

**WHEN THE PREY BECOMES THE PREDATOR: DOES JUSTICE EQUAL A
CONVICTION? AN ANALYSIS OF THE DOMINIC ONGWEN CASE**

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Declaration

I, **JAEL JENNIFER MAREREH**, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: JJM

Date: 29th January 2021

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: CAO

Claire Adionyi

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Dedication

To my parents for the love, understanding and support that has enabled me to pursue my passions. My brother Hans Marereh, who has been my rock and to whom I can always count on. My friends Fenan Estifanos and Eugene Kanyugo for their support, encouragement and guidance throughout. Finally, to myself, for not giving up and for choosing hard work and dedication all through.

List of Abbreviations

AU	African Union
CAR	Central African Republic
CRC	Convention on the Rights of the Child
HSM	Holy Spirit Movement
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LRA	Lord Resistance Army
NRA	National Resistance Army
OPAC	Optional Protocol to the Convention on the Rights of the Child
OTP	Office of The Prosecutor
PTSD	Post Traumatic Stress Disorder
UPDF	Uganda People's Defence Forces

List of Cases

Prosecutor v Celebici ICTY, IT- 96- 21 (1996)

Prosecutor v Clement Kayishema ICTR- 95- 1- T (2001)

Prosecutor v Drazen Erdemovic, ICTY- Appeals Chamber IT- 96- 22- A (1997)

Prosecutor v Halilovic ICTY, IT- 01- 48- T (2005)

Prosecutor v Thomas Lubanga ICC- 01/04- 01/06

Prosecutor v Obed Ruzindana ICTR- 95- 1- T (1999)

Prosecutor v Ongwen ICC- 02/04- 01/05

Prosecutor v Tadic ICTY, IT- 94- 1- A (1995)

United States of America v Wilhelm et al, NMT 11 TWC 1230 (1948)

List of Legal Instruments

Convention on the Rights of the Child, 2nd September 1990.

Rome Statute, 17th July 1998, 2187 UNTS 3.

Abstract

Dominic Ongwen is not only an indicted war criminal but a former child soldier in one of the most brutal rebel groups that has conscripted over 30, 000 children.¹ He is the representation of children that have been bred in the shadows of illiberal war economies and a vulnerable group that have been excluded from polity or never been socialized within it.² With the mental image of a child soldier that has been painted across the international community as a child with an AK- 47 in hand, does not settle well within the community. It is this mental image that does not allow for people to look beyond the actions committed or the horrors that these children have had to go through to be combatant ready. Fearless, loyal and obedient to all orders of their commanders.

The objective of this dissertation is to analyse the process of recruitment and indoctrination that these children go through, the stance on criminal culpability for both child soldiers and commanders face under international criminal law and the mitigating factors surrounding the case of Ongwen due to the difficulty in establishing where his duality nature falls. This study shall heavily rely on doctrinal research due to the practicality surrounding the case and reliance on judicial interpretations of statutes and previously decided cases.

It has been able to establish that due to the duality nature that Dominic Ongwen presents before the ICC, the issues that arise from the indoctrination, the lack of a properly set age at which intent sets in the mind of child and the aspects surrounding what justice would mean for both the victims that have fell prey to the hands of Ongwen and the horrors he has had to endure are well brought out. The Court must realise that this case is simply not a question of law but a question of fact that shall have to delve into the history surrounding the atrocities. They shall also have to separate the moral and legal obligations that they battle in avoidance of a 'victor's justice' or an instance whereby Ongwen is a scapegoat and lastly look into other mechanisms of finding a just ending for both parties. This could be through restorative justice rather than the appreciated retributive system in a bid to set a trend in finding a new approach to ICL.

¹ Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, The Journal of Modern African Studies, 47, 2009, 163.

² Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, 163.

CHAPTER 1: INTRODUCTION

“My squad is my family, my gun is my provider, and protector, and my rule is to kill or be killed.”

- *Ishmael Beah, A Long Way Gone: Memoirs of a Boy Soldier*

Children are but the pawns of war.³ When it comes to international law, it meanders between the vague and the hazy on its stance on the age of criminal responsibility and what, if any, punishments should be imposed on child soldiers guilty of war crimes. Thousands of young boys and girls are used as puppets in the conflicts of men. They are abducted and forced into submission, and exploited as couriers, sex slaves, and menials.⁴ On the other hand, these children can be seen as victims and hence prosecuting them becomes challenging.⁵ Armed groups are using child soldiers all over the continent and are present in nearly every one of its myriads of wars.

The result appears to be an almost endemic link between children and warfare in Africa.⁶ With a common narrative that the leaders of these groups use with child militants to make it digestible, whether it is true or false, that is irrelevant.⁷ Children, particularly adolescents, are very impressionable and willing to simply identify with their peers.⁸ As Kimmel puts it, “despite the fact that children are victimized by child soldiering, their very powerlessness played a role in the perpetuation of the abuse in countries such as Liberia.”⁹ In many cases children are forced to join the armed forces through abduction or coercion intertwined with intimidation resulting to deep loyalty to the cause.¹⁰ All their lives all they have been able to

³ Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, *American University Law Review*, 33, 6, 606.

⁴ Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 606.

⁵ Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 606.

⁶ Denov M, Copying with the trauma of war: Former Child Soldiers in Post Conflict Sierra Leone, *Mc Gill University Press*, 53, 6, 791- 806, <https://journals.sagepub.com/doi/pdf/10.1177/0020872809358400>

⁷ Lakhani K, Indoctrinating Children: The Making of Pakistan’s Suicide Bombers, *CTC Sentinel*, 3, 6, 2010, 11. <https://ctc.usma.edu/wp-content/uploads/2010/08/CTCSentinel-Vol3Iss6-art4.pdf>

⁸ Kimmel E. C and Roby L. J, Institutionalized Child Abuse: The Use of Child Soldiers, *International Social Work*, 50, 6, 2007, 740. <https://journals.sagepub.com/doi/pdf/10.1177/0020872807081901>

⁹ Kimmel E. C and Roby L. J, Institutionalized Child Abuse: The Use of Child Soldiers, 740.

¹⁰ Kimmel E. C and Roby L. J, Institutionalized Child Abuse: The Use of Child Soldiers, 740

grasp and master is the art of war. The lack of morality and the freedom to choose a life that already chose them. Therefore, shouldn't such an aspect be looked into by the courts as they try to seek out justice for those that fell victim to these children?

For this dissertation, chapter one shall give a background to the study, trying to understand the issue at hand with a brief look into the views of other scholars and authors. Chapter two shall give a view on the process of recruitment, indoctrination and integration of these children into the war life. Chapter three shall cover the aspects of criminal culpability for child soldiers and for those in command under international law with chapter four going into the redefinition of justice. Does a conviction of these former child soldiers equate to justice for those they failed within the society? Lastly chapter five shall look into giving a conclusive review and any recommendations.

1.1 Background

While the participation of children in armed conflict was common throughout history, the recruitment and usage of child soldiers has only recently begun to garner international attention and condemnation. "The stereotypical image of a child soldier as painted to the world is of a pre-adolescent African boy, often posing with an AK-47 tends to rest uneasily in the eyes of the international community."¹¹ Some have opined that despite their young age, these children commit horrific war crimes and should therefore be held accountable.¹²

Government militias and opposing armed forces are generally responsible for the recruiting, indoctrination and eventually the tragedies the majority of child soldiers commit in order to further political agendas.¹³ A Taliban Commander, Qari Hussain once called children tools used to achieve the work of God and no matter what came your way you had to sacrifice yourself.¹⁴ As Lakhani Kalsoom states, "children at a young age are vulnerable, malleable and impressionable."¹⁵ These are the traits that leaders manipulate and help in the indoctrination of these soldiers for the psychology of morality and conscience is absorbed at that age and if in

¹¹ Leonie S, 'Child soldiers as agents of war and peace: A restorative transitional justice approach to accountability for crimes under International Law', 3.

¹² Sharbani D, 'Should child soldiers be held responsible for their crimes?' Academia, 2010, 4.

¹³ Kimmel E. C and Roby L. J, Institutionalized Child Abuse: The Use of Child Soldiers, 740.

¹⁴ Lakhani K, Indoctrinating Children: The Making of Pakistan's Suicide Bombers, CTC Sentinel, 11.

¹⁵ Lakhani K, Indoctrinating Children: The Making of Pakistan's Suicide Bombers, CTC Sentinel, 11.

that period all one has been exposed to is violence, it becomes a powerful and scary phenomenon.¹⁶

What we fail to acknowledge is the indoctrination experiences, that are an important processual influence which impacts young minds, involving elements of identity transformation, and rebirth into the world of being a child soldier to a war-lord.¹⁷ Relationships within these groups with commanders and peers create a semi- balance of regularity and stability in a world where this stability is threatened.¹⁸ Children adopt new norms and ways of life in the fighting world with little resistance, developing deep loyalty for commanders who mistreated and abused them, in a radical inversion of corrupted values.¹⁹

Irrespective of whether recruits enter an armed organization with homogeneous norms and beliefs, the socialization processes after induction provide the glue for group cohesion, reorienting cultural norms and beliefs through a mixture of violence, submission and selective incentives.²⁰ Rebel groups vary in their socialization practices, from using mass killing ceremonial induction, ritualistic initiation to gang rape, to reinforce the public image of ‘rebel’ as a killer, as destructive and dissociated from the norms of the community in which these small soldiers grew up as children.²¹

For Northern Uganda, describing their history in fine detail here is impractical, in view of the large number of atrocities that have occurred in the country over a period of 18 years.²² The conflict in northern Uganda began in 1986, when Yoweri Museveni took power.²³ We see the Holy Spirit Movement (HSM), a predecessor of the Lord’s Resistance Army, led by Alice Auma Lakwena, a self- proclaimed spiritual medium, launch several successful attacks on

¹⁶ Lakhani K, *Indoctrinating Children: The Making of Pakistan’s Suicide Bombers*, CTC Sentinel, 11.

¹⁷ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, Palgrave Macmillan, 1, 2011, 3.

¹⁸ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 3.

¹⁹ Lakhani K, *Indoctrinating Children: The Making of Pakistan’s Suicide Bombers*, 11.

²⁰ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 3.

²¹ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 3.

²² Acker V F, *Uganda and The Lord’s Resistance Army: The New Order No One Ordered*, African Affairs, 104, 412, 337.

²³ Lorenzo R, *Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals*, 614.

