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Victims who victimise

Mark A. Drumbl*

How to speak of the agency of the oppressed to harm others in times of atrocity? This article juxtaposes Holocaust literature (Levi, Frankl, Kertész, Ka-Tzetnik) with Holocaust judging (the *Kapo* collaborator trials in Israel). It does so didactically to interrogate international criminal law's interaction with former child soldier Dominic Ongwen, currently awaiting trial at the International Criminal Court.

*'The Law of the Lager said:
"eat your own bread, and if you can, that of your neighbor."*¹

Primo Levi's writing memorialises the day-to-day in Auschwitz. He gazes beyond the structural brutality of the camps as designed and operated by the Nazis. His principal subjects, in fact, are not guards, nor Schutzstaffel (SS) members, nor camp officials. His principal subjects are the inmates. He presents them in their many conflicting dimensions. Schepschel, for example, was cunning with petty thievery at Auschwitz. Schepschel stole from the factory in cahoots with Moischl. But, 'when the opportunity showed itself . . . [Schepschel] did not hesitate to have Moischl, his accomplice[,] . . . condemned to a flogging'.² Schepschel did so because he aspired to curry favour in his quest to become a *Kesselwäscher*—a 'vat washer'—with the easier life that such a promotion ostensibly portended.

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1 P Levi, *Survival in Auschwitz: The Nazi Assault on Humanity*, trans. S Woolf (Simon & Schuster, 1993) 160.

2 Ibid 93.

Levi's texts—along with those of other Holocaust survivors such as Viktor Frankl, Ka-Tzetnik and Imre Kertész—are populated by any number of Schepschels.³ These authors caustically scorn these Schepschels; but all the while they refrain from denouncing them or locating in their desperate conduct any diffusion of responsibility from the Nazis. In Levi's own words: 'I know of no human tribunals to which one could delegate the judgment.'⁴ Each of these authors captures—divergently yet delicately—the essence of humanity as good and evil, differently on different days. The literary format of their texts, to be clear, does not oblige them to pardon or punish. This format thereby nourishes the freedom to address the reality that, in times of atrocity, the divide between victimisers and victims blurs. Literary accounts of atrocity unpack the subtleties of and contiguities among victims and perpetrators, including betrayals, loyalties, connivances and acts of resistance. These accounts memorialise a pressing story of atrocity that carries great meaning for many survivors.⁵

Criminal law, on the other hand, spurns any such blurring. The representational iconography, and the symbolic economy, of the criminal law is one of finality, disjuncture and category: guilty or not-guilty, persecuted or persecutor, abused or abuser, right or wrong, powerful or powerless. Judicial accounts tend to be austere. Victims are to be pure and ideal; perpetrators are to be unadulterated and ugly. International criminal law hinges upon these antipodes which, in turn, come to fuel its existence. Contrived as they are, these binaries nonetheless undermine international criminal law's ability to speak in other than a crude register, in particular when it comes to the collective nature of mass atrocity.⁶ Victims, after all, may be imperfect. Perpetrators may be tragic. The

3 How to class these works? With the exception of Ka-Tzetnik's, they are not fiction, although they deploy narrative techniques associated with novels. These works are also auto-biographical. They are ethnographic in that they reflect a thick description born out of the most poignant of participant observation. Ka-Tzetnik's work, while grounded in what has been experienced, enters the realm of the fictional. Other writers, whose *oeuvre* this article does not discuss, also have engaged with the *Kapo*—for example, Art Spiegelman's *Maus*.

4 P Levi, *The Drowned and the Saved*, trans. R Rosenthal (Vintage Books, 1989) 44-45.

5 See also, MJ Bazyler & JY Scheppach, 'The Strange and Curious History of the Law Used to Prosecute Adolf Eichmann' 34 *Loyola of Los Angeles International and Comparative Law Review* (2012) 417, 420 ('Survivor memoirs invariably include details of killings, participation in selection of prisoners for extermination, beatings, theft and humiliation imposed by Jewish *Kapos* on their fellow Jewish prisoners').

6 As Sofia Stolk notes in her work on opening statements in international criminal trials, '[t]he defendant is depicted as a truly despicable person, which is contrasted with the innocence of the victims'. S Stolk, 'Ntaganda at the ICC—Some observations from the public gallery', *Center for International Criminal Justice*, 14 September 2015, available at <https://cicj.org/2015/09/the-opening-of-the-ntaganda-trial-at-the-icc-some-observations-from-the-public-gallery/> (last visited 20 May 2016). See also KM Clarke, 'Refiguring the Perpetrator: Culpability, History and International Criminal Law's Impunity Gap' 19 *The International Journal of Human Rights* (2015) 592.

shapeshifting of humanity in times of violent cataclysm, however, does not mix or play well with criminal law's absolutes.

Unlike Levi, Israeli legislators and courts did judge some of the Schepschels. They did so in the 1950s and 1960s in a series of national trials called the *Kapo* trials. The term *Kapo* refers to inmates—initially German professional criminals or political prisoners, then prisoners of war, but then, later, also persecuted Jews—who served as guards in the camps and, in turn, received a putative ‘privileged status’.⁷ *Kapos* were inmate functionaries whose day-to-day supervision enabled the camps, even sprawling ones, to run with comparatively few SS overseers. They were key cogs in the Nazi policy of ‘prisoner self-administration’. *Kapos* exercised their limited agency at times in empathetic ways, at other times to resist, but also to hurt and savage others under their charge. *Kapos* themselves were hierarchically organised—from a chief *Kapo* down to the barrack commander (*Blockältester*) and even lower, ending with the *Sonderkommando*, those inmates engaged to extract teeth and shear hair—mutilations undertaken for the purposes of supplying the Reich—from the dead after the SS gassings and then to burn the bodies in the crematoria.

While many *Kapos* were compelled to serve, others made their services available—at times readily. The recruitment of the persecuted as agents of the Final Solution exposes the totalising perfidy of Nazi eliminationism. Pitting victims against victims broke solidarity and metastasized extirpation within the targeted group. A detainee's status as a *Kapo* was fragile. Demotion was always possible. An erstwhile *Kapo* could be expelled back into the ranks of the ordinary prisoners, in which case he or she might face a most uncertain fate. Despite the contingency of their status, *Kapos* wielded enormous power over their subjects. Authority, after all, is situational. Relatedly, in the ghettos throughout Eastern Europe, Jews served as police officers and administrators. These individuals were also prosecuted in the *Kapo* trials. Following the liberation of the camps, survivors attacked *Kapos* and police officers; some *Kapos* were prosecuted in informal proceedings that were conducted, but only at times thoughtfully, in

7 IM Singer, ‘*Reductio ad Absurdum*: The *Kapo* Trial Judgements’ Contribution to International Criminal Law Jurisprudence and Customary International Law’ 24 *Criminal Law Forum* (2013) 235, 236. See also O Ben-Naftali & Y Tuval, ‘Punishing International Crimes Committed by the Persecuted: The *Kapo* Trials in Israel (1950s-1960s)’ 4 *Journal of International Criminal Justice* (2006) 129, note 6 (‘The term “*Kapo*” refers to inmates in Nazi Lagers and ghettos (Jews and non-Jews) who were appointed by the Nazis to serve in various functions, mainly in the areas of discipline, order, policing and hygiene amongst the inmates.’). The origin of the term *Kapo* is unclear. It may be traced to the Italian word ‘capo’ (meaning head or boss) or as derivative of the German term *Kameradschaftspolizei* (‘comrade police’). The Nazis planned for *Kapos* to fulfil goals of prisoner self-governance, in a manner similar to the place of the *Judenräte* in the ghettos.

displaced persons camps in Europe.⁸ The Israeli *Kapo* trials, therefore, map onto a history of summary trials and, in a sense, may have helped expiate anger in chance encounters that occurred between *Kapos* and regular prisoners on the sunny streets of Tel Aviv, for example, a decade later.

The records of many of the *Kapo* trials have been sealed (for seventy years as of the time of the judgment);⁹ records of other trials were destroyed in a flood. Still, enough evidence regarding these trials seeps into the public frame to expose the clumsiness that the criminal law experiences in explicating the victim/victimiser divide as prevalent in Levi's 'grey zone'. The murkiness and fragmentation of the 'grey zone' became embarrassing and discomfiting once refracted through the lens of the criminal law.

Notwithstanding this awkwardness, the criminal law continues to garner even greater status as the iconic—and infatuated—manner in which to deliver accountability for mass atrocity. Courtrooms and jailhouses have become indelibly associated with international law's linear progress narrative. The inflation of international criminal law's ambit ironically may exacerbate the struggle to narrate how and through whom atrocity actually occurs. The criminal law condemns, but fails to actuate the granularity of survivors' stories.

The pursuit of justice, meaning and transition in the wake of the Holocaust is not self-contained. The variance between Holocaust writing and Holocaust judging—as evidenced in the *dénouement* of the *Kapo* proceedings—conveys pedagogic value for transitional reckoning in the wake of other atrocities, including atrocities that fall within the jurisdiction of contemporary international judicial institutions.

