

# Victims Who Victimize: Transcending International Criminal Law's Binaries

Mark A. Drumbl<sup>1</sup>

## Abstract

LITERARY ACCOUNTS OF ATROCITY UNPACK THE SUBTLETIES OF AND CONTIGUITIES AMONG VICTIMS AND PERPETRATORS. THESE GRIPPING ACCOUNTS ARE ABLE TO DO SO BECAUSE THEY ABSTAIN FROM CONDEMNING, DENOUNCING, OR INCAPACITATING. JUDICIAL ACCOUNTS OF ATROCITY, ON THE OTHER HAND, CONDEMN. THEY ARE ABLE TO DO SO BECAUSE THEY PROCEED AUSTERELY. THEIR STORIES – LAW'S STORIES – TEND TO ELIDE THE CONDUCT OF THE OPPRESSED IN TIMES OF ATROCITY, INCLUDING THE AGENCY OF THE OPPRESSED TO HARM OTHERS. THIS FLATTENED NARRATIVE, A KEYSTONE IN THE ARCHITECTURE OF JUSTICIABILITY, STIFLES THE URGE OF SURVIVORS TO MEMORIALIZE THIS CONDUCT AND RELATED BETRAYALS, LOYALTIES, CONNIVANCES, AND ACTS OF RESISTANCE. THIS ARTICLE JUXTAPOSES HOLOCAUST LITERATURE (LEVI, FRANKL, KERTÉSZ, KA-TZETNIK) WITH HOLOCAUST JUDGING (THE *KAPO* COLLABORATION TRIALS IN ISRAEL) WHEN IT COMES TO CONCEPTUALIZING VICTIM-PERPETRATORS. THIS ARTICLE DOES SO DIDACTICALLY TO INTERROGATE INTERNATIONAL CRIMINAL LAW'S INTERACTION WITH ANOTHER VICTIM-PERPETRATOR, DOMINIC ONGWEN, CURRENTLY IN CUSTODY AT THE INTERNATIONAL CRIMINAL COURT. THIS ARTICLE CONSIDERS HOW, IF AT ALL, CRIMINAL PROCEEDINGS AGAINST ONGWEN MIGHT ACHIEVE ETIOLOGICAL EXPRESSIVE PURPOSES. SUCH PURPOSES INCLUDE NARRATING HIS COMING OF AGE IN NORTHERN UGANDA SO AS TO EDUCATE THE PUBLIC ABOUT CHILD SOLDIERING, AGENCY, VICTIM-PERPETRATOR CIRCULARITY, AND THE MALLEABILITY OF POWER. ULTIMATELY, THIS ARTICLE ENCOURAGES INTERNATIONAL CRIMINAL LAW TO RECEDE, RATHER THAN TO REGALE, AND IN TURN TO WELCOME STORIES AS TOLD DIVERSELY THROUGH MULTIPLE FORMATS.

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<sup>1</sup> Class of 1975 Alumni Professor of Law and Director, Transnational Law Institute, Washington and Lee University. Special thanks to Kateřina Uhlířová for introducing me to Viktor Frankl's work; to Barrie Sander, Barbora Holá, Wouter Werner, Sergey Vasiliev, and Russ Miller; and to participants at workshops at the European Society of International Law (Oslo, September 2015), the University of Liverpool (November 2015), the University of Birmingham (September 2015), and the VU Amsterdam (October 2015) for helpful guidance.

*‘The Law of the Lager said:  
“eat your own bread, and if you can, that of your neighbor.”’<sup>2</sup>*

Primo Levi’s writing memorializes the day-to-day in Auschwitz. He gazes beyond the structural brutality of the camps as concocted and operated by the Nazis. His principal subjects, in fact, are not guards, nor SS, nor camp officials, nor architects of the Holocaust. 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...’<sup>3</sup> Schepschel did so because he aspired to curry favor in his quest to become a *Kesselwäscher* – a ‘vat washer’ – with the easier life that such a promotion ostensibly portended.

