

Department of Law, University of Gothenburg

Master of Laws Programme

Master's thesis, 30 ECTS

Fall 2016

Trivialising Through Trial

The Victim-Perpetrator in International Criminal Law

Author: Johan Lindberg

Examiner: Joachim Åhman

Supervisor: Mikael Baaz

Style guide: International Journal of Transitional Justice

1. INTRODUCTION	2
1. 1 PROLOGUE	2
1. 2 LORD’S RESISTANCE ARMY AND CHILD SOLDIERING	3
1. 3 AIM	5
1. 4 SCOPE AND LIMITATIONS	6
1. 5 METHOD AND MATERIAL	6
1. 6 INTRODUCING THE DILEMMA OF THE VICTIM-PERPETRATOR	7
2. ANALYSIS OF INTERNATIONAL CRIMINAL LAW AND THE VICTIM-PERPETRATOR	10
2. 1 A LEGAL ISSUE?	10
2. 2 WHY PUNISH A VICTIM-PERPETRATOR?	14
2. 2. 1 THE VICTIM-BACKGROUND DEFENCE	23
2. 3 THE NARRATIVE IN INTERNATIONAL CRIMINAL TRIALS	25
2. 4 THE CAPACITY OF INTERNATIONAL CRIMINAL LAW	34
3. CONCLUDING REMARKS	42
3.1 HARD CASES MAKE BAD LAW	42
3. 2 A NEW TYPE OF DETERRENCE	42
3. 3 A POST-MODERN PROCEDURE	43
3. 4 SENTENCING A VICTIM-PERPETRATOR	43
3. 5 LAW WITHOUT MORALITY	45
BIBLIOGRAPHY	47
TREATIES AND CONVENTIONS	47
INTERNATIONAL CASE LAW	47
NATIONAL CASE LAW	47
BOOKS	48
ARTICLES	49
U.N. DOCUMENTS	52
NEWSPAPERS	52
WEBSITES	52

1. INTRODUCTION

1. 1 Prologue

Writing about International Criminal Law (ICL) is quite different from law in general. Not even mentioning the political aspect of international law as such, ICL aspires to deal with the most monstrous aspects of humanity. There cannot be anything more despicable than to be convicted for crimes against humanity. To differentiate between homicide and genocide is a challenging task, both morally and legally: how does one make the incomprehensible comprehensible? Is it within law's potential to adequately respond to these atrocities?

Within ICL, the discussion ranges from post-colonial criticism to the potential of the human mind and the nature of evil, which makes for more of a hybrid, interdisciplinary field of research. I would thereby like to start this thesis with a rather extensive conclusion made by the late Hannah Arendt after attending the Eichmann trial in Jerusalem 1961-1962.

Some years ago, reporting on the trial of Eichmann in Jerusalem, I spoke about 'the banality of evil' and meant with this no theory or doctrine but something quite factual, the phenomenon of evil deeds, committed on a gigantic scale, which could not be traced to any particularity of wickedness, pathology, or ideological conviction in the doer, whose only personal distinction was a perhaps extraordinary shallowness. However monstrous the deeds were, the doer was neither monstrous nor demonic, and the only specific characteristic one could detect in his past as well as in his behavior during the trial and the preceding police examination was something entirely negative: it was not stupidity but a curious, quite authentic inability to think.¹

This perspective is the most inspiring reason for why I have developed a certain interest for ICL in general, and for individual responsibility for collectively committed atrocity, in particular. It was also an essential element in my first reaction concerning the former child soldier, Dominic Ongwen from Lord's

¹ Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), 159.

² This amount, 70 charges, is the largest number of counts in the history of international criminal

Resistance Army (LRA), who is currently awaiting 70 charges of war crimes and crimes against humanity before the International Criminal Court (ICC), some that he himself have been a victim of.²

1. 2 Lord's Resistance Army and Child Soldiering

For 30 years, the rebel group LRA, originating from Acholi (Northern Uganda), plundered in Uganda and across borders in South Sudan, the Democratic Republic of Congo and the Central African Republic. The LRA have operated with extraordinary violence and brutality, they have launched attacks masquerading as military soldiers and murdered equate to the widespread nature of genocide and crimes against humanity. Fighting for a 'biblical' state, the group has killed more than 100 000 people, and kidnapped more than 60 000 children over the three decade-long conflict.³ Capturing those useful for their group, the LRA targeted children strong enough to carry weapons to be indoctrinated into the organization and transformed into child soldiers. Partly because of this brutality, the ICC issued arrest warrants in 2005, concerning five of the leaders: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen.⁴ While the rest are either dead or still at large, Ongwen, after surrendering himself to US troops in the Central African Republic, is now awaiting trial before the ICC under the charges of war crimes and crimes against humanity, including murder, pillage and enslavement. The *Ongwen* case is an especially adequate subject to discuss the width of individual responsibility under ICL since he, as a legal subject, is both a victim and a perpetrator. As a 'victim-perpetrator', he has suffered from the crime against humanity of enslavement, war crimes such as conscription and use as a child soldier, and of cruel treatment – the same crimes that he now stands accused of.⁵

² This amount, 70 charges, is the largest number of counts in the history of international criminal tribunals, *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, International Criminal Court.

³ Jason Burke, 'Child soldier to war criminal: the trial of Dominic Ongwen', *The Guardian*, 27 March 2016, <http://www.theguardian.com/law/2016/mar/27/dominic-ongwen-war-crimes-trial-former-child-soldier-icc-uganda>.

⁴ *The Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, Case No. ICC- 02/04-01/05-57, Warrant of Arrest from the International Criminal Court, 13 October 2005.

⁵ All parties in the procedure acknowledge Ongwen's background as a child soldier, see for instance the statement of the Prosecutor in Transcript of Confirmation of Charges hearing 22 January 2016 page, 58-59.

Despite the well-documented list of atrocities, I could not help but question the issue of actual guilt.

It is evident that the case of Ongwen causes a lot of headache among the professionals around the ICC, one of them being the defence counsel of Ongwen who stated:

When you get a person at the age of ten, and you keep him in the bush, you keep him, and teach him the art of killing, the art of remorselessness – you know – he turns into an animal. So is he responsible for the change of heart – is he responsible? So, I find a lot of conflict in my mind, about what I would do with a man like Dominic Ongwen.⁶

Even the President of the assembly of the state parties of the ICC seems confused, answering the question of why a victim of abduction should be indicted by replying ‘I am asked this question ... and I have to say I do not know’.⁷ The question of prosecuting subjects that have experienced child soldiering has also been addressed by the Secretary General of the UN upon the establishment of the Special Court of Sierra Leone. In the Sierra Leone Report, he recognises the moral dilemma:

The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.⁸

⁶ Said by the former LRA Legal Advisor and present defense counsel for Ongwen, Krispus Ayena Odong, 28 October 2013, <https://www.youtube.com/watch?v=OXoT2I27oMU>.

⁷ Profile of the LRA Commander Dominic Ongwen, *NTV Uganda*, 7 January 2015, <https://www.youtube.com/watch?v=iMZ-Kytz7E0>

⁸ *The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. SCaR, 1: 23, U.N. Doc. S/2000/915 (2000).

Child soldiers are raised in depraved surroundings with structural violence always present. Raised under duress, the children are being ordered to kill others trying to escape the armed group and often stand before the choice to kill or be killed. As Hannah Arendt puts it, the ‘comprehension does not deny the outrageous ... it means the facing up to, and resisting of, reality, whatever that may be’.⁹

Before moving further, I would like to stress that this thesis does not advocate impunity, or in any other way to marginalize the atrocities that ICL was created to give response to. To question the ambivalent relationship between individual responsibility in an ‘widespread and systematic attack’ of Article 7 of the Rome Statute on the one hand, and the possible context-based guilt of the society where the perpetrator is raised on the other, risks to be misunderstood as relativizing in absurdum. With that said, ICL should not be self-evident in its purpose; intolerable atrocities do not provide ICL with any lower thresholds of legitimacy than criminal law in general. It is not enough that it just ‘feels right’ to punish. On the contrary, the importance of criticism for the sake of improvement is even more desired in the light of intolerable atrocities – and with that desire in mind I write this thesis.

1.3 Aim

The aim of this thesis is to discuss the new legal subject victim-perpetrator, and to investigate the legal and moral dilemma of prosecuting former child soldiers. This unprecedented situation challenges earlier jurisprudence from the ICC where the suffering from being a child soldier has been assessed as on going, a trauma that never goes away. The question of how to develop case law on this matter is particularly interesting. This thesis does not only discuss the effects of declaring Ongwen guilty or innocent, but also discusses the narrative in which that is done. What issues that are included in this narrative are of wider importance than to Ongwen himself, since this will set a future precedent that will affect international criminal trials long after the *Ongwen* trial is done. Trials in ICL are, as has been argued before, not only about judging but also about establishing historical record.¹⁰ The intention is to question the narrative of the trials, and discuss how we could

⁹ Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York City The Viking Press 1963), viii.

¹⁰ Cf. William A. Shabas, ‘Sentencing by International Tribunals: A Human Rights Approach’, *Duke Journal of Comparative and International Law* 7 (1997) and Martti Koskeniemi, ‘Between Impunity and Show Trials’, (2002), 6 *Max Planck Yearbook of United Nations Law*, vol 6.

provide etiological understanding of how atrocity occurs and spread. Subsequently, this thesis will assess whether this consideration of the narrative is within the capacity of ICL. This will be done through the following main issues: (1) Why former child soldiers are a legal issue; (2) Why victim-perpetrators shall be punished in ICL; (3) The narrative in ICL-trials and (4) The capacity of ICL.

1. 4 Scope and Limitations

The scope of the thesis is of course tied to answering the main questions above. The discussion regarding the second question of why we should punish a victim-perpetrator will not engage in any deepened analysis of *mens rea*, the mental element of the crime; rather, I will probe the grounds for excluding responsibility.

The concept of victim-perpetrators transcends the traditional line between victim and perpetrator in criminal law – both national and international. Not really suitable as either ugly perpetrator or pure victim, it creates a lacuna, which lacks coverage in the literature.¹¹ However, this thesis will not examine child soldiers as subjects in ICL, instead it will concentrate on the issues relating to former child soldiers. That said, the thesis contains aspects of child soldiers as protected by international law in general.

The procedure of Ongwen is still in pending, which means that documents submitted to the ICC after 20 December 2016 and the judgment itself are not to be covered below. This fact is, of course, a limitation in itself, but also a certain academic privilege in producing text on the brink of the creation of precedent.

1. 5 Method and Material

First of all, the structure and nature of this thesis is most similar to that of an article in an academic journal. For example, I have used the style guide from International Journal of Transitional Justice.

No international tribunal has yet considered the legal issues relating to the responsibility of former child soldiers. Furthermore, this issue has only sparingly been addressed in the doctrine. Below, ICL and its case law will be analysed with a contextual method of interpretation where I focus on judgments as narrative, as an establisher of the past in a post-conflict atmosphere. Additionally, writing this thesis

¹¹ The only scholarship so far: Mark A. Drumbl, 'Victims Who Victimize: Transcending International Criminal Law's Binaries', *London Review of International Law* Vol 4, Issue 2 (2016).

on the unprecedented calls for analogies with domestic law, comparative methods of interpretations of earlier case law and interdisciplinary reason in search for the legitimate precedent. One example of the interdisciplinary method is the extensive use of the mainly political philosopher Hannah Arendt, although by some recognized as a theorist of ICL.¹² As mentioned, there is no precedent regarding former child soldiers and the use of jurisprudence from international tribunals is therefore limited, not to mention that the *Ongwen* case is pending before the ICC. The majority of the material used is thus from the academia.

The approach will be to compare theories and criticism about ICL as establisher of history with the purpose of individual responsibility for international crimes, including discussing the discourse setting at trial and the relevance of context in international criminal trials.

1. 6 Introducing the Dilemma of the Victim-Perpetrator

The first victim-perpetrator to enter an ICC trial is the above-mentioned former child soldier Dominic Ongwen. Ongwen was abducted by the LRA when walking to school at the age of nine, and then ‘... tortured ... forced to watch people being killed and was used for fighting as a child soldier’.¹³ Too small to hike, he was carried by older rebels towards the camp, instantly placed in the house of his lapmony (teacher) Vincent Otti – formerly second-in-command next to Joseph Kony, the leader of the LRA.¹⁴ Why we have not seen any similar cases until now is not only because of the rather few trials at the ICC, but also because most child soldiers do not rise within the ranks to become one of the ‘most responsible’. The Prosecutor of the ICC has expressed the selectivity, urging to ‘focus its investigations ... on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes’.¹⁵ While, Ongwen still remains the youngest ever to be in custody in The Hague.

¹² David Luban, ‘Hannah Arendt as a Theorist of International Criminal Law’, *International Criminal Law Review* 11 (2011), 621-641.