Yoweri Museveni's NRA.²⁴ Acker observes that the Lord Resistance Army just like the NRA, sees its struggle against the government of Uganda as a divine cause that is being directed and guided by God through his prophet Kony.²⁵

This was indicated by the importance of supporting rituals and the transcendent moralism justifying the acts of violence and the ritual intensity with which these acts are committed.²⁶ The younger soldiers have no clear idea why they are fighting, only that they must.²⁷ Yet this war has carried on for decades with little attention from the international community.²⁸ As the Lord's Resistance Army has ravaged much of Northern Uganda against the Uganda national army, killing tens of thousands and leaving many mutilated and traumatized, Kony held claims to be a prophet and possesses powers that enabled him to see the future and control the minds of his young soldiers.²⁹

The use of the community's own children and the lack of an explicit agenda legitimizing the use of violence epitomize an extreme depoliticization, in which victims are even deprived of the possibility of taking up responsibility for, or understanding of, the anguish they suffer while they commit these atrocities.³⁰

In 1988, a ten-year-old boy was abducted by the LRA on his way to school.³¹ We now face a boy who has grown to become Dominic Ongwen, the Brigadier General of the LRA.³² He was trained to fight against the Government of Uganda as a young child and forced to kill, mutilate,

²⁴Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 614.

²⁵ Acker V F, Uganda and The Lord;s Resistance Army: The New Order No One Ordered, 104, 412, 348.

²⁶ Acker V F, Uganda and The Lord;s Resistance Army: The New Order No One Ordered, 104, 412, 348.

²⁷ Eichstaedt H P, First kill your Family: Child Soldiers of Uganda and the Lord's Resistance Army, Lawrence Hill Books, 1, 2009, 6.

²⁸ Eichstaedt H P, First kill your Family: Child Soldiers of Uganda and the Lord's Resistance Army, 8.

²⁹ Eichstaedt H P, First kill your Family: Child Soldiers of Uganda and the Lord's Resistance Army, 8.

³⁰ Acker V F, Uganda and The Lord;s Resistance Army: The New Order No One Ordered, 354.

³¹ Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, The Journal of Modern African Studies, 47, 2009, 180.

³² Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 606.

loot from and rape civilians.³³ He became an efficient soldier, fearlessly loyal to his superiors and eventually promoted to the inner circle of the LRA.³⁴

In 2005, the International Criminal Court (ICC) issued arrest warrants for Ongwen for crimes against humanity, including massacres, abduction and enslavement of children.³⁵ On the 6th of January, in a remote region of Central African Republic (CAR), Ongwen surrendered to Seleka rebels, who without knowing his identity, delivered him to US special forces located in the area to provide training and support to an African Union (AU) regional task force fighting the LRA.³⁶ A former child soldier himself, Ongwen is charged with the same crimes of which he was victim.³⁷

A basic tenet of criminal justice, *actus me incito factus non est meus actus*, which means, ‘an act done by me against my will is not my act.’³⁸ Crimes that Ongwen is being charged with are crimes, committed or attempted directly, alone as well as jointly with other co-perpetrators in the LRA, that is, direct individual criminal responsibility, as seen under Article 25(3)(a) of the Rome Statute as read with Article 25 (3) (b) and (d) of the Rome Statute.

The prosecution claims he ordered, solicited and induced the commission of some of these crimes.³⁹ With claims that he even attempted the commission of these crimes in a group of persons with a common purpose, he is also charged under the principle of command responsibility of Article 28(a) as a leader of the LRA.⁴⁰

1.2 Problem statement

Dominic Ongwen faces 70 charges that also include crimes against humanity and war crimes. Indeed, if the laws were meant to protect the child, it is inapposite to suggest that individual

³³ Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, 180.

³⁴ Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, 180.

³⁵ Branch A, Dominic Ongwen on Trial: The ICC’s African Dilemmas, International Journal of Transitional Justice, 1, 2015, 76.

³⁶ Branch A, Dominic Ongwen on Trial: The ICC’s African Dilemmas, 76.

³⁷ Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, American University Law Review, 33, 6, 606.

³⁸ Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, American University Law Review, 33, 6, 606.

³⁹ Article 25 (3) (a) and (b) Rome Statute, 17th July 1998, 2187, UNTS 3.

⁴⁰ Article 28 Rome Statute, 17th July 1998, 2187, UNTS 3.

criminal liability can then be imposed by the sheer passage of time. Now, even if we are to find him responsible for all these charges, in pursuit of justice for all the victims he left scarred for life, should not his past be used as a mitigating factor?

1.3 Hypothesis

If the court was to look into the life of Dominic Ongwen and see that one cannot separate the child soldier from the war lord, could aspects such as his social background be used as a mitigating factor in a bid to create a balance between the justice he deserves and those of his victims.

1.4 Research objectives

1. To analyse the recruitment and integration of child soldiers into the life of war.
2. To broaden the current view of criminal liability under international law for both child soldiers and the concept of command responsibility, in light of the Dominic Ongwen case.
3. To establish whether, there are sufficient mitigating factors that the Court should look into when it comes to cases of child soldiers.

1.5 Research questions

1. What is the process of recruitment, indoctrination and integration of child soldiers?
2. What is the current view of criminal liability under international law in relation to child soldiers and the concept of command responsibility?
3. Are there sufficient mitigating factors that the Court should take into consideration for cases involving child soldiers?

1.6 Conceptual framework

The analysis of this study is significantly premised on the interplay between the legal concepts of criminal liability as in the Rome Statute, the effect of the concept of command responsibility on such liability as predicated on this position, and largely borrowing from the foundational but fundamental concept of a principal-agent relationship between child soldiers and their superiors. These concepts in tandem constitute the framework through which the study aims at addressing the problem presented.

These child soldiers are a paradox to the terms: childhood, perpetrator, and innocence. This paradox makes the issue of post-conflict justice even more complex.⁴¹ When children do participate in conflict, the atrocities they commit and the burden they carry at the point of coming face to face with the rest of society with the horrors they battled weighs on them.⁴² When they are needed to contribute to the rebuilding of the society and to flourish as members of the society's future, how should they as perpetrators of abuse be perceived and treated?⁴³

Guided by the concepts laid out in law, generally, in cases in which serious criminal acts are committed and it can be proven that they could not appreciate the actions, such individuals are usually rightly exonerated or excused of responsibility on the grounds that they lacked the necessary mens rea.⁴⁴ For child soldiers, coercion and intimidation, features in their lives and are conditions that are quite aptly regarded as diminishing or absolving personal responsibility. These children are considered to be incapable of the moral judgments and reasoning necessary to commit a criminal.⁴⁵

Lastly, the fact that action is committed as part of collective wrongdoing can be considered an aggravating factor, such as in- regards to gang participation.⁴⁶ When looking at who is to be held accountable, it still boils down to the aspect of acting on orders from superiors and these superiors are tied down by virtue of Article 28.⁴⁷ Now, the one aspect that has not been solved yet, what if this child soldier does not manage to break out from the shackles of war? Do we still render them the same justice accorded to those liable for similar atrocities under international law? Is there now a different side to it that the law had not factored in?

⁴¹ Steinl L, *Child Soldiers as Agents of War and Peace; Restorative Transitional Justice approach to Accountability for Crimes under International Law*, 22.

⁴² Steinl L, *Child Soldiers as Agents of War and Peace; Restorative Transitional Justice approach to Accountability for Crimes under International Law*, 22.

⁴³ Henquet T, 'Convictions for Command Responsibility Under Articles 7 (1) and 7 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia', 826.

⁴⁴ *Article 28*, Rome Statute, 17 th July 1998 UNTS 3.

⁴⁵ Henquet T, 'Convictions for Command Responsibility Under Articles 7 (1) and 7 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia', 829.

⁴⁶ Henquet T, 'Convictions for Command Responsibility Under Articles 7 (1) and 7 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia', 829.

⁴⁷ *Article 28*, Rome Statute, 17 th July 1998 UNTS 3.

1.7 Purpose of study

One of the original sins of humanity has been its inability to live at peace. Indeed, much of what is written in human history is simply a history of warfare.⁴⁸ No one can predict the time a war may break out in their country. With the snap of the finger of a powerful individual out to serve his selfish needs, the life of a child could be turned around. Child soldiers have been an integral part of these wars since the inception of modern warfare either voluntarily or by forced recruitment.

Understanding the history and the concept of child soldiers can help in understanding the duality of victim and perpetrator as portrayed in the Dominic Ongwen Case. As we seek to understand the lives of child soldiers, this study simply looks into furthering what is already available on child soldiers, by looking into the aspect of justice being served for those that have not been able to break from that cycle of life, of war. This case will set out precedent for all other cases against child soldiers that have not been thought of.

1.8 Research methodology

Looking into the practicality and mode of carrying out the research, the information in the paper will be heavily based on doctrinal research which includes the combination of books, journal articles, and research papers. There shall also be heavy reliance on international statute and their judicial interpretations as well as library searches for any other material that may be relevant for the study.

1.9 Literature review

Most times we forget that the experiences these children go through that hampers their development and their ability to function properly even upon the violence being ceased.⁴⁹

At present, child soldiering remains a poorly understood discussion in the international community.⁵⁰ This is because child soldiering face the strict categorization under criminal law of guilty or not guilty.⁵¹ Scholars such as Lorenzo, Ozerdem and Podder try to bring out the

⁴⁸ Mann H, International Law and the Child Soldier, 36 The International and Comparative Law Quarterly 1, 1987, 32-57.

⁴⁹ *Prosecutor v Thomas Lubanga Dyilo*, ICC- 01/04- 01/06.

⁵⁰ Drumbl A. M, Victims Who Victimise, 4(2), London Review of International Law, 2016, 240.

⁵¹ Drumbl A. M, Victims Who Victimise, 4(2), 240.

aspect of the fact that a child soldier's social background does play a role in the criminal culpability Dominic would face.⁵² Looking at the immersion into the fighter's world is an important disjuncture in the 'normal' pre-war life of children who become part of armed groups.⁵³ Children adopt new norms and ways of life in the fighting world with little resistance, developing deep loyalty for commanders who maltreated and abused them, in a radical inversion of values.⁵⁴

They talk with the view that the crimes Ongwen is charged with, are the same crimes of which he fell victim to.⁵⁵ Scholars such as Baines and Drumbl come and introduces the complex political concept of victim- perpetrator to describe a generation of victims in settings of chronic crisis who not only adapt to violence to survive but thrive in it.⁵⁶ However, even in light with all that these children go through, the Prosecutor during the opening statement spoke of the fact that escapes within the LRA were not unheard of and that Dominic Ongwen thrived to the point that he began to act on his free will and not as an innocent child.⁵⁷ But we fail to take account of the complete socialization and maturation processes within family settings they no longer enjoy and that indoctrination processes are important processual influences which impact on young minds, involving elements of identity transformation, and rebirth into the world of being a rebel or child soldier.⁵⁸ Relationships within these groups with commanders and peers create a semblance of regularity and stability in a world where every moment is insecure.⁵⁹

By becoming a perpetrator, the child or youth can gain some degree of control over his or her life and the lives of those that fall victim to him.⁶⁰ For Ongwen and generations like him, the state is absent and has been unable to extend any form of protection.⁶¹ The point still stands

⁵² Lorenzo R, *Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals*, 616.

⁵³ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 3.

⁵⁴ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 3.

⁵⁵ Lorenzo R, *Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals*, 616.

⁵⁶ Baines E K, *Complex political perpetrators: Reflections on Dominic Ongwen*, 180.

