

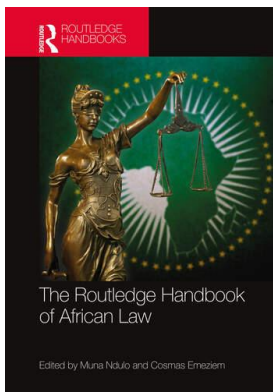
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ABDUCTED, INDUCTED, AND INDICTED

The case of *Dominic Ongwen* in the International Criminal Court

Simeon P. Sungi and George R. Kakoti

Introduction

In his opening statement before the International Criminal Court (ICC), Dominic Ongwen stated that he was not sure why he was being charged before the court, because he considered himself the victim of the Lord's Resistance Army's (LRA) crimes.

The trial against Ongwen, a former LRA commander and a former child soldier, began in the ICC on December 6, 2016. The prosecution began the presentation of its case on January 16, 2017. He is charged with 70 counts of crimes against humanity and war crimes, which includes those of attacking civilians, torture, sexual and other gender-based crimes, and conscription and use of child soldiers.¹

The LRA abducted Dominic when he was on his way to school in northern Uganda. He was only 10 years old at the time of the abduction (*BBC News* 2021). While in captivity under the lethal LRA control, Dominic was molded into a merciless killing machine. He was reportedly forced to participate in the killing and/or beatings of other abducted children who attempted to escape, forced to watch people being killed, taught to fight in ruthless fashion, and exposed to other desensitizing cruel, inhumane, torturous, and vicious and destructive behaviors. All these activities brutalized and traumatized Dominic and other abducted children. Research on long-term psychosocial effects on the welfare of child soldiers in northern Uganda show that former child soldiers suffer from post-traumatic stress disorder (PTSD) and elevated levels of stress.

Moreover, child soldiers suffer from severe anxiety as a result of the high levels of indoctrination that made it easier for them to be obedient to authority. The repeated traumatic stress and violence left the child soldiers susceptible to mental and other psychosocial and personality disorders. During the opening day of his trial in December 2016, Dominic told the Trial Chamber that he was "one of the people against whom the LRA committed atrocities!" He continued, "I am not the LRA ... it is the LRA who abducted people in northern Uganda, it is the LRA who killed people" (Hattem 2016).

The problem that this article explores is the effectiveness of trial justice in attempting to respond to cases related to the criminal culpability of child soldiers, even after they reach the

age of majority, and the possibilities of alternatives to trial justice in seeking peace and reconciliation in post-conflict and cyclical-conflict societies, like in northern Uganda.

The chapter proceeds in four sections. The second section delves into examining the psychosocial issues as they are related to child soldiers. Causation assists in proving *actus reus*, an important element in proving criminal culpability, since it provides a means of linking conduct with a resulting harm. The experiences to which children are exposed may have serious consequences on their mindsets and continue well after they have attained the age of majority. The third section examines the role of the trial justice mechanism and its priorities in affixing criminal accountability to perpetrators of crimes. This section also engages in a comparative analysis between trial justice and alternative justice mechanisms (AJMs), with a view toward determining the best forum to address to cases related to the criminal culpability of child soldiers, even when they attain the age of majority. The fourth section concludes the discussion and offers recommendations on the most appropriate mechanism for responding to cases of child soldiers' criminal culpability for offenses allegedly committed from childhood through to the age of majority.

The psychosocial impact of child soldiers

What is the life of a child soldier like? Could the experiences they go through shape their future conduct? This section examines these questions in depth in order to understand what the criminal law terms "causation", a means to connect conduct with resulting effect.

The ease of manipulating, conscripting, training, and deploying child soldiers cannot be overemphasized. Literature on the psychology of child soldiers shows the advantage of training an army of children for combat operations during war. Children have limited ability in self-reflection and articulating their feelings, often have a deluded self-perception of invulnerability, and are prone to short-sighted perspectives about the future. It is simple and cheap to recruit children, and they are easily molded to become obedient and loyal to authority figures. Studies also show that former child soldiers suffer from numerous psychological effects, including traumatic stress caused by forced separation from family at a very young age, acts of physical and mental abuse that include torture and/or rape, witnessing their family members being tortured and/or killed, insufficient health care, inadequate shelter, and many more (UNICEF 2005).

