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Submission of Amicus Curiae Observations in the Case of The Prosecutor v. Dominic Ongwen

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Submission of Amicus Curiae Observations on the Merits of the Legal Questions Presented in the "Order Inviting Expressions of Interest as Amici Curiae in Judicial Proceedings (Pursuant to Rule 103 of the Rules of Procedure and Evidence)" of 25 Oct. 2021, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15A (filed Dec. 23, 2021).

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**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15 A

Date: 23 December 2021

THE APPEALS CHAMBER

Before:

Judge Luz del Carmen Ibáñez Carranza, Presiding Judge

Judge Piotr Hofmański

Judge Solomy Balungi Bossa

Judge Reine Alapini-Gansou

Judge Gocha Lordkipanidze

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR V. DOMINIC ONGWEN

Public Document

Submission of *Amicus Curiae* observations on the merits of the legal questions presented in the "Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)" of 25 October 2021 (ICC-02/04-01/15A)

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Document to be notified in accordance with regulation 31 of the *Regulations of the Court***to:****The Office of the Prosecutor**

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Toward a Framework for Juvenile Justice in Contexts of Trauma and Mental Illness

1. On 24 November 2021, the Appeals Chamber granted leave to Professors Erin Baines, Kamari M. Clarke, and Mark A. Drumbl (the amici) to submit observations on the matter concerning Grounds for Excluding Criminal Responsibility under international law to The Appeals Chamber of the International Criminal Court pursuant to paragraph 19 of the "Order inviting expressions of interest as amici curiae in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence)" of 25 October 2021. The amici, therefore, submit the following reflections.

Introduction

2. The important questions laid out by the Appeals Chamber in this case highlight the need for the proper delineation and interplay between mental illness and criminal responsibility under international law. Specifically, this case represents a watershed moment for the Appeals Chamber to set a framework for adjudicating mental illness in the context of collectivized child abuse and trauma. This is especially true for former child soldiers who occupy both a victim and alleged perpetrator status.
3. The victim status of an alleged perpetrator, particularly when that status derives from having endured successive violations of international criminal law, should factor into any assessment of their penal responsibility. These interpretive considerations relate to questions of culpability as well as to the length and nature of sentences. It is crucial to interpret defences under the Rome Statute in light of children's rights that are broadly recognized in international law, as well as the prior approaches of the ICC regarding child soldiers. These interpretive lenses satisfy the goals of consistency, predictability, and justice that ICC judgments are geared to promote.
4. Our submissions advocate for the articulation of a therapeutic justice framework that emphasizes a culture of juvenile rights. The framework examines culpability from a broad perspective that considers the unique circumstances of that individual's mental and social development. What is needed is a structure for determining culpability of children, especially child soldiers, that is shaped by scientifically informed guides that also consider cultural approaches to maturity. The framework considers the elements of: a) indoctrination; b) spiritual cosmologies; c) neuroscience and mental

development; d) temporal continuities of childhood trauma; and e) an examination of the mental capacity using the standard of the “reasonable child soldier”.

5. Dominic Ongwen should not have been found culpable because his forcible abduction by and indoctrination in the LRA has resulted in a mental defect leading to incapacity under Article 31(1)(a) of the Rome Statute. If the Appeals Chamber upholds the Trial decision, we submit that Dominic Ongwen’s status as a child soldier should result in a substantially lower sentence than 25 years. This is due both to his status as a victim, as well as our assertion that he qualifies for the mitigating status of substantially diminished mental capacity provided for in Rule 145(2)(a)(1) of the Rules of Procedure and Evidence.

The Special Status of Children in International Law

a) International Law Protections

6. Children are afforded special treatment under international law (as well as in domestic law systems across the world). Many treaties and agreements codify the special rights of children, including the United Nations’ *Convention on the Rights of the Child*¹ (CRC) and the *African Charter on the Rights and Welfare of the Child*.² Both of these instruments outline states’ obligations to protect children and provide access to health, education, family life, and the general wellbeing of children.
7. The devastating impacts of child soldiering has also been recognised by international treaties and case law.³ International Human Rights Law, International Humanitarian Law and International Criminal Law “prohibit the recruitment and use of children in hostilities for the protection of their physical, psychological, and psychosocial well-

¹ United Nations General Assembly, [Convention on the Rights of the Child](#), entered into force 2 September 1990, UNTS Vol. 1577, p.3.