⁵⁷ *Prosecutor v Ongwen*, ICC 02/04- 01/05.

⁵⁸ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 3.

⁵⁹ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 3.

⁶⁰ Baines E K, *Complex political perpetrators: Reflections on Dominic Ongwen*, 180.

⁶¹ Baines E K, *Complex political perpetrators: Reflections on Dominic Ongwen*, 180.

that his point of entry into this world of violence remains fixed on the aspect that he was young, kidnapped, orphaned and abused in the process.⁶² In its absence, war opens spaces for social, economic and political innovation that goes ahead to exclude children and youth and can be either forced or voluntarily enter and thrive.⁶³ Gendered, soldiers are trained to be tough, fearless and aggressive, situated within a dysfunctional masculine hierarchy where they exercise power over subordinates and derive security from their own excess inflictions upon their victims.⁶⁴

It is however important to take note that freedom is necessary for a judgement of moral and/or legal responsibility.⁶⁵ This is questioned by Henquet on the extent to which child soldiers exhibit the mental element necessary for moral and legal responsibility.⁶⁶ It may not be sufficient that they had knowledge of the consequences of his or her actions or that he or she even desired the consequences of the actions, that the outcome was 'both desired and foreseen'.⁶⁷ Seeing that coercion, a feature in the lives of majority of child soldiers, is a condition that is quite aptly regarded as diminishing or absolving of personal responsibility, then at what point can we state that this child gained the moral capacity to know wrong from right? Unfortunately, if they cannot break away from the life of war and continue killing with inability to comprehend the consequences of their actions, how can we then seek out justice against this individual?

For them, securing a position of prestige in the rebel group simply means that this individual has been able to survive all that had to be endured. As one climbed through the ranks, he obtained wives, children and material wealth, derived through looting and violence.⁶⁸ Young

⁶² Drumbl A. M, *Victims Who Victimise*, 4(2), *London Review of International Law*, 2016, 241.

⁶³ Baines E K, *Complex political perpetrators: Reflections on Dominic Ongwen*, 180.

⁶⁴ Baines E K, *Complex political perpetrators: Reflections on Dominic Ongwen*, 181.

⁶⁵ Henquet T, 'Convictions for Command Responsibility Under Articles 7 (1) and 7 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia', 826.

⁶⁶ Henquet T, 'Convictions for Command Responsibility Under Articles 7 (1) and 7 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia', 826.

⁶⁷ Henquet T, 'Convictions for Command Responsibility Under Articles 7 (1) and 7 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia', 826.

⁶⁸ Baines E K, *Complex political perpetrators: Reflections on Dominic Ongwen*, 181.

men and women that engage in military ‘work’ come to embrace expectations of themselves by their commanders as a form of re- claiming political space.⁶⁹

The question that we then ponder upon is what is just? Kirsten J tries to bring out the aspect of evaluating the right means of culpability for child soldiers.⁷⁰ The accountability mechanism must be both appropriately retributive and expressively significant. The accountability mechanism must be both appropriately retributive and expressively significant.⁷¹ Thus, the view that the court should look- into the aspect of being a child soldier for Dominic Ongwen’s instance as a mitigating factor that would not completely exclude him from all liability but reduce the sentencing.

Even if society was to look at the idea of social reconstruction as a way of promotion of peace and the reintegration of these child soldiers back into society, the belief in the value of accountability or the faith the people hold in an eye for an eye under most conditions still faces the battling aspects of justice not necessarily equating to a conviction of these soldiers for it can obfuscates the aims of the social reconstruction, therefore, should not be assumed vital or as the only way for healing to occur within the nation.⁷²

1.10 Limitation of study

Some of the limitations that may be faced during this study would be the fact that little has been made publicly accessible when it comes to all the facts of the central case study. At this point the only thing we can rely on are summary reports laid out by the International Criminal Court and the released footages of proceedings such as the opening trial.

Also, the fact that the trial is still ongoing with a lack of a definite date for giving a ruling or judgement, bearing in mind the currently prevalent COVID-19 pandemic, the trial is likely to

⁶⁹ Baines E K, *Complex political perpetrators: Reflections on Dominic Ongwen*, 181.

⁷⁰ Fischer J K, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post Conflict Contexts*, Palgrave Macmillan, 1, 2013, 148.

⁷¹ Fischer J K, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post Conflict Contexts*, 148.

⁷² Fischer J K, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post Conflict Contexts*, 105.

be postponed. With very few written articles on the issue the author seeks to unpack those that would pose a challenge when it comes to looking for credible sources to rely on.

1.11 Chapter breakdown

Chapter One shall give a background to the study, trying to enunciate the problem statement, the hypothesis, research questions, methodology and the general purpose of the paper.

Chapter Two will delve into the lives of child soldiers. From their recruitment to their indoctrination into the life of war in order to depict what it is like to be in that state of hopelessness with no other alternative but to choose staying alive above everything. This section shall heavily rely on autobiographies of child soldiers and have the reader stand from a different point of view.

Chapter Three will assess the notion of criminal responsibility and mostly focus on the place of child soldiers in the international sphere versus the doctrine of command responsibility that is placed on leaders of armed militia groups under International Law.

Chapter Four will try and address the issue of justice under international law, specifically for child soldiers as victims. What does it mean to have one look at a case and think this would be the just way to handle the matter? We will attempt to balance it out with certain factors such as the social backgrounds of these soldiers and the lack of morality or proper reasoning for them, as well as the need for resocialization and reintegration of child victims/perpetrators?

Chapter Five will review the findings of the previous chapters and look into giving a conclusive, well-informed opinion on how the issue could best be handled, as well as any relevant recommendations.

CHAPTER 2: AN ANALYSIS OF THE RECRUITMENT, INDOCTRINATION AND INTEGRATION OF CHILD SOLDIERS

2.1 Introduction

This chapter analyses the recruitment, indoctrination and integration of the child soldiers into the world of war in an attempt to understand their social backgrounds. It is in understanding how their minds and personalities are moulded by these leaders that we can understand the position that children like Ongwen are placed in, which consequently affects their future.

When it comes to the process of adding new individuals to a population by growth, reproduction, immigration and stocking, this what we term as recruitment, while to integrate is to incorporate or to unite into a larger unit.⁷³ While the meaning of indoctrination is simply, brainwashing or to instruct people especially in fundamentals.⁷⁴ The term child soldier was first adopted at the “*Symposium on the Prevention of Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa*,” in Cape Town in 1997.⁷⁵ A child soldier was defined to be any person under the age of 18 years, who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members.⁷⁶ The definition also includes girls recruited for sexual purposes and forced marriage.⁷⁷ The reality of child soldiers, as well as the circumstances and conditions of their recruitment, does not qualify them to be called soldiers, when considering the soldiering profession strictly as an adult profession.⁷⁸

Under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), Article 6 (3) has raised the age of recruitment into government forces and direct participation in hostilities to the minimum age of 18. Looking

⁷³ Merriam Webster Dictionary, 11th ed.

⁷⁴ Merriam Webster Dictionary, 11th ed.

⁷⁵ Leonie S, ‘Child soldiers as agents of war and peace: A restorative transitional justice approach to accountability for crimes under International Law’, *International Criminal Justice Series*, 14, 2017, 1.

⁷⁶ Leonie S, ‘Child soldiers as agents of war and peace: A restorative transitional justice approach to accountability for crimes under International Law’, 1.

⁷⁷ Leonie S, ‘Child soldiers as agents of war and peace: A restorative transitional justice approach to accountability for crimes under International Law’, 1.

⁷⁸ Kiyala KCJ, *Child Soldiers and Restorative Justice: Participatory Action Research in the Eastern Democratic Republic of Congo*, Springer, Durban South Africa, 42.

into this, there is no justification for voluntary or forced participation of children in armed conflict. However, children who are left unprotected, without educational opportunities and occupational activities, are more likely to join militia groups.

Child soldiers are viewed differently in the international community. For some in the international sphere, they see them as victims, who should be protected and reintegrated back into society.⁷⁹ Victims after all can sometimes be imperfect.⁸⁰ Others view them as perpetrators that deserve to face the consequences of the atrocities they committed while another group in the community is of the view that even in armed forces and groups, belligerent children that perpetuate heinous atrocities, including crimes of genocide and those against humanity, the equation becomes more complicated when these young soldiers are extolled as heroes by their communities.⁸¹ It is these perpetrators that bring tragedy to all, giving humanity a shapeshifting persona in times of violence that does not sit well with the law.⁸² Either way, whether victim or perpetrator they have been victims of the same horrors that have befallen upon the people of Uganda.

2.2 Process of Recruitment, Indoctrination and Integration

When it comes to recruitment and retention, they are essential for any group.⁸³ To be viable, a group must have members, whether a labour union, a political party or a rebel army.⁸⁴ A group must be able to convince people to join and to persuade them to continue participating in the group which is extremely important for a violent organization engaging in military conflict all for the survival of the group itself as well as its leadership.⁸⁵ In this instance we are looking at children, who are unable to understand the consequences of their actions, one who follows instructions without question, with an immaturity that does not allow them to see these faults.⁸⁶

⁷⁹ Kiyala KCJ, *Child Soldiers and Restorative Justice: Participatory Action Research in the Eastern Democratic Republic of Congo*, Springer, 19.

⁸⁰ Drumbl A. M, *Victims Who Victimise*, 4(2), 218.

⁸¹ Kiyala KCJ, *Child Soldiers and Restorative Justice: Participatory Action Research in the Eastern Democratic Republic of Congo*, 19.

⁸² Drumbl A. M, *Victims Who Victimise*, 4(2), *London Review of International Law*, 2016, 219.

⁸³ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 53.

⁸⁴ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 53.

⁸⁵ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 53.

⁸⁶ Nortje W and Quenivet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, Palgrave MacMillan, 2020, 2.

With all that in mind, for the militia groups, the first requirement is that the child is placed in such a situation that he/she may die or suffer serious bodily harm if he/she does not carry out a certain act that could be against the law.⁸⁷

The requirement is not only a threat of serious bodily harm, that is, a threat to the physical integrity of the body of the perpetrator but to another person.⁸⁸ Children adopt new norms and ways of life in the fighting world with little resistance, developing deep loyalty for commanders who mal- treated and abused them, in a radical inversion of values.⁸⁹ These children tend to react to a wide swathe of elements rather than one specific threat.⁹⁰

Moreover, the threats are often psychological in nature, served as a dangerous cocktail of physical and psychological harm which ultimately disrupts their moral development.⁹¹ Children participate in atrocities because of their will to survive, out of obedience or even the simple idea of the need to fit in with their peers, a source of identity, because of the normalization of violence, due to the satisfaction derived from violence, and for reasons of ideology.⁹² To which, war lords such as Joseph Kony used in exploitation of the children. Having them believe in his powers and that they fought for a good cause. Spiritual indoctrination as a means to controlling the behaviour of children dissuaded them from attempting to escape.⁹³ Former child soldiers and commanders report that Kony has omnipresent powers: he can predict the future and uses this power to defeat his enemies.⁹⁴

Most times it could also be the fact that allegiance to these armed groups stems from a process of organisational socialisation.⁹⁵ The degree upon which this socialisation processes would lead to an internalisation of these rules and norms will depend on how the group will succeeded in

⁸⁷ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 53.

