas and long-term psychological effects the law seeks to avoid magically vanish because Ongwen is charged with the same crimes he fell prey to so many years ago¹⁹⁷ upon his coming of age.¹⁹⁸ It thus appears that the

195. See also Sarah Kihika Kasande & Virginie Ladisch, *The Complex Reality Beyond the Trial of Dominic Ongwen*, INT'L CTR. TRANSITIONAL JUST. (Dec. 5, 2016), <https://www.ictj.org/news/complex-icc-ongwen> (discussing the importance of the Ongwen case and its lasting repercussions).

196. See also Prosecutor v. Banović, Case No. IT-02-65/1-S, Sentencing Judgement, ¶ 77 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 28, 2003) (noting that the defense introduced evidence from expert witness Dr. Mikoš Biro, a University clinical psychologist professor who found the defendant able to understand the consequences of their actions).

197. See Prosecutor v. Ongwen, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 68 (stating that Ongwen's past as a child soldier transcended into his adult life).

198. See also Cottier, *supra* note 36, at 468-69 (discussing the how international

Court must confront not only the hefty burden of adjudication but the sensitivities of ensuring that the long-term objective of protecting the child soldier is neither abandoned nor shifted.