² African Union, [African Charter on the Rights and Welfare of the Child](#), entered into force 29 November 1999.

³ See for example UNICEF, [The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups](#) (February 2007); UNICEF, [The Cape Town Principles and Best Practices](#), (April 1997); Government of Canada, [Vancouver Principles on Peacekeeping and the Prevention of the Recruitment and Use of Child Soldiers](#) (15 November 2017); and General Assembly, [Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography](#), 16 March 2001, A/RES/54/263.

being”.⁴ The CRC requires that States Parties must “take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim” of an armed conflict.⁵ This includes child soldiers.

8. The CRC recognizes that a child is any person under the age of 18.⁶ In international instruments, child soldiers are considered to either be anyone under the age of 15 or under the age of 18.⁷ We submit that the categorization of ‘child soldier’ applies regardless of the age at which the individual is demobilized, decommissioned, and reintegrated. Hence, Dominic Ongwen, in light of his age of abduction into the LRA, should be considered a child soldier to this day. We respectfully disagree with the Trial Chamber’s view on this point and its belief in a lack of a legal nexus between Ongwen’s victimisation as a child soldier and his actions as a leader in the same army. Rather, we advocate for a conceptualization of juvenile justice that not only recognizes the profound psychological impact of trauma, but also asserts the linkages between juvenile trauma and the continuing impact of that trauma into adulthood.

b) Prior Treatment of Child Soldiers at the ICC

9. In the *Lubanga* case, the ICC moved towards a purposive interpretation of children’s rights when it assessed the trauma, psycho-social status, and intergenerational effects of having been a child soldier.⁸ The Court admitted considerable expert evidence to this effect to underscore the gravity of this crime. The Court ruled that child soldiering leaves forever scars.⁹

⁴ Raphael Lorenzo Aguilin Pangalangan, “[Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals](#)” (2018) 33(3) *American University International Law Review* 605 at 628.

⁵ [Convention on the Rights of the Child](#), Article 39.

⁶ [Convention on the Rights of the Child](#), Article 1.

⁷ UNICEF, [The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups](#) (February 2007) at 7; UNICEF, [The Cape Town Principles and Best Practices](#), (April 1997); ICRC, “[IHL Database: Customary IHL](#)”, Rule 136. Recruitment of Child Soldiers.

⁸ [Prosecutor v Thomas Lubanga Dyilo](#), Judgement Pursuant to Article 74 of the Statute, ICC-01/04-01/06, 14 March 2012 at para 478.

⁹ [Prosecutor v Thomas Lubanga Dyilo](#), Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/06, 10 July 2012 at para 20.

10. *Lubanga* also cast the linkage between the past as a child soldier and the present as a former child soldier as linear and continuous.¹⁰ The child soldiering experience was constructed as ongoing and assured; it rendered the children as unwitting 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.¹¹
11. In *Ongwen*, a different narrative was put forth by the Prosecutor and accepted by the Court. This narrative asserted agency, choice, and action on the part of Ongwen, rather than the acknowledgment of victimhood and trauma afforded to child soldier witnesses. The linkages between Ongwen's past as a child soldier and his present as a former child soldier was seen as discontinuous.¹²
12. Dominic Ongwen's trial demonstrated a clear failure to properly balance criminal justice issues with children's human rights considerations.¹³ As Defence counsel argued, "if the laws of war were meant to protect children it is inapposite to suggest that individual criminal liability can then be imposed upon those like [Ongwen] who should have been protected but ended up enslaved[.]"¹⁴ The decision to prosecute Ongwen flew in the face of international precedent to not prosecute child soldiers, such as at the Special Court for Sierra Leone.¹⁵ Ongwen was simply not afforded the rehabilitative and restorative mechanisms granted to other child soldiers, which are required by the CRC and which have been supported by the ICC in the past.¹⁶
13. There is an urgent need for the ICC to be consistent, predictable, and principled in assessing and determining the long-term effects of trauma on child soldiers. This means recognizing the painful reality that victims can victimize. It also means not dismissing

¹⁰ [Prosecutor v Thomas Lubanga Dyilo](#), Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/06, 10 July 2012 at paras 38-42.