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.<sup>4</sup> 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.’<sup>5</sup> The literary format of their accounts, to be clear, does not oblige them to judge. This format thereby nourishes the freedom to address the reality that, in times of atrocity, the divide between victimizers and victims blurs. These accounts thereby memorialize a pressing story of atrocity that carries great meaning for many survivors.

Criminal law, on the other hand, abjures any such blurring. The iconography of the criminal law is one of finality, disjuncture, linearity, and category: guilty or not-guilty, persecuted or persecutor, abused or abuser, right or wrong, powerful or powerless. Victims are to be pure and ideal; perpetrators are to be unadulterated and ugly. International criminal law hinges upon these constructions which, in turn, come to fuel its existence. These constructions,

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<sup>2</sup> Primo Levi, *Survival in Auschwitz: The Nazi Assault on Humanity* (trans Stuart Woolf, Simon & Schuster, 1993) at 160.

<sup>3</sup> *Id.* at 93.

<sup>4</sup> 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.

<sup>5</sup> Primo Levi, *The Drowned and the Saved* (R. Rosenthal trans., New York: Vintage Books, 1989) at 44-45.

contrived as they are, 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.<sup>6</sup> Victims, after all, may be imperfect. Perpetrators may be tragic. The 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 1950's and 1960's in a series of national trials called the *Kapo* trials. The term *Kapo* refers to inmates – mostly Jewish – who served as guards or police in the camps and, in turn, received a putative 'privileged status'.<sup>7</sup> The records of many of these trials have been sealed (for seventy years as of the time of the judgment);<sup>8</sup> others were destroyed in a flood. Still, enough evidence regarding these trials seeps into the public frame so as to reveal the clumsiness that the criminal law experiences in explicating the victim/victimizer 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 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 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.

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<sup>6</sup> As Sofia Stolk notes in her extensive 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.' Sofia Stolk, *Ntaganda at the ICC – Some observations from the public gallery*, webposting CICJ (2015) (on file with the author).

<sup>7</sup> Ilana M. Singer, 'Reductio ad Absurdum: The *Kapo* Trial Judgements' Contribution to International Criminal Law Jurisprudence and Customary International Law', *Melbourne Journal of International Law*, downloaded from SSRN, at p. 1 of download. See also Orna Ben-Naftali and Yogev Tuval, 'Punishing International Crimes Committed by the Persecuted: The *Kapo* Trials in Israel (1950s-1960s)', 4 *Journal of International Criminal Justice* 129 n. 6 (2006) ('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.').

<sup>8</sup> It has been surmised that the seal was ordered upon request of the family members of the accused owing to their embarrassment. Singer, *supra* note 7, at 2 (citing Antonio Cassese). Ultimately, however, the trials themselves came to be seen as embarrassing.

Is the criminal law's gaucheness in the *Kapo* trials, however, a congenital condition? Although particularly crimped in the invidiousness of the Nazi concentration camps, the capacity of victims to victimize arises wherever atrocity metastasizes; so, too, does the hunger of survivors to memorialize the exercises of this capacity. These demands now percolate, for instance, in proceedings against a formerly abducted Ugandan child soldier, Dominic Ongwen, pending before the International Criminal Court.

Ongwen rose well beyond *Kesselwäscher*. He became a Brigade Commander in Joseph Kony's Lord's Resistance Army (LRA). Ongwen extensively deployed violence not only to survive but also to thrive. He built oppressive structures rather than just serving in them. Ongwen nonetheless is accused of committing crimes – for example, child soldiering and enslavement as a crime against humanity – that he himself suffered after having been abducted into the LRA while walking home from school. Ugandans wrestle with his victim/perpetrator circularity, 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 bedeviled the *Kapo* trials. They also touch upon documentary concerns as to how best to understand, conceptualize, and remember LRA violence. Which stories, and whose, to authenticate? And why?