A former child soldier who was 18 years old at the time of his interview had this to say about his experience after he was abducted by the LRA at the age of 14:

After two days, an assembly took place. Everybody was gathered. They talked about us newly abducted children and they said: "you look like people who plan to escape and we are going to make you rebels now." They told us to lie down. Now we were surrounded by 40 rebels. They said: "do not raise your head or we will kill all of you." We had to stretch our hands forward and put our foreheads to the ground. They started beating my back. 350 strokes were given on my back and buttocks. After a while the pain was so big that I felt that it would be better if I was dead. It was just too much to bear. Coldness started creeping into my body. And the trembling started. And then it happened again. I looked at my body from outside. I knew I would die. I saw death. It was in me. Death takes people's soul. My soul was already outside my body. I could feel pain, deep pain, but it was not from my back, from the strokes, it was everywhere inside me now. Death was trying to take my soul. Pain was everywhere in me. I could see death. You can see it when you are going to die. I couldn't hear anything. I also didn't realise when it was that they had stopped beating me. But

then I heard a loud voice: “Get up.” I tried, but I couldn’t sit. I kneeled for almost one hour. It felt like a very long time. I realised that all other children around me had died in the beating. I could see them lying still and not breathing. They were lying all around me. Their bodies were swollen and full of blood all over. The rebels dragged their bodies and dumped them into the nearby river.

Schauer and Elbert 2010, 318

A number of interpretations emerge from the narrated experiences of children at war. Arguably, children cannot truly be said to possess the requisite free will to choose to join an armed group, even where there is no overt forced conscription. First, due to their tender years, they lack the cognitive ability to properly process information they are provided, and therefore lack the maturity to make sound decisions relating to weighty matters affecting their very existence. Second, the level of indoctrination that takes place is overwhelming, and it is almost impossible for a child of tender years to process and separate fact from myth, fabrication, or exaggeration, particularly when the source of the information is a primary authority figure. It is the ease of manipulating or coercing children that makes them prime targets for abduction in the first place.² Commanders assume the role of parent/guardian and become mentors, while other abducted children become surrogate siblings. Third, the inhuman conditions to which the children are exposed are exceedingly harsh and life-threatening and could hardly be withstood by adults, let alone children. In addition to the severe beatings and other types of degrading treatments intended to break down these children and strip them of their self-identity and sense of self-worth, the LRA induction sessions involved the invocation of magic and supernatural rituals. Magical tales and superstitious beliefs are extremely potent tools of make-believe that continue to influence grown adults in modern African society, and at most, influence how they make social decisions. This make-believe, therefore, is even more effective in overcoming any natural moral inhibitions of a child to harm others.

The victimology impacts on children who engage in or witness armed conflict include psychological, emotional, physical, and sociological trauma, among other harms. Child soldiers are exposed to severe traumatic stress and have been known to experience PTSD, which is a lifelong condition that typically remains undiagnosed and untreated. Moreover, mental illness carries a deep stigma in African society, so people tend to avoid public acknowledgment of its existence and only rarely do they proactively search for treatment. A few of these affected former child soldiers have shared their experiences with researchers (Schauer and Elbert 2010). A 20-year old female, a former LRA abductee, had this to say about her experiences at the time of her therapy:

I remember my life from around the time when I was 5 years old. I lived with my parents in the hills around Gulu and we had a good time. When I was 7 years old, my mother got poisoned and died. From then on, my step-mother took over the household and I suffered a lot, she used to beat me badly. When I was 9 years old, a boy raped me while I was on the way to the well to fetch water. When I was 10 years old, I got abducted by the LRA. I witnessed how many other children got abducted and we were made to walk towards Sudan. On the way, I saw he beat many people to death, probably those who could not keep up with walking and the heavy loads. When we arrived at Kony’s place in Sudan, I witnessed the torture and killing of a wizard. I was given to one of the elder women of a commander as a helper. She was nice, but she died soon and from then I was mistreated by the co-wives. At age 11, I remember the

commander coming home to the house early and I had not cleaned-up yet; he beat me severely for that. From that day onwards he would do it regularly. Sometimes so much that I had to go to hospital, but the rebels always took me out again forcefully and brought me back before my wounds were healed. One day when I was 12 years old, we saw how children in a school were forced to eat their own teacher by the LRA; apparently the man had resisted giving food to the rebels. At age 14 years, the commander started raping me and told me that I am now his wife. A few months later I had my first baby. It was a beautiful child, but I did not know how to look after him, so he died soon. In the same year, there was a fierce battle with the UPDF [Uganda People's Defense Force], an air attack, where many of our people in the settlement died. At age 16, I gave birth to another baby. The next morning when I woke up, also he had died. He had been tiny and weak and he probably died from the cold night air, since I had nothing to cover him. One day soon after this we saw how the Lutugu people got hold of enemies and poured boiling water over their bodies until they died. At age 18, I had to take part in a raid on Lira IDP camp. We were trying to get new abductees and food, but people resisted, so 18 of them were killed by our group. At age 20, I gave birth to George in the bush. He is weak, but he is still alive, I so much hope that he will grow up. That same year during an attack by government soldiers, the rebels, including my husband, left me behind. I guess I was a burden to them, since we women with small children were not able to run fast. He never explained to me what he was thinking, he just left me behind and the soldiers brought me to this reception center ...