Is the criminal law's gaucheness in the *Kapo* trials, however, a congenital condition? Although particularly constrained in the invidiousness of the Nazi concentration camps, the capacity of victims to victimise arises wherever atrocity metastasizes; so, too, does the hunger of survivors to memorialise the exercises of this capacity. These demands now percolate, for instance, in

8 In addition, a few *Kapos* (not Jewish) were prosecuted in East and West Germany. See, e.g., R Wolf, 'Judgement in the Grey Zone: The Third Auschwitz (Kapo) Trial in Frankfurt, 1968' 9 *Journal of Genocide Research* (2007) 617. Some were prosecuted in Poland; and also by Allied military tribunals: see, e.g., Trial of Werner Rohde and Eight Others, British Military Court, Wuppertal, Germany (29 May-1 June 1946). (Berg, a German *Kapo*, was sentenced to five years imprisonment for cremating dead bodies). In the US, several alleged Jewish *Kapos* have faced legal proceedings (criminal or deportation) or the threat thereof. SG Freedman, 'Haunting Issues Surround Jewish Nazi Camp Overseer', *New York Times*, 26 May 1987.

9 It has been surmised that the seal was ordered upon request of the family members of the accused owing to their embarrassment. Singer (2013) 2, citing Antonio Cassese. Ultimately, however, the trials themselves came to be seen as embarrassing.

proceedings against a formerly abducted Ugandan child soldier, Dominic Ongwen, pending before the International Criminal Court (ICC).

Ongwen rose well beyond *Kesselwäscher*. He became a Brigade Commander in Joseph Kony's Lord's Resistance Army (LRA). What this exactly means is unclear. Rank was contingent within the LRA. Kony always remained very controlling of the organisation and its members. Ongwen nonetheless extensively deployed violence against others.¹⁰ Ongwen is paradoxically accused of committing crimes that he himself suffered after having been abducted into the LRA while walking home from school: the war crime of cruel treatment, conscription and use as a child soldier, and the crime against humanity of enslavement. Ugandans wrestle with his victim/perpetrator duality, leading to debates about where and how—and, even, if—he should be criminally prosecuted. These debates thereby bear witness to some of the themes that had bedevilled the *Kapo* trials. They also touch upon documentary concerns as to how best to understand, conceptualise and remember LRA violence. Which stories, and whose, to authenticate? And why?

In late March 2016, an ICC Pre-Trial Chamber confirmed charges—many charges, including for sexual and gender-based crimes—against Ongwen. The tone and content of the confirmation of charges decision, while ensuring that the criminal law advances, do not augur well for the prospect that criminal *fora* can accommodate the diversity of stories about his coming of age in the LRA, his deployment of violence, and the suffering of those he harmed. This article nonetheless persists in considering a number of criminal procedure sites, including sentencing, as potential venues for such accommodation and, thereby, as pivots to facilitate broader didactic, pedagogic and explanatory ambitions. Whereas much of expressive theory focuses on criminal law's ability to narrate norms and prohibitions, this article probes its ability to unpack the aetiology of mass violence and the discursive content of what survivors wish to remember. This article therefore considers how, if at all, criminal proceedings against Ongwen might achieve aetiological expressive purposes. Such purposes include narrating his coming of age in northern Uganda in order to educate the public about child soldiering, agency, victim–perpetrator concatenation and the malleability of power. Ultimately, this article considers criminal law's ability in this regard to be rather thin.

Survivors may wish to remember what they endured, and how they suffered, at the hands of others who, too, were persecuted. The ability of literary and cinematographic accounts to deliver this content helps expiate the 'ethical loneliness'

10 See also, I Cakaj, 'The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander', *Justice in Conflict*, 12 April 2016, available at <https://justiceinconflict.org/2016/04/12/the-life-and-times-of-dominic-ongwen-child-soldier-and-lra-commander/> (last visited 20 May 2016) ('Ongwen was good at fighting and killing. But he never was a top commander').

that tormented victims victimised by other victims. ‘Ethical loneliness’, a condition identified and a term coined by philosopher Jill Stauffer, reflects the double experience of being abandoned by humanity only to be followed up by not being heard—truly heard—when talking about what happened.¹¹ An ethically lonely person is rendered invisible; the alienation is all the more embedded because no one is listening well. Stauffer adroitly identifies many instances of ethical loneliness within and without the transitional justice context. Examples include victims pressured into reconciliation and disavowed of their resentment; survivors stripped of their expressed agency and ventriloquised as passive; and when the pursuit of microscopic facts in an atrocity trial pushes broader narratives of structural injustice aside. I see deep ethical loneliness in survivors of *Kapo* violence; just as I see deep ethical loneliness in the child (or adult) brutalised by a child soldier; just as I see ethical loneliness (and great fear of becoming ethically lonely) in those who survived Ongwen’s assaults. In these instances, the harm suffered is no less painful, but the characteristics of the aggressor are such that the injury becomes awkwardly told, feebly under-told, ignored outright or sensationalised.

Can criminal trials of victim–victimisers expiate ethical loneliness? This article is sceptical. This goal may be too nuanced to square with the reductionist pressures of the courtroom; too delicate to outlast the adversarialism that inheres between prosecution and defence where the winner takes all; and perhaps too distant from other aspirations such as deterrence, retribution and incapacitation. Where then—and how—to capture the ethical loneliness of the victim of *Kapo* brutality, of the beneficiary of *Kapo* mercy, and of the *Kapo* tormented by his or her own nightmares?

Experiences with the *Kapo* trials might provide a way to re-cast the current proceedings against Ongwen. This article, however, ultimately discourages criminal prosecutions of victim–perpetrators. It instead encourages international criminal law to recede, rather than to regale, and in turn to welcome stories as told diversely through multiple formats.

IMPERFECT SUFFERING

In *Se questo è un uomo*, written in 1947 immediately upon his repatriation to Italy, Primo Levi backgrounds the structural injustices of the concentration camps in order to foreground the day-to-day interactions among inmates.¹² Levi certainly does not suspend the horrors the Nazis imposed upon the inmates. He details how

11 J Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia UP, 2015).

12 Levi, a chemist, joined the Italian resistance. He was arrested by Italian fascists who turned him over to the Germans. He was deported to Auschwitz.

the prisoners were intentionally squeezed into the most desperate of situations, the most deprived of conditions and the most odious of circumstances. Levi gracefully minces no words: ‘The only way out is through the chimney.’ He unfurls the squalor and subjugation of the camps; the perpetual hunger and exhaustion; the shivering and collapse at roll-call. ‘*Hier ist kein warum*’ (‘Here, there is no why’), he recounts being told, after he had asked a question as to why this-or-that was required of him-or-another. Levi lays bare what it means to demolish a human being.¹³ For Levi, however, this discussion constitutes the frame. His composition—his very text—roots itself in the prisoners: their lives, their affections and afflictions, their deaths and the choiceless choices they make.

The American-backed English language translation of *Se questo è un uomo* has been chastised for its re-packaging as *Survival in Auschwitz* from its initial title—which hews much closer to the Italian—*If This Is a Man*.¹⁴ No doubt the modified title departs from the Italian in terms of meaning and form. But, on the other hand, the functionality of the English language title also exposes the heart of the book—the struggle to survive—which Levi presents as an iterated game.¹⁵ At times, interactions among inmates are supportive, enhancing, communal and conspiratorial. But, more often than not, the inmates foist indignities upon each other. Within the ‘grey zone’, survival owes itself not exclusively to random luck or chance, but to manoeuvres that may involve passive condonation of the demise of others. One detainee’s ability to endure remains contingent upon someone else’s faltering. Levi depicts the German oppressors as cruelly anonymous babble, in the distant horizon, with the protagonists and antagonists being the oppressed.¹⁶ Some of the oppressed abuse

13 See also, G Banner, *Holocaust Literature* (Valentine Mitchell, 2000) 96 (‘Levi quickly understood the difference between physical attacks upon the body which, damaging as they were, did not necessarily compromise the integrity of identity in the way that attacks upon selfhood did. So, broken limbs were one thing, but the shaving of hair, the theft of an old letter, the denial of a name, were quite another. The accuracy of this insight is borne out again and again in Levi’s writing as the desperate fragility of the self is revealed.’)

14 The second part of the re-title, following the colon, is ‘The Nazi Assault on Humanity’, which indicates Levi’s presentation of the Nazis as the architects of the violence. Nearly four decades later, Levi authored *The Drowned and the Saved*, another touchstone of the quotidian within the Holocaust. The two books demarcate ‘the beginning and end of his writing life’. Ibid 87.

15 See also J Wood, ‘The Art of Witness: How Primo Levi Survived’, *The New Yorker*, 28 September 2015 (noting that Levi’s American publisher ‘rewrapped’ the book’s title ‘in [a] heartier, how-to-ish banner’).

16 So, too, does Ka-Tzetnik. See, e.g., O Bartov, ‘Kitsch and Sadism in Ka-Tzetnik’s Other Planet: Israeli Youth Imagine the Holocaust’ 3 *Jewish Social Studies* (1997) 42, 63 (‘If the Nazis are always in the background of the evil he portrays, his attention is focused much more on the disintegration of even the most basic human relationships and moral codes among the inmates, the cruelty of the Kapos, the murderous instincts to which hunger, deprivation, and humiliation give rise, the fall of those who under other circumstances would have been the most admired members of a community.’).

others, to be sure, and their tales of survival twist into acts of cruelty. Levi locates agency amid chains. His work is controversial to some readers, to be sure, but remains telling; he bears witness to stories that yearn to be told.

The pulse of agency, moreover, fuels the autobiographical accounts of camp life rendered by Victor Frankl (*Man's Search for Meaning*) and Imre Kertész (*Fatelessness*). Their depictions of daily life in the camps—in Frankl's words, the concomitant 'multitude of small torments'¹⁷—track Levi's by foregrounding the disposition of the inmate rather than the inevitability of circumstance.