Insofar as the charges against Ongwen have not yet been confirmed, this paper considers the prospect that international criminal law could 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 paper gestures towards a number of sites, including sentencing, as potential venues of accommodation and, thereby, as pivots to facilitate broader didactic, pedagogic, and explanatory ambitions. Whereas much of expressive theory focuses on law's ability to narrate norms and prohibitions, this paper probes the ability of legal procedures to unpack the etiology of mass violence and the discursive content of what survivors wish to remember. Yet perhaps this goal is too nuanced to square with the reductionist pressures of the courtroom; perhaps it is too delicate to outlast the adversarialism that inheres between prosecution and defense where the winner takes all; perhaps it is too distant from other aspirations such as deterrence, retribution and incapacitation.

### 1. *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.<sup>9</sup> Levi certainly does not skip over the horrors the Nazis

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<sup>9</sup> 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.

imposed upon the inmates. He details how the prisoners were intentionally squeezed into the most desperate of situations, the most depraved of conditions, and the most invidious 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 trembling and the 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. Levi lays bare what it means to demolish a human being.<sup>10</sup> 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 choices they make.

The 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*.<sup>11</sup> No doubt the new 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.<sup>12</sup> 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 maneuvers that may involve passive condonation of the demise of others. One detainee’s ability to endure remains contingent upon the faltering of another. Levi depicts the German oppressors as cruelly anonymous babble, in the distant horizon, with the protagonists and antagonists being the oppressed.<sup>13</sup> Some of the

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<sup>10</sup> Cf Gillian Banner, *Holocaust Literature* 96 (2000) (‘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.’)

<sup>11</sup> 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 architects of the structures of violence. Nearly four decades later, Levi authored *The Drowned and the Saved*, another touchstone of memory and life within the Holocaust. The two books demarcate ‘the beginning and end of his writing life’. Banner, *supra* note 10, at 87.

<sup>12</sup> See also James Wood, ‘The Art of Witness: How Primo Levi Survived,’ *The New Yorker* (September 28, 2015) (at p. 1 of print-out) (noting that Levi’s American publisher ‘rewrapped’ the book’s title ‘in [a] heartier, how-to-ish banner’).

<sup>13</sup> So, too, does Ka-Tzetnik. See e.g. Omer Bartov, ‘Kitsch and Sadism in Ka-Tzetnik’s Other Planet: Israeli Youth Imagine the Holocaust’, 3:2 *Jewish Social Studies* 42-76 (1997) at 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.’). Ka-Tzetnik is the *nom de plume* of Yehiel Dinur, who also testified at the

oppressed abuse 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 push 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'<sup>14</sup> – 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 pleats available to him – he benefitted from chance, from affection, 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, edema, 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.<sup>15</sup>

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.<sup>16</sup> Frankl, like Levi, faults *Häftlinge* who survive the camp

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Eichmann trial in a fashion that did not meet the formal requirements of legally probative, or even admissible, information.

<sup>14</sup> Victor E. Frankl, *Man's Search for Meaning* (original 1956, revised Beacon Press 1956) at 3.

<sup>15</sup> 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.

<sup>16</sup> '[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 freedom; which determined whether or not you would become the plaything

by accelerating the demise of others.<sup>17</sup> 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.<sup>18</sup> Ka-Tzetnik, for his part, embraces the drowned – the *Musselmänner*, no more (or 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 – there is a 'right way' or an 'honorable way' to endure one's sufferings.<sup>19</sup> 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.<sup>20</sup>

Like Levi, Frankl nonetheless balks at condemning the ethics of those who spin machinations to survive and who thereby fail to suffer rightly or honorably. Frankl flatly rejects collective guilt. He does so theoretically as well as 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 preserved Frankl's life. And Frankl played that game, to be sure, which in retrospect he recalls with drenching sarcasm: 'I was very happy

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of circumstance, renouncing freedom and dignity to become molded into the form of a typical inmate.' Frankl, *supra* note 14, at 67.