Schauer and Elbert, 2010, p.321–2

Recent research on the psychological impact of prolonged exposure of violence and sudden death on child soldiers shows that the traumatized population typically suffer from significant levels of physical morbidity and mortality that contribute to elevated levels of anxiety and trauma. The psychological effects on child soldiers are quite obvious, explaining why it may be legally dicey to suggest that they have free rational thinking that can allow them to extricate themselves from their situation. This research-based evidence should be relevant in any legal proceedings relating to crimes committed by former child soldiers in the international criminal justice system.

Trial justice versus alternative justice mechanisms

There are clear differences in approach and objectives between trial justice and AJMs. The typical criminal trial in a trial justice mechanism (TJM) follows a rigid preestablished ritual. It is adversarial rather than cooperative and focuses on rule-based fact finding, determining whether there have been breaches of criminal law established under applicable standards of proof and if there are valid justifications or excuses for the conduct. |Finally, appropriate penalties are imposed. The prosecution has the onus and burden of proof, and the defendant does not have to prove anything. Criminal culpability is individual, and the ultimate goal in practically all justice trials in the overwhelming majority of legal systems worldwide is retribution, that is, just deserts. Motives and underlying psychosocial causes are immaterial, other than for purposes of assessing mitigating or aggravating factors to determine the appropriate punishment. All TJMs are inherently dualistic. The proceedings culminate in either a “yes” or a “no” decision. The outcome of a trial can only be “guilty” or “not guilty.” You are either “evil” and deserving punishment, or you are not.

The penological objectives of TJMs for breach of international criminal law typically mimic the norms of modern Western justice systems, namely, the alternate or combined pursuit of retribution, deterrence, and incapacitation, with minimal emphasis on rehabilitation or restorative justice. International criminal tribunals are created, constituted of panels of justices from nations that were not involved in the hostilities at issue. Typically, trials are conducted thousands of miles away from the nations where the hostilities took place. The latter aspect diminishes the other purpose of a criminal trial, that is, to demonstrate to the affected community a society's outrage and condemnation of the alleged crimes. Additionally, the time it takes to trace witnesses, assemble evidence, and secure custody of the suspects results in trials taking place and judgments being delivered several years after the hostilities. By this time, victims and witnesses may have relocated, died, or suffered diminished memories, thereby impairing chances of successful convictions, and the affected communities may have moved on as best as they could, so that the delayed trial outcome may lack any discernible impact on their perception of justice.

There are certain defenses recognized in most TJMs that justify, excuse, or mitigate criminal acts. The age of the defendant at the time of the crime is a crucial factor in determining the appropriate trial forum. A juvenile offender, generally one under 14, may not be subjected to the trial process at all, after factoring in his level of cognitive development. Alternatively, an older juvenile will be adjudicated in a juvenile court with typically relatively benign penalties in the event of a disposition of delinquency. This is because of the universal acknowledgment that a juvenile is less responsible for his actions than an adult due to immaturity, that is, an inability to properly appreciate the consequences of his actions. As with certain types of mental illnesses, it is recognized that people may lack the mental capacity to determine whether what they are doing is wrong or may fail to conduct themselves in accordance with the requirements of the law.

In such systems, there are very few instances of juveniles being tried or sentenced, but in other systems, such as in the United States, crimes committed by some juveniles may be considered to be so heinous that they are waived to adult courts where the juveniles are tried as adults. Even in these cases, however, upon conviction, incarcerated juveniles are treated differently and housed separately from adult prison inmates until they reach the age of majority. In some notorious cases, juveniles who committed crimes at a very young age have been released upon reaching the age of majority to public outrage. However, their long-term subjection to the deleterious effects of the TJM methods of the criminal justice system often predisposes them to a higher risk of subsequently reengaging in criminal or other deviant behavior that the initial action of the criminal justice system sought to discourage.³

Child soldiers, moreover, are *sui generis* and do not quite fit the common criminal trial mold, making it even more likely that subjecting them to trial justice will only serve to reinforce their acquired antisocial tendencies. Child soldiers are not typically found in stable countries with established judicial systems. Abducted at tender, impressionable ages, they are forced to participate in brutal crimes with the threat of death should they fail to comply. These children undergo a phase of indoctrination whereby their personalities are shaped to be brutishly inhuman, gradually morphing from unwilling participants into willful, cold-blooded killers. When subsequently apprehended, it remains debatable whether the ordinary TJM is well-suited to deal with them.