For Levi, Auschwitz is strategy: clinical, primordial and survivalist. Kertész, to be sure, also survived. He plotted in the spaces available to him—he benefited from chance and from friendship. But, fundamentally, Kertész sought ownership not so much of his trajectory but of how he felt along that trajectory. Kertész was determined that his world neither be fated nor fateless. His agency is that of recollection: to move on and transcend. It is also that of the dissident—of finding fleeting happiness in the *Lager* and glimmers of nostalgia thereafter. He recalls the sunset as the best time of the day. Kertész's embarrassment is that no one may ever come to ask of the good times in the camps. His goal is memory (or revision)—how to make sense of the past, and how to communicate the awkward experience that shards of joy sparkle even within the most appalling of conditions. To be sure, Kertész unpacks the pain. He shares, for example, in grim detail how his wooden shoes melded to his feet amid the glue of pus, oedema and mud. But he refuses to permit the pain to entirely define him or his experiences. For Ka-Tzetnik, on the other hand, the pain—starvations, beatings, rapes, scarification, brothels, cannibalism—visited upon the bodies and souls of the inmates is luridly omnipresent.¹⁸

Frankl, for his part, drills down into the vision that no one, no matter how constrained, is ever bereft of agency. For Frankl, agency lies in how one responds to the impossible, to the implausible and to the unimaginable.¹⁹ Frankl,

Ka-Tzetnik is the *nom de plume* of Yehiel Dinur, who also testified at the Eichmann trial in a fashion that did not meet the formal requirements of legally probative, or even admissible, evidence.

17 VE Frankl, *Man's Search for Meaning* (Beacon Press, 2006) [1956] 3.

18 In *House of Dolls*, Ka-Tzetnik recounts his sister Daniella, who is compelled to join a camp's *Freudenabteilung* ('Joy Division'), namely brothel, where she is stripped and lashed by Elsa, an overseer, after Elsa forces her to bend over a chair. The girls selected for the Joy Division have '*Feld-Hure*' (military whore) tattooed between their breasts. *Nota*: at Auschwitz the brothel was frequented by *Kapos* and privileged prisoners.

19 '[E]verything can be taken from a man but one thing: the last of the human freedoms—to choose one's attitude in any given set of circumstances, to choose one's own way. . . . Every day, every hour, offered the opportunity to make a decision, a decision which determined whether you would or would not submit to those powers which threatened to rob you of your very self, your inner

like Levi, faults *Häftlinge* who survive the camp by accelerating the demise of others.²⁰ He praises those who refuse to do so. Frankl affirms life, not just survival: *Trotzdem Ja zum Leben Sagen* is his book's original German title. How one lives or dies is what matters, not whether one lives or dies. Paradoxically, however, Frankl also propounds strategy—which forms the essence of his ensuing logotherapy. He insists that what distinguishes the drowned from the saved—to invoke Levi's terms—is that the saved have a purpose, they retain hope in the future and can imagine that future, whereas the drowned have given up: in a wrenching passage, Frankl says they hardly move, lie in their own excreta, and nothing bothers them anymore.²¹ Kattzetnik, for his part, embraces the drowned—the *Musselmänner*, no more (nor less) than mere living skeletons—and, writing from their perspective, garishly depicts their suffering, all the while toggling between the actual and the imaginary and between the lived and the conjured. The fragments of the imaginary, however, may well constitute a stenography of what has been experienced.

Frankl is opinionated. He is exigent. He maintains that there is a 'right way' or an 'honorable way' to endure one's sufferings.²² Suffering conveys meaning; the challenge of the human condition is not what we experience but how we respond to our experiences. Frankl posits:

The way in which a man accepts his fate and all the suffering it entails, the way in which he takes up his cross, gives him ample opportunity—even under the most difficult circumstances—to add a deeper meaning to his life. It may remain brave, dignified and unselfish. Or in the bitter fight for self-preservation he may forget his human dignity and become no more than an animal.²³

Like Levi, Frankl nonetheless balks at condemning the ethics of those who spin machinations to survive and who thereby fail to suffer rightly or honourably. Frankl flatly rejects collective guilt. He does so theoretically as well as

freedom; which determined whether or not you would become the plaything of circumstance, renouncing freedom and dignity to become molded into the form of a typical inmate.' Frankl (2006) 67.

20 Ibid 5-6 ('On the average, only those prisoners could keep alive who, after years of trekking from camp to camp, had lost all scruples in their fight for existence; they were prepared to use every means, honest and otherwise, even brutal force, theft, and betrayal of their friends, in order to save themselves.').

21 Ibid 74.

22 Ibid 38.

23 Ibid 67.

personally—choosing as he did to return to Vienna after the Holocaust to the same community that had previously shunned him. Frankl accords his own survival to the need of one *Kapo* to unburden his mental anguish upon him; the resultant confessional and therapeutic conversations safeguarded Frankl's life. And Frankl played that game, to be sure, which in retrospect he drenches with sarcasm: 'I was very happy to be the personally appointed physician to His Honor the *Capo*, and to march in the first row at an even pace.'²⁴

Frankl's account, however, is not only about the inmates. He also gestures towards the German guards. Frankl locates agency within the guards themselves: discretion that can be turned towards excessive sadism, towards dullness or towards pity. Frankl concludes, in a passage of brutalist equivalence:

It is apparent that the mere knowledge that a man was either a camp guard or a prisoner tells us almost nothing. Human kindness can be found in all groups, even those which as a whole it would be easy to condemn. The boundaries between groups overlapped and we must not try to simplify matters by saying that these men were angels and those were devils. Certainly, it was a considerable achievement for a guard or foreman to be kind to the prisoners in spite of all the camp's influences, and, on the other hand, the baseness of a prisoner who treated his own companions badly was exceptionally contemptible.²⁵

Levi evokes the constant prospect he faces of other inmates stealing his pathetic food rations and his blankets and clothing and shoes. So much can be lost so quickly, a tragedy which Levi ascertains early on:

We have learnt . . . that everything can be stolen, in fact is automatically stolen as soon as attention is relaxed; and to avoid this, we had to learn the art of sleeping with our head on a bundle made up of our jacket and containing all our belongings, from the bowl to the shoes.²⁶

This theft is painful, omnipresent and pitiless. It robs the residue from those who remain, thereby shattering any vestige of solidarity:

[I]f one goes to the latrine or the washroom, everything has to be carried along, always and everywhere, and while one washes one's face, the bundle of clothes has to be held tightly between one's knees: in any other manner it will be stolen in that second.²⁷

24 Ibid 27.

25 Ibid 86.

26 Levi (1993) 33.

27 Ibid 34.

Levi's book is redolent with disdain for the *Sonderkommando* and the *Prominenz* and their advantages and special lavatories;²⁸ of *Kapo* thuggery and violence;²⁹ about machinations as to where to wait in line so as to maximise the likelihood of getting a thicker ladleful of the thinnest soup instead of an even skimpier one. Levi chides the well-educated Italian Jews, whose tattooed numbers are in the 174,000s, who 'do not know how to work, and let their bread be stolen, and slapped from the morning to the evening . . . [t]he Germans call them "zwei linke Hände" . . . and even the Polish Jews despise them as they do not speak Yiddish'.³⁰ A Pole, also an inmate, rails against Levi—'Du Jude, kaput. Du schnell Krematorium fertig'—in what Levi memorialises as among the most hurtful words hurled at him during his internment.

Although Levi documents the victimisation he suffers at the hands of other victims, and does so candidly, he too—like Frankl—abstains from denouncing:

We now invite the reader to contemplate the possible meaning in the Lager of the words 'good' and 'evil', 'just' and 'unjust'; let everybody judge, on the basis of the picture we have outlined and of the examples given above, how much of our ordinary moral world could survive on this side of the barbed wire.³¹

The point is not to condemn the saved or pity the drowned, but rather to admit that in the *Lager* 'the struggle to survive is without respite'³² and that someone's survival may hinge upon another's demise. It is not all, or exclusively, about chance or luck but—at times—design, scheming and gaming. Those who drown, Levi points out, are those who 'carry out all the orders one receives, to eat only the ration, to observe the discipline of the work and the camp'.³³ The drowned have no story other than Ka-Tzetnik's. The path ahead—though Frankl would not say 'forward'—is that which leads to the

28 Those *Sonderkommando* who outlived Auschwitz were among the few to memorialise—through words and art—the ways of the crematoria.

29 Levi (1993) 45 ('The *Kapo* arrives, he distributes kicks, punches and abuse, and the comrades disperse like chaff in the wind. Null Achtzehn puts his hand to his nose and blankly looks at it, dirty with blood. I only receive two blows on the head, of the sort that do no harm but simply stun.').

30 Ibid 49. See also Wood (2015) ('[Levi] places in the gray zone all those who were morally compromised by some degree of collaboration with the Germans—from the lowliest (those prisoners who got a little extra food by performing menial jobs like sweeping or being night watchmen) through the more ambiguous (the *Kapos*, often thuggish enforcers and guards who were themselves also prisoners) to the utterly tragic (the *Sonderkommandos*, Jews employed for a few months to run the gas chambers and crematoria, until they themselves were killed)').