¹³ Thomas Odhof, part of the defense team for Ongwen, <https://www.theguardian.com/law/2016/mar/27/dominic-ongwen-war-crimes-trial-former-child-soldier-icc-uganda>

¹⁴ *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript from Pre-Trial Chamber II of the International Criminal Court.

¹⁵ *Paper on some policy issues before the Office of the Prosecutor* (2003), p. 7, <https://www.icc-cpi.int/NR/>

If criminal responsibility in ICL strictly focuses on the age of eighteen, the division between victim and perpetrator can be upheld. However, the Prosecutor of the ICC has not accepted any policy of former child soldiers accused of core crimes.¹⁶ To uphold this age limit is, of course, comfortable, but if we look at the ICC as a storyteller that shall establish the truth of events of international crimes it is a not very suitable strategy to handle a past full of conflict. To see ICL as a service of remembrance is nothing new or unusual: ‘The lessons of history must be repeated for future generations in order to help prevent the political consequences of the crimes that were associated with undemocratic regimes...’¹⁷

If you are accused of committing war crimes you most likely possess a complex personality. However, this is the first time this duality has reached an international tribunal and the profile is not new. On the contrary, this kind of victim-background is a common foundation in the creation of a war criminal and plays a frequent role in how atrocities occur and spread. The only combination of facts necessary to create this legal and moral dilemma is a conflict long-enduring enough to let someone grow from child soldier to one of the ‘most responsible’ – and an international community passive enough to let the conflict be long-enduring in the first place. The *Ongwen* judgment will be an important precedent on how ICL will handle complex perpetrators such as former child soldiers in the future. To put it in the words of the late controversial Jacques Vergès: ‘The beauty of a trial can be measured by the trail it leaves behind, long after the sentence has been pronounced.’¹⁸

Perpetrators in ICL are generally viewed as sadists and savages, but most likely they are ordinary persons. Ordinary persons in extraordinary circumstances might create a social construction where killing and raping is something necessary and good – a virtue. Alette Smeulers has created three pre-atrocity categories of people: (1) the law-abiding citizen; (2) borderline types, and (3) criminals. When atrocity occurs, these characters develop into different types of perpetrators. In short, these typologies of perpetrators consist of: the criminal mastermind; the profiteer; the criminal/sadist; the fanatic; the conformist/follower and the compromised

¹⁶ The Office of the Prosecutor did not mention it in the *DRAFT Policy in Children*, (22 June 2016).

¹⁷ William A. Shabas, ‘Sentencing by International Tribunals: A Human Rights Approach’, *Duke Journal of Comparative and International Law* 7 (1997), 516.

¹⁸ Jaques Vergès in Brita Sandberg and Eric Follath ‘Interview with the Notorious Lawyer Jaques Vergès: There is No Such Thing as Absolute Evil’ *Der Spiegel*, 21 November 2008.

perpetrator. The compromised perpetrator can also be seen as a captive participant acting through fear; the victim-perpetrator would be placed under this compromised type. The compromised type is in some way or another forced or pressured into collective violence in a poor social situation such as unemployment or young age.¹⁹

International criminal trials assess crimes committed in extraordinary chaos that contain complexities that domestic trials do not need to examine. In this case, the concatenation of victim and perpetrator disrupt the normal division in criminal trials. Immi Tallgren explains how the normal division is troublesome in ICL:

The seemingly unambiguous notions of innocence and guilt create consoling patterns of causality in the chaos of intertwined problems of social, political, and economic deprivation surrounding the violence. Thereby international criminal law seems to make comprehensible the incomprehensible.²⁰

Further, Tallgren describes individual criminal responsibility as a reducing phenomenon making atrocities easier for the eye it reduces complexity and the scale of multiple responsibilities to a mere background. However, Janus-faced subjects, such as Ongwen, do not necessarily make the atrocities easier for the eye. Instead, empathy arouses when reading about the tragic and ironic fate of Ongwen. Discussing the subject with friends and colleagues made it clear to me that there is an interesting difference between the intuitive reactions from legal and non-legal minds. The non-legal minds tend to advocate acquittal on moral grounds, while the legal ones seem more likely to support conviction.

¹⁹ Alette Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in *Supranational Criminology: Towards a Criminology of International Crimes*, ed. Alette Smeulers and Roelof Haveman (Cambridge: Intersentia, 2008.), 234-257.

²⁰ Immi Tallgren, 'The Sensibility and Sense of International Criminal Law', *European Journal of International Law* vol 13 no .3 (2002), 593 f.

2. ANALYSIS OF INTERNATIONAL CRIMINAL LAW AND THE VICTIM-PERPETRATOR

2. 1 A Legal Issue?

The critical reader might ask the question if the topic of my thesis is relevant at all. Many perpetrators possess a tragic background where they in one way or another have been victims of deprivation. In fact, the Pre-Trial Chamber II (PTC II) of the ICC dismisses the argument that Ongwen's individual responsibility should be excluded because of his victim-background, by stating that it 'is entirely without legal basis, and the Chamber will not entertain it further.'²¹ But the case is still pending and we do not have any precedent regarding criminal responsibility for former child soldiers.

Upholding the consequent age limit of eighteen for criminal responsibility under the Rome Statute provides legal certainty. The selective notion of the most responsible doctrine, however, does not.²² This aspect of illegitimacy is not necessarily only negative. This is exactly the flexible political side of ICL, closer to customary international law, which domestic criminal law does not possess. Flexibility creates considerable room for manoeuvring the development of a doctrine where proper victim-perpetrators of the Ongwen sort could be excluded from the 'most responsible-sphere'. Perhaps, Ongwen's background cannot save him from a sentencing judgment and this type of defence will potentially never work for any future victim-perpetrator at trial before the ICC. Once again, this thesis is not pursuing impunity for victim-perpetrators.

However, the *Ongwen* case provides some inconsistency when read in the light of the *Lubanga* case.²³ In *Lubanga*, the court convicted Thomas Lubanga for enlisting or conscripting of child soldiers as a war crime. However, Lubanga had

²¹ *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red, Pre Trial Chamber II of the International Criminal Court, (23 March 2016), para 150.

²² The Prosecutor of the ICC has expressed his discretion, urging to 'focus its investigations [...] on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes'. See, *Paper on some policy issues before the Office of the Prosecutor* (2003), p. 7, see

https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf

²³ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2842, Judgment of the Trial Chamber of the International Criminal Court, para 1358.

not been a child soldier himself. One aspect for the crime to be considered severe was that the suffering from being a child soldier is linear and continues for life. The consequences of victimhood follow the child into adulthood. Child soldiers are thus granted protection by the ICL sphere. The continued aspect of the crime tied to child soldiering is best pictured by the following quote from former Chief Prosecutor Ocampo:

They cannot forget the beatings they suffered; they cannot forget the terror they felt and the terror they inflicted; they cannot forget the sounds of their machine guns; they cannot forget that they killed; they cannot forget that they raped and that they were raped.²⁴

Relying on the expert submission of Dr Elisabeth Schauer, the ICC states that a significant number of the children who were interviewed had developed post-traumatic stress disorder (PTSD). Following the judgment in the decision on sentencing *Lubanga*, the Court relied upon Dr Schauer when assessing the gravity of the crimes committed. The protection granted to child soldiers does not only entail injuries during fighting, but also the trauma of being recruited.²⁵ Additionally, the Chamber is quoting her statement that ‘the post-traumatic stress tends to persist, possibly for the remainder of the individual’s life.’ Further, that ‘former child soldiers ... have little skills to handle life without violence ... show ongoing aggressiveness within their families and communities even after relocation to their home villages’ and that ‘psychological exposure and suffering from trauma can cripple individuals and families even into the next generations’.²⁶

In the *Ongwen* case, however, the narrative shifts.²⁷ The PTC II dismissed this defence completely by focusing solely on Ongwen as an adult, commenting his childhood as irrelevant. Expert submissions like this seem to belong to pure victims only. The Chamber held that ‘the circumstances of Ongwen’s stay in the LRA ...

²⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-T-107, Transcript from Trial Chamber I of the International Criminal Court, page 4-5.

²⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-2901, Decision on Sentence of the Trial Chamber I of the International Criminal Court, para 38.

²⁶ *Ibid*, para 40-41.

²⁷ This point was first stressed by Mark A. Drumbl in ‘Shifting Narrative: Ongwen and Lubanga on the Effects of Child Soldiering’, *Justice in Conflict*, <https://justiceinconflict.org/2016/04/20/shifting-narratives-ongwen-and-lubanga-on-the-effects-of-child-soldiering/>

cannot be said to be beyond his control...' and that 'escapes from the LRA were not rare.'²⁸ It underscored that Ongwen 'could have chosen not to rise in hierarchy and expose himself to increasingly higher responsibility to implement policies'. This is a peculiar assessment based on the general evidence that escapes did occur. It is not, however, possible to make this evaluation without knowing how it actually was for Ongwen.²⁹ The defence devotes a great deal of their pleading to describing numerous escape attempts, and the sanctions from Kony if the escape attempt failed.³⁰ The past life was not of any particular importance for the Court, but instead temporary and ending. In fact they do not mention his background at all in the Pre-Trial Brief submitted by the ICC Chief Prosecutor on 6 September 2015.³¹ It seems like the ICC cannot judge the *Ongwen* case in the light of the *Lubanga* case, perhaps because the *Ongwen* case disturbs the comfortable division between victims and perpetrators.³² This inconsistency makes the question of former child soldiers legally relevant.

If ICL fails in finding a way to appropriately address the victim-perpetrator subject, considerable amount of important understanding of conflict is lost: '...recognizing these perpetrators as victims is quite critical, because if we do not see them as victims, we are unlikely to understand the true horror of [the context]'.³³ Acting in the sphere of politics, even more so than national criminal law, the ICC needs to explicitly touch on these structural contexts where child soldiering and other international crimes are fostered. It is, nonetheless, not clear that criminal law possesses the functions to adequately handle this. One alternative is, however controversial, to not persecute these victim-perpetrators and practice the selectivity of the ICC in a new suit of silence – *juris silentum*.³⁴ It is not necessary that the law shall be involved; let us not forget that the majority of core crimes

²⁸ *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-422-Red, Pre Trial Chamber II of the International Criminal Court, (23 March 2016), para 154.

²⁹ In comparison 'No one can judge who had not been there', Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), 18.

³⁰ *The Prosecutor v. Dominic Ongwen*, Transcript from Pre-Trial Chamber II of the International Criminal Court, Case No. ICC-02/04-01/15-T-22-ENG

³¹ *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Prosecution's Trial Brief for the International Criminal Court, (6 September 2016).

³² Christine E. J. Schwöbel, 'The Comfort of International Criminal Law', *Law and Critique* 24(2) (2012).

³³ Erica Bouris, *Complex Political Victims*. Sterling, VA: (Boulder: Kumarian Press 2007), 67.

³⁴ Mark A. Drumbl, 'Victims Who Victimize: Transcending International Criminal Law's Binaries', *London Review of International Law* Vol 4, Issue 2 (2016), 217–246.

committed never end up in the ICC.

Notwithstanding inconsistency or content of judgment, it is submitted that the former child soldier still would be relevant for discussion on a moral and political ground: the moral foundations and the public opinion of ICL are relevant for its evolution and survival. For instance, the survival of the ICC is dependent on state parties accepting not only the jurisprudence, but also its moral and political effect, with treat of withdrawal from the statute. The necessary connection between law and morality is especially present in ICL; for instance, international crimes that are allowed by corrupt states are still international crimes on the basis of a conception of ‘international morality’.³⁵ To acknowledge the contextual background of these crimes, even in a sentencing judgment, is an important response to these atrocities. And in the end, that is everything that ICL is – a response to atrocities committed against mankind.

Since the narrative, so far, changed between *Lubanga* and *Ongwen*, there seems to be an uncertain picture of the former child soldier, and corollary the victim-perpetrator. Portraying Ongwen as a former child soldier would disturb the courtroom game where, in the end, the verdict shall state innocent or guilty. Irrespectively of whether the victim-perpetrators will enjoy mitigated judgments in the future, the complexities of these individuals need to be considered. If the complexities are left out, the most negative aspects of the individual criminal responsibility present themselves in trials where the sentence *per se* is more important than a thoroughly legitimate procedure. Non-nuanced trials, that automatically vindicate the Prosecutor, are in risk to become ‘show trials’, were an individual is convicted to show the public that something is done about these atrocities.³⁶

In the end, these crimes are considered the worst partly because of the complexity and the need of a mass machinery to carry them out. Indoctrination by propaganda and duress are clear aspects of mass atrocity, and thus also the trials. The question is if a fair trial, a plausible portrait of the victim-perpetrator, could be achieved within the ICC. Could the ICC have followed the *Lubanga* view on ‘child soldiers for life’ and simultaneously do what is expected – to convict Ongwen? This

³⁵ About the law and morality as forming legality, see Frank Haldemann. ‘Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law’, *Ratio Juris* 18 (2005), 163.