⁸⁸ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 53.

⁸⁹ Steinl L, *Child Soldiers as Agents of War and Peace; Restorative Transitional Justice approach to Accountability for Crimes under International Law*, 22.

⁹⁰ Steinl L, *Child Soldiers as Agents of War and Peace; Restorative Transitional Justice approach to Accountability for Crimes under International Law*, 22.

⁹¹ Nortje W and Quenviet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, 34.

⁹² Steinl L, *Child Soldiers as Agents of War and Peace; Restorative Transitional Justice approach to Accountability for Crimes under International Law*, 22.

⁹³ Baines E K, *Complex political perpetrators: Reflections on Dominic Ongwen*, 169.

⁹⁴ Baines E K, *Complex political perpetrators: Reflections on Dominic Ongwen*, 169.

⁹⁵ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 30.

transforming the preferences of abductees.⁹⁶ Violence permeates these socialization processes, affecting ‘compliance, role adoption, internalisation of group norms, cognitive dissonance reduction, habituation to violence, diffusion of responsibility onto the group, deindividuation, and de-humanisation of the victimised group and changing fresh recruits to instruments of violence.’⁹⁷

Once disoriented and initiated, new abductees are provided military training, which involves long drills in using a gun and conducting raids.⁹⁸ Children as young as fourteen could be put in command of small groups of children and sent on raids, looting goods from trading centres or food from gardens and stores.⁹⁹ The formerly abducted youth could warn other children that should they be abducted, they should never cry, regardless of the circumstances, as displays of emotion, such as keeping to oneself, or being quiet or remorseful, may be construed as longing for home which was punishable.¹⁰⁰ Some commanders also forced their new ‘recruits’ to participate in ‘rituals’ involving tasting the blood of those they killed or rolling in that person’s blood or even eating with bloodied hands while sitting on the bodies of persons who have just been killed.¹⁰¹

2.3 Conclusion

In a revealing interview with the ICC prior to his incarceration, Ongwen went ahead to state, “In my mind, I thought war was the best thing. Even up to now, I dream about war every night. But if they don’t want to forgive me, I leave it in their hands. I have become like a lice, which

⁹⁶ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 30.

⁹⁷ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, Palgrave Macmillan, 1, 2011, 30.

⁹⁸ Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, *The Journal of Modern African Studies*, 47, 2009, 170.

⁹⁹ Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, *The Journal of Modern African Studies*, 47, 2009, 170.

¹⁰⁰ Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, *The Journal of Modern African Studies*, 47, 2009, 170.

¹⁰¹ Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, *The Journal of Modern African Studies*, 47, 2009, 172.

you remove from your hair or waist and kill without any resistance.”¹⁰² Following Ongwen’s surrender to the Seleka Rebels who then handed him over to the US troops,¹⁰³ he now faces 70 charges of crimes against humanity and war crimes committed between the year 2002 and 2005 which include, murder, sexual and gender- based violence (such as forced marriages, rape and sexual slavery) and conscription of child soldiers.¹⁰⁴ For young Dominic Ongwen, having spent his formative years and adult life with the LRA, years that shaped his social background, inculcated the disvalues of the same, a species of Social Darwinism where only the most fit survive.¹⁰⁵ Ongwen’s values and beliefs were molded by his environment while he was a child soldier. The LRA precisely executed a six- month indoctrination process to inculcate a new set of norms into the abductees.¹⁰⁶ Which birthed not only the child soldier but the commander as well.

¹⁰² Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, *American University Law Review*, 33, 6, 629.

¹⁰³ ¹⁰³ Branch A, Dominic Ongwen on Trial: The ICC’s African Dilemmas, *International Journal of Transitional Justice*, 1, 2015, 76.

¹⁰⁴ Kan G, The Prosecution of a Child-Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen, 5, 1, *SOAS Law Journal*, 2018, 75.

¹⁰⁵ Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, *American University Law Review*, 33, 6, 629.

¹⁰⁶ Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, *American University Law Review*, 33, 6, 629.

CHAPTER 3: CRIMINAL CULPABILITY- CHILD SOLDIER v DOCTRINE OF COMMAND RESPONSIBILITY

3.1 Introduction

When it comes to the enforcement of provisions under international criminal law on perpetrators, the principle of international criminal responsibility is one of the most important principles.¹⁰⁷ Despite the lack in an international definition of international crimes, there are certain elements that are sought out.¹⁰⁸ First and foremost, all international crimes involve direct individual liability under international law.¹⁰⁹ Secondly, the norm that is part of the international law has been violated by these crimes especially international treaties or customary norms.¹¹⁰ Thirdly, these norms offer protection to values that are deemed important by the international community hence any violation warrants international concern.¹¹¹ Fourthly, due to the universality attached to these so protected values, there is a profound interest in ensuring that there is a repression of these violations and lastly, when it comes to matters dealing with jurisdiction, it does not fall squarely on a single state but attracts universal jurisdiction.¹¹²

Today, individual criminal responsibility is not a novelty, with it being well known that one can be individually held responsible for international crimes committed.¹¹³ Dating from the Nuremberg trials, Judge Jackson stated that, “*it is men that commit crimes against international law and the push for punishment to be inflicted upon the said individuals, enables these provisions under international law to be enforced.*”¹¹⁴ The statement by the judge can be buttressed by the general principle that no one may be held accountable for an act he has not

¹⁰⁷ Malekian F, Basis of Criminal Accountability in Principles of Islamic Law, 5, Brill’s Arab and Islamic Law Series, 2011, 385-https://brill.com/view/book/9789004203976/Bej.9789004203969.i-452_033.xml 17th December 2020.

¹⁰⁸ Nortje W and Quenivet N, Child Soldiers and the Defence of Duress under International Criminal Law, 19.

¹⁰⁹ Nortje W and Quenivet N, Child Soldiers and the Defence of Duress under International Criminal Law, 19.

¹¹⁰ Nortje W and Quenivet N, Child Soldiers and the Defence of Duress under International Criminal Law, 19.

¹¹¹ *Prosecutor v Tadic* (1995), ICTY of the Former Yugoslavia

¹¹² *United States of America vs Wilhelm List et al* (1948), Nuremberg Military Tribunals, Germany.

¹¹³ *Prosecutor vs Dominic Ongwen* (2015), International Criminal Court.

¹¹⁴ Duffy H, *The War on Terror and the Framework of International Law*, Cambridge University Press, 2005, 74.

performed, as well established under the Tadic Appeal, laying down two notions.¹¹⁵ That one may not be held accountable for criminal offences perpetrated by others (premised under the rationale of collective responsibility that no longer existing) and that one may only be held criminally liable if he is somehow culpable for any breaches of criminal rules.¹¹⁶

Struggling with the nature of the case and the fact that Dominic brings out a duality aspect that has not been seen before, he blurs the established moral norm that divides victims who are in most cases seen as pure and innocent and perpetrators who on the other hand are seen as being of guilt and are evil, to which Dominic exudes both.¹¹⁷ With international criminal law based on a victim- perpetrator dichotomy,¹¹⁸ and on a necessity of seeking out justice for victims and ending impunity as its main aims,¹¹⁹ the duality that persons such as Ongwen face, tends to shatter the perfect model of adults- bad and children- good that really dominates the modern legal arena.¹²⁰ This third chapter shall seek to dive into the doctrine of command responsibility that Dominic Ongwen faces as we also seek to understand the place of child soldiers within the international sphere and the extent of their accountability, as well as the arguments raised from both parties in the Dominic Ongwen Case.

3.2 Doctrine of Command Responsibility

Generally, international criminal trials and judgements tend to have a unique capability to condemn, meaning they will always bear strong connotations to a value-based system of considerations.¹²¹ The judgment will be based on the perpetrator but will mirror and reflect the audience and their perception of the atrocities that took place, which tries not to limit the reviewal of past events but also build upon the understanding of any future atrocities.¹²² Hence,

¹¹⁵ Casese A, *Criminal Liability for Omissions in International Criminal Law* (ed), 1st ed, Oxford University Press, United Kingdom, 2003, 196.

¹¹⁶ Casese A, *Criminal Liability for Omissions in International Criminal Law* (ed), 1st ed, 197.

¹¹⁷ Nortje W and Quenivet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, 15.

¹¹⁸ Nortje W and Quenivet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, 15.

¹¹⁹ Thomas A.M, *Malice supplies the age: Assessing the Culpability of Adolescent Soldiers*, 44, 1, *California International Law Journal*, 2013, 3.

¹²⁰ Nortje W and Quenivet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, 15.

¹²¹ Hasselind S.F, *The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen*, *Social and Legal Studies*, 2020, 5, <journals.sagepub.com/home/sls>

¹²² Hasselind S.F, *The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen*, 5.

the judgements need to link the past and the present to provide a justification for what happened in that given context.¹²³ One cannot build an argument on a foundational notion that conduct can be completely isolated from the structural explanations such as historical contexts or social backgrounds, therefore leading down a distorted view of the entire picture by an individual based focal point which risks distorting the political context surrounding the perpetrator.¹²⁴

Starting with the first aspect of the duality nature, Article 28 of the Rome statutes envisages the doctrine of command responsibility, which is seen as both a mode of liability and also a separate offense. It tries to bring out a distinction between military superiors and non- military superiors.¹²⁵ Superior or command responsibility is the mechanism through which superiors can be held criminally liable for the failure in preventing or punish crimes that are committed by their subordinates that result in violation of the norms under the Rome Statute.¹²⁶ The Rome Statute generally requires proof of guilt to be beyond reasonable doubt but for commanders their guilt sits on a plane that is much higher than those that are following the orders.¹²⁷ With origins from the aftermath of the Second World War atrocities, the doctrine of command responsibility was premised on the failure to prevent or punish crimes perpetrated by the subordinates of these superiors.¹²⁸ In the controversial case of Yamashita, a Japanese army general who led a group of soldiers that massacred a large population of civilians in the Batangas province.¹²⁹ He was deemed to have a duty to take such appropriate steps within his powers to control of his troops for the prevention of violations of the law of warfare.¹³⁰

Cases such as Yamashita's have set the first contours of superior responsibility based on three foundational elements.¹³¹ The functional element: that the superior had a duty to act; a cognitive

¹²³ Zunino M, *Justice Framed: A Genealogy of Transitional Justice*, Cambridge University Press, 2019, 130.

¹²⁴ Hasselind S.F, *The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen*, 5.

¹²⁵ Sliedregt V.E, *Article 28 of the ICC Statute: Mode of Liability and / or Separate Offense?* 12,3, University of California Press, 2009, 420.

¹²⁶ Sliedregt V.E, *Article 28 of the ICC Statute: Mode of Liability and / or Separate Offense?* 420.