<sup>17</sup> *Id.* at 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.').

<sup>18</sup> *Id.* at 74.

<sup>19</sup> *Id.* at 38.

<sup>20</sup> *Id.* at 67.

to be the personally appointed physician to His Honor the Capo, and to march in the first row at an even pace'.<sup>21</sup>

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 brutal moral 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.<sup>22</sup>

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 already 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.<sup>23</sup>

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.<sup>24</sup>

Levi's book is redolent with disdain for the *Sonderkommando* and the *Prominenz* and their advantages and special lavatories;<sup>25</sup> of *Kapo* thuggery and violence;<sup>26</sup> about machinations

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<sup>21</sup> *Id.* at 27.

<sup>22</sup> *Id.* at 86.

<sup>23</sup> Levi, *supra* note 2, at 33.

<sup>24</sup> *Id.* at 34.

<sup>25</sup> The *Sonderkommando* were Jewish inmates engaged to extract teeth and shear hair – excavated for the purposes of supplying the Reich – from the dead after the SS gassings. Those *Sonderkommando* who outlived Auschwitz were among the few to memorialize – through words and art – the ways of the crematoria.

as to where to wait in line so as to maximize 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 174000s, 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’.<sup>27</sup> One of Levi’s neighbors, a Pole, rails against Levi – ‘*Du Jude, kaput. Du schnell Krematorium fertig*’ – in what Levi memorializes as among the most hurtful words hurled at him during his internment.

Each of these four authors captures, divergently yet delicately, the essence of humanity as good and evil, differently on different days. Their narratives challenge the reductionism in law of the perpetrators as uniform devils and the victims as uniform angels.

Although Levi – like Frankl – documents the victimization he suffers at the hands of other victims, and does so candidly, he too abstains from judging:

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.<sup>28</sup>

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’<sup>29</sup> and that someone’s survival may require 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’.<sup>30</sup> 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 *Prominenz*, a collective that Levi sees as ‘monsters of

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<sup>26</sup> Levi, *supra* note 2, at 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’).

<sup>27</sup> *Id.* at 49. *See also* Wood, *supra* note 12, at p. 13 of print-out (‘[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’).

<sup>28</sup> Levi, *supra* note 2, at 86.

<sup>29</sup> *Id.* at 88.

<sup>30</sup> *Id.* at 90.

asociality and insensitivity'. In a devastating passage, Levi recounts the balefulness of those who successfully strategize 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.<sup>31</sup>

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 labors 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. She collects little Red Cross packages, along with scraps of food, from her own camp-mates. She bags the provisions; she and Anne agree to 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 from her, 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 recognizes that survival of those who are not officials is conditioned on the need to 'resist enemies and have no pity for rivals'.<sup>32</sup> 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.'<sup>33</sup> Levi chides himself for his own survivalist plots, which at one point he bitterly remarks betray him by shame.<sup>34</sup> His final days in the abandoned camp essentially involve barring migrating masses from his barracks in order for him to live on.

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<sup>31</sup> *Id.* at 91.

<sup>32</sup> *Id.* at 92.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 150.

Yet, the taste of survival strategems grows rancid through time. Levi mordantly 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 experiences in Auschwitz.<sup>35</sup> Steinberg 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 laborer 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.’<sup>36</sup> After the war, Levi tracks Lorenzo, by then terribly ill with alcoholism, and tries to heal him, without success.

## 2. *The Futility of Israel’s Kapo Trials*

The State of Israel was established in 1948. From the late 1940’s until the end of the 1950’s, 470,000 Holocaust survivors arrived in Israel: this group comprised one-quarter of the nation’s population.<sup>37</sup> Post-war political discourse in Israel praised Jewish resisters, eulogized 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.’<sup>38</sup>

Within this context, then, the *Kapo* trials intended to purify the immigrant *arrivistes* in Israel. These trials were conducted under the 1950 Nazi and Nazi Collaborators (Punishment) Law. Between thirty and 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.<sup>39</sup> The only Nazi ultimately tried under this law was Adolf Eichmann, whose transfer into Israeli jurisdiction was of course highly controversial. The Nazi and Nazi Collaborators (Punishment) Law was ‘the legal expression given by Israeli lawmakers to “the

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<sup>35</sup> Paul Steinberg, *Speak You Also: A Survivor’s Reckoning* (Picador, USA, trans 1996, 2001).