³⁶ Martti Koskenniemi, ‘Between Impunity and Show Trials’, (2002), 6 *Max Planck Yearbook of United Nations Law*, vol 6, 11.

challenge is one of the most central issues in the proceedings. How the ICC should address and handle these dual characters of victim-perpetrators is therefore a question legally and morally relevant to discuss herein.

2. 2 Why Punish a Victim-Perpetrator?

First and foremost, the essence of individual criminal responsibility for international crimes withholds a liberal perspective where actors, individuals, are punishable for structural violence. The strictly liberal perspective is that everyone should be punished for his or her conducts, and no one should be outside-of-law.³⁷ The alternative is a more structural point of departure where individuals are not to blame, and an alternative reconciliation, such as amnesty, could be provided that is liberating but not liberal. As a matter of principle, everyone should be accountable for core crimes in a campaign against impunity.

Which individuals that could be factually liable vary. The general policy of the ICC and ICL is to observe those most responsible for the most serious crimes. Obedience to order is no excuse for responsibility in ICL: ‘The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.’³⁸ On this note, it is interesting to raise the question of whether the most responsible doctrine is based on reasons of procedural efficiency or on the concept of transferred *mens rea* – where those most responsible are seen as indoctrinators transferring their criminal intent to the masses.

The individual responsibility in ICL was first expressed in one of the IMT judgments in Nüremberg and the underlying logic is the same today:

That international law imposes duties on and liabilities on individuals as well as upon states has long been recognized ... crimes against international law are committed by men, not by abstract entities, and only by punishing

³⁷ Martti Koskenniemi, ‘Between Impunity and Show Trials’, (2002), 6 *Max Planck Yearbook of United Nations Law*, vol 6, 2.

³⁸ ILC, Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (1950).

individuals who commit such crimes can provisions of international law be enforced.³⁹

However, the victim-perpetrators do not fit as well as the guilty and diabolically evil ‘men’ that you imagine when you read the IMT judgment. Perhaps, the complete perpetrators never existed; instead, we need to punish these complex personalities and recognize that the complexity is what makes them human: ‘We must not believe everything about a man, because a man can say everything. We must believe only what is human about him.’⁴⁰ That is, to see Ongwen as just another variation of the tragic backgrounds often shared by perpetrators of atrocity – to see him as just another perpetrator, just another human, driven to the utter monstrosity of his own capacity.

The freedom of moral choice is also represented in the Article 31 (1d) of the Rome Statute with the duress defence. A criminal system where someone is punished for acting out of absolute necessity cannot be legitimate; the legitimate sentence demands some sort of freedom and intention. Where there is no freedom there cannot be any threat, because this threat of punishment would not make the person act any differently.

In light of the discussion of moral choice, it is time to discuss the existence of choice in the *Ongwen* case. The alternative to obeying orders, and acting within the criminal normality of the LRA, was to escape. Although sanctioned, people did succeed to flee the LRA. The motives to escape were not necessarily because of the ill treatment they were forced to inflict on civilians, but also the ill treatment that they themselves suffered. Nonetheless, escaping the LRA was a way to resist participating in mass atrocity. The majority, however, chose not to choose – a sort of thoughtlessness. To abandon thinking, willing and judging is, according to Arendt, why atrocity and evil deeds can spread like ‘fungus on the surface’.⁴¹

³⁹ Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London, 1950, at 447.

⁴⁰ Cyrano de Bergerac quoted in Pierre Vidal-Naquet, ‘A Paper Eichmann’, trans., Maria Jolas, *Democracy* 1, 2 (1981), 93.

⁴¹ Hannah Arendt to Gershom Scholem, Hannah Arendt, *The Jewish Writings*, ed. Jerome Kohn and Ron H. Feldman (New York, Schocken Books, 2007), 471.

The question is whether we can hold people responsible for conforming to their new environment; if we can hold them responsible for not telling right from wrong in a morally inverted society. The majority reaction is to stop thinking and instead act as others act and believe what others believe.⁴² For a person with a childhood defined by victimisation of international crimes, the natural custom pattern is presumably to imitate the acceptable action. The chance that such a person can be the exception that resists and, after a silent conversation in his own mind, reaches a personal division of right and wrong, distinct from the rest of the LRA, must be regarded as very slight. However, Arendt holds that the only excusable way to handle an inverted morality is a full withdrawal – in this case to escape from the LRA – even if that would mean to suffer the consequences. The wrongdoer in this quote should be understood as herself, her fictional past.

If I would do what is now demanded of me as the price of participation, ... I could no longer live with myself ... Hence, I much rather suffer wrong now, and even pay the price of a death penalty in case I am forced to participate, than do wrong and then have to live together with a wrongdoer.⁴³

A fundamental question that should be regarded in this matter is why we should punish individuals for core crimes. When it comes to the purpose of the ICC itself, the negotiators behind the Statute held that the new Court primarily serves to prevent future atrocities. ‘... punishment of war criminals should be motivated primarily by its deterrent effect, by the impetus it gives to improve standards of international crimes’.⁴⁴ This argument is not so convincing, even when defining deterrence broadly; that it is within the ability of a legal system such as the ICC to prevent further atrocities, even in the bush in northern Uganda. First of all, one may wonder what kind of attention the LRA leaders directed towards the ICC prior to the issued arrest warrant – after the crimes were committed. Even less attention was

⁴² Tamar De Waal, ‘Personal Responsibility Under Totalitarian Regimes: An Analysis of Hannah Arendt’s Philosophy On The Prevention of Evildoing and Criminal Liability For International Crimes’, *Amsterdam Law Forum* (2012), 135.

⁴³ Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), 156.

⁴⁴ Cherif Bassiouni, *Crimes Against Humanity in International Law*, (Dordrecht: Martinus Nijhoff Publishers 1992), 14.

paid by Ongwen as an abused child soldier, one may speculate.

If you take the philosophical view that the perpetrators of these crimes are demonically evil, such calculations based on ICC jurisprudence are not plausible, since prosecution does not ‘scare the devil’. If you instead take the view that evil is more banal, that the perpetrators actually believe that they are acting to do good, this calculation is also out of the question – they are doing the right thing!⁴⁵ Additionally, international prosecutions are rare and most probably, the risk of ending up in the ICC is viewed as slight.⁴⁶ Internal ‘prosecutions’ within the LRA, however, are not rare. The obedience to authority is compounded with death threats for even banal misfortunes. Put simply, sanctions for escaping the LRA machinery was far more deterrent than ICC arrest warrants.

It could be argued, in an Arendt manner, that the individual convictions are necessary but inadequate and destroy legal order. It may be added, as Koskenniemi interprets Arendt statement, that the tragedies are sometimes so metaphysically significant and the punishing of individuals does not come close to measuring up to it.⁴⁷ These scholars doubt ICL’s ability to handle events of enormous historical and political impact with the responsibility for a few individuals in The Hague. Michel Foucault is adding something similar, stating that: ‘There is aspects of evil that have such power of contagion, such a force of scandal that any publicity multiples them infinitely. Only oblivion can suppress them’.⁴⁸ Individual responsibility presumes certain levels of rationality among the perpetrators, which seems somehow limited as a model of explanation. This is certainly the case since these crimes are often committed in a ‘context of the chaos of massive violence, incendiary propaganda, and upended social order that contours atrocity’.⁴⁹

Notwithstanding arguments about faint deterrence and the inadequacy of punishing individuals, there is another argument favouring punishment that could be tied to Arendt’s theory of inverted moral societies: a criminal trial should be viewed as a part of transitional justice where the judgment is seen as the final indication that

⁴⁵ Martti Koskenniemi, ‘Between Impunity and Show Trials’, (2002), 6 *Max Planck Yearbook of United Nations Law*, vol 6, 2.

⁴⁶ David Wippman, ‘Atrocities, Deterrence, and the Limits of International Justice’, 23 *Fordham International Law Journal* (1999), 476.

⁴⁷ *Ibid*, at 2.

⁴⁸ Michel Foucault, *Madness and Civilization* (New York: Vintage Books 1965), 67.

⁴⁹ Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, New York, Cambridge University Press 2007), 171.

a certain organization or state belonged to a morally inverted past. A trial could be a community-creating symbol of reaffirmation, to ‘perform ... a successful “final judgment” in the religious sense, a performance that would ultimately enable the state itself to function as a moral agent.’⁵⁰ This argument is connected to the narrative and establishing of historical record and will be discussed more thoroughly under headings 2.3–2.4. There is no doubt, however, that a conviction of Kony would be a stronger symbol in Uganda to reaffirm the moral community. While Ongwen, once again, symbolizes the victim of that very inverted moral reality rather than the agent of said inversion

The charges against Ongwen regard crimes committed when he was an adult, and his child soldier background could therefore not be a defence in itself. Crimes committed under the age of 18 will not be addressed in accordance with Article 26 of the Rome Statute. Instead the charges concern attacks on civilians from 2004 to 2005 and his background must be intertwined with a defence category in Article 31 of the Rome Statute. In the pleading of the defence before the PTC II, however, the notion of transferred *mens rea* is submitted. The rhetorical question to the bench is whether he ‘owned his own mind’, or if he was ‘carrying the missions, the intent, propagating the intent of those who put him under captivity and made it impossible for him to have a free mind’.⁵¹ This argument seems appealing, but cannot be seen as something else than a *lege ferenda* reasoning, transferred *mens rea* as a way to handle extreme indoctrination. The legal argument would be to prove that this indoctrination, this traumatised background, could be tied to mental disease or defect or duress in accordance with Article 31 of the Rome Statute, which will be addressed below.

Another alternative would be to exclude the victim-perpetrators from the sphere of ‘most responsible’. John Borneman argues that the core of legitimacy for systems under the rule of law is to locate the ‘actual perpetrator’ and not a substitute.⁵² All perpetrators cannot be located in ICL. Thus the corresponding core of legitimacy in ICL rather lean towards locating those ‘actually most responsible’; those creating

⁵⁰ John Borneman, *Settling Accounts. Violence, Justice and Accountability in Postsocialist Europe*, (Princeton: Princeton University Press 1997), 23.

⁵¹ *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript from Pre-Trial Chamber II of the International Criminal Court, page 42, line 11-14.

⁵² John Borneman, *Settling Accounts. Violence, Justice and Accountability in Postsocialist Europe*, (Princeton: Princeton University Press 1997), 22.

the incentives of atrocities would be those that suffer from it – the engineers of the mass machine. The legitimacy of the ICC ought to be related to how they manage their selective policy. Ongwen’s uncle Odong states his opinion on the matter while observing that former fighters are walking free in Uganda when his nephew is not:

If anyone is to be tried, it should be the early members of the LRA, the ones who volunteered to fight and swelled their ranks with children they abducted and indoctrinated. They are the ones who forced 14-year-old Ongwen to become a killer in order to save his own life.⁵³

This quote is a perfect example for what, inter alia, Martii Koskenniemi calls ‘show trials’ without reason. There is simply no argument to accept these situations where a few political leaders are tried while the rest are granted amnesty as beneficial.⁵⁴ But, since it is the duty of the ICC to prosecute those most responsible for atrocities where they have jurisdiction, it is paramount to exclude the victim-perpetrator from the most responsible sphere if we do not want them to be sentenced. This could, for instance, be done as a matter of policy making from the ICC, where they develop the idea of most responsible.

Another aspect is the selectivity of arrest warrants from the ICC. It is of course impossible that a 30-year long war consisting of multiple core crimes could be singled down to this one individual. Especially in light of how the Court has neglected to investigate state-perpetrated atrocities, something heavily criticised by human rights organisations.⁵⁵ The obvious response is thus: why punish Ongwen if you do not punish the Ugandan Peoples Defence Force (UPDF)? But the show is booked, the choices are made, the politics of the case is set and the framework of truth is somewhat cemented. Chief Prosecutor Bensouda of the ICC states:

As it concerns judicial proceedings, only the cases of Joseph Kony or Dominic Ongwen are before the ICC. No other LRA member is subject to ICC proceedings. We have seen encouraging trends: many LRA fighters are

⁵³ Andrew Green, ‘To Forgive a Warlord’, *Foreign Policy* (February 6, 2015), 6 of print-out.

⁵⁴ Martti Koskenniemi, ‘Between Impunity and Show Trials’, 6 *Max Planck Yearbook of United Nations Law*, Vol 6 (2002), 11.