Such trial justice courts face a dilemma. There is a question of whether to treat child soldiers recruited in non-state-armed groups and participating in armed hostilities as combatants under the rules of war, in which case, they are immune from prosecution—or to reject a claim of combatant status. Under art. 43 of the Additional Protocol 1 to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts

(Protocol I), June 8, 1977, a child soldier may invoke the privilege of a combatant, and therefore, seek to obtain immunity from prosecution if they can establish that they participated in hostilities as a member of an armed group under a “command responsible to that Party for the conduct of its subordinates . . . subject to an internal disciplinary system, which . . . shall enforce compliance with the rules of international law applicable in armed conflict.”⁴

At the same time, rules of war prohibit torture and gratuitous violence. However, many non-state armed groups have employed torture and gratuitous violence as effective tools for mass intimidation, which then puts the child soldiers at risk of being placed under the jurisdiction of tribunals for war crimes. At that point, the courts have to determine whether these child soldiers acted as independent autonomous actors, even when they were part of a non-state armed group under the command of an adult, or as actors operating under undue influence, coercion, or out of necessity.

It is difficult to precisely assess the extent of undue external control over a child to secure long-term compliance. Non-state armed groups almost never acknowledge the existence of child soldiers in their midst, and it is often hard to convincingly rebut such denials, as these groups are not organized like regular armies with established rigid hierarchies and command structures. Commanders or superiors of these child soldiers are aware that admission would render them subject to the war doctrine of command responsibility (aka the Yamashita or Medina standard), holding them criminally responsible for crimes committed by their subordinates.

It should be noted that customary international law and various international treaties seek to protect children and prohibit the participation, voluntary or otherwise, of juveniles under 15 in any type of armed group. Some instruments have gone as far as to stipulate 18 years of age as the minimum age for joining an armed group.⁵ Most of these treaties, however, envisage hostilities that spill over national boundaries, or involve parties from more than one nation, or are deemed to be part of a war of (national) liberation, essentially.

Additionally, as a quirk of international law, such international treaties do not bind non-state armed groups, unless they either expressly accept or indirectly indicate agreement to being so bound. In view of the circumstances that make the recruitment of child soldiers a simple and attractive proposition, it is extremely rare for such groups to agree to be so bound, and even more rare to actually abide by such an undertaking.

Another problem is the practical difficulty of ascertaining the ages of these child soldiers. These children often lack knowledge of their own ages due to various reasons, including having been born during conflict, displacement from their places of birth, separation from their parents at an early age, or originating from impoverished settlements that lack social infrastructure, including formal or accurate birth recording systems. As there are no documented cases of child soldiers being apprehended and prosecuted while still being under age, the practical issue that arises is whether former child soldiers should be prosecuted for crimes against humanity committed when they were still under age.

This presupposes that either the hostilities ceased before the child reached the age of majority, or that the child was removed from the hostilities while still under the age of 15. Should the nature of the acts themselves determine the prosecutability of that child, that is, whether that child should be tried as an adult, or should the generally accepted lower level of cognitive development of a child under 15 serve as an automatic bar to prosecution? What about those ex-child soldiers who grew up and continued to commit crimes under a “kill or be killed” environment well past the age of maturity? Should they be placed at the same point on the mental competency spectrum and be held to the same standard of culpability as a run-of-the-mill offender who never experienced similar atrocities? These are issues that have not been conclusively settled.

Another wrinkle arises where the non-state-armed group is found to have committed horrible crimes of such heinous nature against the civilian population that they forfeit their claim to combatant status. Does it follow, therefore, that the child soldiers within such a group would also lose this privilege, reverting to the status of criminal perpetrators subject to the normal justice trial mechanism? As to the question whether, in most instances, child soldiers should be held accountable for war crimes, there is a view that if they are not, they will continue to be attractive targets for recruitment, and their harmful effect on the communities that they attack are not in any way lessened by their young age.⁶

Finally, what should happen, as in the rare, documented case of Dominic Ongwen, when a person, abducted as a child, grows up in that man-eat-man environment and turns into a veritable killing machine? Should he be considered to suffer from a type of Stockholm Syndrome, and if so diagnosed, should that serve as an excuse or mitigating factor in the ensuing criminal trial? Surely, nobody can deny that childhood abduction and subsequent experiences have had such a corrosive effect on his psyche that he is essentially a victim turned into a perpetrator? The question would be how to assess what part of a former child soldier's behavior is attributable to willful, competent decision-making, and what part is derived from one's long-term involuntary destruction of his soul. Where the person's personality is found to have been gradually degraded since childhood, one might wonder whether punishing a person, who has lost the ordinary cognitive ability to separate right from wrongful acts, is not in itself immoral.

There is also the position that, in view of the almost universal consensus that child soldiers' natural cognitive developments were interrupted and co-opted, there is a growing consensus that the focus should be on demobilization, rehabilitation, and reintegration of former child soldiers into society. This, of course, is possible only where hostilities have come to an end, such as in South Africa and Liberia, and where the demobilized returning of child soldiers have not been rejected and denounced or shunned by their original communities. However, a long-term, continuous cessation of hostilities has yet to materialize in some of the most conflict-ridden areas of the world, such as in transnational areas covering parts of Uganda, Congo, South Sudan, and Central Africa, where cross-national hostilities involving several armed groups have persisted for decades. This is the region where Ongwen was raised, abducted, and operated until adulthood.