<sup>36</sup> Levi, *supra* note 2, at 122. Lorenzo also helped Levi send letters to his family in Italy.

<sup>37</sup> Hanna Yablonka, ‘The Development of Holocaust Consciousness in Israel: The Nuremberg, Kapos, Kastner, and Eichmann Trials’, 8:3 *Israel Studies* (Fall 2003) 1, 9.

<sup>38</sup> *Id.* at 5. Hannah Arendt was among those who castigated the *Judenräte* along these lines.

<sup>39</sup> Ben-Naftali and Tuval, *supra* note 7, at 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’).

guilt of the victim” syndrome.’<sup>40</sup> The Israeli Justice Minister presented the legislation to the 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.<sup>41</sup>

The 1950 Nazi and Nazi Collaborators (Punishment) Law included a number of offenses. The major offenses, which entailed a mandatory death penalty, were crimes against the Jewish people, crimes against humanity, and war crimes. The legislation proscribed five other offenses: crimes against persecuted persons, offenses in places of confinement, delivering up persecuted persons to enemy administration, blackmailing persecuted persons, and membership in an enemy organization. These offenses did not trigger the death penalty. Only one of the Jewish defendants convicted in the *Kapo* trials was found guilty of a major offense. No Jewish defendant ever was charged with crimes against the Jewish people.<sup>42</sup> The crime of ‘offenses 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.<sup>43</sup> 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 constructed the persecuted Jew as a Nazi. The law thereby dispelled the ‘grey zone’.

The *Kapo* trials were controversial. Ben-Naftali and Tuval note that, at the time they were rendered, only six of the judgments were deemed by Israeli editors to be sufficiently part of the public interest so as to be published.<sup>44</sup> 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’.<sup>45</sup> Unpublished judgments in the Courts’ archives were destroyed by a flood.<sup>46</sup> Observing the

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<sup>40</sup> Yablonka, *supra* note 37, at 10-11.

<sup>41</sup> Statement of Pinhas Rosen, cited in *id.* at 11.

<sup>42</sup> Ben-Naftali and Tuval, *supra* note 7, at 153.

<sup>43</sup> *Id.* at 136.

<sup>44</sup> *Id.* at 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.

<sup>45</sup> *Id.* at 128, 151.

<sup>46</sup> *Id.* at 150.

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.<sup>47</sup>

The *Kapo* trials also were clumsy. Shoehorning realities of victims as victimizers 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 very small fry such as the *Kapos*; appellate interventions were extensive; and, while judges were of different minds,<sup>48</sup> the verdicts overall squirm with discomfort about the delegated task at hand. Judges at times used harsh language to denounce the accused, but they paradoxically deployed tonalities of clemency, leniency, and mercy when it came to assessing culpability.<sup>49</sup> Judges expressed empathy, and their own queasiness, in particular when it came to sentence. In the *Enigster* case, two judges remarked that having to determine sentence made their ‘heart tremble[.]’<sup>50</sup> 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.<sup>51</sup> An appellate judge asked to adjudicate the case of a Jewish policeman in a Polish ghetto who was a member of the *Judenrat* remarked that the question raised was ‘for history and not for the court’,<sup>52</sup> thereby declaring it fundamentally non-justiciable.

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

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<sup>47</sup> *Id.* at 129 n 4.

<sup>48</sup> 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’. *Id.* at 161 n 126.