⁵⁵ Mark Kersten, ‘Why the ICC wont prosecute Museveni’, *Justice in Conflict*, <https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/>

returning home and reintegrating into their communities. I urge those still in the bush to also seize any opportunity to stop fighting and return home, where you have a chance to rebuild your lives.⁵⁶

However, bringing the victim-perpetrator to trial could be done in different ways. Notwithstanding matters of evidence, there could be a proper sentence, a judgment with narrative including their traumatic background, where victim-background is used to mitigate the sentence or a defence leading to acquittal. Another alternative is to change the law, to review Article 31 of the Rome Statute and to develop the doctrine of duress and mental disease or defect, and include the compromised perpetrator with their ‘rotten social background’.⁵⁷ The theory of a rotten social background was developed in the US where the strong relationship between socioeconomic deprivation and criminal behaviour needed a response in criminal law theory. This is similar to Ongwen’s background, with the difference that Ongwen not solely suffered a socioeconomic deprivation in extreme poverty in Uganda, but even that rotten social background was taken away from him: he was born into a rotten social background, and then abducted from that context into an even more brutal abyss. Still, the defence theory is the closest analogy to be found so far in criminal law.⁵⁸ In criminal law, exculpatory defences, such as insanity and intoxication in criminal law all spring from the same theoretical foundation, best described in its simplicity by H.L.A Hart: ‘no one should be held blameworthy and punished for criminal conduct if he or she acted involuntarily – that is, without free choice’.⁵⁹

Philosophically there is a slight difference between the absence of choice and the absence of thinking, but both can be placed under the umbrella of an absent mind. Arendt held that the key factor to how atrocity and evil spread is that the majority do not think – the masses develop a thoughtlessness. This mass thoughtlessness is

⁵⁶ Message from the Prosecutor of the International Criminal Court, Fatou Bensouda, calling for defection by LRA fighters, see <https://www.youtube.com/watch?v=seeZmmj2S0M>

⁵⁷ Richard Delgado, ‘Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation’, *Law and Inequality* 3 (1985).

⁵⁸ I would like to thank Mark A. Drumbl for introducing me to this theory in his article ‘Victims Who Victimize: Transcending International Criminal Law’s Binaries’, *London Review of International Law* Vol 4, Issue 2 (2016).

⁵⁹ H. L. A. Hart, *Punishment and Responsibility* (New York and Toronto: Oxford University Press 1968), 35-40.

not legally relevant in trial, but an aspect of the complexity that questions the ability of ICL to best respond to mass atrocity. Arendt asked herself:

What happens to the human faculty of judgment when it is faced with occurrences that spell the breakdown of all customary standards and hence are unprecedented in the sense that they are not foreseen in the general rules, not even as exceptions from such rules.⁶⁰

The legal challenge of allowing the victim-background defence is the difficulty of application and limitation. Allowing environment deprivation to be argued in a moral defence is one thing, but to provide space for it in criminal procedure is another. When is a victim-background serious enough to exclude voluntarily actions and when does heavy influence turn into brainwashing? It has been argued that a brainwashed-defence should be available in criminal law.⁶¹ One of the strongest arguments is the above-mentioned concept of transferred *mens rea*, where the brainwashed defendant adapts the criminal intent ‘that is not the actor’s own’, meaning that it is something belonging to the indoctrinators.⁶² It has been submitted that this defence, in relation to other excuses, lacks distinctive character that makes it difficult to circumscribe in trial.⁶³ This could lead to legal uncertainty, since it would be complicated to know when it could be applied. In comparison, the excuse of mental disease or defect, although with its own aspects of uncertainty, is based on psychological assessment. The defence of environmental deprivation would call for a sociological assessment. However, the rotten social background could also be seen as a version of mental disease or defect, where the social background has produced psychological effects and subsequent criminal behaviour.

There have been cases in domestic criminal law where psychiatrists have testified that the defendant’s social background led to the criminal behaviour, but did not impact them enough to label them as insane.⁶⁴ Professor Dressler comments critically that ‘the law has allowed only those defences that fall within specific,

⁶⁰ Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), 27.

⁶¹ Richard Delgado, ‘Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded “Brainwashed” Defendant’, 63 *Minnesota Law Review* 1 (1978).

⁶² *Ibid*, 11.

⁶³ Joshua Dressler, ‘Professor Delgado’s “Brainwashing” Defense: Courting Determinist Legal System’, 63 *Minnesota Law Review* 335 (1979), 358.

⁶⁴ 471 F.2d 923, *United States v. Alexander*, at 958

reasonably identifiable categories in which choice is obviously substantially limited'.⁶⁵ The desire for identifiable categories for excusable defences is based on the view that a system of punishment ought to be generally deterrent. The legitimacy of penal law is dependent on a majority that avoid criminal behaviour, while a few criminals get punished, which causes the majority to stay deterred. To be excluded from this responsibility must therefore be granted groups separated from the two main categories of law-abiding citizens and criminals. Regarding the insanity defence, Professor Williams said: 'Being a defined class their segregation from punishment does not impair the efficacy of the sanction for people generally'.⁶⁶ Applied in this case, the argument would be that it is impossible to define what constitutes a severe rotten social background and what does not. Nonetheless, it is submitted that it would be difficult to appreciate any background more severe than Ongwen's, and child soldiers could be an identifiable category in ICL.

The question of a victim-background accompanied with mental disease and defect is troublesome. If this Ongwen-background could constitute a defence, the following question must regard impunity. If the defence is legit in the future, a lot of victim-background perpetrators could profit impunity thanks to their background. Professor Morse's response to the rotten social background theory is that environmental circumstances are unlikely to entirely remove a defendant's control of choice.⁶⁷ The same thought seems to lay behind the dismissal of the defence in the PTC II in the Ongwen case, stating that the circumstances were within his control and that he could have chosen not to rise in the ranks.⁶⁸

As has been hinted, the rotten social background defence could form a part of existing defences such as mental disease or duress.⁶⁹ It needs to be accommodated to acknowledged legal theory.⁷⁰ Which defence that would accommodate the

⁶⁵ Joshua Dressler, 'Professor Delgado's "Brainwashing" Defense: Courting Determinist Legal System', 63 *Minnesota Law Review* 335 (1979), 335.

⁶⁶ Glenville Williams, 2nd ed, *Criminal Law: The General Part* (London: Stevens & Sons, Ltd. 1961), 347.

⁶⁷ Stephen Morse, 'The Twilight of Welfare Criminology: A Final Word', 49 *Southern California Law Review* 1249 (1976), at 1249 and 1251.

⁶⁸ *The Prosecutor v. Dominic Ongwen*, Case No. PTC II, ICC-02/04-01/15, Prosecution's Pre Trial Chamber II of the International Criminal Court, (23 March 2016), para 154.

⁶⁹ Art 31 (1) (a). Rome Statute.

⁷⁰ Paul Harris and Peter Gabel, 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law', 11 *New York University Review of Law & Social Change* 369 (1982), 403.

victim-perpetrator in the most appropriate way is not difficult to say. Accommodation to mental disease relates to indoctrination suffered as a child soldier, while duress is related to the absence of choice. The latter is more far-fetched since it must be proved that the upbringing in the LRA is similar to a permanent imminent threat. The PTC II, however, held that the question of duress was not as clear so as to lead to a non-confirmation of charges, but that the actual trial will resolve this question.⁷¹ The argument would be that the totality of the LRA upbringing as a child soldier construes a circumstance of constant threat that pushes the defendant to act accordingly. Although factually near impossible to prove, the importance of authority shall not be forgotten:

An act carried out under command is, psychologically, of a profoundly different character than action that is spontaneous. The person who, with inner conviction, loathes stealing, killing, and the assault may find himself performing these acts with relative ease when commanded by authority.⁷²

2. 2. 1 The Victim-Background Defence

The development of a defence for accused perpetrators with child soldier-backgrounds could consist of different elements such as: (1) general psychological principles; (2) the historical-sociological experience of child soldiers; (3) the defendant's upbringing, severity of context and (4) the defendant as a subject in international law.⁷³

The first element would be similar to the expert submission of Dr Schauer in *Lubanga*. How child soldiering lead to post-traumatic stress disorder, how they possess few skills to function in a normal society without violence and how the victimhood is brought into adulthood. This element would preferably try to tie the child soldier-experience to the defence regarding mental disease. Psychological aspects of child soldiering will be left to appropriate child psychiatrist with expertise regarding neurodevelopmental aspects of child soldiering.

⁷¹ *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Prosecution's Pre Trial Chamber II of the International Criminal Court, (23 March 2016), para 151.

⁷² Stanley Milgram, *Obedience to Authority* (New York: Harper & Row 1974), preface xi.

⁷³ Inspired by the 'Black Rage' defence developed by Paul Harris, 'Psychiatric Defense: Black Rage', *California Attorneys for Criminal Justice*, Criminal Law Seminar Syllabus, 1-16 (1979).

The second element would regard sociological aspects of living as a child soldier, in particular in the LRA, but also historically compared with child soldiers' experience from other rebel groups. This element, alongside the first element, would preferably be tied to arguments regarding duress as ground for excluding responsibility.

The third element would, in this case, circumscribe the upbringing in the LRA, which is known as one of the most brutal rebel forces to date. The PTC II stated that escapes were not rare, but they still were exceptional; in fact, the defendant is pleading in considerable length about the fatal consequences of Ongwen's escape attempts. In the criminal society of the LRA, escaping was sanctioned, while staying in the rebel group was the normal and 'right' thing to do. This element is the crucial step to constitute a defence such as mental disease or duress, or a new exculpatory defence within ICL.

The fourth element is centred on child soldiers' protégé status within international law. As a child soldier you are a victim in ICL, but also protected by the international community and the state of origin. The defence team of Ongwen is pleading that international humanitarian law shall offer protection and that states, according to Article 38 of the UN Convention on the Rights of the Child, shall ensure that persons under 15 not participate in hostilities. Furthermore, Article 39 of the same convention specifies:

States shall ... take appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: Any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts.⁷⁴

Perhaps the last element will prove to be the most cumbersome aspect in the *Ongwen* trial since a convicting judgment would mean to reject the international community's protection of child soldiers. It is here the assessment of a victim-perpetrator is done; are the subject in first hand a victim of crimes against international law, or should the perpetrator-side be seen as predominant? While the other elements could be handled strictly legalistic with inconsistent use of expert submissions from psychiatrists, the fourth element would place the Court in an adverse position towards the international community and potentially anger the UN

⁷⁴ Article 39 of the UN Convention on the Rights of the Child.

and NGO's who proclaim the importance of reintegration and rehabilitation for former child soldiers. This fracture within international law – between its conventions and ICL – is perhaps the most delicate issue regarding former child soldiers' legal status.

This defence is controversial and not recognized whatsoever in criminal law generally, even less so in the early stages of ICL's evolution. But the victim-perpetrator raises the question of blame, or rather the lack of blame, something that our collective conscience demands of the criminal law and the development of ICL is constantly underway.

2.3 The Narrative in International Criminal Trials

The main difference between trials and other stories, such as literature and history, is the trial's unique compulsion to condemn. Complex narratives about life among atrocity are, in general, more suited for the vivid presentation of literature. But the content of a judgment, as well as literature, creates and establishes stories that did not exist before: sentencing to imprisonment makes someone lose his or her freedom, etc. The narrative of a judgment, the story, follows the perpetrator, but also affects the audience in their perception of atrocity and their perpetrators. Judgments do not only review past events, but creates and develops the view of the crime and the understanding of atrocity. The challenging question is thus if trials need to acclimatize with the story of a victim-perpetrator such as Ongwen. The following statement from Vergès will introduce this section of the thesis.

Man is very complex, his opinions and his mind are neither black nor white. The judge, however, asks binary questions that must be answered 'yes' or 'no'. At the end of the trial there is the prosecutor facing the defence. Both lawyers are drawing their arguments from the same dossier—how can either account be the complete truth?⁷⁵

International criminal trials have in all essence followed the classical division of criminal law when it comes to its characters. The division between the good,

⁷⁵ Chris Tenove, 2008. 'Meeting the Devil's Advocate: An Interview with Jaques Vergès', *Justice in Conflict*. <http://justiceinconflict.org/2013/08/26/meeting-the-devils-advocate-an-interview-with-jacques-verges> (accessed 30 November 2016).

innocent victim and the evil, abusing perpetrator contains a division of guilty and non-guilty, right and wrong. The international criminal trials clearly picture the defendant as disgraceful in relation to the pure and ideal victim.⁷⁶ Is there a space for a more nuanced picture of the perpetrator as both victim and perpetrator? This part of the thesis aims to more thoroughly discuss the content of a judgment rather than the actual outcome of the judgment.