¹¹ Mark Drumbl, "[Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering](#)" (20 April 2016), *Justice in Conflict*.

¹² Mark Drumbl, "[Shifting Narratives: Ongwen and Lubanga on the Effects of Child Soldiering](#)" (20 April 2016), *Justice in Conflict*.

¹³ [Pangalangan](#) at 631.

¹⁴ *Prosecutor v Dominic Ongwen*, Third Public Redacted Version of Defence Brief for the Confirmation of Charges Hearing, ICC-02/04-01/15, 25 May 2016 at Page 4.

¹⁵ Windell Nortje, "[Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court](#)" (2017) 17 *International Criminal Law Review* 186 at 198.

¹⁶ [Convention on the Rights of the Child](#), Article 3(1).

Ongwen as an exception because he is an accused instead of a prosecution witness. As has been made abundantly clear by the evidence at trial, Ongwen was a victim first.¹⁷ As argued by Defence Counsel, “[i]t is disingenuous to only recognize the immense suffering of child soldiers and the impact their experiences have on them as victims in one breath while in the other breath rejecting the same arguments in relation to Dominic.”¹⁸

Mental Illness and Incapacity

14. Article 31(1)(a) of the Rome Statute excuses individuals from criminal responsibility if the individual was i) suffering from a mental disease or defect at the time he or she committed the offence, and ii) the mental disease or defect had one of the following two effects: it either destroyed the individual’s capacity to appreciate the unlawful nature and quality of his or her acts, or destroyed the individual’s capacity to control his or her conduct. Where the accused person meets these exceptional criteria, a verdict of not criminally responsible on account of mental disease or defect must be entered. This test for mental incapacity in the Rome Statute is far more stringent than is seen in many domestic jurisdictions, as it demands the *destruction* of the person’s capacity to appreciate or control. Conversely, the M’Naghten Rules, where the defense of insanity originated in common law jurisdictions, only requires that the person be suffering from a certain mental condition that causes a lack of insight into the criminal nature of his behaviour.¹⁹

a) Mental Defect Arising From Coercive Indoctrination

15. The terms “mental disease” and “defect” are not defined by the ICC Statute or the Rules of Procedure. As such, there is room for new and broader interpretations based upon the particular circumstances of each accused brought before the Court.

¹⁷ Everisto Benyera, “[Child Victim, Loyal War Spirit Medium or War Criminal: Shifting the Geography and Logic of Historical Accountability in Dominic Ongwen’s ICC Trial](#)” (2021), *African Identities* 1 at 5 [Benyera].

¹⁸ *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-T-23, Transcript of the Confirmation of Charges Hearing, 26 January 2016 at 5-6.

¹⁹ *R v M’Naghten* (1843) 8 E.R. 718; (1843) 10 Cl. & F. 200.

16. Dominic Ongwen’s abduction and indoctrination into the LRA has resulted in a mental defect that has destroyed his capacity to appreciate the unlawful nature or quality of his acts under Article 31(1)(a). This is a full defence to culpability. As an abducted child soldier, Ongwen developed his sense of morality within the confines of the LRA and applied it “with standards of right and wrong established by LRA leaders.”²⁰ We submit that the LRA’s coercion, conscious manipulation, and creation of new realities and their spiritual consequences destroyed Ongwen’s capacity to develop an understanding of morality and criminality within a standard of mature “reasonableness”.
17. The proper recognition of this mental defect by the Appeals Chamber can cascade into the development of more robust cultures of human rights and can better align international criminal law with general principles of domestic criminal law. This is recognized with the community of nations pursuant to Article 21(1)(c) of the Rome Statute. As this is the first case of this nature to be tried at the ICC, the Court should seriously examine domestic cases that have contained elements of victimhood, perpetration, and coercive indoctrination to best understand how to apply similar principles in the international realm.