<sup>49</sup> 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. *Id.* at 138. In one case, *Enigster*, ‘[e]vidence ... that the *Kapo* role was optional and only demotion for disobeying orders led the court to dismiss duress because there lacked an objective threat of immediate death.’ See Singer, *supra* note 7, at p. 13 of print-out (for a harsh critique of this judgment, see Ben-Naftali and Tuval, *supra* note 7, at 168).

<sup>50</sup> *Attorney General v. Enigster*, District Court of Tel Aviv (4 January 1952). *Enigster* was the only Jewish defendant convicted of a crime against humanity. His appeal judgment is unavailable. It is known, however, that *Enigster* was not executed; secondary sources disclose that his punishment was reduced upon appeal to two years (which suggests that his conviction for crimes against humanity in the District Court was overturned in light of the mandatory death sentence). Ben-Naftali and Tuval, *supra* note 7, at 157.

<sup>51</sup> Cited in *id.* at 169 n 148.

<sup>52</sup> *Barnblatt v. Attorney General*, 18(2) PD 70 at 95-96 (Supreme Court of Israel).

finally delivered.’<sup>53</sup> While understandable, and indicative of how the new Israeli judiciary exercised its independence, these discrepancies led to gnarly text that, in turn, reveals 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’.<sup>54</sup> The trials did not explicate the ‘grey zone’, saturated as it is with morally ambiguous conduct. Ben-Naftali and Tuval posit that the judges 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’.<sup>55</sup> 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.<sup>56</sup> Although recognizing how some of the *Kapo* judgments strove to elucidate a deeper sense of meaning, and providing examples thereof, these authors – among the very few to write in detail about the *Kapo* trials – remain sharply circumspect about the criminal law’s fundamental capacity to attain these ends.

### 3. 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*

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<sup>53</sup> Ben-Naftali and Tuval, *supra* note 7, at 160 (noting also at 169 the judgments’ ‘incoherence between style and substance’).

<sup>54</sup> *Id.* at 161.

<sup>55</sup> *Id.* at 162.

<sup>56</sup> *Id.* at 162-168. *See also id.* at 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’).

*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.*<sup>57</sup>

- Dominic Ongwen, interviewed before being handed over to the ICC

The Lord's Resistance Army (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 has been particularly protracted.<sup>58</sup> LRA violence peaked in the late 1990's and early 2000's. Dominic Ongwen – a former child soldier known as the 'White Ant' – was among the LRA's senior commanders, specifically tasked with responsibility over the Sinia Brigade. The LRA is currently depleted, exhausted, mostly 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 militarized 60,000 children and young people as combatants, auxiliaries, and sex slaves.<sup>59</sup> 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 some of the victims of 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 lead 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.<sup>60</sup>

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<sup>57</sup> Moses Akena, 'Ongwen speaks out on why he quit LRA,' *The Daily Monitor*, January 19, 2015, available at <http://www.monitor.co.ug/News/National/Ongwen-speaks-out-on-why-he-quit-LRA/-/688334/2593818/-/5ox5ac/-/index.html>.

<sup>58</sup> International Center for Transitional Justice, *From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda* (October 2015) at 4 [hereinafter ICTJ].

<sup>59</sup> *Id.* at 6. See also *id.* at 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.

<sup>60</sup> *Id.* at 1. See also *id.* at 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').

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.<sup>61</sup> He defected, indeed escaped from, the LRA. Ongwen arrived shortly thereafter at the ICC’s detention center 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.’<sup>62</sup>

Many of the details of Ongwen’s identity remain shrouded. It has been reported that Dominic Ongwen is not his actual name, but a name he made up when he was first kidnapped so that the rebel kidnappers would not be able to come after his family.<sup>63</sup> Apparently his family taught the children to play it safe in this way. His family says he was born in 1980; he says he was born in 1975. He says he was fourteen when he began as an LRA soldier. His family says he was ten when he was abducted.

On March 6, 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, however, interfered, along with political tensions within Uganda.<sup>64</sup> And other distractions arose, notably, the ICC’s move into a gloriously new building.<sup>65</sup> So the hearing will be held in these new premises in The Hague.