To challenge the binaries in ICL is, however, not a simple task. We are all complex and multi-nuanced persons, but that characterisation does not fit in trials. ‘It is necessary to choose one interpretation. The chosen interpretation constitutes the very framework or the context of the trial.’⁷⁷ Or as Jean-François Lyotard calls it: the *differend*.⁷⁸ Accepting the *differend* means accepting the roles within it, who is the accused and what she or he is accused of, and in the long run framing ‘the context among those between which the political struggle has been waged’.⁷⁹

A case of differend between two parties takes place when the ‘regulation’ of the conflict opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.⁸⁰

The setting and the context is a part of the dispute – in this case the trial. Critically, one can argue that there is a factual *differend* juxtaposed to the ICC itself in its inability to prosecute the state side of conflicts where atrocity occurred. The Chief Prosecutor of the OTP stated that ‘all sides involved in the conflict’ will be investigated ‘in complete independence and impartiality’.⁸¹ In reality, the ICC requires state cooperation to conduct necessary investigations and have not yet convicted any state officials for crimes under the Rome Statute. In this sense, it

⁷⁶ Sofia Stolk, ‘Ntaganda at the ICC – Some observations from the public gallery’, webposting *Center for International Justice* (14 September 2015).

⁷⁷ Mikael Baaz and Mona Lilja, ‘Using Criminal Law to Resist Transitional Justice’, *Conflict and Society: Advances in Research* 2 (2016), 147.

⁷⁸ Jean-François Lyotard, *The Differend. Phrases in Dispute*, transs, Gerooge Van Den Abbeele (Minneapolis, University of Minnesota Press 1988).

⁷⁹ Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing 2011), 191.

⁸⁰ My italics, Jean-François Lyotard, *The Differend. Phrases in Dispute*, trans., George Van Den Abbeele (Minneapolis: University of Minnesota Press 1988), 9.

⁸¹ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: *Justice will ultimately be dispensed for LRA crimes*, 27 February 2015, <http://reliefweb.int/report/uganda/statement-prosecutor-international-criminal-court-fatou-bensouda-press-conference>

could be added to the theory of the *differend* that even those not being parties in the trial are forming the dispute.

In this case, the absence of the representatives from the Ugandan army is ‘haunting’ the trial, with trails of accepting the truth of the referring government.⁸² The fact that the documented atrocities allegedly committed by the Ugandan army are not at trial is already to accept the *differend* where the LRA are the perpetrators in the situation in Uganda. The *differend* attached to the LRA could not be transformed into an investigation about core crimes committed by the Ugandan army. In this sense, the *differend* also possess a direction of wrongdoing, which is pointed towards the LRA in a locked trial setting. Either the LRA is guilty or not; no other conclusion or consensus can follow the judgment. If they are not found guilty, and the guilt starts to be directed against the Ugandan army, then there is a need of a new trial – in this sense the discourse of *differend* is inflexible. The trial is thus fixed and the response to the situation in Uganda depends on conviction.

Rarely enough, the abducted children turned into soldiers have experienced a transformation: to be identified on both sides of the *differend*. The *differend* attached to the LRA is not changed, but Ongwen exists on both sides of it – as a victim and a perpetrator of the LRA. For Ongwen, the whole *differend* is within him and he as an individual represents both sides, encircling the dispute. Accepting the *differend*, that he, as a representative of the LRA, is accused is also to accept his past as victim of the LRA, which is an indirect effect of the trial. With some imagination, you could handle the ‘situation in Uganda’ with Ongwen as the only individual at trial, one day as a victim and the other day as the accused. On the contrary, if he is not found guilty, the idiom of the ICC removes his jurisprudential status as a victim. Ongwen is the only one from the LRA brought to trial, and the *differend* attached to the LRA disappears by acquittal.⁸³

The above-suggested perspective of the *differend within* actually pinpoints why the story of Ongwen is too complex for present day trials when it is analysed in the light of the most responsible and the reason is this: The first setting of the *differend* in the case of *Ongwen* is made when the ICC issue arrest warrants for the leaders of

⁸² Martti Koskenniemi, ‘Between Impunity and Show Trials’, 6 *Max Planck Yearbook of United Nations Law*, Vol 6 (2002), 17.

⁸³ Discussion about attached differends, see Jean-François Lyotard, *The Differend. Phrases in Dispute*, translated by G. Van Den Abbeele, 2988, 56.

the LRA. The LRA are the perpetrators in the dispute and their victims are corollary the victims at trial. Since one of the most responsible possesses this *differend within*, the binaries are disturbed in a way that must be handled with either ignorance, or a new view on what a trial and a judgment can consist of. In the latter situation, this *differend within* needs to emerge from within and be allowed to openly challenge aspects of these binaries. Ongwen would play the part of partly perpetrator and partly victim in the courtroom where he must be allowed to speak in both these roles. He could thus transcend the binary without disrupting *the differend* attached to the LRA – they can still be depicted as the wrongdoers. Ongwen would be recognised as a compromised wrongdoer who committed evil deeds because of the wrongdoers. Ongwen, the rare subject that encircles a *differend* symbolises the complexity of the situation in Uganda, which makes him a perfect subject for establishing historical and etiological understanding, but perhaps not the perfect subject for individual responsibility, as we know it. If this cannot be done in the courtroom, alternative remedies must be the next resort. But, with ignorance and reductionism, where the *differend* stays within, the ICC will be left with a ruptured system that could be accused of not fully understanding the nature of the deeds they intend to deter.

The trial's search for objectivity does not play well with the shape shifting nature of human in conflict where atrocities occur. Instead, ICC convictions need to portray the individual as guilty without any reasonable doubt, and provide justice to the civilian victims in that very conflict. This is especially important when, as in the case of Ongwen, where one individual is the only one being prosecuted. It has been argued that these trials are more about establishing the truth of historical, political and criminal events, than the actual punishment of the individual.⁸⁴ Scholars mostly make this notion, but the Trial Chamber of the ICTY in *Tadic*, for example, spent the first 69 pages on Balkan history. An account that was later relied upon in the *Milošević* trial.⁸⁵

By telling the story and the truth of the past, the wounded community is provided a condition in which it can recreate social life and simultaneously relieve some

⁸⁴ Martti Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law*, vol 6 (2002), 3.

⁸⁵ Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press 2011), 74-75.

collective guilt.⁸⁶ Via a richer narrative, telling the story of these indoctrinated persons, we can improve the hunt for the most responsible. Finding the persons with the catalyst roles would have a better symbolic value in the local community. Engaging didactically in this way could detect the conditions and manifest these circumstances where the atrocities grow. Maybe someone creating victim-perpetrators, those structuring the incentives, could be a modern definition of the most responsible.

However, Arendt criticised the Eichmann-trial for the introduction of didactic purposes about historical, political and educational objectives:

The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes - 'the making of a record of the Hitler regime...' can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.⁸⁷

Detracting from 'law's main business' creates what Arendt calls a 'show trial' – more of a political show for the public opinion than a criminal trial about innocence or guilt. This risk is relevant. Not recognizing international criminal trials as somewhat a show from the international community would be a mistake. ICL and cases before the ICC are politicized, it is political, and once again concerns a referred situation as a whole, not only individual guilt. Besides, it would be possible to resist the political show; the political lessons to the public, while instead interact with the history of the accused – since this is in the interest of 'justice and nothing else'.⁸⁸ Arendt later stated that, although courts cannot accept a defence that lays all responsibility on the system and not the person, the system itself cannot be left out of account.⁸⁹

⁸⁶ Martti Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law*, vol 6 (2002), 4. Joe Verhoeven, 'Vers un ordre répressif universel? Quelques observations', *Annuaire Français De Droit International* 45 (1999), 55.

⁸⁷ Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York City: The Viking Press 1963), 232.

⁸⁸ Hanna Arendt, rev ed. *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York City: The Viking Press 1964), 286.

⁸⁹ Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), 32.

The defence team of Ongwen pleaded with a narrative, including the history of Uganda and the history of Ongwen himself. This pleading, in essence, centred on the indoctrination, geopolitical chaos and the supernatural influence of Kony; this was not Ongwen's war.⁹⁰ But the PTC II did not shed a light on this narrative in their conformation of charges. This illustrates that the narrative is out there but not allowed to enter. The pleading also included the responsibility of the international community where Ongwen should be protected by conventions but ended up enslaved by Kony. Further, a promise from the United Nations envoy, Joaquim Chissano, who participated in the Juba Peace talks, reassured to help Ongwen escape from the LRA. In the light of this, it would be 'inapposite to suggest individual criminal liability'.⁹¹

Establishing and continuing with the individual responsibility in ICL does not necessarily mean that the focus of the trial shall be strictly individual, as in domestic criminal trials where the only question is whether or not the accused committed the crime. Important aspects of ICL – such as the solution of conflicts that are too complex for the domestic system – certainly need a wide narrative and an understanding of context. Let us not forget that the ICC is complementary in helping Uganda with the 'situation concerning Lord's Resistance Army': a situation where individuals such as Ongwen lived in a different society where they did not act in anti-social way, such as criminals in general do, but in a criminal normality. This is one of the most interesting differences between domestic and international criminal law; that perpetrators in ICL often follow the social code – they are those who abide by the rules. Arendt explained the procedure in totalitarian regimes as moral standards turned upside down, where a new reality is created.⁹²

In a normal political and legal system, such crimes occur as an exception to the rule ... However ... in a state founded upon criminal principles, the situation is reversed.⁹³

⁹⁰ *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript from Pre-Trial Chamber II of the International Criminal Court, page 40-71.

⁹¹ *Ibid*, page 56.

⁹² Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), 22.

⁹³ Hanna Arendt, rev ed. *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York City: The Viking Press 1964), 291.

Crime becomes law and law becomes crime.⁹⁴ This is not only the greatest difference between domestic law and ICL, but also the greatest legal and moral challenge: to express a criminal normality where one could be found is legitimate in light of this complexity.⁹⁵

But these Janus-faced individuals are, however comfortable, not always great when it comes to answering the question: what happened here? If we focus, as in the *Ongwen* case, on the perpetrator part of their multiple identities, the truth cannot simply be presented that way. Of course, it may be argued that this is not the mission of ICL, but if its not dealt with, then we are stuck in a helix of individual evil, a situation where the circularity of violence is individualised, trivialised and condemned but not explained. Although the inversion of society, the world upside down, complicates the legal division between victim and perpetrator, this inversion could be brought to light even with a conviction. The wider narrative is not only for the defence, or a defence itself, but a general improvement of legitimacy of ICL's understanding of atrocity.

It seems like the doctrine of individual criminal responsibility in ICL is stuck between the comfortable trial of a strict individual focus and the wider narrative, which tells the 'truth/s' by referring to historical context and structural cause. Which path to take depends of what we think that ICL should achieve – if anything at all other than individual trials. In the end, this is a question of ideology and historical theory; if structure or individual agency is forming human behaviour, ICL has chosen the latter. But large political crimes cannot be handled as narrowly or be as fact-focused as criminal trials in general are. Judging the facts in ICL also means judging the context.⁹⁶ The crimes are even formulated with 'wide and systemic' as requisites, which means that context is necessary to constitute a core crime of ICL. Because of this concatenation between facts and context, the individual responsibility doctrine creates a multitude of questionable situations. The context is

⁹⁴ David Luban, 'Hannah Arendt as a Theorist of International Criminal Law', *International Criminal Law Review* 11 (2011), 624.

⁹⁵ Hanna Arendt, rev ed. *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York City: The Viking Press 1964), 26-27.

⁹⁶ Danièle Lochak 'Prescription, remarques dans un débat de table ronde le 22 janvier 1999', *Droits* 31 (2000), 64. Also Martti Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law*, Vol 6 (2002), 16.

not only needed by the defence, but also by the prosecutors in international criminal trials.

The judges looked to history to make more sense of the crimes ... It is an appropriate backdrop, since you just do not kill that many people without a context.⁹⁷

The ICC would achieve some pedagogic and didactic goals with a wider narrative. In general, it would explain how atrocities like these could occur, how they spread, and in this case how victim-perpetrators are born. To simply issue warrants of arrest for individuals and sentence them with a narrow context-perspective would not, with the ICL diminishing deterrent effect, come to terms with the conditions of the crimes.⁹⁸ But the wider the narrative – the more side effects will occur from establishing the truth of events. The more space the victim-perpetrator is given in trial – the more of an abstract and complex picture could be delivered. The individual accused of crimes against humanity can raise the question whether or not that could be us, if we were raised in the same circumstances. But understanding the accused, his motives, and letting him speak also risk that the trial becomes a propaganda show for the cause of the rebels.⁹⁹ Someone who only cared about context and structure was the controversial defence counsel Jacques Vergés with his strategy of rupture.¹⁰⁰ The strategy concerns when the defendant ignores *the differend*, the roles within it, and reverses the discourse with an attack towards the system represented by the Court and the prosecution. In *Ongwen*, this would mean to focus the pleading around crimes committed by the State party, the Ugandan army, and the double standard underlying this selectivity of prosecution. However, this strategy is mostly used as a last resort in show trials that are doomed to follow the line of the prosecutor.