b) *Domestic Cases of Coercive Indoctrination*

18. A number of cases from domestic jurisdictions demonstrate the diminished blameworthiness of indoctrinated perpetrators in various ways. As asserted by Richard Delgado, “persons who have without fault undergone brutalizing experiences aimed at effecting drastic changes in their thoughts and behavior should not be held accountable for actions stemming from these experiences.”²¹ Although these cases were unsuccessful in establishing total non-culpability due to indoctrination because of domestic limitations relating to mental illness defences, they offer principles that can be adopted into the examination of incapacity at the ICC when engaging with the defence of mental defect. In these cases, courts and political actors have also turned to philosophical arguments around blameworthiness and proposals for new defences,

²⁰ Renée Nicole Souris, “[Child Soldiering on Trial: an Interdisciplinary Analysis of Responsibility in the Lord’s Resistance Army](#)” (2017) 13 *International Journal of Law in Context* 316 at 323.

²¹ Richard Delgado, “[Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded \(“Brainwashed”\) Defendant](#)” (1978) 63 *Minnesota Law Review* 1 at 7.

including the process of forcible indoctrination and the neurological impact it has on children as more susceptible individuals, as well as in explaining concepts of voluntariness, emotional responses and ability to resist. Below, we have highlighted two cases from the United States that we feel offer principles applicable to this case.²²

1. Alex Cabarga

19. Alex Cabarga was a young child when he was abandoned by his parents and given to a pedophile, known as Tree Frog. Tree Frog raped and abused Cabarga for over a decade, depriving him of basic necessities and hiding him from the outside world. Cabarga eventually helped Tree Frog to kidnap and sexually abuse two other children. Cabarga was arrested for his role in these crimes after he turned 18. Upon exposure to the norms of the outside world, Cabarga expressed remorse for what he had done.²³

20. Since there was no criminal law doctrine in place to recognize a defense or mitigation for Cabarga, he was convicted and given a life sentence. On appeal, however, the court recognized that “the issue of Cabarga’s blameworthiness was more muddled than criminal law doctrine was willing to recognize”²⁴ and reduced his prison term to twenty-five years. He was subsequently paroled after thirteen years. Two appellate judges wrote in dissent that “[a] sentence of life imprisonment for Cabarga, who the evidence overwhelmingly discloses was Johnson’s ‘third victim’, is constitutionally excessive”²⁵ and a third argued that “if the record makes anything clear, it is that Alex Cabarga is as tragic a victim as [the girl he helped to kidnap]; a victim not just of Tree Frog Johnson but of the misguided parents who delivered him to that monstrous pedophile at the age of about 10.”²⁶ This judge “suggested that Cabarga never should have been tried as an adult and that he should receive a hearing to re-determine his capacity to stand trial.”²⁷

²² See for example the indoctrination cases of Lee Boyd Malvo, Richard Tenneson, and Colonel Frank H. Schwable in: Frances Chapman, “[Implanted Choice: From Prisoners of War to Patty Hearst to Lee Boyd Malvo. Examining the Past to Determine if There is Room for a Modern Criminal Defence of Brainwashing](#)” (2013) 49(6) *Criminal Law Bulletin* 1379 at 1413-1418, 1449-1453; Paul H. Robinson and Lindsay Holcomb, “[Indoctrination and Social Influence as a Defense to Crime: Are We Responsible for Who We Are?](#)” (2020) 85(3) *Missouri Law Review* 1 at 742-745.

²³ [Robinson and Holcomb](#) 2020 at 750.

²⁴ [Robinson and Holcomb](#) 2020 at 750.

²⁵ [Robinson and Holcomb](#) 2020 at 750.

²⁶ [Robinson and Holcomb](#) 2020 at 750.

²⁷ [Robinson and Holcomb](#) 2020 at 750.