For hostilities to end and peace to reign, non-state armed groups have to agree to demobilization, rehabilitation, and possible reintegration into state armed forces. Such groups are unwilling to do so, absent a solid commitment from the state and other decision-making parties to grant them immunity from prosecution for any war crimes committed during the hostilities. Furthermore, members of these groups may originate from different nations, or belong to disfavored or marginalized tribal, cultural, or ethnic groups, thus making it almost politically untenable to consider them for enlistment in the state armies of nations different from their own.

Note must also be taken that most TJMs do not accept the defense of necessity in such cases, that is, killing a defenseless person to avoid being killed by another is not an excuse recognized in many national jurisdictions. It still begs the question though: is prosecution the best response to such crimes committed during periods of armed hostilities?

Finally, a major problem affecting TJMs is the lack of resources required to prosecute and punish offenders. These long-lasting transnational conflicts of the type at issue here involve large numbers of armed combatants fighting over a long period of time, during which the parts of perpetrator or victim may shift back and forth. Moreover, prosecution and punishment are undesirable where the objective is to heal and promote reconciliation and harmony among previously warring groups, which often have to subsequently live in close proximity to

each other, and inevitably, have to interact. Trials serve to express outrage and to condemn the offender, essentially determining winners and losers, which may rip families and communities apart, perpetuate resentment, and encourage future retaliatory hostilities. At the end of the day, TJMs, despite their emphasis on punishment, merely serve a symbolic purpose, since only a tiny fraction of the perpetrators of atrocious war crimes are ever held accountable for their crimes. Perhaps, a consideration of what alternatives exist is desirable.

***Lubanga* and *Ntaganda* cases before the International Criminal Court**

The *Lubanga*⁷ and *Ntaganda*⁸ cases are landmark cases decided by the ICC. The historical nature of these cases relate to the fact that, for the first time in the history of international criminal justice, an individual has been charged with acts of enlisting and conscripting children as soldiers. These two cases address crimes committed in the Democratic Republic of the Congo (DRC). The *Lubanga* and the *Ntaganda* cases are of relevancy to this study because Dominic Ongwen argues that his abduction and forceful conscription into a brutal organization effectively brainwashed his young mind, desensitized him to the brutality, and shaped his adult behavior. The *Lubanga* and the *Ntaganda* cases contribute to our understanding of the dynamics that augur for an enhanced role of AJMs in responding to international crimes. In the next paragraphs, we will discuss the two cases to show the experiences of children who are abducted and trained to become killing machines.

The facts in the *Lubanga* case show the brutality and psychological abuse that children recruited as soldiers undergo. The evidence showed that the abducted children were deprived of sleep and forced to consume drugs as part of military training. The girls were regularly sexually assaulted. Sexual violence was used as an effective method of exerting control and ownership over the child soldiers. The abducted children thus suffered irreparable damage to their mental and physical well-being. The children lost their safety, protection of physical and bodily integrity, the right to education, the right to exercise their reproductive rights and health, and their sexual autonomy was denied and destroyed.⁹ Those children who were able to escape were rejected by their families upon their return. They were stigmatized and perceived as the source of violence and suffering in the community.

The story is similar in the *Ntaganda* case. According to the evidence produced before the ICC, Ntaganda conscripted an estimated 149 young men into his forces (Human Rights Watch 2012). His forces raided schools, homes, and farms, and rounded up children. The recruited children were trained for military combat and forced to become porters of weapons and ammunition. Human Rights Watch interviewed a 17-year-old student, who explained how the children were recruited:

There were so many of them. They came at 1:30 p.m. We were almost done with the school day. [The fighters] asked us to exit the room and then they took us behind the school building. They tied my hands with a rope. All of us were tied up. Then they marched us to the hill ... They told us we would fight for Bosco [Ntaganda] ... They informed us that we would liberate our country by giving our support to Bosco Ntaganda. We must support him so that our Congo would not be taken by others.

Human Rights Watch 2012

The children had horrible experiences that altered their humanity and forced them to become killing machines. Children interviewed by Human Rights Watch describe these horrific experiences. A 16-year-old boy narrated how he transported a body of another child who was

shot: “We saw one of us in military uniform who had been killed ...”. Other boys, 16 and 13-years-old, respectively, recounted similar experiences: “I was with a group of four others and we were all my age or younger ... We were so tired and hungry and we wanted to stop, but the soldiers wouldn’t let us. They gave us nothing to eat or drink. They beat us whenever we stopped walking. I know others in the group ahead and behind me were also suffering, because I could hear them crying” (Human Rights Watch 2012).