¹²⁷ Schabbas A.W, *General Principles of Criminal Law in An Introduction to the International Criminal Court* (eds), 4th ed, Cambridge University Press, United States of America, 2011, 231.

¹²⁸ Casese A, *Criminal Liability for Omissions in International Criminal Law* (ed), 1st ed, 264.

¹²⁹ Casese A, *Criminal Liability for Omissions in International Criminal Law* (ed), 1st ed, 264.

¹³⁰ Casese A, *Criminal Liability for Omissions in International Criminal Law* (ed), 1st ed, 264.

¹³¹ Sliedregt V.E, *Article 28 of the ICC Statute: Mode of Liability and / or Separate Offense?* 423.

element: that the superior should have known of the crimes that were committed by the subordinates; and lastly an operational element: whereby the superior failed to act by either preventing the commission of the crimes or punishing the wrong- doers.¹³² These elements have been envisaged within various legislations dating from Article 1 and 43 of the Regulations annexed to the Fourth Hague Convention of 1907, Article 19 of the Tenth Hague Convention of 1907, Article 26 of the 1929 Geneva Convention,¹³³ Article 86 of the Additional Protocol 1 to the 1949 Geneva Conventions, Article 7(3) of the ICTY Statute all the way to Article 28 of the Rome Statute.¹³⁴

Landmark cases such as the Celebic case in the ICTY and the Kayishema and Ruzindana cases at the ICTR have managed to set good precedent when it comes to superior responsibility from the point of view of civilians despite the contentious aspects that come with it such as the lack of clear and proper hierarchical structures as compared to those seen in the military.¹³⁵

Similarly, on the 21st of March 2016, the Trial Chamber 3 of the ICC convicted Jean- Pierre Bemba of three counts of war crimes and two counts of crimes against humanity.¹³⁶ Amongst them the concept of command responsibility came out and he was the first man to be convicted under Article 28 of the Rome Statute.¹³⁷ This case expounded on the three set elements of command responsibility and brought out the aspect of *mens rea* when it came to the crimes committed.¹³⁸

When dissecting the three elements that the prosecution must prove, when it comes to the element of superior- subordinate relationship, the power of the superior to control the acts of his or her subordinates is the most important aspect.¹³⁹ In trying to unpack this element, all mentioned tribunals (the ICTY, ICTR and the Special Courts) and their various statutes; Article

¹³² Sliedregt V.E, Article 28 of the ICC Statute: Mode of Liability and / or Separate Offense? 423.

¹³³ Casese A, Criminal Liability for Omissions in International Criminal Law (ed), 1st ed, 264.

¹³⁴ Sliedregt V.E, Article 28 of the ICC Statute: Mode of Liability and / or Separate Offense, 423.

¹³⁵ Williamson J.A, Command Responsibility in the case law of the ICTR: ICC Legal Tools Database, 367.

¹³⁶ McDermott Y, Prosecutor vs Bemba, 110, 3, The American Journal of International Law, 2016, 526.

¹³⁷ McDermott Y, Prosecutor vs Bemba, 526.

¹³⁸ McDermott Y, Prosecutor vs Bemba, 526.

¹³⁹ Moloto J.B.J, Command Responsibility in International Criminal Tribunals, 3, Berkeley Journal International Law Publicist, 6.

7 (3) of the ICTY and Article 6 (3) of the ICTR,¹⁴⁰ have managed to apply the *effective control test* which aims at determining whether the superior had the material capability of controlling the actions of his subordinates and even prevent and punish criminal conduct.¹⁴¹ This test is the key element in the doctrine of superior responsibility and its only upon a commander having effective control, he will be held liable.¹⁴²

With control defined as the authority exercised by a commander over part of the activities of his subordinates, it also encompasses the responsibility for implementing orders or directives with this authority either being delegated or being transferred.¹⁴³ This was similar to the definition offered in the Halilovic case. Recently under the Celebic case it was noted that the control aspect is very vital for the non- military superiors such as Ongwen.¹⁴⁴ The tribunal also noted that command responsibility is also responsibility for an omission.¹⁴⁵

The omission is what is culpable under international criminal law and imposes an affirmative duty on the superiors to prevent and punish the crimes that their subordinates commit. The imposition of responsibility that rests upon the commander for the breach of that duty is to be weighed against the gravity of the crimes committed by his subordinates and not the fact that, the commander is to be held responsible for the commission of the crimes of his subordinates as though he committed them himself.¹⁴⁶

The second aspect is the mental element, which tackles the issue that the superior knew or had reasons to know that his subordinates were committing or about to commit the crimes.¹⁴⁷ In the total absence of knowledge on the part of the commander, there will be no ground for the prosecution to hold him accountable for any dereliction of duty or for the commission of the atrocities on the part of his subordinates.¹⁴⁸ However, tribunals have interpreted the entire

¹⁴⁰ Bonafe I. B, Finding a Proper Role for Command Responsibility, 1, Journal of International Criminal Justice, 2007, 601.

¹⁴¹ Moloto J.B.J, Command Responsibility in International Criminal Tribunals, 3, 6.

¹⁴² Sliedregt V.E, Article 28 of the ICC Statute: Mode of Liability and / or Separate Offense? 423.

¹⁴³ Sliedregt V.E, Article 28 of the ICC Statute: Mode of Liability and / or Separate Offense? 423.

¹⁴⁴ Sliedregt V.E, Article 28 of the ICC Statute: Mode of Liability and / or Separate Offense? 423.

¹⁴⁵ Bonafe I. B, Finding a Proper Role for Command Responsibility, 602.

¹⁴⁶ Bonafe I. B, Finding a Proper Role for Command Responsibility, 602.

¹⁴⁷ Moloto J.B.J, Command Responsibility in International Criminal Tribunals, 6.

¹⁴⁸ Dinstein Y, War Crimes, Orders, Command Responsibility and Defenses: In the Conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press, 2016, 377.

element of knowledge broadly to encompass the aspect of negligence and whether that piece of information was available to the superior that would have put him in the know of crimes being committed and hence, the tribunal also goes into aspects such as reports addressed to the superior or even the tactical situation.¹⁴⁹ Thus, under the Celebic case, it was noted, if the superior had the means to obtain such information and instead opted to refrain from obtaining it, the knowledge is presumed.¹⁵⁰ This presumption is linked to the official position of the accused in the state hierarchy and from the notorious and widespread character of the crime committed.¹⁵¹

The final element that the prosecution would have to look into when it comes to establishing culpability under Article 28, are the legal duties that come with the doctrine, which is the duty to prevent or repress the crimes committed by his subordinates.¹⁵² With reliance on the jurisprudence set forth by the ICT of the former Yugoslavia, a failure to prevent the atrocities from taking place could not be remedied by now holding the subordinates accountable.¹⁵³ These two duties tends to place a duty upon the commander to take action as soon as the commander acquired the actual knowledge about the commission of the crime and even after the crime has occurred.¹⁵⁴ The court shall look into the necessary and reasonable measures that have been taken, for it will all come down to more of a question of evidence and whether he had the material ability to act.¹⁵⁵ In the Bemba case, he was found to have made no effort when it came to matters of putting in the effort to investigate or prosecute the matters himself and to even take the extra steps to refer the cases to the competent national authorities within the country or simply cooperate with the international efforts to seek out justice.

Noting that Article 25 of the Rome Statute which Ongwen is also charged under, furthers the commanding authority doctrine, it goes ahead to place individual criminal responsibility be it

¹⁴⁹ Moloto J.B.J, Command Responsibility in International Criminal Tribunals, 7.

¹⁵⁰ Moloto J.B.J, Command Responsibility in International Criminal Tribunals, 7.

¹⁵¹ Bonafe I. B, Finding a Proper Role for Command Responsibility, 603.

¹⁵² Casese A, Criminal Liability for Omissions in International Criminal Law (ed), 1st ed, 269.

¹⁵³ McDermott Y, Prosecutor vs Bemba, 529.

¹⁵⁴ Moloto J.B.J, Command Responsibility in International Criminal Tribunals, 19.

¹⁵⁵ Moloto J.B.J, Command Responsibility in International Criminal Tribunals, 20.

jointly or individually.¹⁵⁶ Bringing charges under both articles allows the ICC the jurisdictional reach to extend far and wide to even instances such as conscription of child soldiers which Ongwen faces charges for.¹⁵⁷

3.3 Culpability of Child Soldiers under International Criminal Law

The second aspect of the duality nature is the place of being a child soldier for Dominic Ongwen. With the LRA seeing its struggle with the Government of Uganda as a divine cause that is being directed by God through his prophet Kony,¹⁵⁸ the recruitment of child soldiers into such struggles is not new.¹⁵⁹ Yet the law has not been able to fully protect these children hence having these children take up active roles of perpetrators as passive ones or end up as commanders.¹⁶⁰ The first conception of the needs of children for special protection came in the 1924 League of Nations Declaration of Geneva, which still failed to address the political and civil rights of the child.¹⁶¹ It was until when the industrial revolution hit, that we had The International Labour Organisation come up with the 1919 Minimum Age Convention in trying to curb the number of children in the working force.¹⁶² This was then followed by the Universal Declaration of Human Rights in 1948 highlighting the importance of the providing special care and assistance starting from the family unit.¹⁶³

Stemming from the belief that children are incapable of evil we also have The Nuremberg Charter of 1945, The Geneva Convention 4 of 1949 that tried to enunciate the need to protect these children.¹⁶⁴ The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) that have articles such as Article 24 addressing the minor status that children held and hence in need of protection setting the pace for the Convention on the Rights of the Child which still set forth

¹⁵⁶ Davidson Ann, Child Soldiers: No longer a minor incident, 12, 124, *Williamette Journal International and Dispute Resolution*, 2004, 148.

¹⁵⁷ Davidson Ann, Child Soldiers: No longer a minor incident, 148.

¹⁵⁸ Acker V F, Uganda and The Lord's Resistance Army: The New Order No One Ordered, 104.

¹⁵⁹ Shrabani D, Should Child Soldiers be held Responsible? 2.

¹⁶⁰ Shrabani D, Should Child Soldiers be held Responsible? 2.

¹⁶¹ Davidson Ann, Child Soldiers: No longer a minor incident, 12, 124, 135.

¹⁶² Davidson Ann, Child Soldiers: No longer a minor incident, 12, 124, 135.

¹⁶³ Davidson Ann, Child Soldiers: No longer a minor incident, 12, 124, 135.

¹⁶⁴ Happold M, Excluding Children from Refugee Status: Child Soldiers and Article 1F of The Refugee Convention, 17, 6, *American University International Law Review*, 2002, 1147.

the rights found in the ICESCR and the ICCPR but still failed in protecting the child and hence the coming of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.¹⁶⁵

Even with such opportunities to protect the child, legislations such as the CRC failed in setting simple guidance on the issue.¹⁶⁶ Not only the minimum age of culpability but also the age at which children are to be presumed be it capable or incapable of forming the required intent element of a crime.¹⁶⁷ The CRC defines a child as every human under the age of 18 years,¹⁶⁸ but the same statute leaves room to the domestic courts of states to set their own minimum age of criminal responsibility,¹⁶⁹ which it fails at setting a customary norm on the age of culpability.