⁹⁷ Interview with ICTY Prosecutor in Richard Aschby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press 2011), 12-13.

⁹⁸ Alfred Grosser, *Le crime et la memoire*, ed. Flammarion (Flammarion: Paris 1989), 76-77.

⁹⁹ Martti Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law*, Vol 6 (2002), 25.

¹⁰⁰ Jacques Vergés, *De la strategie judiciaire* (Paris: Éditions de Minuit 1968).

To provide space for the traumatised backgrounds of perpetrators in ICL narrative is far from uncontroversial. On the contrary, the defendants are traditionally displayed as evil sadists – closer to monsters than men.¹⁰¹ Even though perpetrators, even without victim-duality, do experience trauma, this is left out in trial. It has been argued that even the more traditional perpetrator's trauma should be acknowledged, not necessarily for sympathy or empathy, since that would be unseemly, but rather to look at the big picture.¹⁰² The big picture narrative is needed to heal societies and make the transition from conflict to peace smoother. Some understanding for the perpetrators is desired, since thousands of the actual perpetrators are going back to be neighbours to the victims after the conflict. Of course, this assignment first and foremost belongs to the defence, to plead about the creation of a perpetrator through victim-background, and bring that experience into the courtroom. Notwithstanding the final judgment, someone has at least brought the defendant's truth to court and consequently to the public at large. Although it would not directly affect the trial, the narrative about Ongwen's background is out there; several articles about the extraordinary circumstances in the Ongwen case have been written. In other words, an important story can deserve and need publicity although that particular story is not transformable to the language of acquittal in trial. There are examples where the pleadings of the defendant have widened the scope of conflict. One is when Drazen Erdemovic's guilty plea led to the discovery of a massacre that had not been covered before.¹⁰³ This is, of course, not comparable to the victim-background of Ongwen, but rather an example of letting the defendant's story improve the full story of crimes committed during the conflict.¹⁰⁴

Regarding pedagogic goals, there is one fundamental story to be learned from Dominic Ongwen and that is that it could have been us. There is nothing more human than to act accordingly in ones surroundings to survive. Maybe that is why that complexity is trivialised and treated with reductionism; because that complexity proves that each and every one of us possess the capacity of monstrosity.

¹⁰¹ Saira Mohammed, 'Of Monsters and Men: Perpetrator Trauma and Mass Atrocity', 115 *Columbia Law Review* (2016), 1158.

¹⁰² *Ibid*, 1159.

¹⁰³ *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Sentencing Judgement, 5 March 1998 [16(iv)].

¹⁰⁴ Nancy Amoury Combs, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes', 151 *University of Pennsylvania Law Review* 1, 101 (2002), 110.

2. 4 The Capacity of International Criminal Law

Reading about Ongwen and the LRA makes you question the capacity of criminal law. Stories about abductees forced to drink the blood from their former friends transcend legal order. It is difficult to picture these personalities in a court system, in a legal order, where they themselves have grown up in a parallel society without even a tendency of the Rule of Law. The law suddenly feels insufficient to master the patterns in the LRA.

I know a lot of law ... But I'm not a lawyer. That's why I can see what it is like. It's like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling, and someone is always going to nigh catch pneumonia. Hell, the law is like the pants you bought last year and the seams are popped and the shankbone's to the breeze. The law is always too short and too tight for growing mankind.¹⁰⁵

The goals of ICL are not only those of domestic criminal trials: deterrence, retribution and incapacitation, etc. Acting in the global political arena, the courts have also expressed a will to achieve security and peace, to stop current conflicts, and create reliable historical documentation of the context where the crimes were committed. Notwithstanding that the international importance of the latter goals risks making procedure against individuals more about politics than law, threatening the rights of the accused, it does not require a lot of thinking to realise the overabundance of these goals.¹⁰⁶ As a point of departure, a wider narrative would increase this overabundance. It would not manage expectations in a way that could dress ICL in a suit of success; and the capacity and reputation of ICL is related to the aspiration and the corollary expectations.

In the core of the problem stands whether ICL is capable of handling collective violence of this complex kind. It is a legalist conviction that moral questions of this

¹⁰⁵ Fictional character Willie Stark in Robert Penn Warren, *All the King's Men* (New York: Harvest 1996), 136.

¹⁰⁶ Mirja Damas, 'What Is the Point of International Criminal Justice?', 83 *Chicago-Kent Law Review* (2008), 331.

altitude can be solved by judicial procedure.¹⁰⁷ Arendt has argued, already in the Nuremberg trials, that:

For these crimes, no punishment is severe enough. It may as well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems.¹⁰⁸

Or as Tallgren puts it, ‘perhaps there is pain which has no closure’.¹⁰⁹ Individual responsibility presumes certain levels of rationality among the perpetrators, which seems somehow limited as a model of explanation. Certainly since, as worth repeating, these crimes are often committed in a ‘context of the chaos of massive violence, incendiary propaganda, and upended social order that contours atrocity’.¹¹⁰

Former child soldiers are not the only problematic legal subjects in ICL. The same counts for the Eichmann-type: the bureaucratic type of evil, sitting at his desk signing papers that indirectly leads to hundreds of people dead. The child soldier and the bureaucrat, however, share some characteristics – they hang-on in, and imitate, their context. All creation, even the creation of a perpetrator, begin with the exertion to imitate. The perfect persecutor would possess the more demonic type of evil; someone inspired by Lucifer whose sin is pride. Instead these individuals often act in a criminal normality where they possess thoughtlessness – either because of young age and unfinished mental development, or because of automatism behind a desk far away from physical violence. Since the trials also establish historical record, they ought to shed light on the circumstances in the background of these deeds. This does not mean that the deeds’ severity shall be reduced; the deeds can still be depicted by ICL as grave although the doer himself thought his acts were deeds of virtue. This idea can exist while the narrative of the doer is further nuanced. A wider narrative of the complex perpetrator is desired where there is one.

¹⁰⁷ Gary Jonathan Bass, *Stay the Hand of Vengeance* (Princeton, Princeton University Press 2000), 20.

¹⁰⁸ Karl Jaspers to Hannah Arendt, *Hannah Arendt-Karl Jaspers Correspondence 1926-1969*, ed. Lotte Kohler and Hans Saner, (New York: Mariner Books 1992), 54.

¹⁰⁹ Immi Tallgren, ‘The Sensibility and Sense of International Criminal Law’, *European Journal of International Law*, vol 13 no .3 (2002), 593.

¹¹⁰ Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, New York, Cambridge University Press 2007), 171.

This division, between the doer and the deeds are the foundations behind Arendt's argument against demonic evil.¹¹¹

It is hard to think of any deed with more morally and ethically negative association than crimes against humanity, genocide and war crimes. Invented with the intention of grasping what is not possible to grasp. The behaviours constituting international crimes are more thought of as evil in terms of ethics and morality than customs and habits, 'and we know only too well the alarming speed with which they are unlearned and forgotten when new circumstances demand change in manners and patterns of behaviour'.¹¹² The behavioural patterns of the doers in a criminal normality could take place in trial and thus improve understanding of how atrocity occurs. Thoughtlessness and absence of conscience is, according to Arendt, the real creatures and the components of evil. Acting as a moral authority, the ICL needs to acknowledge, through thought and global conscience, the creation of perpetrators to be the counterpart of evil deeds – the moral agent of the world. But trials with narrow scopes that dismiss perpetrators' backgrounds risk being an institution of thoughtlessness.

Abovementioned Smeulers has developed a typology for perpetrators in ICL: Besides submitting that the ICL criminal often is an ordinary man in extraordinary circumstances, she developed a typology where Ongwen would be categorised as a compromised perpetrator. The consistent and pure compromised perpetrator would likely entail acquittal with a duress defence, as someone who does not have a choice to not co-operate if they want to survive. But this type could be 'transformed into a far less reluctant perpetrator'.¹¹³ The best-known example of this transformation is the so-called *Kapos* in the concentration camps of the Second World War. Former prisoners were given the position of a *Kapo*, which is a type sort of guard with more power than the other prisoners. As documented, a lot of *Kapos* abused their power.¹¹⁴ If the ICL trials could give account for this spiral of violence and creation of a perpetrator, for example by using this typology, it would lead to increased understanding of how atrocity occurs. This account needs to be expressive about

¹¹¹ Hannah Arendt, *The Life of the Mind* (New York: Harvest Book 1971), 4.

¹¹² Hannah Arendt, *The Life of the Mind* (New York: Harvest Book 1971), 5.

¹¹³ Alette Smeulers, 'Perpetrators of International Crimes: Towards a Typology', in *Supranational Criminology: Towards a Criminology of International Crimes*, ed. Alette Smeulers and Roelof Haveman (Cambridge: Intersentia, 2008.), 258.

¹¹⁴ *Ibid*, at 264.

how Ongwen played a part in the LRA. Ongwen and Uganda deserve a plausible portrayal, which reflects the reality of many Ugandans. The judges of the ICC have the capacity to formulate the Ongwen-persona in such a way, even with a guilty verdict.

If ICL wants to function as deterring, we first need to understand the cause behind the atrocities that we want to deter. To understand the making of a perpetrator such as Ongwen, their story needs to emerge from the trial itself. Even the outrageous have their motive, and ‘comprehension does not deny the outrageous ... it means the facing up to, and resisting of, reality, whatever that may be’.¹¹⁵ Sentencing individuals by an individualised, non-contextual depiction cannot give a corollary effect towards the masses; the collective is the necessary component to commit an international crime. Allowing ICL to influence the handiwork of the masses – the industry of atrocity – instead of relieving collective guilt. That being said, it is a great challenge to acknowledge the victim-past of Ongwen and simultaneously respect the dignity of the victims, certainly those who are heard as witnesses in trial.

Bearing in mind that the evolution of ICL is marked by speed, the demand to revolutionise the very foundation of a criminal trial is, in a sense, naïve. But the complementary role of the ICC must not be mistaken as its purpose; it is simply a necessary component in creating jurisdiction. If this would be the purpose, it would be satisfying enough that ICC sentenced those who the domestic system failed to convict. The purpose is to sentence those who commit atrocities against humankind and prevent future atrocities. Irrespective of how terrible the acts are, a person could be guilty of crimes against humanity, yet still be morally ambiguous. As Mark A. Drambl notes:

Whereas much of expressive theory focuses on law’s ability to narrate norms and prohibitions, this article suggests that expressive theory might attain etiological goals, namely, to clarify – rather than occlude – how atrocity

¹¹⁵ Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York City The Viking Press 1963), viii.

spreads and in particular the roles that those who are dually victims and perpetrators play in that process.¹¹⁶

Worst-case scenario would be if the ICC were used only to solve conflict by taking the referring government's side in civil wars. This scenario is an illegitimate and legalistic solution of handling complex conflicts, and risks trivialise complex conflict through trial. There is a need to simplify, but not necessarily to shot a simplistic silver bullet at the core of the problem. If the adversary nature of trials cannot handle the full story of the creation of its perpetrators, there is a need for change or abstinence. ICC should develop a precedent with a rich narrative to explain the ambiguous mind of humans in conflict, or, otherwise stay away from these characters. Instead, they should direct their selectivity to focus on other persons within the ranks, preferably the dictatorial leader Kony.

Widening the narrative in ICL trials is within its formulated goals of constructing a reliable historical context of conflict, but the complicated task of establishing the 'truth' of events seems out of its capacity in present day. Painting this bigger picture is complicated enough to multiply the issues at trial. A good example of this incapacity is how the victim background in the *Ongwen* case is faced with reductionism, where the Court trivialise the complexity of context. The comfortable solution ought to be to reduce the aspirations of establishing historical reliability and focus solely on the individualisation.¹¹⁷ ICL would then become more strictly complementary in its role and act as substitute where a domestic procedure has failed. This avenue does not mean that the ICL judges can abandon the determination of context, since it is necessary to examine whether or not a widespread crime has occurred. The context must become a manifest part of the jurisprudence. This wish to widen the narrative and the objective of education, history lessons and expressive etiological understanding descends, according to Koskennemi, from an ambivalent accommodation to Realism in international law. That is, acknowledging the conclusion that there is a need to take account of

¹¹⁶ Mark A. Drumbl, 'Victims Who Victimize: Transcending International Criminal Law's Bineries', *London Review of International Law* Vol 4, Issue 2 (2016), 27.