31 Levi (1993) 86.

32 Ibid 88.

33 Ibid 90.

Prominenz, a collective that Levi sees as ‘monsters of asociality and insensitivity’. In a devastating passage, Levi recounts the balefulness of those who successfully strategise survival:

[I]f one offers a position of privilege to a few individuals in a state of slavery, exacting in exchange the betrayal of a natural solidarity with their comrades, there will certainly be someone who will accept. . . . [H]e will only be satisfied when he has unloaded on to his underlings the injury received from above. We are aware that this is very distant from the picture that is usually given of the oppressed who unite, if not in resistance, at least in suffering.³⁴

The downtrodden exert a thread of agency when they tread—whether as tactic, desperation or deprivation—upon others below.

This agency recurs in Holocaust remembrance. In the Anne Frank House in Amsterdam, for example, a video plays of Hannah Goslar, Anne’s dear childhood friend. A Paraguayan national, and thereby slightly protected by virtue of her state’s relationship with Germany, Hannah ends up as a slave worker but does not get sent to a death camp. She labours next to Anne’s camp. She learns that Anne is nearby. Through word of mouth, the two girls furtively meet up at night near the fence that separates their camps. They call to each other in the darkness. Anne is weak. Hannah is better fed. Hannah collects little Red Cross packages, along with scraps of food, from her own camp-mates. She bags the provisions. She and Anne agree to yet another meeting. Hannah throws the package over the fence in the darkness. Anne is there, but she cries out in agony: the woman next to her grabbed the package, stole it and ran away. Anne is left with nothing. Hannah tries again, another night, and this time she succeeds in getting some food to Anne.

Levi recognises that survival is conditioned on the need to ‘resist enemies and have no pity for rivals’.³⁵ For Levi, ‘[s]urvival without renunciation of any part of one’s own moral world—apart from powerful and direct interventions by fortune—was conceded only to very few superior individuals made of the stuff of martyrs and saints.’³⁶ Levi chides himself for his own survivalist plots, which, he bitterly remarks, betray him by shame.³⁷ His final days in the abandoned camp essentially involve barring migrating masses from his barracks in order for him to live on.

34 Ibid 91.

35 Ibid 92.

36 Ibid.

37 Ibid 150.

Yet, the taste of survival stratagems grows rancid through time. Levi mor-
dantly scuttles an inmate—whom he calls Henri—and belittles him as soiling
his soul in order to cling to life. Henri, as it would turn out, did survive. His
actual name is Paul Steinberg and he, too, later penned a memoir of his own
experiences in Auschwitz.³⁸ Steinberg vaguely concurs with Levi's assessment of
his conduct, but queries whether it is truly pitiful to pounce upon survival. The
bounty of virtue, however, persists for Levi. For example, Levi's love for
Lorenzo—the Italian day labourer who saved him by passing on rations and
food—warms his pages: 'Thanks to Lorenzo, I managed not to forget that I
myself was a man.'³⁹ After the war, Levi tracks Lorenzo, by then terribly ill with
alcoholism, and without success tries to heal him.

THE FUTILITY OF ISRAEL'S KAPO TRIALS

The State of Israel was established in 1948. From the late 1940s until the end of
the 1950s, 470,000 Holocaust survivors arrived in Israel: this group comprised
one-quarter of the nation's population.⁴⁰ Post-war political discourse in Israel
praised Jewish resisters, eulogised the perfect victims, disdained Jews perceived
as having acquiesced in the murder of others, and expressed vexation with those
Jews seen to have failed to struggle sufficiently in order to avoid their fate—in
particular, the *Judenräte* and other local leaders (including ghetto leaders),
taken as 'sheep to the slaughter'.⁴¹

Within this context, then, the *Kapo* trials intended to purify the immigrant
arrivistes in Israel.⁴² These trials were conducted under the 1950 Nazi and Nazi
Collaborators (Punishment) Law (the original title of the legislation was the
'Act against Jewish War Criminals'). Forty cases are estimated to have been
brought. Insofar as there were no Nazis in Israel at the time, the purpose of the
law was to target Jewish Holocaust survivors suspected of collaboration. The
only German Nazi tried under this law was Adolf Eichmann, whose transfer
into Israeli jurisdiction was of course highly controversial. John Demjanjuk, a

38 P Steinberg, *Speak You Also: A Survivor's Reckoning* (Picador, 2001).

39 Levi (1993) 122. Lorenzo also helped Levi send letters to his family in Italy.

40 H Yablonka, 'The Development of Holocaust Consciousness in Israel: The Nuremberg, Kapos, Kastner, and Eichmann Trials' 8 *Israel Studies* (2003) 1, 9.

41 *Ibid* 5. Hannah Arendt was among those who castigated the *Judenräte* along these lines.

42 Ben-Naftali & Tuval (2006) 141, 144, 147 (noting that 'the Law had as its primary target Jewish collaborators, who were themselves persecuted persons' and that it was 'primarily designed to realize, indeed, to constitute a community of "pure victims"' and to 'cleans[e] the Jewish community in Israel of Jewish traitors').

Ukrainian-born, concentration-camp guard, and SS volunteer, who had been captured by the Germans as a prisoner-of-war, was also tried under the law in the late 1980s.⁴³ He was prosecuted following his deportation to Israel from the US (where he had emigrated and was an auto worker). The *dénouement* of the Demjanjuk trial proved an ‘embarrassment’ to Israel’s legal system; the Nazi and Nazi Collaborators (Punishment) Law has since remained unused.⁴⁴

The Israeli Justice Minister presented the Nazi and Nazi Collaborators (Punishment) Law to the first Knesset as follows:

We may safely assume that Nazi criminals . . . will not venture to Israel, but the law also applies to those who implemented the Nazis’ will, and unfortunately some of them may be in our midst Hopefully the proposed law will contribute to cleansing the air among the survivors who have immigrated to Eretz Israel.⁴⁵

The 1950 Nazi and Nazi Collaborators (Punishment) Law included an array of offences. The major offences, which entailed a mandatory death penalty, were crimes against the Jewish people, crimes against humanity and war crimes. The legislation proscribed five other offences: crimes against persecuted persons, offences in places of confinement, delivering persecuted persons to enemy administration, blackmailing persecuted persons and membership in an enemy organisation. These latter offences did not trigger the death penalty. Only one of the Jewish defendants convicted in the *Kapo* trials was found guilty of a major offence. No Jewish defendant ever was charged with crimes against the Jewish people.⁴⁶ The crime of ‘offences in places of confinement’ (article 4(a) of the legislation) was specifically designed to deal with *Kapo* actions in ghettos and concentration camps that fell short of major crimes.⁴⁷ The 1950 Nazi and Nazi Collaborators (Punishment) Law did not formally distinguish between the Nazis and their collaborators, even when collaborators were persecuted persons. Its quest for condemnation, finitude and clarity effectively

43 Demjanjuk ultimately was acquitted in Israel on charges of having been a guard at Treblinka. In 2011, he was tried and convicted in Germany as an accessory to mass murder as a guard at Sobibór. He appealed. He died during the appeal process. Hence, his conviction was never validated. The legal theories deployed to try Demjanjuk in Germany have inspired other subsequent prosecutions of former concentration camp guards and officials. For his part, Demjanjuk argued that he was like a Jewish *Kapo*—that he should be seen as a victim injured by the Nazis.

44 Bazylar & Scheppach (2012) 461 (‘Though it remains officially on the books, the law is a dead letter.’).

45 Statement of Pinhas Rosen, cited in Yablonka (2003) 11.

46 Ben-Naftali & Tuval (2006) 153.

47 Ibid 136.

constructed the persecuted Jew as a Nazi. The law thereby dispelled any ‘grey zone’.

The *Kapo* trials were controversial. Orna Ben-Naftali and Yogev Tuval note that, at the time they were rendered, only six of the judgments were deemed by Israeli editors to be of sufficient public interest to be published.⁴⁸ The unpublished judgments in the State Archive were sealed in a 1995 order for a period of seventy years as of the date of the judgment. Sealing those judgments found in the State Archive—an unorthodox move—has, according to Ben-Naftali and Tuval, ‘expunged [them] from public memory’ and has led to ‘deliberate collective forgetting’.⁴⁹ Unpublished judgments in the courts’ archives were destroyed by a flood.⁵⁰ Observing the dearth of publications in Hebrew that relate to these trials, Ben-Naftali and Tuval—writing in 2006—additionally remark:

The subject is not part of the curriculum in the Israeli educational system. Indeed, over the past four years, we have regularly asked students at the law school whether they are familiar with these trials. Not one person was aware of them.⁵¹

In 2015, Holocaust scholar Itamar Levin published a major study, *Kapo on Allenby Street*.⁵² Invoking the reality of a former *Kapo* who sold ice cream on one of Tel Aviv’s busiest walkways, Levin freshly researches and comprehensively unwraps the *Kapo* trials. Levin notes that documentation exists regarding 23 of the *Kapo* indictments (out of approximately 40 in total). Nine of these ended up in acquittals, 14 in convictions; the average sentence was 17 months; one convict, Joseph Pal, was sentenced to 10 years’ imprisonment. Another scholar, Rivka Brot, has recently published brilliant work contrasting trials of suspected Jewish collaborators in displaced persons camps in Europe with Israel’s *Kapo* trials.⁵³ These publications by Brot and Levin, among

48 Ibid 150. These authors, however, have located materials in the estate of a lawyer who had represented some of the accused *Kapos*. This estate had been donated to the State Archives. It is not covered by the sealing order.