These experiences are common to child soldiers. There is nothing to suggest that Dominic Ongwen experienced anything different. This fact raises serious issues regarding the distinction that the trial chamber will need to make between Ongwen’s status as victim and perpetrator. For this reason, we advocate for AJMs that may be able to take into account Ongwen’s possible dual roles as both victim and perpetrator, for the purposes of bringing accountability and justice in post-conflict societies.

Alternative justice mechanisms

Alternative justice mechanisms (AJMs) may be viewed as a paradigm rather than a specific model, in view of the wide diversity of the forms in which they appear. Since they differ from the Western, retributive model that defines TJMs, AJMs have often been viewed as being at odds and inconsistent with the international community’s desire to prosecute and punish genocide, crimes against humanity, and other violations of international human rights. Additionally, they are considered to be imprecise and ineffective mechanisms of justice, as they are seen to sacrifice justice in favor of peace, a view that AJM proponents dispute (Keller 2008), and lack identifiable common practices or measurable outcomes across different communities.

However, there has been a recent shift in this school of thought, as AJMs have increasingly been successfully adopted following mass conflicts in developing countries, particularly in Africa. The recognition of the potential for positive outcomes of AJMs is demonstrated by then UN Secretary General Kofi Annan’s 2004 exhortation for “due regard [to] be given to Indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international standards and local tradition” (UN 2004).

The lack of rigid guidelines for AJMs allows for a flexibility that accommodates various settings and cultures. AJMs provide room for broad dialogue involving victims, perpetrators, and the community. They have been adopted across a wide range of post-conflict situations, including state supported repressions against racial groups (for example, in South Africa) and ethnic or religious-based crimes, including killings and abductions (in Rwanda, Burundi, Uganda), comprising differing numbers of perpetrators and victims either over short or long periods of time. Huysse (2008) has identified accountability, truth, reconciliation, and reparations as the four positive attributes associated with AJMs in Africa.¹⁰ Often the participants have been both perpetrators and victims, complicating these normally mutually exclusive categories. Trial justice mechanisms, with their pursuit of a binary adjudication of the presence or absence of guilt and the emphasis on punishment, lack the required subtlety to address these complexities. On the other hand, AJMs incorporate discussions, such as palavers and other traditional rituals, to open up issues of accountability that undergird the approach to achieve lasting peace following mass violence. They are also desirable where justice trial processes may impede cooperation and create tensions with their underlying threat of retribution. Furthermore, since AJMs take place in the areas or within the communities where the crimes occurred, affected communities are at least able to witness some form of resolution.

While formal truth commissions may be appropriate in such instances as post-apartheid South Africa, they may not be as acceptable in other local cultures (for example, Burundi). Some cultures do not have traditions of public confessions and have developed certain common ritualistic practices that allow for the unfolding of full or partial truth in a nonthreatening manner, which may not meet the standards of accountability preferred by Western and international crime tribunals. Typically, AJMs commonly involve small numbers of disputants and are administered with a certain level of solemnity, which legitimizes the rituals that enable the disputants to accord due respect to the outcome. Many post-conflict rural communities may lack the resources to deal with huge numbers of perpetrators and victims.

Reconciliation, a key process in the restoration of broken community harmony after mass hostilities against civilians, tends to be a very challenging undertaking. It is, however, necessary to avoid frequent resumption of hostilities. Cleansing and reintegration rituals, such as the *gamba* spirit ceremony in Mozambique, have been successful in bringing about reconciliation between perpetrators and victims in cases involving ex-combatants and the return of abducted children, as have cleansing ceremonies among the Acholi of Northern Uganda.¹¹

AJMs have demonstrated the capacity to repair damaged social capital. These ceremonies have also spurred development and acknowledgment of shared social norms. These AJMs, once reconstituted, are able to address other conflicts emanating from armed hostilities, such as property disputes between current holders and returning displaced owners, along with issues of domestic violence. However, AJMs are not without their shortcomings, and there are situations where they may not be as effective, if at all. These include circumstances where there is an absence of common conflict resolution traditions.

AJMs are ethnic group-specific, typically restricted by language and geographic area. Where the former warring groups do not share a common tradition, or are located across linguistic and political boundaries, it may not be possible to reach an agreement on a specific form of AJM to govern the process. Moreover, there have been criticisms of modern mass rituals—a departure from the customary, small, intimate ceremonies—for lacking the requisite solemnity necessary for the desired effectiveness of such ceremonies.

The concern about such mass rituals is that they may end up being gimmicky and mechanistic, thereby lacking the symbolic power associated with them and lessening their effectiveness. Typically, AJMs involve small numbers of disputants, but large-scale, often transnational, multi-year armed conflicts generate thousands of post-conflict issues, and destroy much of the pre-conflict institutions and degrade the authority of traditional leaders. Consequently, AJMs tend to lack the resources and social capital to deal with huge numbers of perpetrators and victims.