¹¹⁷ Mirja Damas, 'What Is the Point of International Criminal Justice?', 83 *Chicago-Kent Law Review* (2008), 340.

context, but simultaneously discard the Realist's conclusion that law has nothing to do with it.¹¹⁸

The problem with lowering aspirations is that mass atrocities in Uganda have been occurring during a period of over 30-years and the investigation is per definition a historical account because of the considerable amount of time elapsed. However, reducing the historical aspect of ICL would certainly lower the expectations of ICL, since the broader the portrait of a conflict; the more victims would expect prosecution.¹¹⁹ Defining a historical record at trial correspondingly affects the alleged perpetrators when it comes to judicial fairness, since determined findings in an earlier case prevents the accused in a later trial to challenge the circumstantial evidence. This problem does not exist in domestic criminal law. On this note, it is submitted that Arendt had a point when stating: 'the law's main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.'¹²⁰ Additionally, there is the question of multiples of truths that can be highlighted in trial, and the fragility of truths that are tied to distant events. The defence team for Ongwen stresses the evidentiary difficulties when managing a 30-year-long conflict.¹²¹ In this sense, trials are defective interpreters of history. Further, rules about presenting evidence affect historical facts: Richard Wilson notes that, since evidence must fit in legal categories, the record will automatically be deficient and not objective.¹²² Important historical events that are not relevant to the defendant can be excluded.¹²³ However, this does not affect the example of Ongwen.

Since the point of departure is that all stories are of the same value, the trial risks becoming scenery for historic revisionism. The prime example would be the denial of the holocaust.¹²⁴ This view is criticised with the argument that a legitimate

¹¹⁸ Martti Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law*, Vol 6 (2002), 34.

¹¹⁹ *Ibid*, at 341.

¹²⁰ Hanna Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York City The Viking Press 1963), 232.

¹²¹ Thomas Obhof, part of the defence team of Ongwen, see https://www.youtube.com/watch?v=O-3IfAj_deng

¹²² Richard Aschby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press 2011), 9-10.

¹²³ Rules of Evidence, 89 (C), International Criminal Tribunal for Rwanda

¹²⁴ Martti Koskenniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law*, Vol 6 (2002), 7.

criminal case always needs to be proven beyond reasonable doubt, which would provide a shelter from 'revisionism'.¹²⁵

Further, it must be remembered that judges of ICL are not willing to take on the traditional role of historians, which does not mean that the background of these crimes are forgotten. But, if ICL decides to hold on to the goal of establishing a reliable historical record, the victim-perpetrator subject deserves to be portrayed; otherwise it would not be reliable, but rather trivialised.

On this note, it is time to draw a line between truth and completeness according to history. It is submitted that authors use the notion of historical truth, instead of completeness, as an answer to the question: what happened in this chaos? Nonetheless, completeness is the aspect of the record that claims the facts of committed crimes; not only those by the LRA in the Ugandan civil war. Completeness is not within the capacity of ICL, certainly not in the light of the abovementioned *differend* attached to the courtroom. But the historical truth is about the reliability of the facts addressed by the judges.¹²⁶ This is where the facts about a perpetrator background could be included. It does not necessarily mean that the Court shall increase its workload and investigate the perpetrators past; this assignment is left to the defence, but rather to respond to the facts when they have been forwarded.

The ICC does not really seem willing to establish the historical record of the perpetrator. However, this is desired and can be done by other actors. Jaspers developed a quite simple idea in his letters to Arendt that suggested the best situation would be a process of examination and clarification, something close to the present day truth commissions. The reason behind this idea was that the globe lacks 'a court that, as representative of humanity, is competent to judge a crime against humanity'.¹²⁷ Today, we have the ICC as the closest example of a court that tends to represent humanity. The future will tell if this Court is competent, so far the challenges seem as incomprehensible as the crimes they investigate. As an example,

¹²⁵ Giorgio Bongiovanni, Giovanni Sartor, Chiara Valentini, 'Philosophy of Law and International Criminal Law: Between Peace and Morality', (2014), *International Criminal Law Review* 14 (2014), 763.

¹²⁶ Giorgio Bongiovanni, Giovanni Sartor, Chiara Valentini, 'Philosophy of Law and International Criminal Law: Between Peace and Morality', (2014), *International Criminal Law Review* 14 (2014), 763.

¹²⁷ Karl Jaspers to Hannah Arendt, *Hannah Arendt-Karl Jaspers Correspondence 1926-1969*, ed. Lotte Kohler and Hans Saner, (New York: Mariner Books 1992), 424.

the community-creating effect of a judgment from the ICC would more likely serve the memory of the international community than the local Ugandans who still credit the traditional remedies such as the *mato oput*. The *mato oput* is a form of cleansing through healing that is believed to bring reconciliation in a way that formal legal procedure cannot. Instead, the ICC acts in an ‘international community-creating’ effect with a service of vain remembrance. Philosopher Alain Finkelkraut identified the ‘vain memory’ as a concept where the outsider not participating – those far from *the differend* – can admire our own moral standards while observing someone like Ongwen being accused of crimes against humanity.¹²⁸ Because, by depicting an evil individual at trial, we correspondingly fortify our own moral position in the ‘international community’.

In the end, the overabundance of the aspirations of ICL is juxtaposed to the idealism often formulated in international relations, and it has its clear limits.¹²⁹ Noticeable idealism is used both when a state denounces the iniquity of another state and when ICL depicts the perpetrators of war criminals. As Fyodor Dostoevsky, with nuances, pictured it: ‘It is not by confining one’s neighbour that one is convinced of one’s sanity’.¹³⁰ Translated into the language of international law and international relations: it is not by depicting a state as illegitimate that you define and ensure the legitimacy of the state. Into the language of ICL, it is not by prosecuting perpetrators, not being prosecuted in the ‘unwilling or unable state’, that you ensure the legitimacy of the ICL-procedure.¹³¹ In the phrases of criminal procedure; it is not by defining someone as a perpetrator that you erase their victim experiences.

¹²⁸ Martti Koskenniemi, ‘Between Impunity and Show Trials’, 6 *Max Planck Yearbook of United Nations Law*, Vol 6 (2002), 34, with reference to Alain Finkelkraut, *La mémoire vaine. Du crime contre l’humanité*, 1988, at 51-52.

¹²⁹ Gary Jonathan Bass, *Stay the Hand of Vengeance* (Princeton, Princeton University Press 2000), 5.

¹³⁰ Fyodor Dostoyevsky, *The Writer’s Diary*, quoted in Michel Foucault, *Madness and Civilization* (New York: Vintage Books 1965), preface (ix).

¹³¹ Article 17 of the Rome Statute of the International Criminal Court.

3. CONCLUDING REMARKS

Below, I will stress some aspects, reflections and conclusions following the *Ongwen* trial. There is more important questions juxtaposed to this trial, but I have made a selection. An extract from Child Soldiers International's submission to the ICC is an important point of departure:

The resolution of these important issues will set an important precedent and have ramifications for former child soldiers, both as perpetrators and as victims, beyond the Ongwen case.¹³²

3.1 Hard Cases Make Bad Law

Some kind of sympathy, and certainly empathy, is aroused when reading about the fate of Ongwen and to introduce the victim-perpetrator defence in ICL could risk triggering the legal maxim that 'hard cases make bad law'.¹³³ The *Ongwen* case could be seen as one of those unfortunate and exceptional cases that would work poorly as a precedent and general laws. However, the creation of horrendous perpetrators through child soldiering is not exceptional. Not allowing this defence, or the wider narrative, would demand that this situation with child soldiers becoming 'most responsible' stays exceptional; otherwise it would be illegitimate to not address the issue.

3.2 A New Type of Deterrence

Notwithstanding the fate of Ongwen's trial, a wider narrative could lead to a new type of deterrence. Not at all linked to the notion that certain crimes equate life in prison, but as a warning sign that surroundings of criminal normality develop a society towards a moral collapse. The famous strategy of Nazi Germany was to little by little increase the moral collapse, from exclusion to extermination, a gradual sequence of anti-Semitic measures. To acknowledge these steps, the creation of a society where mass atrocity becomes custom, would place the individual in a more sensible context. This is more of a global-conscience approach, but in an era of

¹³² *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber XI, Application by Child Soldiers International for leave to submit an *amicus curiae* brief pursuant to Rule 103 of the Rules of Procedure and Evidence, (24 November 2016), para 5.

¹³³ Introduced by Judge Robert Rolf in the case of *Winterbottom v Wright* in 1842.

globalisation there is a greater chance of preventing isolated communities to develop their own horrendous normality. To depict that what is about to happen is an abnormal exception, and if they do not withdraw from the moral inversion, exception can spread limitlessly and become rule. When exceptions turn to rule, when crime becomes law, it is only a matter of time before the atrocity occurs. If the victim-background is included in trial, the ICC can, for instance, deter victims to stay in the context of perpetratorisation.

3.3 A Post-Modern Procedure

A lot has happened with ICL since the Nuremberg trials. For example, we have a new view on child soldiers, which is to see them as protected subjects in international law and victims of crimes against humanity within ICL. It is because of this view of the child soldier that Ongwen appears as a complex Janus-face, but the individual responsibility was not developed with present day respect for conventions such as the Convention of the Rights of the Child. It is however, not unlikely that the victim-perpetrator would be responsible even in the future, but the judgment requires acknowledgment of context. ‘No one ... who spent his life among rascals without knowing anybody else could have a concept of virtue.’¹³⁴ A childhood spent among rascals should, at least, be portrayed in trial.

If the ICC delivers a precedent of criminal responsibility for former child soldiers, alternative sentences deserve to be addressed. Even scholars that argue that there is nothing extraordinary with the pending *Ongwen* case admit that he is psychologically broken down, desensitised and dehumanised.¹³⁵ If Ongwen’s traumatised child soldier past is not enough so to constitute duress defence, this should be a signal to open a discussion of alternative sanctions, for example forensic psychiatric care.

3.4 Sentencing a Victim-Perpetrator

Sentencing a former child soldier under ICL would develop the idea of individual responsibility. It would send the signal that we demand people to have an inherent

¹³⁴ Hannah Arendt quoting Immanuel Kant in Hannah Arendt, *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003), 61.

¹³⁵ Alex Whiting, ‘There is Nothing Extraordinary about the Prosecution of Dominic Ongwen’, *Justice in Conflict*, <https://justiceinconflict.org/2016/04/18/there-is-nothing-extraordinary-about-the-prosecution-of-dominic-ongwen/>

judgment that resists indoctrination. Not only an ‘eye not blind and a heart not stony and corrupt in order to spot unlawfulness’, but also an independent faculty of conscience that exist in every human being, unaffected by environment.¹³⁶

It is, to put it mildly, difficult to provide a preventive effect to future victim-perpetrators. The compromised perpetrator, for example a child soldier, would not be able to calculate their actions in relation to the ICC. Prevention gathered from normal convictions is as held above low, individuals that end up in an international court are simply too few. Those convicted are generally from the losing side in a civil war and, cynically speaking, this could be an incitement to be even more brutal in military operations.¹³⁷ However, individual prevention regarding Ongwen will be provided with a conviction, but surely ICL must aspire to accomplish more than that. Missing the general deterrence and prevention function is serious; this is supposed to be the main function of punishment.¹³⁸

Re-education and victim-perpetrators *de lege ferenda* would need some kind of psychiatric care to invert their upside-down world back to normal. Re-educational aspects for Ongwen are difficult to conclude, but he has been clear about leaving the LRA for good. Ongwen escaped the rebel group and encouraged other members to surrender.

I am now free and when you look at where I sleep you won't believe. I realized that I was wasting my time in the bush. I have studied the LRA and found that the LRA has no future. You all know how brave I was but I decided to come out, then what are you still doing there?¹³⁹

Sentencing Ongwen of committing crimes that he never would have committed, without his abduction, may also end up being politically costly. In one-way or another, the seriousness of being a victim to international crimes is marginalised,

¹³⁶ Kafr Kassen case App. 279–83 (1958), quoted in Hannah Arendt, *Responsibility and Judgment*, New York: Schocken Books (2003), at 41.

¹³⁷ Giorgio Bongiovanni, Giovanni Sartor, Chiara Valentini, ‘Philosophy of Law and International Criminal Law: Between Peace and Morality’, (2014), *International Criminal Law Review* 14 (2014), 765.

¹³⁸ Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press 1945), ch 1, section B.d.

¹³⁹ A Look at Dominic Ongwen's Life in the UPDF Camp, *NTV Uganda*, 15 January 2015, <https://www.youtube.com/watch?v=pKqAAMEBPiE>

and the public will ask the international community: how could this be? How this will affect the legitimacy of the ICC remains to be seen.

The most plausible solution will be to convict Ongwen and then address his background in terms of mitigating circumstances during the sentencing stage of the trial. The personal mitigating circumstances cannot be underestimated. To recognise these circumstances in detail would strike a fair response to his victim-perpetrator duality. Whether the verdict declares Ongwen guilty or not, the effect will rupture the trial, *the differend*, and disturb the binary system. To acknowledge a hybrid character, a perpetrator and a victim, risks relativizing the other victim's dignity. Contrary, if he should be found guilty, risks undermining their understanding of atrocity. His hybrid, his *differend* within, challenges the very foundations of a trial and a legal precedent and the ICC of today do not possess the capacity to fully grasp this hybrid.