However, for the Special Panels for Serious Crimes, sets the minimum age at 12 years while Article 7 of the Special Courts of Sierra Leone which saw the worst that could be committed by minors, at 15 years.¹⁷⁰ Even then, with the inconsistencies with the minimum age requirement for culpability, there seems to be one thing that is constant, the inability for holding these child soldiers accountable. The Rome Statute under Article 26 clearly states the exclusion of jurisdiction on trying matters at which at the time the person was under the age of 18 years.¹⁷¹

3.4 Discussion

Even with the lack of uniformity, Dominic Ongwen has clearly brought out two issues that lie at the heart of this paper: the age at which intent sets in for child soldiers, which needs to be looked at from a legal and moral point of view and whether child soldiers should be held accountable if at all. Essentially, minors do not go looking for conflicts to take part in, just like in Ongwen's situation which is the situation that several child soldiers find themselves in, war

¹⁶⁵ Davidson Ann, *Child Soldiers: No longer a minor incident*, 12, 124, 135.

¹⁶⁶ Happold M, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of The Refugee Convention*, 1148.

¹⁶⁷ Happold M, *Excluding Children from Refugee Status: Child Soldiers and Article 1F of The Refugee Convention*, 1148.

¹⁶⁸ Article 1, *Convention on the Rights of the Child*, 2nd September 1990.

¹⁶⁹ Article 40, *Convention on the Rights of the Child*, 2nd September 1990.

¹⁷⁰ Konge P, *International Crimes and Child Soldiers*, 16, 1, *Southwestern Journal of International Law*, 2010, 51.

¹⁷¹ Article 26, *Rome Statute*, 17th July 1998, UNTS 3.

comes to them.¹⁷² Standing as the biggest losers during times of conflict when seen under the lens of a victim, these are the same children that have committed the worst atrocities.¹⁷³ At the conclusion of the war in 2000 in Sierra Leone, the Special Court for Sierra Leone came to an understanding that the people who were to be prosecuted were to be the those responsible for the greatest atrocities. This resulted in a need for the creation of a Separate Juvenile Chamber with the provisions under Article 7 of the Special Court, giving the Court the jurisdiction to try adolescents between the age of 15- 18 years.¹⁷⁴

Bearing in mind what these children go through to be combat ready, from the transitional phase which is the initial recruitment, that is filled with death threats and coercion, to the indoctrination phase, where he no longer questions the morality or the wrongfulness of his actions and is aligned with the beliefs of the militia group, these children must be broken to obey.¹⁷⁵ Some will still hold the thought that, “there can be no peace without justice, no justice without law and no meaningful law without a court to decide what is just and lawful under any given circumstance.”¹⁷⁶ Hence a push towards punishment for a wrong committed as the main ingredient for justice.¹⁷⁷

Seeking justice for the victims in this war- torn states all in the name of ending impunity is said to be the aims of international criminal law.¹⁷⁸ Maybe subjecting these adolescents to a formal judicial process may be the right way to go and even going as far as putting in prison terms would be an appropriate measure.¹⁷⁹ However, is child even capable of holding independent moral views to conceive right from wrong as they act under strict instructions,¹⁸⁰ and how then can we also state that upon the attainment of the child soldier’s eighteenth birthday, he ipso

¹⁷² Thomas A.M, Malice supplies the age: Assessing the Culpability of Adolescent Soldiers, 12.

¹⁷³ Thomas A.M, Malice supplies the age: Assessing the Culpability of Adolescent Soldiers, 12.

¹⁷⁴ Romero A.J, The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, 2, Northwestern University Journal of international Human Rights, 1, 2004, 9.

¹⁷⁵ Thomas A.M, Malice supplies the age: Assessing the Culpability of Adolescent Soldiers, 13.

¹⁷⁶ Ferencz B.B, An International Criminal Court, A Step Towards World Peace: A documentary History and Analysis, Oceana Publications, 1980, 31.

¹⁷⁷ Romero A.J, The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, 12.

¹⁷⁸ Thomas A.M, Malice supplies the age: Assessing the Culpability of Adolescent Soldiers, 20.

¹⁷⁹ Thomas A.M, Malice supplies the age: Assessing the Culpability of Adolescent Soldiers, 20.

¹⁸⁰ Shrabani D, Should Child Soldiers be held Responsible? 2.

facto sheds his protected status as a victim and is now a perpetrator, that should be held accountable, if all he has known is killing?¹⁸¹ It would be antithetical to now come and impose liability upon one who has been unfortunate and to whom the law failed to protect.¹⁸²

¹⁸¹ Lorenzo R, Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 630.

¹⁸² Lorenzo R, Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 630.

CHAPTER 4: A QUEST FOR JUSTICE

4.1 Introduction

Despite their ages, child soldiers commit some serious atrocities that qualify as genocide or even war crimes and hence warrants a serious, sensitive and nuanced approach when handling such cases.¹⁸³ While trying to balance between protecting these child soldiers and balancing the level of blame with their victim- perpetrator role, there is also the need to avoid re-victimizing those that have already suffered in the hands of these children.¹⁸⁴ Essentially, upon establishment of guilt, the criminal justice system sets in the assumption that this offender is to receive what they deserve.¹⁸⁵

That justice must settle the score and a moral debt is to be paid to settle the imbalance.¹⁸⁶ In the previous chapter, a detailed explanation was given of the criminal responsibility that Ongwen carries as a commander and the stance that the international community has taken on child soldiers. This chapter tries to look at all surrounding influences on the outcome of the case all in pursuit of justice. It analyses whether it means Ongwen should be convicted, acquitted or whether his social background shall act as a mitigating factor for him upon conviction.

4.2 To convict or to acquit?

In countries such as Sierra Leone where innocent people have faced extrajudicial killings, rape, and body mutilation at the hands of child soldiers, it is a reasonable expectation that Sierra Leoneans would advocate for the punishment of these juvenile combatants.¹⁸⁷ As compared to provisions of the Rome Statute that exclude jurisdiction over persons under 18 years,¹⁸⁸ upon formation of the Sierra Leone Tribunals, its Statute clearly stated that the Special Courts were

¹⁸³ Fisher J.K, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict Contexts*, 162.

¹⁸⁴ Fisher J.K, *Transitional Justice for Child Soldiers: Accountability and Social Reconstruction in Post-Conflict Contexts*, 162.

¹⁸⁵ Zehr Howard, *Changing Lenses: A New Focus for Crime and Justice*, 1, Herald Press, United States, 1990, 129.

¹⁸⁶ Zehr Howard, *Changing Lenses: A New Focus for Crime and Justice*, 129.

¹⁸⁷ Romero A.J, *The Special Court for Sierra Leone and the Juvenile Soldier Dilemma*, 2.

¹⁸⁸ *Article 26*, Rome Statute, 17th July 1998, UNTS 3.

to have jurisdiction over any person between the age of 15- 18 years.¹⁸⁹ This was a deviation from the internationally accepted approach of working in the best interest of the child.¹⁹⁰ We now see an instance where children are being put on trial for war crimes.¹⁹¹

However, despite the need for accountability, the Special Court, pursuant to Article 7 (7) of its Statute, ruled that child soldiers were not to face any corporal punishment such as imprisonment.¹⁹² They were to face a rehabilitative sentencing, that is, the child soldier would go through rehabilitative programs to try and reintegrate them back into society, in pursuit of not only individual healing but societal healing as well.¹⁹³

Just like the people of Sierra Leone, Uganda referred the matter to the ICC with the view that under no condition should compromise be made on the prosecution of the perpetrators.¹⁹⁴ The Prosecutor put out a narrative that all humans are to be taken as being endowed with the moral responsibility for their actions.¹⁹⁵ Due to the fact that we decide how to behave, Ongwen would be convicted for these crimes, as a person with the moral capability of knowing good from bad.¹⁹⁶

Ongwen's childhood has been compared to the lives of those that are subjected to abusive and irrational upbringings and still do not chose to be criminals.¹⁹⁷ However, this would be a terrible point of argument, considering not only the brainwashing but the physical and psychological trauma child soldiers endure. One cannot compare children that grow up in an abusive environment despite experiencing a worse quality of life, with child soldiers that experience a qualitatively worse experience.¹⁹⁸

¹⁸⁹ Article 7, Statute of the Special Court for Sierra Leone, United Security Council, 16th January 2002.

¹⁹⁰ Article 3 (1), Convention on the Rights of the Child, 20th November 1989, 1577 UNTS 3.

¹⁹¹ Romero A.J, The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, 2.

¹⁹² Romero A.J, The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, 2.

¹⁹³ Romero A.J, The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, 9.

¹⁹⁴ Schabbas A.W, General Principles of Criminal Law in An Introduction to the International Criminal Court (eds), 4th ed, 42.

¹⁹⁵ *Prosecutor vs Dominic Ongwen* (2015), International Criminal Court.

¹⁹⁶ Hasselind S.F, The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen, 12.

¹⁹⁷ Seyfarth H. F, Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation, 14, Chicago-Kent Journal of International and Comparative Law, 1, 2014, 19.

¹⁹⁸ Seyfarth H. F, Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation, 19.

The defence has tried to argue that the lack of the necessary mental capacity, the ICC would be persuaded to reduce his sentencing, for it destroys the accused's ability to appreciate the unlawfulness of his or her behaviour.¹⁹⁹ The Court's appointed psychiatric expert, Emilion Oruga and Dicken Akena noted that, Ongwen is a man that battles not only PTSD but depressive and dissociative disorder.²⁰⁰ Fully aware of the psychological trauma Ongwen had undergone, this manifested itself in fear that acted as a catalyst for the devotion and loyalty he had and even the dependency behaviour to the group, which the Prosecution pointed out.²⁰¹

In the *Lubanga* case, it was clearly established that there was no difference between the conduct of a child and a soldier, hence they were to behave like soldiers and obey.²⁰² Children were beaten and threatened to be killed if they showed any form of weakness even after being left traumatized after their first kill.²⁰³ It is one thing to go through one traumatic event that could cause trauma for years and another to have your life in a continuous state of recurring traumatic events.²⁰⁴ Continuous exposure to certain stressors for these children affects their brain development, which occurs along a certain stress responsive pathway.²⁰⁵ This leads the brain and mind to go into survival mode in a world full of deprivation and danger thus an increased risk in developing PTSD.²⁰⁶

The ICC will also have to look into the social background of Ongwen, taking note that exposure to violent crime for children increases the likelihood of developing psychological issues such as PTSD, which may contribute to future violence.²⁰⁷ This could be used to seek grounds for either mitigation depending on how persuasive it could be made. Thus, the Prosecution's expectation that the status of victimhood for child soldiers ends when they enter adulthood,

¹⁹⁹ Article 31 (1) (a), Rome Statute, 17th July 1998, UNTS 3.