49 Ibid 128, 151.

50 Ibid 150.

51 Ibid 129, note 4. See also I Zertal, *Israel’s Holocaust and the Politics of Nationhood* (Chaya Galai, 2005) 87 (noting that the sealed records ‘lie like corpses in the obscurity of Israel’s legal archives’).

52 I Levin, *Kapo on Allenby Street* (Yad Ben Tzvi & Moresheet Publications, 2015).

53 R Brot, ‘No One Was an Angel: The Gray Zone of Collaboration in Court’, in L Jockusch & G Finder (eds), *Jewish Honor Courts: Revenge, Retribution, and Reconciliation in Europe and Israel after the Holocaust* (Wayne State UP, 2015); R Brot, ‘Julius Siegel: Kapo in Four (Legal) Acts’ 25 *Dapim Journal: Studies on the Holocaust* (2011) 81.

others⁵⁴—along with recent cinematographic treatment of *Kapos*⁵⁵—might vivify public discourse in Israel on the *Kapo* trials. Perhaps these recent contributions will drain some of the discomfort that permeates these conversations.

What cannot be drained, however, is the palpable clumsiness of the *Kapo* trials. Shoehorning realities of victims as victimisers into a juridical framework proved to be frustrating; justiciability was slippery; refusing to distinguish the Nazis from persecuted collaborators proved far too crude, in particular, when it came to small fry such as the *Kapos*; appellate interventions were extensive; and, while judges were of different minds,⁵⁶ the verdicts squirm with disquiet about the delegated task at hand. Punishing the *Kapo*, it was remarked, somehow diminished Nazi guilt.⁵⁷ Judges at times used harsh language to denounce the accused, but they paradoxically deployed tonalities of clemency, empathy and mercy when it came to assessing culpability and pronouncing sentence.⁵⁸ In the *Enigster* case—which involved one of the most brutal *Kapos* in which duress was rejected as a defence—two judges still remarked that having to punish made their ‘heart tremble[]’.⁵⁹ In *Beisky*, the judges called the *Kapo* ‘a human worm’ but then sentenced him to five years’ imprisonment at trial, a punishment that was subsequently reduced to two years on appeal.⁶⁰ An appellate judge, asked to adjudicate the case of Barnblatt, a Jewish police commander (formerly a pianist and conductor) in a Polish ghetto, remarked that the question raised was ‘for

54 T Friling, *A Story of a Kapo in Auschwitz: History, Memory and Politics* (University of New England Press, 2014) (concerning judicial or quasi-judicial proceedings, not conducted in Israel, brought against Eliezer Gruenbaum).

55 See, e.g., *Kapo in Jerusalem*, dir. U Barbash (2014); *Kapo*, dir. T Ben-Mayor & D Setton (2000). And, on the *Sonderkommando*, *Son of Saul*, dir. L Nemes (2015).

56 Ben-Naftali and Tuval identify how a judge’s capacity for empathy in the case of an individual defendant ‘depended, inter alia, on whether he [n.b. the judge] was a Holocaust survivor’. Ben-Naftali & Tuval (2006) 161, note 126.

57 Bazylar & Scheppach (2012) 431 (quoting a source citing the words of Supreme Court Justice Moshe Silberg).

58 Article 10 obliged the release of a ‘persecuted person’ from penal responsibility in cases where specific criteria of duress were established, but this would not apply to charges related to the major crimes or to murder. Ben-Naftali & Tuval (2006) 138.

59 *Attorney General v. Enigster*, District Court of Tel Aviv (4 January 1952). Enigster was the only Jewish defendant convicted of a crime against humanity (which carried a mandatory death sentence). It is known, however, that Enigster was not executed; sources disclose that his punishment was extraordinarily mitigated to two years from the day of his arrest in light of the fact he was extremely ill at the time of trial. Bazylar & Scheppach (2012) 433. Enigster died shortly after his release.

60 Cited in Ben-Naftali & Tuval (2006) 169, note 148.

history and not for the court',⁶¹ thereby cloaking it as fundamentally non-justiciable. Barnblatt was initially convicted and given a five-year sentence. In 1964 (after the Eichmann trial, incidentally), however, his conviction was reversed on appeal and he was acquitted of all charges on the basis of duress. On appeal, it was observed how 'presumptuous' and 'self-righteous' it would be 'to be critical of these "small people" who were incapable of transcending into an ultimate level of morality'.⁶² And, what is more:

[C]riminal law prohibitions, including the Nazi and Nazi Collaborators law, were not written for exceptional heroes, but for ordinary mortals, with their ordinary weaknesses.⁶³

The first *Kapo* trial involved a Jewish policeman in the Ostrovitz ghetto in Poland; it ended in an acquittal. Elsa Trank, a Birkenau women's camp block commander (aged 18 at the time) who became an ice cream seller, was sentenced to two years' imprisonment following extensive evidence of the abuses she inflicted. The judges commented how she, too, was persecuted like the others. Since she had been arrested two years previously, she was promptly released upon conviction for time served.⁶⁴

The *Kapo* judgments were riddled with 'discrepanc[ies] between the harsh language that the courts often used to describe the acts of the accused and the relatively mild sentence that they finally delivered'.⁶⁵ While understandable, and indicative of how the new Israeli judiciary exercised its independence, these discrepancies led to gnarly and queasy text that, in turn, radiates the challenges that inhere in judging *Kapo* conduct within the reductionist strictures of the criminal law.

To be sure, the process of prosecution generated information and testimony. Documents from the *Kapo* trials offered glimpses into life as experienced in the camps. On the other hand, according to Ben-Naftali and Tuval, these documents 'fail to record . . . reflection upon and understanding of the meaning of these experiences'.⁶⁶ The trials did not explicate the 'grey zone', saturated as it is with morally ambiguous conduct. Ben-Naftali and Tuval posit that the judges

61 *Barnblatt v. Attorney General*, Supreme Court of Israel, 18(2) PD 70, 95-96. This defendant is alternately spelled Berenblatt and Bernblat. He was charged *inter alia* with rounding up children and ghetto inhabitants for the selection.

62 *Ibid* 101.

63 *Ibid*.

64 Bazylzer & Scheppach (2012) 433.

65 Ben-Naftali & Tuval (2006) 160. See also, *ibid* 169, noting the judgments' 'incoherence between style and substance'.

66 *Ibid* 161.

felt ‘the unconscious yet nagging sense of their *impotentia judicandi*’; these authors conclude that the *Kapo* trials ‘do not reveal the power of law; on the contrary, these cases expose the limits of law’.⁶⁷ These authors further unpack how common devices of legal reasoning—argument by analogy, treating like cases alike, leanness of language, eschewing doubt and imposing rationality—are ill-suited to draw meaning from, or simply recollect, the Holocaust.⁶⁸ Although recognising how some of the *Kapo* judgments strove to elucidate a deeper sense of meaning, and providing examples thereof, Ben-Naftali and Tuval remain sharply circumspect about the criminal law’s fundamental capacity to attain these ends. Nor is the penological purpose of the *Kapo* trials evident: in other words, did they serve deterrent, retributive or protective goals? They may, however, have expiated vigilante attacks when ordinary prisoner and *Kapo* crossed paths on streets, on buses and in the theatre.

PROSECUTING A FORMER CHILD SOLDIER AS AN ENEMY OF HUMANKIND

‘Each of us sin in words, deeds, and thoughts. Each of us sin in different ways. If I committed a crime through war, I am sorry. In my mind, I thought war was the best thing. Even up to now, I dream about war every night. But if they don’t want to forgive me, I leave it in their hands. I have become like a lice, which you remove from your hair or waist and kill without any resistance.’

– Dominic Ongwen, interviewed before being handed over to the ICC⁶⁹

The LRA operated for some decades in northern Uganda. While violence has laced Uganda since the country’s independence in 1962, including the ruthlessness of Idi Amin, the armed conflict between the LRA and the Ugandan government was particularly protracted.⁷⁰ LRA violence peaked in the late 1990s and early 2000s. Dominic Ongwen—a former child soldier known as the ‘White Ant’—was among the LRA’s commanders, specifically

67 Ibid 162.

68 Ibid 162–68. See also ibid 168 (‘The court’s artificial construction, in effect, repaints, in black and white, the grey zone. The picture thereby generated of life in the camp does not reconstruct the reality of the camp. It creates something else, more knowable and subject to control. Indeed, this juridical feat does not unearth the truth: it buries it.’).

69 M Akena, ‘Ongwen speaks out on why he quit LRA’, *The Daily Monitor*, 19 January 2015, available at <<http://www.monitor.co.ug/News/National/Ongwen-speaks-out-on-why-he-quit-LRA/-/688334/2593818/-/5ox5ac/-/index.html>> (last visited 20 May 2016).

70 International Center for Transitional Justice (ICTJ), *From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda* (ICTJ, 2015) 4. See generally S Finnström, *Living With Bad Surroundings: War, History, and Everyday Moments in Northern Uganda* (Duke UP, 2008).

tasked with responsibility over the Sinia Brigade. The LRA is currently depleted, exhausted, run out of the country and essentially out of commission. Its leader, Joseph Kony, nonetheless remains at large.