This is the concluding perplexity. To ignore his victimised past, the ICC would appear illegitimate – trivialising understanding of atrocity through trial. To be legitimate, the past must emerge from within and the judges must address the guilt of LRA's criminal normality and thus mitigate the scope of individual responsibility. Meanwhile, some days ago in trial, Ongwen himself has a blurred understanding of the scope of individual criminal responsibility:

I did understand the document containing the charges but not the charges. Because the charges – the charges I do understand as being brought against LRA but not me, because I'm not the LRA. The LRA is Joseph Kony ...¹⁴⁰

3. 5 Law without Morality

The undertone of this thesis has often been based in the opinion that perpetrators, such as Ongwen, do not deserve to end up in the ICC. Not only because the story itself is sad and ironic, but also because the selectivity could be directed to other types of perpetrators than the compromised one – this is still submitted. Nonetheless, maybe the only justice Ongwen deserves is that his story is spread? Since Ongwen ended up in the ICC, the legal reality is that his background merely would have bearing in the sentencing stage of the proceedings as a mitigating factor.

¹⁴⁰ *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-T-26-ENG, Transcript from the Trial Chamber IX of the International Criminal Court, page 17.

It is difficult to accept that Ongwen's background could be a defence itself: victim-background is certainly not uncommon among perpetrators in both domestic and international proceedings. The reaction from others and myself is most likely tied to the fact that (1) the *Ongwen* case considers the most serious crimes known to mankind and (2) Ongwen is the first one at trial that has been both victim and alleged perpetrator of these crimes. It does not, yet, exist any type of *jus cogens* defence where victims of crimes against humanity would be immune to responsibility. No possible interpretation of the Rome Statute could lead to an accepted defence of past life experiences: Ongwen was not a child, but around 30 when he allegedly, during a three-year period, committed the crimes at stake in the ICC. A duress defence would necessitate proving threats of imminent risk of death threat or seriously bodily injury during three years, something that is possible in theory, but not factually.

So why is a straight conviction of Ongwen, although totally in line with the Rome Statute, still upsetting people and inflicting ambivalence? The answer could be that the moral questions impelled transcend the capacity of law, as we know it. In that case, response to atrocity must be accompanied and complemented with other paths of justice, such as truth commissions to deliver a compelling historical record of the creation, nature and existence of atrocity. The demand of punishment from a legitimate state or institution, such as the ICC, shall 'implement a moral world' and not be neutral to that extent, but reflect vision and utopia.¹⁴¹ The 'moral world' in this case is cumbersome, where the moral of the story, cynically speaking, could be formulated: 'stay away from abduction and child soldiering!'

Nonetheless, the narrative and the understanding of atrocity will continue to be substantial aspects of the evolution of ICL. In the end, the ICC, as a representative for the international community, has a huge responsibility to provide a legitimate story of the capacity of the complex human mind. After all, we have decided that the human mind, and not abstract entities, is responsible for incomprehensible atrocity.

¹⁴¹ Jean Hapton, 'Correcting Harms versus Righting Wrongs: The Goal of Retribution' *UCLA Law Review* 29 (1992), 1693.

BIBLIOGRAPHY

Treaties and Conventions

UN General Assembly, Rome Statute of the International Criminal Court. 17 July 1998.

UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989.

International Case Law

Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22, London, (1950).

Prosecutor v. Erdemovic, Case No. IT-96-22-T, Sentencing Judgement from the International Criminal Tribunal for the former Yugoslavia (5 March 1998).

The Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, Case No. ICC- 02/04-01/05-57, Warrant of Arrest from the International Criminal Court (13 October 2005).

The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Prosecution's Pre Trial Chamber II of the International Criminal Court, (23 March 2016).

The Prosecutor v. Dominic Ongwen, Case No. ICC-02/04-01/15, Prosecution's Trial Brief for the International Criminal Court, (6 September 2016).

National Case Law

Winterbottom v Wright, 1842, 152 ER 402, Court of Exchequer, United Kingdom.

471 F.2d 923, *United States v. Alexander*, 152 U.S.App.D.C. 371, Court of Appeals, District of Columbia Circuit, United States of America.

Kafr Kassen case App. 279–83, 1958, Israeli military Court of Appeal, Israel.

Books

Arendt, Hannah. *Responsibility and Judgment*, ed. Jerome Kohn (New York: Schocken Books, 2003).

Arendt, Hannah. *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York City The Viking Press 1963).

Arendt, Hanna. *Eichmann in Jerusalem: A Report on the Banality of Evil*, rev. Ed. (New York City The Viking Press 1964).

Arendt, Hannah. *The Life of the Mind* (New York: Harvest Book 1971).

Hannah Arendt, *The Jewish Writings*, ed. Jerome Kohn and Ron H. Feldman (New York, Schocken Books, 2007).

Bass, Gary Jonathan. *Stay the Hand of Vengeance* (Princeton, Princeton University Press 2000).

Bassiouni, Cherif. *Crimes Against Humanity in International Law*, (Dordrecht: Martinus Nijhoff Publishers 1992).

Borneman, John. *Settling Accounts. Violence, Justice and Accountability in Postsocialist Europe*, (Princeton: Princeton University Press 1997).

Bouris, Erica. *Complex Political Victims*. Sterling, VA: (Boulder: Kumarian Press 2007)

A. Drumbl, Mark. *Atrocity, Punishment, and International Law* (Cambridge, New York, Cambridge University Press 2007).

Foucault, Michel. *Madness and Civilization* (New York: Vintage Books 1965).

Grosser, Alfred. *Le crime et la memoire*, ed. Flammarion (Flammarion: Paris 1989).

Hart, H. L. A. *Punishment and Responsibility* (New York and Toronto, Oxford University Press 1968).

Kelsen, Hans. *General Theory of Law and State* (Cambridge: Harvard University Press 1945).

Kohler, Lotte and Saner, Hans ed. *Hannah Arendt-Karl Jaspers Correspondence 1926-1969*, (New York: Mariner Books 1992).

Koskenniemi Martti. *The Politics of International Law* (Oxford: Hart Publishing 2011).

Lyotard, Jean-François. *The Differend. Phrases in Dispute*, translation, George Van Den Abbeele (Minneapolis, University of Minnesota Press 1988).

Milgram, Stanley. *Obedience to Authority* (New York: Harper & Row 1974).

Wilson, Richard. *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press 2011).

Smeulers, Alette and Haveman, Roelof, *Supranational Criminology: Towards a Criminology of International Crimes* (Cambridge: Intersentia, 2008.).

Williams, Glenville. 2nd ed. *Criminal Law: The General Part* (London: Stevens & Sons, Ltd. 1961).

Articles

Baaz, Mikael and Lilja, Mona. 'Using Criminal Law to Resist Transitional Justice', *Conflict and Society: Advances in Research* 2 (2016).

Bongiovanni, Giorgio, Sartor, Giovanni, Valentini, Chiara. 'Philosophy of Law and International Criminal Law: Between Peace and Morality', (2014), *International Criminal Law Review* 14 (2014).

Combs, Nancy. 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes', 151 *University of Pennsylvania Law Review* 1, 101 (2002).

Damas, Mirja. 'What Is the Point of International Criminal Justice?', 83 *Chicago-Kent Law Review* (2008)

Delgado, Richard. 'Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded "Brainwashed" Defendant', 63 *Minnesota Law Review* 1 (1978).

Delgado, Richard. 'Rotten Social Background: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation', *Law and Inequality* 3 (1985).

Dressler, Joshua. 'Professor Delgado's "Brainwashing" Defense: Courting Determinist Legal System', 63 *Minnesota Law Review* 335 (1979).

Drumbl, A. Mark. 'Victims Who Victimize: Transcending International Criminal Law's Binaries', *London Review of International Law* Vol 4, Issue 2 (2016).

Haldemann, Frank. 'Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law', *Ratio Juris* 18 (2005).

Harris, Paul. 'Psychiatric Defense: Black Rage', *California Attorneys for Criminal Justice*, Criminal Law Seminar Syllabus, 1-16 (1979).

Harris, Paul and Gabel, Peter. 'Building Power and Breaking Images: Critical Legal Theory and the Practice of Law', 11 *New York University Review of Law & Social Change* 369 (1982).

Koskenniemi, Martti. 'Between Impunity and Show Trials', 6 *Max Planck Yearbook of United Nations Law*, vol 6. (2002).

Lochak, Danièle. 'Prescription, remarques dans un débat de table ronde le 22 janvier 1999', *Droits* 31 (2000).

Luban, David. 'Hannah Arendt as a Theorist of International Criminal Law', *International Criminal Law Review* 11 (2011).

Mohammed, Saira. 'Of Monsters and Men: Perpetrator Trauma and Mass Atrocity', *115 Columbia Law Review* (2016).

Morse, Stephen. 'The Twilight of Welfare Criminology: A Final Word', 49 *Southern California Law Review* 1249 (1976).

Schwöbel, E. J. Christine. 'The Comfort of International Criminal Law', *Law and Critique* 24(2) (2012).

Shabas, A. William. 'Sentencing by International Tribunals: A Human Rights Approach', *Duke Journal of Comparative and International Law* 7 (1997).

Smeulers, Alette. 'Perpetrators of International Crimes: Towards a Typology', in ed. Alette Smeulers and Roelof Haveman, *Supranational Criminology: Towards a Criminology of International Crimes* (2008).

Tallgren, Immi. 'The Sensibility and Sense of International Criminal Law', *European Journal of International Law*, vol 13 no .3 (2002).

Verhoeven, Joe. 'Vers un ordre répressif universel? Quelques observations', *Annuaire Français De Droit International* 45 (1999).

Vidal-Naquet, Pierre. 'A Paper Eichmann', translation, Maria Jolas, *Democracy* 1, 2 (1981).

Waal, De. Tamar. 'Personal Responsibility Under Totalitarian Regimes: An Analysis of Hannah Arendt's Philosophy On The Prevention of Evildoing and Criminal Liability For International Crimes', *Amsterdam Law Forum* (2012).

Wippman, David. 'Atrocities, Deterrence, and the Limits of International Justice', *23 Fordham International Law Journal* (1999).

U.N. Documents

ILC, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, U.N. Doc. A/CN.4/SER.-A/1950/Add.1 (1950).

The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, U.N. SCaR, 1: 23, U.N. Doc. S/2000/915 (2000).

Rules of Procedure and Evidence, International Criminal Tribunal for Rwanda, last amended 13 May 2015 (1995)

DRAFT Policy on Children, Office of the Prosecutor of the International Criminal Court (2016).

Newspapers

Green, Andrew. 'To Forgive a Warlord', *Foreign Policy*, 6 February 2015.

Sandberg, Brita. and Follath, Eric. 'Interview with the Notorious Lawyer Jaques Vergès: There is No Such Thing as Absolute Evil' *Der Spiegel*, 21 November 2008.

Websites

Bensaouda, Fatou. Message from the Prosecutor of the International Criminal Court calling for defection by LRA fighters, 1 April 2016,
<https://www.youtube.com/watch?v=seeZmmj2S0M>

Burke, Jason. 'Child soldier to war criminal: the trial of Dominic Ongwen', *The Guardian*, 27 March 2016,
<http://www.theguardian.com/law/2016/mar/27/dominic-ongwen-war-crimes-trial-former-child-soldier-icc-uganda>.

Kersten, Mark. 'Why the ICC wont prosecute Museveni', *Justice in Conflict*, 19 March 2015, <https://justiceinconflict.org/2015/03/19/why-the-icc-wont-prosecute-museveni/>

Odong, Krispus. 28 October 2013,
<https://www.youtube.com/watch?v=OXoT2I27oMU>

Paper on some policy issues before the Office of the Prosecutor (2003), p. 7,
https://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf

Profile of the LRA Commander Dominic Ongwen, *NTVUganda*, 7 January 2015,
<https://www.youtube.com/watch?v=iMZ-Kytz7E0>

Stolk, Sofia. 'Ntaganda at the ICC – Some observations from the public gallery',
webposting *Center for International Justice*, 14 September 2015,
<https://cicj.org/2015/09/the-opening-of-the-ntaganda-trial-at-the-icc-some-observations-from-the-public-gallery/>

Whiting, Alex. 'There is Nothing Extraordinary about the Prosecution of Dominic Ongwen', *Justice in Conflict*, 18 April 2016, <https://justiceinconflict.org/2016/04/18/there-is-nothing-extraordinary-about-the-prosecution-of-dominic-ongwen/>

Registered on the course Master's thesis, 30 ECTS, fall 2016. I have not been registered on the course before or participated in any moments of examination previous to this one.

Johan Lindberg