²⁰⁰ *Prosecutor vs Dominic Ongwen* (2015), International Criminal Court.

²⁰¹ *Prosecutor vs Dominic Ongwen* (2015), International Criminal Court.

²⁰² *Prosecutor v Thomas Lubanga Dyilo* (2008), Trial Chamber 1.

²⁰³ *Prosecutor v Thomas Lubanga Dyilo* (2008), Trial Chamber 1.

²⁰⁴ Schauer E and Elbert T, *The Psychological Impact of Child Soldiering* in Trauma Rehabilitation After War and Conflict, (ed) Springer, New York, 2010, 329.

²⁰⁵ Schauer E and Elbert T, *The Psychological Impact of Child Soldiering* in Trauma Rehabilitation After War and Conflict, 331.

²⁰⁶ Schauer E and Elbert T, *The Psychological Impact of Child Soldiering* in Trauma Rehabilitation After War and Conflict, 331.

²⁰⁷ Seyfarth H. F, *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, 4.

when they are unable to break from the life of war that was chosen for them would be absurd.²⁰⁸ Already the portrayal of Ongwen as a victim is unsettling to the Prosecution.²⁰⁹ Despite the fact they do acknowledge that it would be relevant to look into his experiences, they do not think that this would grant Ongwen immunity for his actions.²¹⁰

The second aspect in which criminal liability would be excluded is through the defence of duress.²¹¹ For the defence of duress to be applicable, certain elements must be met: the presence of imminent death or serious bodily harm, whether the act was necessary and reasonable to avoid the harm they would face and lastly, whether the person did not intend to cause a greater harm than the one sought to be avoided.²¹² This sort of position reflects the fact that the international community does identify with the actor's dilemma, to commit or to not commit the crime but, are repulsed by the actions committed and hence the need for condemnation in promotion of deterrence.²¹³ Despite the fact that for child soldiers this would be a reliable defence, for adults like Ongwen the likelihood of its usage is even slimmer.²¹⁴ Seeing that the Prosecution team is trying to hold Ongwen accountable for the crimes he committed while he was an adult, he would be tried as an adult and not as a child soldier.²¹⁵

With a Prosecution team out for blood, it is interesting to see them go out of their way to establish the innocence of the Ugandan Government and to see a defence team not question this position.²¹⁶ With the Office of The Prosecutor working closely with the Ugandan Government, it comes as no surprise for them to shut down the cry for accountability on Ugandan Government officials for similar crimes, all in the name of the greater gravity that the LRA has brought upon Uganda.²¹⁷ Even if it is in the name of putting an end to impunity and

²⁰⁸ Seyfarth H. F, *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, 4.

²⁰⁹ Branch A, *Dominic Ongwen on Trial: The ICC's African Dilemmas*, 43.

²¹⁰ Branch A, *Dominic Ongwen on Trial: The ICC's African Dilemmas*, 43.

²¹¹ *Article 31 (1) (d)*, Rome Statute, 17th July 1998, UNTS 3.

²¹² *Article 31 (1) (d)*, Rome Statute, 17th July 1998, UNTS 3.

²¹³ Nortje W and Quenivet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, 109.

²¹⁴ Nortje W and Quenivet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, 109.

²¹⁵ *Prosecutor vs Dominic Ongwen* (2015), International Criminal Court.

²¹⁶ Branch A, *Dominic Ongwen on Trial: The ICC's African Dilemmas*, 43.

²¹⁷ Branch A, *Dominic Ongwen on Trial: The ICC's African Dilemmas*, 43.

fostering deterrence, this will not only be felt in Uganda but in all countries.²¹⁸ Retributive punishment upon an individual, on its own does not bring about justice.²¹⁹

If the public narrative painting the Ugandan Government as the innocent one fighting for the protection of its civilians was to be challenged we would have the Prosecution's case crumble before the eyes of the international community.²²⁰ With a vast amount of research that detailed the lack of effort on the government's side to protect its civilians,²²¹ if justice is what the ICC seeks to give the people of Uganda, rather than having the LRA as their lead perpetrator, the Prosecution team should acknowledge the role that the Ugandan People's Defence Force (UPDF) had too.²²²

Ongwen's abduction on its own should raise questions amongst the judges on how thousands of children had been conscripted despite the government's responsibility to protect these children and their humanitarian military campaigns.²²³ However, we are stuck in a situation between the lack of interest in reopening the history of atrocities and the narratives of the ICC's tendency to partner with these powerful African states in exchange for cooperation and immunity.²²⁴ This would be a difficult argument for the defence team to push without proper records. Even if the historical truth could play a pivotal role in Ongwen's case, the main question in criminal trials remains whether the Prosecution managed to prove beyond reasonable doubt that the person committed the acts they are accused of.²²⁵

Through the strategy of rupture as seen in the book of, *De la Strategie Judiciare* by Verges, is a legal defence influenced by Marxism and post-colonial thought tradition.²²⁶ The defence team

²¹⁸ Schabbas A.W, Punishment in An Introduction to the International Criminal Court (eds), 4th ed, 333.

²¹⁹ Schabbas A.W, Punishment in An Introduction to the International Criminal Court (eds), 4th ed, 334.

²²⁰ Branch A, Dominic Ongwen on Trial: The ICC's African Dilemmas, 43.

²²¹ Dolan C, An overview of the situation in Northern Uganda in Social Torture: The Case of Northern Uganda, 1986- 2006, Berghahn Books, New York, 2009, 62.

²²² Dolan C, An overview of the situation in Northern Uganda in Social Torture: The Case of Northern Uganda, 1986- 2006, 62.

²²³ Branch A, Dominic Ongwen on Trial: The ICC's African Dilemmas, 48.

²²⁴ Branch A, Dominic Ongwen on Trial: The ICC's African Dilemmas, 48.

²²⁵ Hasselind S.F, The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen, 7.

²²⁶ Hasselind S.F, The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen, 7.

would attempt to reverse the legal process and attack the argument by the Prosecution team and attack the legal system as well.²²⁷ A move employed by Ongwen's defence team trying to look at the possibility of forcing the legal system to face up to its present contradictions that it could neither suppress nor contain.²²⁸ These contradictions include the push for the protection of the child but the lack of a universal definition of the term child, which sets the age limit thus fostering the position of the international community when it comes to the age of accountability.²²⁹

If the defence team sticks to this form of defence, a rupture could also occur on the binaries of international criminal responsibility due to the duality that Ongwen's case brings out and hence no longer presenting an individual that fits perfectly into the criminal system.²³⁰ Hence, we would see a push by the defence team on the necessity to question, deconstruct and add to the current international framework of a new legal subject with a hybrid victim-perpetrator status.²³¹ This would accommodate his historical context and how he came to be bred into the commander he is.²³² This would also help in finding the blind spots within the practice of ICL and have them rectified in a bid to avoid another 'victors justice' situation.²³³ Trying to convict Ongwen of the charges he faces is not only a step towards conviction of the commander but the child soldier that could not be protected by the law. The child who suffered from the soldiering cannot at any point during his trial be separated from the soldier and commander he grew to be.²³⁴

The awareness on the importance of opting for rehabilitation for these perpetrators is a clear indication of the importance of restorative justice, which seeks to widen our thinking when it

²²⁷ Branch A, Dominic Ongwen on Trial: The ICC's African Dilemmas, 50.

²²⁸ Hasselind S.F, The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen, 7.

²²⁹ Davidson A, Child Soldiers: No longer a minor incident, 135.

²³⁰ Nortje W and Quenivet N, Child Soldiers and the Defence of Duress under International Criminal Law, 15.

²³¹ Hasselind S.F, The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen, 14.

²³² Hasselind S.F, The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen, 14.

²³³ Hasselind S.F, The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen, 15.

²³⁴ Lorenzo R, Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 621.

comes to wrongdoing and justice.²³⁵ The idea of justice and punishment as the pillars of the justice system or the idea of the necessity of inflicting suffering upon those that bring suffering on others is a norm many opt out of.²³⁶ With children as nothing but pawns of war, the dangers that these children face are not simply physical ones but psychological ones that hinders their development which influences their adult years.²³⁷ Under restorative justice, all these circumstances are taken into account, taking note of the damaged relationship and injuries the victims bear, yet still sharing the same stance as retributive justice of making right the wrongs while targeting at achieving societal healing in the midst of a conflict.²³⁸

Even in the spirit of promoting deterrence in quest for justice, traditional criminal law is not only viewed as being legalistic but also problem- solving, which means that it will take into consideration the world order as it is.²³⁹ It accepts it as the framework for action but try to understand the problem within it, question it and the existing institutions and power relations, asking for its origins, who it intends to serve and finally what the future holds for them.²⁴⁰ And it is in asking these questions that we have defences such as the strategy or rupture coming to light with the need to look deeper into the historical context that build up to the moments we have, in this instance, the Dominic Ongwen case. This should not only be considered by the judges, but the prosecution and defence team when handling matters touching on child soldiers.²⁴¹

²³⁵ Zehr Howard, *The intersection of Restorative Justice with Trauma Healing, Conflict Transformation and Peacebuilding*, 20.

²³⁶ Zehr Howard, *Changing Lenses: A New Focus for Crime and Justice*, 131.

²³⁷ Lorenzo R, *Dominic Ongwen and The Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals*, 619.

²³⁸ Vogel J.H, *The Restorative Justice Wager: The Promise and Hope of a Value- Based, Dialogue- Driven Approach to Conflict Resolution for Social Healing*, 8, *Cardozo Journal of Conflict Resolution*, 2, 2007, 566.

²³⁹ Hasselind S.F, *The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen*, 6.

²⁴⁰ Hasselind S.F, *The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen*, 6.

²⁴¹ Seyfarth H. F, *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, 28.

CHAPTER 5: CONCLUSION

5.1 Introduction

In the last few years, the institutions of international criminal justice have taken up a more prominent role in the international community with a goal of ending impunity for the perpetrators of the worst atrocities.²⁴² These international trials are used as a vehicle for telling history despite the legitimate fear of creating a significant tension with the principle of individual criminal responsibility and the triggering controversies surrounding it.²⁴³ It is also through these international trials, that these trials could act as a means in trying to achieve national reconciliation rather than having the present danger of scapegoating an individual.²⁴⁴ The moral dilemma, the questionable mental capacity, the hybrid victim-perpetrator capacity and the importance in which history plays, are some of the factors that will influence the outcome of the case. This final chapter will discuss the main findings of this study and give a concise conclusion to some of the issues that have been raised and any recommendations to that effect.

5.2 Main findings

In the previous chapters the issue surrounding the recruitment and indoctrination of child soldiers was well brought out.²⁴⁵ It delved into not only the psychological but the psychical harm these children go through in their process of recruitment, a dangerous cocktail for a minor.²⁴⁶ From the form of organisational socialisation that goes on and the new norms that these children take up, coupled with the need to survive and find a place they belong, these are the perfect tools during war.²⁴⁷ It is through the threats they face, that we have children that lack the proper maturity to understand what they are doing and the lack of appreciation of the acts that they carry out all in the name of obedience and loyalty resulting from fear.²⁴⁸

²⁴² Benvenuti P, *Transitional Justice and Impunity*, 11, *International Studies Journal*, 1, 2014, 119.