The LRA has been implicated in widespread civilian killings. It also had forcibly militarised 60 000 children and young people as combatants, auxiliaries and sex slaves.⁷¹ The LRA abducted children to staff its fighting and support units and, also, to torment communities. Many of these conscripts—now adults—face an uncertain future. Their reintegration into civilian life remains fragile. LRA fighters initiated, and many children conducted, widespread campaigns of rape, mutilation and torture against civilian populations. While many people harmed by this violence are open to forgive, many call out for justice—at times a very harsh justice indeed. Many victims of sexual crimes within the LRA, including crimes that led to motherhood, face a tenuous future. In the absence of acknowledgment and accountability for these crimes, some influential stakeholders have argued that the path for social reintegration of these girls and women, together with their children, remains unstable.⁷²

Ongwen was kidnapped into the LRA as a child while on his way to school in his home town—a dot of a village called Coorom. A lifetime later, he surrendered to US Special Forces in January 2015 in the Central African Republic, a jurisdiction to which the LRA has relocated its rump operations.⁷³ He defected, indeed escaped from, the LRA. Ongwen arrived shortly thereafter at the ICC's detention centre in The Hague. He appeared at his first pre-trial hearing '[d]ressed in a suit and checked tie, [bearing] only the faintest resemblance to the young man in the few old photos of him still circulating: tightly cropped images showing a solemn, almost brooding, fighter sporting dreadlocks and wearing fatigues.'⁷⁴ Although the ICC has indicted five LRA leaders, Ongwen is the only one in custody. Some others are definitely, or likely, dead. Kony himself remains alive and at large.

Many of the details of Ongwen's identity remain obscure. It has been reported that Dominic Ongwen is not his actual name, but a name he made

71 ICTJ (2015) 6. See also *ibid* 5 for reporting another survey according to which the LRA has abducted 54 000 to 75 000 people, including 25 000 to 38 000 children, since 1986.

72 *Ibid* 1. See also *ibid* 12 (discussing the fathers of children born in captivity in the LRA, and noting a 'blurring of the lines between perpetrator and victim' in that 'low-ranking LRA commanders who had forced marriages and fathered children . . . highlight how they were also abducted at very young ages and became victims of a system and structure that forced them to take on a wife or wives . . . and to bear children as part of an LRA strategy to grow its ranks').

73 Prior to his surrender, Ongwen had been wanted by the ICC for nearly a decade.

74 A Green, 'To Forgive a Warlord', *Foreign Policy*, 6 February 2015, available at <http://foreignpolicy.com/2015/02/06/ongwen-uganda-icc-joseph-kony-international-justice/> (last visited 20 May 2016).

up when he was first kidnapped so that the rebel kidnappers would not be able to come after his family.⁷⁵ Apparently his family taught the children to play it safe in this way. His year of birth is contested. Ongwen says he was nine when abducted for training by the LRA; he began soldiering several years later at the age of fourteen. According to his defence lawyers, his parents were in any event murdered following his capture.

On 6 March 2015, an ICC Pre-Trial Chamber postponed the date of Ongwen's confirmation of charges hearing from late August 2015 to late January 2016. Initially, plans had emerged to hold this hearing in Uganda—perhaps even in Gulu in the north. ICC officials were excited about this possibility. Security concerns interfered, however, along with political tensions within Uganda.⁷⁶ And other distractions arose, notably, the ICC's move into a gloriously new building.⁷⁷

On 23 March 2016, charges were confirmed in The Hague against Ongwen. The ICC Prosecutor succeeded in expanding the range of charges, including charges related to extensive sexual and gender-based violence.

Ongwen has suffered some of the crimes of which he now stands accused, for example, the war crime of cruel treatment, conscription and use as a child soldier, and the crime against humanity of enslavement. He endured what he is charged with subsequently inflicting. He thereby remains exceptional among defendants at the ICC. Ongwen recounts that the LRA acquired in him 'a very sharp recruit . . . [e]very morning when they would blow the whistle for operation, they would find me in my position already standing.'⁷⁸ Ongwen became a noted fighter. Yet his 80-year-old grandmother recalls him before his abduction as an 'innocent and quiet' boy 'who liked digging'.⁷⁹ An uncle, Odong, describes Ongwen's abduction as an incident of misfortune. Ongwen was with a large group of children when LRA fighters emerged from the bush. The children scattered, but Ongwen and two others were captured.⁸⁰ This may indeed have

75 See S Nolen & E Baines, 'The Making of a Monster?' *Globe and Mail*, 25 October 2008, available at http://canadiancrc.com/newspaper_articles/Globe_and_Mail_The_Making_of_a_Monster_child_soldier_25OCT08.aspx (last visited 20 May 2016).

76 'ICC drops plan to try LRA Kony's deputy in Uganda', *AFP*, 28 October 2015, available at <<https://www.yahoo.com/news/icc-drops-plan-try-lra-konys-deputy-uganda-200514182.html>> (last visited 20 May 2016).

77 *Ibid.*

78 'Before Dominic Ongwen Commanded Child Soldiers, He Was One of Them', *RYOT News + Action*, available at <http://sandbox.ryot.org/lra-dominic-ongwen-child-soldier-past-grandmother-icc/918185> (last visited 20 May 2016) ('Before Dominic Ongwen').

79 *Ibid.* (reporting also that his grandmother 'longs to see him').

80 Green (2015).

been a matter of bad luck. Or perhaps Ongwen was not as wily or wiry as the other children. He could not get away. Odong remembers Ongwen, too, as a 'shy boy who hurried home from school to help his grandmother weed the garden'.⁸¹

If anyone is to be tried, it should be the early members of the LRA, the ones who volunteered to fight and swelled their ranks with children they abducted and indoctrinated, Odong says. They are the ones who forced 14-year-old Ongwen to become a killer in order to save his own life, he says. Many of these former fighters are now walking free in Gulu town, recipients of an amnesty that his nephew has been denied.⁸²

A few child soldiers are like Ongwen and rise in the ranks to become commanders.⁸³ The vast majority do not. Yet it is impossible to disentangle who Ongwen is today from where he began in the LRA. Ongwen is a prime candidate for what criminologists might call the 'rotten social background' defence.⁸⁴ Although Ongwen is being tried as an adult for what he did as an adult, he remains the youngest person in ICC custody.

Ongwen's character is enigmatic in other ways. He was mercurial. He was prone to anger and rage, but also exhibited mercy and gentleness. Ongwen pleaded with Kony not to have Vincent Otti (another LRA leader) executed because Otti had encouraged peace negotiations.⁸⁵ Otti had been Ongwen's *lapwony* (teacher) following his abduction into the LRA. The teaching was brutal. It involved routine beatings and abusive punishments for all sorts of bizarre infractions; Ongwen was told his family had died, was instructed to forget his past and was compelled to torment and torture other children.⁸⁶

81 Ibid. His younger sister and older brother also emphasise his shyness.

82 Ibid.

83 For discussion of another abducted child who rose the ranks in the LRA, only to be killed by the Ugandan army in conflict in the Central African Republic when in his thirties, see L Cakaj, 'Joseph Kony and Mutiny in the Lord's Resistance Army', *The New Yorker*, 3 October 2015.

84 R Delgado, "'Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation' 3 *Law and Inequality* (1985) 9.

85 'Before Dominic Ongwen' 78. Kony ultimately did execute Otti.

86 See Nolen & Baines (2008). See also G Warner, 'A Former Child Soldier will Stand Trial in The Hague for War Crimes', *NPR*, 27 January 2015, available at <http://www.npr.org/2015/01/23/379419891/international-criminal-court-to-try-former-child-soldier-with-war-crimes> (last visited 20 May 2016).

Kony lorded over everyone, including Ongwen.⁸⁷ Kony threatened to execute Ongwen on three occasions.⁸⁸ Ultimately, Ongwen did escape the LRA—barefoot and barely clothed, assisted by a friendly guard—after Kony had him arrested and tortured in southern Darfur.⁸⁹ Among Ongwen’s legal arguments raised (unsuccessfully) at the confirmation of charges hearing was that rank in the LRA was essentially a misnomer, or meant nothing more than a raw measure of how well one survived, since Kony controlled everything and defrocked and executed putative commanders.

Ongwen ‘permitted’ several of his concubines to escape with his many children. Florence Ayot, one of his ‘bush wives’, now calls for Ongwen to come home to Uganda and benefit from the amnesty the government gave LRA fighters to end the war.⁹⁰ She says he was, just like her, taken into the LRA at ‘a tender age’. Accordingly, again, just like her and thousands of others, he should be amnestied and forgiven.⁹¹ Ayot remembers Ongwen as a ‘fundamentally “goodhearted” person, who fought only to avoid punishment from . . . commanders’.⁹² She hopes he can return home to Gulu where she now lives in a one-room hut; if he found work, she adds, perhaps he might be able to pay for their children’s school fees.⁹³ Gulu is about an hour’s drive from Coorom.

Official amnesties played a pivotal role in weakening the LRA and demobilising many of its fighters. These amnesties extended immunity from prosecution to LRA fighters, called ‘reporters’, who lay down their weapons. Uganda’s Supreme Court has determined the national amnesty law to be legal.⁹⁴ In 2015, it held that this law does not contravene Uganda’s international obligations because it abstains from granting a blanket amnesty for all crimes.

87 See Cakaj (2016) (‘[I]t must be particularly frustrating for [Ongwen] to be compared to Joseph Kony, a man whose clutches Ongwen has tried to escape for at least the last decade.’).

88 Ibid (‘Kony said he did not want to kill him because his sister, also abducted at a young age, was one of Kony’s favorite wives.’).