Other challenges include modern, Western religions, which tend to dismiss traditional rituals as primitive and ineffective, and conservative patriarchal societies, where tradition-based AJMs minimize or eschew participation of women, children, and young adults who typically constitute the greater number of victims, thereby depriving these groups of a voice in the proceedings. Additionally, some cultures shun these demobilized child soldiers, perceiving them as “damaged goods.” This is more so for females, who endure community stigma because, having been subjected to sexual violence during their abduction and essentially having been forced to become sex slaves, they are then considered defiled and therefore rejected as being unmarriageable.¹² Consequently, they are seen as an embarrassment to, and ostracized by, their own families, causing them to feel unsafe in their old communities. Hence, they drift to the cities where, due to their lack of marketable skills and support systems, they find comfort in those like themselves and end up hovering on the fringes of society, scrounging for a living doing menial jobs, engaging in petty crimes and prostitution, or seeking solace in drugs. These increasingly large numbers of displaced youth with no hope of a better future¹³ and whose sole

or main skills involve inflicting violence and killing, are essentially a time bomb waiting to explode in urban communities.

There is, therefore, an urgent need for intervention on a large scale to rehabilitate these former child soldiers, with the goal of reintegrating them into mainstream society. Certain needs have been identified as being crucial to the reintegration process in order to provide a sense of hope for the future for them. The four major needs have been encapsulated in the acronym SAFE: Safety, providing for freedom from harm; Access to basic physiological needs, such as food, shelter, and adequate medical care; Family and a connection to an attachment figure who will provide a normalizing and safe environment and act in their best interests; and Education, with access to education and economic security. If these needs are not met, the children risk being drawn back into armed conflict with the attendant harm to the general society.

In dealing with the psychological and emotional trauma of former child soldiers arising from their participation in armed conflicts, encouraging stories of success from Sierra Leone suggest using evidence-based health intervention, rooted in cognitive behavior theory and adapted to local culture, could prove effective.

Conclusion

The international criminal justice system, as envisaged in the ICC process, has a unique opportunity to strike a balance between retributive and restorative justice, which will contribute to the development of effective models for addressing international crimes (ICC 2012). In cases that involve perpetrators who could also be considered victims of international crimes, such as child soldiers, less focus should be placed on retribution and more efforts generated toward healing the communities and holding the parties accountable for their actions in a non-punitive way, while reintegrating the former child soldiers in their original communities. This requires, among other things, a buy-in of political will among the major political decision-makers in the nation-state and the broad political, material, and financial support of the international community. This approach could contribute toward addressing the larger issues of the interest of victims and affected communities in order to bring about long-term stability in post-conflict societies.

The *Ongwen* case raises interesting questions relating to the dichotomy between the victim and perpetrator in cases where crimes have been committed by individuals who were recruited as child soldiers and where to draw the line. The Rome Statute of the ICC clearly states that it will not have jurisdiction on crimes committed by children below the age of 18.¹⁴ In *Ongwen's* situation, one can assume that his abduction and eventual molding into a rebel soldier has everything to do with his brutal childhood upbringing in the hands of the LRA. As discussed in this chapter, research on child soldiering points to severe psychological impact on children. This is not to say that children should not be held accountable for their crimes committed during conflict, but rather this chapter is advocating the use of AJMs other than those related to retributive or trial justice. Child soldiers should not be prosecuted simply for their participation or association, which we argue is involuntary, with an armed group. The goal for accountability should be to rehabilitate and reintegrate them into society.

It has been established that Dominic Ongwen's trial before Trial Chamber IX in the ICC can once again provide evidence on the limitation of trial justice and the international criminal justice system, as a whole, in responding to international crimes. Ongwen is a unique perpetrator who is also a victim of the same crimes he is being charged with before a court of law. On February 4, 2021, Trial Chamber IX found Dominic Ongwen guilty beyond a reasonable

doubt of 61 counts of crimes against humanity and war crimes committed in Northern Uganda between July 1, 2002 and December 31, 2005. The Chamber found that Dominic Ongwen was fully responsible for the crimes, for which he was charged, and did not find evidence to support assertions that he was suffering from a mental disease, or under duress or threat during the period between July 1, 2002 and December 31, 2005, when the crimes were committed.¹⁵ The Trial Chamber XI finding is based on a narrow, legalistic interpretation of evidence that may not appreciate the complexity of, first, the nature of the offenses committed and the offender's constitution. We argue that while the Trial Chamber's decision is sound in law, it leaves much to be desired as far post-conflict justice is concerned. The international criminal justice system, therefore, must employ AJMs, which are geared to establishing the truth, acknowledging the atrocities that have occurred, and reconciling and restoring societal harmony.