2. Patty Hearst

21. Patty Hearst was the granddaughter of a wealthy magnate. She was kidnapped by the Symbionese Liberation Army (SLA) and was beaten, repeatedly raped, and kept bound and blindfolded in a closet for weeks. Her captors slowly began to show more kindness to her and she ultimately discharged a gun at a robbery led by the SLA.²⁸
22. An “extraordinary amount” of expert testimony was provided to make out a textbook case of brainwashing at the trial, but the jury nevertheless “convicted Hearst and the judge rejected brainwashing as a mitigating factor and sentenced her to seven years of imprisonment.”²⁹ However, the “brainwashing” or indoctrination defence was not tested in this case, because Hearst’s lawyer decided not to raise the defence at the last minute.³⁰ Despite the conviction, public pressure was so strong in Hearst’s favor that President Jimmy Carter commuted her sentence after two years of incarceration, stating that “it is the consensus of all those most familiar with this case that but for the extraordinary criminal and personal experiences that the petitioner suffered at the hands of the SLA she would not have become a participant in the criminal acts ... and would not have suffered the punishment and other consequences she has endured.”³¹ She was fully pardoned by United States President Bill Clinton in 2001.³²

Proposed Framework for Determining a Mental Defect

23. Although the Rome Statute does not explicitly provide for a defense of coercive indoctrination, we propose a statutory formulation that could bring such a defence under the recognition of a mental defect that was developed during childhood and remains in adulthood. This framework can be helpful in understanding the elements of coercive indoctrination which may render such indoctrination sufficient to eliminate blameworthiness for a wrongful act. The framework draws principles from domestic jurisdictions and considers the elements of a) indoctrination; b) spiritual cosmologies;

²⁸ [Chapman](#) at 1417-1420.

²⁹ [Chapman](#) at 1423.

³⁰ [Chapman](#) at 1423.

³¹ [Chapman](#) at 1425.

³² [Chapman](#) at 1425.

c) neuroscience and mental development; d) temporal continuities of childhood trauma; and e) an examination of the impact on the “reasonable child soldier”.

a) *Indoctrination*

24. International law “recognizes a child’s tractability and serves as a rationale behind the prohibition on child soldiering.”³³ Indoctrination of child soldiers into the LRA typically occurred over a violent, several month process.³⁴ For Ongwen, his indoctrination was achieved through spiritual, physical, and mental violence where his abductors “beat, tortured and subjected him to constant acts of violence and forced him to perform the same on others.”³⁵ This ranged from forced participation in the killing of other children, members of their community and his parents, witnessing grueling physical violence against others and being threatened with that violence; and the use of rituals – such as cleansing the body and forcible desecration of the dead.³⁶ These practices are not new. In such contexts of war, children are often targeted by armed groups precisely because their moral development is malleable.

25. The Office of the Prosecutor in the Ongwen case recognized this point, agreeing that children abducted by the LRA “were easily malleable to whatever purpose Kony wanted and were quick to obey [his] orders.”³⁷ This loyalty, in the Court’s words, “may be an effective means for automatic compliance with leaders’ orders to commit such acts.”³⁸ As Nortje and Quinévet explain, a combination of terror and propoganda can cause children to identify with causes that they do not even understand.³⁹ This

³³ Gerhard Werle, *Principles of International Criminal Law* (The Hague: TMC Asser Press, 2005) at 332.

³⁴ Kennedy Amoné-P’Olak, “[Burning the Bridge: Recruitment and Indoctrination of Children in Northern Uganda by the Lord’s Resistance Army \(LRA\)](#)”, in Overland, Gwynyth, Arnfinn J. Andersen, and Kristin Engh Førde, eds. *Violent Extremism in the 21st Century: International Perspectives* (Cambridge: Cambridge Scholars Publishing, 2018) at pp 167-176.

³⁵ *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges, 25 January 2016 at Page 56.

³⁶ Human Rights Watch, “[Abused and Abducted: Renewed Conflict in Northern Uganda](#)” Vol. 15, No. 12 (A).

³⁷ *Prosecutor v. Dominic Ongwen*, Case No. ICC-02/04-01/15-T-22-ENG, Transcript of the Confirmation of Charges Hearing, 25 January 2016 at Page 13.

³⁸ [Windell Nortje and Noëlle Quinévet, *Child Soldiers and the Defence of Duress Under International Law*](#) (Cham, Switzerland: Palgrave Macmillan, 2020) at 55.