89 ‘Before Dominic Ongwen’ (reporting Ongwen as stating: ‘I left at night with no shoes and no personal belongings. I have shown my true character by coming out . . . I don’t want to die in the wilderness.’).

90 Ibid (reporting that both Ayot and Ongwen were ‘captives’). See also F Chothia, ‘Profile: Dominic Ongwen of Uganda’s LRA’, *BBC News*, 26 January 2015, available at <http://www.bbc.com/news/world-africa-30709581> (last visited 20 May 2016).

91 See M Schenkel, ‘Uganda: The thin line between victim and perpetrator’, *Mail & Guardian*, 16 February 2015, available at <http://mg.co.za/article/2015-02-16-uganda-the-thin-line-between-victim-and-perpetrator> (last visited 20 May 2016).

92 Green (2015).

93 Ibid.

94 *Uganda v. Thomas Kwoyelo*, Constitutional Appeal No. 1 of 2012 (8 April 2015).

In this decision, the Ugandan Supreme Court also ruled that decisions by national authorities to prosecute Thomas Kwoyelo, an LRA colonel who had previously sought an amnesty, were equally constitutional.⁹⁵ Kwoyelo had argued, successfully before the Ugandan Constitutional Court, that he suffered discrimination because the Ugandan authorities failed to grant him an amnesty when other individuals in circumstances similar to his had routinely received an amnesty. The Ugandan Supreme Court, a level higher, disagreed. It held that amnesties cannot be granted for grave crimes as recognised under international law, specifically, crimes committed against innocent communities or civilians. The Supreme Court determined that such crimes, in fact, fall outside the scope of the amnesty legislation itself, which only covers crimes that are committed in furtherance or cause of the war or armed rebellion. The Supreme Court also ruled that Ugandan prosecutors have the discretion to decide whether to prosecute someone who applies for an amnesty. No discrimination claim can be made; whether another individual received an amnesty is immaterial to any given individual's case. This works both ways, too: once the Prosecution grants an amnesty, according to the Supreme Court, the assumption is made that the recipient of the amnesty properly falls within the scope of the legislation. Hence, depending on prosecutorial discretion, were Ongwen to be in Uganda (rather than at the ICC) he could be prosecuted *or* he could receive an amnesty. That said, under the prevailing interpretation of the amnesty legislation, it would seem implausible to interpret the evidence against Ongwen, if proven beyond a reasonable doubt, as failing to implicate crimes committed against innocent civilians or communities. The amnesty therefore lies out of his reach. It remains so even though thousands of other fighters have grabbed it.

Some Ugandans, however, doggedly believe that Ongwen should receive an amnesty and participate in reintegration ceremonies. These feelings are strongest in Ongwen's home region. Ongwen apparently surrendered expecting to receive an amnesty.⁹⁶ He reacted indignantly to the ICC proceedings pending against him:

I was captured at a tender age, and went there as someone who was blind and deaf. It is the same way in which I returned. And I hope my good intention will be reciprocated by the responsible authorities.⁹⁷

95 Kwoyelo reportedly joined the LRA as a minor at the age of 15.

96 Green (2015).

97 Akena (2015).

It is also lost on some observers why Ongwen should be indicted and prosecuted, rather than other commanders. While selectivity remains an inherent foible of international criminal law, the shadow it casts over the Ongwen proceedings seems to be particularly long.

On the other hand, many other Ugandans, including other former child soldiers, insist that Ongwen ‘went overboard’ and should be punished.⁹⁸ They see him as having pursued extreme violence and sadism as a way to achieve power, status and influence within the LRA. Calls for Ongwen to face trial and severe punishment abound in areas such as Lukodi, scarred by the violence he and his forces allegedly committed, although in Lukodi the primary concern of community members reportedly lies in receiving compensation for their losses.⁹⁹ That said, in both Coorom and Lukodi, an assessment survey also reveals the ‘great importance’ of ‘reconciliation and traditional justice’.¹⁰⁰ On a broader note, many northern Ugandans blame the Ugandan government for the violence, for forcible resettlement, for not controlling the LRA, and for not protecting communities.

Ongwen’s path, in any event, was not the desperate one of the *Kapos* nor that of Schepschel to join the *Kesselwäscher*, but rather was somewhat more ambitious. He led many attacks against civilians. He was the youngest LRA officer (28 years old at the time) that Kony promoted to Brigadier.¹⁰¹ Ongwen’s path illustrates the circulatory nature of the victim–victimiser spectrum.

Might Ongwen’s imminent trial leverage itself to further the narrative function of unpacking the complexities of child soldiering, which international law increasingly understands as applying to persons under the age of eighteen who are associated with armed forces or armed groups? At present, child soldiering remains a poorly understood scourge particularly susceptible to simplistic thinking. This is because child soldiering is entangled in the binary reductionism of criminal law’s categorism of pure victim and ugly perpetrator. The child soldier, if still under the age of eighteen, is increasingly seen by international criminal law as a subject who should simply not face criminal trials for international crimes, even in a context where a very clement

98 Green (2015).

99 O Nyeko & H Aloyocan, ‘Community Perceptions on Dominic Ongwen’, Situational Brief, Justice and Reconciliation Project, May 2015.

100 Ibid. See also, ICTJ (2015) 12-13 (calling for accountability for sexual violence in northern Uganda, but also noting that ‘in many cases those who were abducted into the LRA may have committed violations, their status is complicated by the fact that they were forced into that context in violation of their own rights. Therefore individual responsibility for violations does not fit into a simplified victim-perpetrator binary, but needs to be contextualised and nuanced.’).

101 ‘Before Dominic Ongwen’.

sentencing approach might apply. But if an adult commits international crimes as an adult, regardless of how that adult came of age as a child soldier, then neither jurisdictional nor conceptual barriers impede criminal prosecution.¹⁰² ICC Chief Prosecutor Fatou Bensouda's statement upon Ongwen's surrender is telling:

My investigation demonstrates that Dominic Ongwen served as a high ranking commander within the LRA and that he is amongst those who bear the greatest responsibility for crimes within the jurisdiction of the ICC. His transfer to the Court's custody sends a firm and unequivocal message that no matter how long it will take, the Office of the Prosecutor will not stop until the perpetrators of the most serious crimes of concern to the international community are prosecuted and face justice for their heinous crimes.¹⁰³

In the end, as I have argued elsewhere,¹⁰⁴ the international legal imagination is beguiled by chronological bright lines—whether fifteen or, increasingly, eighteen—that deliver the comfort of simplicity but belie a much coarser reality. These condensed attitudes, and disclaiming of subtleties, persist as the *Ongwen* case advances.

Irrespective of how high he ascended, the fact remains that Ongwen's point of entry remains fixed as a young, kidnapped, orphaned and abused child. Ongwen's defence team invoked this point of entry in its submissions in the confirmation of charges hearing. The defence team submitted that coming of age in the LRA amounts to a kind of institutionalised duress that excludes criminal responsibility under Rome Statute article 31(1) rather than just mitigating sentence.¹⁰⁵ According to the defence, Ongwen 'lived most of his life under duress (*i.e.* from the age of 9.5 years old)' and his 'so-called rank was demonstrative of one thing: that he was surviving better than others while

102 What if an adult was forcibly kidnapped into an armed group? In the case of Issa Sesay, one of the convicts at the Special Court for Sierra Leone, the Trial Chamber exigently noted that Sesay's forcible recruitment into the Revolutionary United Front ('RUF') at the age of nineteen cannot mitigate the crimes which he later committed in that 'we consider he could well have chosen another path.' *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Sentencing Judgment)*, Case No. SCSL-04-15-T, Special Court for Sierra Leone, 8 April 2009, para. 220. Sesay was sentenced to 52 years' imprisonment. The Appeals Chamber made some adjustments in terms of convictions (none of which had to do with Sesay's own forcible recruitment), but affirmed his total sentence of 52 years.

103 A recording of the statement is available at <https://www.youtube.com/watch?v=jetE2wPHDas> (last visited 20 May 2016).

104 MA Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford UP, 2012).

105 See *The Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15, Pre-Trial Chamber II, Further Redacted Version of Defence Brief for the Confirmation of Charges Hearing, 3 March 2016.

under duress'. Pre-Trial Chamber II rejected this argument. It held that 'the circumstances of Ongwen's stay in the LRA . . . cannot be said to be beyond his control.' Pre-Trial Chamber II concluded that 'escapes from the LRA were not rare.' It underscored that Ongwen 'could have chosen not to rise in hierarchy and expose himself to increasingly higher responsibility to implement policies'. It added that the evidence demonstrates that Ongwen 'shared the ideology of the LRA, including its brutal and perverted policy with respect to civilians'. Pre-Trial Chamber II noted that Ongwen could 'have avoided raping' forced wives, 'or, at the very least, he could have reduced the brutality of the sexual abuse'.

The Pre-Trial Chamber in *Ongwen* thereby shifted from the narrative—forcefully articulated by the ICC's Trial and Appeals Chambers in the preceding *Lubanga* case—of the pernicious, ongoing effect of being compelled as a child into a violent armed group and socialised therein. *Lubanga* cast the linkage between the past as a child soldier and the present as a former child soldier as linear and continuous. The child soldiering experience was constructed as ongoing and assured: it rendered the children as victims damaged for life, with their reality today as derivative of their previous suffering. Once a child soldier in fact, always a child soldier in mind, body and soul. In *Ongwen*, however, the linkage between the accused's past as a child soldier and his present as a former child soldier was seen as discontinuous and contingent.