²⁴³ Sliedregt E, *Criminal Responsibility in International Law*, 102.

²⁴⁴ Sliedregt E, *Criminal Responsibility in International Law*, 102.

²⁴⁵ Nortje W and Quenviet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, 34.

²⁴⁶ Nortje W and Quenviet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, 34.

²⁴⁷ Ozerdem A and Podder S, *Child Soldiers: From Recruitment to Reintegration*, 30.

²⁴⁸ Nortje W and Quenviet N, *Child Soldiers and the Defence of Duress under International Criminal Law*, 2.

Many child soldiers, do not actively go out to look for war, it comes to them.²⁴⁹ However with the lack of a set age at which criminal intent is formed in the mind of a minor and the provisions of the Rome Statute on lack of jurisdiction over persons under 18, most times discretion is left to domestic courts.²⁵⁰ Hence we have an instance whereby some courts have prosecuted children between the age of 15 years and 18 years.²⁵¹ As an international court, this would be the perfect time to finally address the issue of intent with regards to child soldiers and consequently determine the appropriate age for culpability.

The Court would have to take note of his social background which in most cases brought out not only PTSD but several disorders, which was similar to the findings of the court psychiatrist of Ongwen's current mental state.²⁵² It would not be simple when it comes to giving a judgement on this case, due to the historical context and the role in which some scholars have stated the state has played in the atrocities committed.²⁵³ Something notable would be the push by the defence team and its use of the strategy of rupture, to which they seek to question the current international legal system, especially the laws, deconstruct it and hopefully add to it the hybrid victim-perpetrator personae that is currently lacking.²⁵⁴

Even so the question as to whether to convict or not to convict is at the back of everyone's minds. Either way one thing that stands is the need for restorative justice through rehabilitative processes. Even with doubt in such processes, or the lack of legal backing within the Rome Statute, through active responsibility, perpetrators get to be answerable to the victims and through reparations contributions are made towards restoring the harm committed.²⁵⁵ The aspects of answerability, relates to the victim's right to information and it is through these discussions that we can have healing brought back to the society.²⁵⁶ For Ongwen, having him

²⁴⁹ Thomas A.M, Malice supplies the age: Assessing the Culpability of Adolescent Soldiers, 12.

²⁵⁰ Romero A.J, The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, 9.

²⁵¹ Romero A.J, The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, 9.

²⁵² Seyfarth H. F, Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation, 4.

²⁵³ Branch A, Dominic Ongwen on Trial: The ICC's African Dilemmas, 48.

²⁵⁴ Hasselind S.F, The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen, 14.

²⁵⁵ Steidl L, Child Soldiers as Agents of War and Peace: A Restorative Transitional Justice Approach to Accountability for Crimes Under International Law, 372.

²⁵⁶ Steidl L, Child Soldiers as Agents of War and Peace; Restorative Transitional Justice approach to Accountability for Crimes under International Law, 372.

go back to the people he wronged would be helpful in understanding the gravity of his actions and it is through him telling his story and how he too fell as a victim of Joseph Kony that people would understand the harm occasioned on both sides.

5.3 Current Status

On 4th February 2021, the ICC Trial chamber delivered its judgement in the Trial of Dominic Ongwen, one of the former commanders of the LRA rebel group, pursuant to Article 74 of the Rome Statute.²⁵⁷ They found him guilty and convicted him of 61 of the 70 crimes which included crimes against humanity and war crimes.²⁵⁸ While on the 6th of May 2021, Dominic Ongwen received his sentencing from Trial Chamber IX of 25 years, for the crimes committed in Northern Uganda between 1st July 2002 and 31st December 2005.²⁵⁹ The 25 years would incorporate the deductible amount of time Ongwen had been in detention since the 16th of January 2015, in accordance to Article 78 (2) of the Rome Statute.²⁶⁰

5.4 Recommendations

For the people of Uganda as well stated before, the perspectives of justice in this case differs drastically between seeing Ongwen as a victim of circumstance where the world seeks to punish him twice and the need for accountability on his part.²⁶¹ At the end of it, one cannot completely state that he possesses no agency as to the attacks and now the world needs to reflect and question the salience of the binary of good and evil of victim and perpetrator.²⁶²

The study applauds the court for the recognition of the role his past played as a step towards rectification of its limitations, when it comes to issues surrounding social and political realities.²⁶³ A balance of victimhood and culpability is clearly sought after. However, this study recommends the court to understand that in such cases, the issues present are beyond a question

²⁵⁷ *Prosecutor v Ongwen*, ICC 02/04- 01/05- 1819- Red.

²⁵⁸ *Prosecutor v Ongwen*, ICC 02/04- 01/05- 1819- Red.

²⁵⁹ International Criminal Court, Dominic Ongwen Sentenced to 25 years of imprisonment, 6th May 2021, 1.

²⁶⁰ *Prosecutor v Ongwen*, ICC 02/04- 01/05- 1819- Red.

²⁶¹ Kan G, *The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen*, 84.

²⁶² Kan G, *The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen*, 84.

²⁶³ Kersten M, *We Need To Talk About Ongwen: The Plight of Victim Perpetrators at the ICC*, *Justice in Conflict*, <- <https://justiceinconflict.org/2016/04/19/we-need-to-talk-about-ongwen-the-plight-of-victim-perpetrators-at-the-icc/>>- on 19th July 2021.

of law but a question of fact.²⁶⁴ It would be necessary to delve into the evidence presented and understand them, rather than the legal precepts only.²⁶⁵ As Justice Cassese once stated, law is based on what society can reasonably expect of its members.²⁶⁶ Even then, as we apply the aspects of reasonableness to cases such as Ongwen, the court must remember in future cases that share similar difficulties, society cannot reasonably expect individuals who have been subjected to harsh coercive childhoods within armed groups to be judged on similar standards of reasonable men.²⁶⁷ It would be a positive step if new defences are to be introduced in law, such as the social background theory that would not completely exclude liability, but would step in during mitigation, in helping to humanize child soldiers.

When it comes to the moral dilemma due to the gravity of the crimes committed, defusing moral outrage from the people of Uganda seems to be successful in this instant only when punishment constitutes retribution and in turn fostering peace and reconciliation within the society.²⁶⁸ Most times it is these senior leaders and high-level perpetrators that come to embody the prior repressive regime and the guilt that they may carry serves to exculpate the society in which the repression occurred.²⁶⁹

Hence seeing Ongwen as the product of the misfortunes that happened in Northern Uganda rather than the source, victims of the same violence the community suffered, could push for restoration in these countries through restorative processes and allow him to re-engage with the polity other than through violence, for a man who has only known the life of the gun.²⁷⁰ With the rationale behind the 25 years Ongwen is to serve being that the court would like to

²⁶⁴ Lorenzo R, Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 634.

²⁶⁵ Lorenzo R, Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 634.

²⁶⁶ *Prosecutor v Drazen Erdemovic*, ICTY- Appeals Chamber IT- 96- 22- A.

²⁶⁷ Kersten M, We Need To Talk About Ongwen: The Plight of Victim Perpetrators at the ICC, Justice in Conflict, <<https://justiceinconflict.org/2016/04/19/we-need-to-talk-about-ongwen-the-plight-of-victim-perpetrators-at-the-icc/>> on 19th July 2021.

²⁶⁸ Sliedregt E, Criminal Responsibility in International Law, 14 European Journal of Crime, Criminal Law and Criminal Justice, 1, 2006, 102.

²⁶⁹ Martinez J.S and Danner A.M, Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law, 93, California Law Review, 1, 2005, 95.

²⁷⁰ Baines E K, Complex political perpetrators: Reflections on Dominic Ongwen, 187.

give him a chance to rebuild,²⁷¹ it would be a great step to have the court actualize the influence they have in promotion of restorative mechanisms such as truth seeking mechanisms.

The third recommendation would be based on a critique that is asked time after time, and this is whether any form of justice is really achieved within judicial institutions like the ICC, whose prosecutorial selectivity is consistently aligned with the dictates of state power.²⁷² It is no secret that within the history of ICL, victors in a conflict are given the opportunity to demonise those that oppose them as their crimes are sanitised while perpetuating injustices.²⁷³ This study recommends having states held accountable for the horrors they commit during times of war against its people in the same threshold that the core perpetrator are held at. The ideology of ‘who is most responsible’ mostly comes from one side, based on more logistical and institutional considerations rather than the realities on the ground, which is a sad approach in getting to the root of the issues in most African states.²⁷⁴

This study also appreciates the Courts need to go face to face with the hefty burden of adjudication and the sensitivities surrounding the conversations around child soldiers.²⁷⁵ It also acknowledges their efforts in ensuring that the long- term objective of protecting the child is not abandoned.²⁷⁶ The last recommendation would however be, to have the Court find a new approach to history- making and deal with all the uncharted questions and the unturned stones surrounding such cases.²⁷⁷ Some of the critiques facing the court is the need for provisions or guidelines when it comes to the determination of any mental incapacities or duress by

²⁷¹ *Prosecutor v Ongwen*, ICC 02/04- 01/05- 1819- Red.

²⁷² Kersten M, We Need To Talk About Ongwen: The Plight of Victim Perpetrators at the ICC, Justice in Conflict, -< <https://justiceinconflict.org/2016/04/19/we-need-to-talk-about-ongwen-the-plight-of-victim-perpetrators-at-the-icc/>>- on 19th July 2021.

²⁷³ Igwe S C, The ICC’s Favorite Customer: Africa and international Criminal Law, 41, The Comparative and International Law Journal of Southern Africa, 2, 2008, 295.

²⁷⁴ Arnould V, The Limits of International Criminal Justice: Lessons from the Ongwen Case, Open Democracy, -< <https://www.opendemocracy.net/en/limits-of-international-criminal-justice-lessons-from-ongwen-case/>>- on 22nd July 2021.

²⁷⁵ Lorenzo R, Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 635.

²⁷⁶ Lorenzo R, Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals, 635.

²⁷⁷ Hasselind S.F, The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen, 17.

experts.²⁷⁸ With heavy reliance on expert reports, its baffling seeing both the prosecution team and the defence team come to completely different psychoanalysis of the state of mind Ongwen was in at the time of war or is currently in.²⁷⁹ These guidelines could aid in reaching similar conclusions or nearly similar conclusions.

²⁷⁸ Kersten M, We Need To Talk About Ongwen: The Plight of Victim Perpetrators at the ICC, Justice in Conflict, -< <https://justiceinconflict.org/2016/04/19/we-need-to-talk-about-ongwen-the-plight-of-victim-perpetrators-at-the-icc/>>- on 19th July 2021.

²⁷⁹ *Prosecutor v Ongwen*, ICC 02/04- 01/05- 1819- Red.

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