³⁹ [Nortje and Quinévet](#) 2020 at 91.

alignment has a great impact on the mental development of child soldiers who are “left with little option but to obey the orders of the armed groups.”⁴⁰

26. Contrary to the Trial Chamber’s findings in the Ongwen case, Robinson argues that “indoctrination is not an on-off switch but rather a continuum of depth and control. Even after one is initially indoctrinated, a well-organized program will continue to work to deepen and ‘consolidate’ the indoctrination.”⁴¹ Psychologist Robert Baron “has pointed to three stages: the ‘softening-up stage,’ the ‘internalization stage,’ and the ‘consolidation stage.’ Each phase features powerful mechanisms of control that increasingly diminish the subject’s autonomy and lucidity, rendering him increasingly unable to resist his indoctrinator’s demands or question his indoctrinator’s motives.”⁴²

b) *Spiritual Cosmologies*

27. Spirituality refers to a set of ethical codes and beliefs that point to an individual’s subjective morals acquired through religious, ethnic, and cultural values. Those morals might be rooted in a religious doctrine or might be drawn from non-religious convictions. However, they involve individualistic beliefs and practices that structure the very essence of a person.⁴³ The impact of such beliefs is profound, as they shape an individual’s sense of identity as well as their sense of morality, obligations, and determinations for assessing reasonableness.

28. Spirituality played a large part in the indoctrination of child soldiers. Kony institutionalized the practice of magic as an existential function in order to explain fighters’ misfortune or to offer redress for a particular situation. Captured children were also forced to participate in rites such as drinking the blood of victims and were forcibly inducted into the teachings of Kony.⁴⁴

⁴⁰ [Nortje and Quinévet](#) 2020 at 91.

⁴¹ [Robinson and Holcomb](#) 2020 at 783.

⁴² [Robinson and Holcomb](#) 2020 at 783.

⁴³ David R. Vegvari, “[The Divinity of Crime: How Spirituality can Strengthen the Resilience of Criminal Organizations](#)” (2017), City University of New York John Jay College of Criminal Justice (Master’s Thesis) at 4-5.

⁴⁴ Jo-Ansie Van Wyk, “Joseph Kony and the Lord’s Resistance Army” in [Violent Non-State Actors in Africa](#) (Cham: Palgrave Macmillan 2017) at 237-238; Anthony Matarazzo and Erin Baines, “[Becoming Family: Futurity and the Soldier-father](#)” (2021) 7(3) *Critical Military studies* 278-295 at 281-283.

29. Baines has found that child soldiers' loyalty to Kony and belief in his powers increased among children who were with the LRA for longer than a year.⁴⁵ The younger the child was when recruited, the more likely he or she would be easily indoctrinated.⁴⁶ Baines describes the LRA as "both a political and spiritual project that re-imagines the child as someone who can be purified and made into a superior being", fighting with the Holy Spirit on their side.⁴⁷ Ongwen acted in a state of being dictated by the whims of Kony's spirits, the LRA having corrupted Acholi cosmologies in which the invisible world guides moral behavior.⁴⁸
30. In our view, the Trial Chamber glossed over a rich body of scientific study, literature, and case studies relating to the process and effects of indoctrination – including the weaponization of spiritual and religious indoctrination used to corrupt children's views on morality and criminality. The Appeals Chamber now has an opportunity to fulsomely engage with non-Western norms and legal logic,⁴⁹ such as the spiritual belief in following dictums of agentive and vengeful spirits, guiding behaviour, and obscuring capacity to act with reason according to Western legal codes.
31. Importantly, a belief in magic or spirituality should not be conflated with a mental illness or a mental defect. Oftentimes, international justice mechanisms apply Western-centric notions of reasonability to an individual with spiritual beliefs that, within a typical Eurocentric justice system, may not be seen as reasonable.⁵⁰ The invisible world "exists as a social and cultural reality"⁵¹ to many, including Ongwen and other child soldiers. However, the way in which the perverted spiritual teachings and practices of the LRA impacted upon Ongwen's mental and moral development is relevant to the question of his mental capacity under 31(1)(a).