Whereas the defence sought to link Ongwen's conduct as an adult to his experiences as a child, the Pre-Trial Chamber only examined his agency as an adult—as if he had never been a child, let alone a child in the LRA. In rejecting the duress submissions in *Ongwen*, the Pre-Trial Chamber elided Ongwen's status as a former child soldier. It's as if he lost that status, or ceded it. Hence, there is a proper way to be a victim. Victimhood is contingent, so to speak, even aleatory.

It would be a shame if criminally prosecuting a former child soldier ended up diverting the gaze of the international community from the complexities of child soldiering and the liminality of the process of coming of age. This diversion, however, arises from criminal law's discomfort with victim–perpetrator concatenation.¹⁰⁶ If the defence presents Ongwen only as an innocent child, and the prosecution responds by redlining the fact that Ongwen had entered the LRA as a child and came of age in such a dismal setting, then the result will be to embed the binaries even further. Yet this zero-sum jockeying is what the law expects of its adherents. This is already how the confirmation of charges process—a preliminary step only—has unfolded. Such, in any event, is how the

106 See, for example, CEJ Schwöbel, 'The Comfort of International Criminal Law' 24 *Law and Critique* (2012) 169.

courtroom game is played. And criminal law, through verdict, must give an answer: innocent or guilty. It must condemn, or not.

CONCLUSION: JUSTICIABILITY AND INVISIBILITY

Top leaders set the conditions through which atrocity occurs. They structure the incentives. This is why they are conventionally said to bear the greatest responsibility. But the industrialisation of atrocity—its very happening—remains the handiwork of the masses. This collective *corvée* resonates in survivor recollections. These recollections ooze with the betrayal, compassion, and indifference of murderers, by-standers and side-standers, profiteers, piddlers and idlers. These recollections go so far as to articulate the agency of the persecuted, the tortured and the targeted. One strand that binds many of these stories is the circularity, rather than obversion, of victims and victimisers. The persecuted may persecute and persecutors themselves may become (or already be) the persecuted. Truly understanding atrocity requires an embrace of this bedeviling interstitiality. If prevention flows from comprehension, if justice hinges on accuracy, and if transition involves some appreciation of granularity, then this embrace would activate a much broader normative agenda. At a minimum, it could nourish the development of typologies of atrocity perpetrators—a hugely important task that others have begun to undertake.¹⁰⁷

Survivors tell stories—many stories—about transcending atrocity. I hope this article has established the richness of these stories, the disquiet and comfort they generate, and why they matter. Yet, as is evident in the fate of the *Kapo* trials, these stories may not mesh with law's story-telling capacities.¹⁰⁸ These stories may contradict law's angularity. Hence, law fails to authenticate these stories. Law, in fact, may spoil them.

But is this condition congenital? Intractable? Must victims remain ideally pure and perpetrators perfectly wicked? Perhaps the performance of international courts and tribunals could be tweaked to transcend reductionism and deliver a richer narrative. Such a move might gesture towards an expressive

107 See, for example, Alette Smeulers' research on compromised perpetrators. See A Smeulers & F Grünfeld, *International Crimes and other Gross Human Rights Violations* (Martinus Nijhoff, 2011) 203-330.

108 For discussion of how reductive tropes of victimhood also pervade and hobble reparations programming, and how 'complex' victims are excluded from reparations in order to avoid a moral equivalence with 'innocent' victims, see L Moffett, 'Reparations for "Guilty Victims": Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms' 10 *International Journal of Transitional Justice* (2016) 146 (recommending that complex identities can be accommodated in reparations programmes in transitional societies when these adopt nuanced rules of eligibility and inclusive forms of reparations).

justification for international criminal trials. The operation of international criminal law would thereby relax its condemnatory and denunciatory functions, which Frankl and Levi repudiate in the case of tragic perpetrators, and aspire towards pedagogic and didactic goals. Whereas much of expressive theory focuses on law's ability to narrate norms and prohibitions, this article suggests that expressive theory might attain aetiological goals, namely, to clarify—rather than occlude—how atrocity spreads and, particularly, the roles that those who are dually victims and perpetrators play in that process.

Taking aetiological expressivism seriously could lead to a rethinking of certain aspects of the mechanics of international criminal process beyond the context of absolute defences, a claim that failed in Ongwen's confirmation of charges decision. Sentencing is an obvious candidate. The 'rotten social background' of a convict could be advanced as a mitigating factor in sentencing in a fashion that depicts victim–perpetrator concatenation. So, too, could duress.¹⁰⁹ Sentencing also might engage with the trauma that perpetrators endure.¹¹⁰ Or, perhaps, a failure to suffer properly¹¹¹ could be seen as a failing that ought to aggravate the severity of the sanction. Engaging didactically with the agency of the oppressed, moreover, could enhance the gravity of the conduct for the leaders and commanders who create such oppressive conditions in the first place and, thereby, crystallise this circumstance as aggravating in the sentencing of the most responsible. Yet, throughout all of these instances, the criminal law still remains embedded in punishing, rather than explaining, such that the incorporation of aetiological expressivism would be half-hearted.

Pursuit of aetiologically expressive goals might redefine the role of the witness in international criminal proceedings. Hanna Yablonka, for example, concludes that, perhaps contrary to the intent of Israeli legislators, the *Kapo* trials were not seen as 'a means of strengthening Israeli identity'.¹¹² It was Eichmann's trial, ultimately, that fulfilled nation-building purposes. Legal discourse in *Eichmann* migrated from the 'guilt of the victim' to the 'guilt of the murderer'.¹¹³ At Eichmann's trial, reliant as it was on *viva voce* testimony, *Kapos* and other former inmates unpacked trilemmas of survival, resistance

109 Dražen Erdemović, another tragic victim–perpetrator who was among the ICTY's first convicts, was unsuccessful in arguing duress as a defence but was successful in raising it as mitigating circumstance.

110 For a powerful argument for humanizing our understandings of perpetration, including addressing perpetrator trauma and attendant rehabilitation, see S Mohammed, 'Of Monsters and Men: Perpetrator Trauma and Mass Atrocity' 115 *Columbia Law Review* (2015) 1157, 1215.

111 That is, to invoke Frankl for a purpose that Frankl himself would reject.

112 Yablonka (2003) 12.

113 *Ibid* 22.

and agency. They recounted how *Kapo* discretion was exercised both mercifully and cruelly. While *Kapo* mercy was highlighted and *Kapo* cruelty understated, at least in comparison to literary and cinematographic narratives, the deployment of this testimony in support of the conviction of a perfectly despicable defendant proved to be a more effective courtroom strategy to engage with these questions than attempts to directly ascertain *Kapo* culpability.¹¹⁴ Ultimately, the Eichmann trial humanised the position of Holocaust survivors in Israeli society. By exposing how the Final Solution conscripted the very victims within the machinery of extirpation, this trial unveiled the vast depths of its odiousness. Might these experiences offer some guidance for the architecture of contemporary trials, including Ongwen's? What if Ongwen simply served as a witness in proceedings against Kony, should these ever come to pass? Or, what if the Rome Statute's provisions on victim involvement in the criminal proceedings (as opposed to victims testifying on behalf of the prosecution) were engaged to welcome victim-perpetrators to come forward and recount their experiences?

The pursuit of aetiological expressivism might also reconstitute the text of judgment and its content. Perhaps judgments could refer more extensively to the biography and background of the perpetrator. Their length—already far too onerous—would not necessarily need to be extended. The detailed discussion of procedural backgrounds that appear in them, at times by rote, could, for example, be pared back.¹¹⁵

International criminal law, however, also could take aetiological expressivism most seriously by not trying to accommodate it in a laundry list of reforms. Perhaps it is best for certain actors, survivors and perpetrators simply to lie beyond criminal law's remit and, in turn, be non-justiciable.¹¹⁶ Law could respect imperfect victims and tragic perpetrators by staying away from them. Yet so long as the accoutrements of the criminal law—courtrooms, judgments and jailhouses—expand as the iconic way in which to imagine post-conflict justice and solemnly authenticate the past, non-justiciability leads to invisibility. And this invisibility simply exacerbates the 'ethical loneliness' experienced by many victims.

It is open for law to resist the impulse to jump and speak; law need not always assert its primacy in constructed hierarchies of truths and memories. Law's silence—a *juris silentium*—can echo with listening and thereby encourage

114 See generally *ibid* 17-19.

115 Appreciations to Sergey Vasiliev for this insight.

116 On law's boundaries, see, e.g., H Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford UP, 2013).

the dissemination of other stories of atrocity and support those vehicles—whether institutional or individual—that deliver them within a transitional justice paradigm.¹¹⁷ The non-justiciable would then become visible. The ‘ethical loneliness’ of those who suffered the wrong kinds of harms might dissipate. Most immediately, the pursuit of aetiological expressivism might prompt international criminal law to engage differently with what it currently stylises as ‘alternate’ justice mechanisms—such as truth commissions¹¹⁸ and ritualistic ceremonies—and approach them more as colleagues and less as foils, in particular when these mechanisms memorialise the porousness of atrocity and the limits of judgment.

117 Thanks to Wouter Werner for introducing the concept of *juris silentium* to me.

118 For thoughtful discussion of how truth and reconciliation commissions, were they to discuss ‘failing to resist’, might engage Levi’s ‘gray zone’, see B Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (Cambridge UP, 2011) 147-56.