Notes

- 1 Case information sheet in *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15 available at www.icc-cpi.int/CaseInformationSheets/ongwenEng.pdf.
- 2 Other reasons include the fact that children consume less food than adults, a major concern for non-state groups operating in conflict areas with reduced farming activity; that they are less independent in their thinking; that they are not a big loss if they are wounded or killed in battle; and the fact that modern weaponry is light enough for children to carry and operate.
- 3 Two 10-year-old boys from Kirkby, Merseyside, England, Robert Thompson and Jon Venables, abducted, tortured, and killed a two-year old, James Patrick Bulger on February 12, 1993. They were found guilty of murder and sentenced to indefinite detention at the Queen's pleasure but were released on lifelong license to great public uproar, following the recommendation of a Parole Board when they turned 18. Venables has since been in and out of prison for violating parole, the latest reincarceration occurring November 2017. Lionel Tate, 12, of Broward County, Florida, who said he was imitating professional wrestlers when he killed his 6-year-old playmate in 1999, was convicted of first-degree murder, with the relevant statute not requiring proof of intent to kill or injure, and was sentenced to life imprisonment. The sentence was overturned on appeal in 2004, on the ground that his mental competency had not been evaluated prior to trial. He subsequently accepted a plea deal and was sentenced to one year's house arrest and 10 years' probation. He subsequently was found guilty of violating his probation by possessing a gun while robbing a pizza deliveryman of a pizza and was sentenced to 30 years in prison in 2006. He was still serving this sentence concurrently with a 10-year prison sentence for the robbery itself at the time of writing.
- 4 See <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750053?OpenDocument>.
- 5 The African Charter on the Rights and Welfare of the Child (ACRWC) abrogates criminal liability for a child, defined as being under 18, as does the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted by the General Assembly in May 2000 and entered into force in February 2002, which commits states to eschew and criminalize conscription of soldiers under the age of 18.
- 6 "Victims and their families want justice to be done even if the crimes were committed by child soldiers," according to Vesselin Popovski, co-author of *International Criminal Accountability and the Rights of Children* (Arts and Popovski 2006).
- 7 *Prosecutor v. Thomas Lubanga*, ICC-01/04-01/06. Trial Chamber I, in the International Criminal Court's first verdict, convicted Thomas Lubanga of the offense of conscripting, enlisting, or using children to actively participate in hostilities. In defining active participation, the Chamber adopted a broad definition so as to include children involved even indirectly, so long as their contribution placed them in real danger as a potential target. Unfortunately, the Chamber did not discuss whether sexual violence against these children also fell within the scope of the offense.
- 8 *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06. On July 8, 2019, Trial Chamber VI of the ICC found Mr. Bosco Ntaganda guilty, beyond reasonable doubt, of 18 counts of war crimes and crimes against humanity, committed in Ituri, DRC, in 2002–3.
- 9 The human rights that the child soldiers were deprived of are rights provided for under the Convention on the Rights of the Child. See OHCHR (1990).

- 10 Tradition-based Justice and Reconciliation after Violent Conflict: Learning from African Experiences, IDEA Conference, Brussels, February 6, 2008 (Unpublished; see www.idea.int/sites/default/files/speeches/Presentation-of-Reconciliation-and-Traditional-Justice-After-Violent-Conflict-Learning-from-African-Experiences-PDF.pdf).
- 11 The Acholi have a ritual involving stepping on an egg, a practice originally applied to travelers returning home after an extended absence away, to cleanse them of evil spirits they may have picked up along the way. This ritual has been successfully used to forgive and accept child soldiers on their return to their communities.
- 12 Boys have not been spared sexual abuse either. According to Theresa Betancourt, some provisional reports suggest that up to 5 % of child soldiers who participated in the civil war in Sierra Leone experienced sexual abuse within their armed groups.
- 13 In Liberia, by 2017, 14 years after the end of its civil war, there were approximately 35,000 displaced former child soldiers who had served under Charles Taylor, and about 10,000 who had served in militias of other warlords. Over the past few years, there have reports of the release of child soldiers from their former armed militias in numbers exceeding 10,000 in the DRC, 9,000 in Central African Republic, and 1,600 in Chad, among others. All of these are potential security threats in the communities in which they settle. Some former child soldiers have also begun to serve as mercenaries in emerging flash points, such as South Sudan (17,000 since 2013), and in 2016, 2,000 former child soldiers were reportedly working for Boko Haram in Nigeria and adjacent countries.
- 14 See art. 26 of the Rome Statute, which states: “The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime” (ICC 2002).
- 15 See the Trial Chamber XI decision: www.icc-cpi.int/CourtRecords/CR2021_01026.PDF.

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