⁴⁵ Erin Baines, "[Complex Political Perpetrators: Reflections on Dominic Ongwen](#)" (2009) 47(2) *The Journal of Modern African Studies* 163 at 179-171.

⁴⁶ [Baines](#) 2009 at 170-171.

⁴⁷ [Baines](#) 2009 at 171.

⁴⁸ Erin Baines, "[The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda](#)" (2007) 1(1) *The International Journal of Transitional Justice* 91 at 92-95; Erin Baines, "[Spirits and Social Reconstruction After Mass Violence: Rethinking Transitional Justice](#)" (2010) 109(436) *African Affairs* 409 at 417- 420.

⁴⁹ [Benyera](#) at 9.

⁵⁰ [Benyera](#) at 2.

⁵¹ Aleksandra Cimpric, "[Children Accused of Witchcraft: An Anthropological Study of Contemporary Practices in Africa](#)" (Dakar: UNICEF, 2010) at 6.

c) Neuroscience and mental development

32. A foundational principle of justice is that perpetrators of criminal acts should only be punished for those acts if they are truly blameworthy or culpable.⁵² Fagan et. al. argue, like many others, that because their executive functions/prefrontal cortexes are under development well into their teenage years and their early twenties, children lack the capacity to be considered legally and morally responsible for their actions.⁵³ Research has led to new understandings of how brain function is not only a product of biological genetics, but also is part of a dynamic new field of study documenting the way that brain circuits are actively engaged in ongoing brain development.⁵⁴
33. Executive functions “allow persons to plan actions that involve other people; to include the beliefs and feelings of others in ongoing cognition; to withhold all manner of gratification until the appropriate time and place; and to temper the expression of emotions in a socially acceptable way.”⁵⁵ As adolescents age into adulthood, executive functions mature and full capacity develops. However, where trauma has resulted in brain impairment, there may be circumstances and psychopathologies that are worsened by prolonged periods of abuse. It is in these contexts where a presumption of adult capacity may and should be rebutted in law.⁵⁶
34. Child soldiers, including Ongwen, witness and commit some of the most horrendous crimes imaginable. Growing up as a child soldier has undoubtedly had an impact upon Ongwen’s mental and moral development — which we assert resulted in a destruction of Ongwen’s ability to understand the immorality of his actions.

⁵² Tyler Fagan, William Hirstein and Katrina Sifferd, “[Child Soldiers, Executive Functions, and Culpability](#)” (2016) 16 *International Criminal Law Review* 258 at 266-267.

⁵³ [Fagan et al](#) at 277.

⁵⁴ Michelle de Haan and Mark H. Johnson (eds), [The Cognitive Neuroscience of Development](#), (London, Psychology Press, 2003).

⁵⁵ [Fagan et al](#) at 267.

⁵⁶ [Fagan et al](#) at 286.

d) Temporal Continuities of Childhood Trauma

35. Trauma is “neither suffered nor alleviated in a social vacuum”.⁵⁷ When determining the culpability of a former child soldier, the Court must take into consideration the linkages between childhood trauma and the continuing impacts of that trauma on the individual as an adult. The Trial Court did not accept or sufficiently focus on the nexus between Ongwen’s childhood trauma and his criminality as an adult. As was outlined extensively above, the ICC had previously recognised this temporality in *Lubanga*. As explained by Raphael Pangalangan,

Ongwen, the Brigadier General, carries with him the same traumas and values formed by Ongwen the child soldier. The former is but the necessary product of the latter. For the Court to turn a blind eye to this reality runs the risk of failing to give life to the rights of the child the law so vehemently seeks to protect.⁵⁸

36. In addition to an emerging recognition of the impact that a child’s exposure to various traumatic events has on their long-term development, national institutions are also critically examining the impact that traumatic events during childhood have on developmental competencies.⁵⁹ Termed complex trauma, the emerging literature is rich with empirical documentation of the developmental challenges that highlight how “children exposed to complex trauma often experience lifelong problems that place them at risk for additional trauma exposure and cumulative impairment...These problems may extend from childhood through adolescence and into adulthood.”⁶⁰

e) The “Reasonable Child Soldier”

37. Article 31(1)(a) conceptions are based on the core principles of reasonableness influenced by notions of mental capacity. The standard for mental incapacity in cases

⁵⁷ [Pangalangan](#) at 629.

⁵⁸ [Pangalangan](#) at 629.

⁵⁹ See for example: David Lawson and Jamie Quinn, “[Complex Trauma in Children and Adolescents: Evidence-based Practice in Clinical Settings](#)” (2013) 69(5) *Journal of Clinical Psychology* 497; Karen Zilberstein, “[Neurocognitive Considerations in the Treatment of Attachment and Complex Trauma in Children](#)” (2014) 19(3) *Clinical Child Psychology and Psychiatry* 336; and Pall Vidalin Jonsson, “[Complex Trauma, Impact on Development and Possible Solutions on an Adolescent Intensive Care Unit](#)” (2009) 14(3) *Clinical Psychology and Psychiatry* 437.

⁶⁰ Alexandra Cook et al., “[Complex Trauma in Children and Adolescents](#)” (May 2005) 35(5) *Psychiatric Annals* 390 at 390.

such as these should be of a reasonable child soldier — not the reasonable “man”. This assertion is critical because of the extent to which coercive indoctrination is present in this case.

38. Coercive indoctrination involves a complete destruction of children’s previous selves. For instance, similar to Ongwen, “Cabarga never had a sense of self before being indoctrinated and thus had no point of reference in the outside world from which to understand his precarious condition.”⁶¹ The decisions that Ongwen made were a direct result of having grown up and developed mentally in the LRA environment. Ongwen should not be held to the same standard as a “reasonable man,” a standard not relevant to someone who spent his formative and developing years in a coercive environment of trauma and weaponized spiritual indoctrination. Rather, it presumes a standard developed in an uncorrupted prior sense of morality, criminality, and self.

Sentencing

39. A sentence of 25 years is a disproportionately high sentence, given Ongwen’s status as a victim of the abuses he was convicted of. This is particularly true given that the maximum sentence available at the ICC is 30 years. Ongwen’s forcible abduction and indoctrination as a child soldier in the LRA should have been considered overwhelmingly mitigating. We do not believe that the Trial Chamber fulsomely considered the “individual circumstances of the convicted person” in addition to the gravity of his crimes, as is required by Article 78(1) of the Statute.
40. If this Court does not accept that Ongwen’s traumatic child and forcible indoctrination has amounted to a mental defect precluding culpability on the basis of mental incapacity, the Court should accept that such circumstances amounted to a substantially diminished mental capacity under Rule 145(2)(a)(1) of the Rules of Procedure and Evidence. Although we believe that his experiences as a child soldier destroyed his capacity, we also certainly believe that his experiences meet the lower requirements for a determination of diminished responsibility.

⁶¹ [Robinson and Holcomb](#) 2020 at 771.

Conclusion

41. Dominic Ongwen is a child soldier. This Court has recognised the lifelong, debilitating impacts of being a former child soldier in prior jurisprudence. The doctrine of precedent, consistency of application, and stability of law requires that the Court afford Dominic Ongwen this same recognition when assessing both his culpability and potential punishment.
42. The proper recognition of mental illness defences by the Appeals Chamber can cascade into the development of more robust cultures of human rights, including for children whose opportunity to enjoy a healthy development into adulthood was torn away. The determination of what amounts to a mental defect is an understudied and under-litigated area of international law. This Court can and should engage with domestic approaches and principles relating to mental illness and culpability.
43. The childhood trauma and indoctrination that Ongwen experienced amounted to a loss of capacity to make moral decisions during his childhood development. This resulted in a mental defect as an adult. Should the Court not agree with the recognition of this mental illness defence, we submit that Ongwen's sentence should be significantly lowered due to the extensive mitigating circumstances in this case.



Professor Kamari M. Clarke
on behalf of **Professor Erin Baines and Professor Mark A. Drumbl**

Dated this 23rd day of December, 2021
Toronto, Canada