Although the ICC has indicted five LRA leaders, Ongwen is the only one in custody. Some others are definitely dead or likely dead. Kony himself remains alive and at large. Ongwen initially faced three counts of crimes against humanity and four counts of war crimes arising out of an attack on a displaced persons camp in 2004 in the village of Lukodi. These charges, however, reflect only a tiny slice of what is believed to be his overall pattern of criminality. The ICC Office of the Prosecutor responsively announced in September 2015 that it plans to greatly expand the charges against him (to a total of 67 charges) and to include *inter alia* child soldiering crimes and sexual slavery. This expansion, while evident, still reflects only a

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<sup>61</sup> Prior to his surrender, Ongwen had been wanted by the ICC for nearly a decade.

<sup>62</sup> ‘To Forgive a Warlord’, *Foreign Policy* (February 6, 2015) p. 5 of print-out.

<sup>63</sup> See Stephanie Nolen and Erin Baines, ‘The Making of a Monster?’ (October 25, 2008), available at [http://canadiancrc.com/newspaper\\_articles/Globe\\_and\\_Mail\\_The\\_Making\\_of\\_a\\_Monster\\_child\\_soldier\\_25OCT08.aspx](http://canadiancrc.com/newspaper_articles/Globe_and_Mail_The_Making_of_a_Monster_child_soldier_25OCT08.aspx)

<sup>64</sup> AFP, *ICC drops plan to try LRA Kony’s deputy in Uganda* (October 28, 2015) (on file with the author).

<sup>65</sup> *Id.*

slightly wider slice of the overall violence in which Ongwen is believed to have been enmeshed. Regardless, Ongwen has suffered some of the crimes for which he now faces trial, for example, enslavement as a crime against humanity and unlawful military recruitment of children under the age of fifteen. He endured what he subsequently inflicted.

Ongwen is among the more enigmatic of the ICC's indictees. He 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.'<sup>66</sup> His eighty-year-old grandmother recollects him before his abduction as an 'innocent and quiet' boy 'who liked digging'.<sup>67</sup> 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.<sup>68</sup> This may indeed have 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':<sup>69</sup>

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.<sup>70</sup>

A few child soldiers are like Ongwen and become brutal leaders.<sup>71</sup> 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'

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<sup>66</sup> 'Before Dominic Ongwen Commanded Child Soldiers, He Was One of Them', Associated Press, RYOT News (on file with the author)

<sup>67</sup> *Id.* (reporting also that his grandmother 'longs to see him').

<sup>68</sup> 'To Forgive a Warlord', *supra* note 62, at p. 5 of print-out.

<sup>69</sup> *Id.* at p. 6 of print-out. His younger sister and older brother also emphasize his shyness. See Nolen and Baines, 'To Forgive a Warlord', *supra* note 63.

<sup>70</sup> 'To Forgive a Warlord', *supra* note 62, at p. 6 of print-out.

<sup>71</sup> 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 Ledio Cakaj, 'Joseph Kony and Mutiny in the Lord's Resistance Army', *The New Yorker* (October 3, 2015).

defense.<sup>72</sup> 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 complex in other ways. Ongwen was mercurial. He was prone to anger and rage, but also exhibited mercy and gentleness. He pleaded with Kony not to have Vincent Otti (another LRA leader) executed because Otti had encouraged peace negotiations.<sup>73</sup> 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.<sup>74</sup>

Kony nearly executed Ongwen on two occasions.<sup>75</sup> Ongwen had contemplated fleeing (ultimately, he did abandon the LRA after Kony had him arrested and beaten).<sup>76</sup> Ongwen says that when Kony became concerned that he may have intended to escape, he warned Ongwen that if he escaped then the ICC would prosecute him.<sup>77</sup> History, indeed, proved Kony correct. 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.<sup>78</sup> 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.<sup>79</sup> Ayot remembers Ongwen as a 'fundamentally

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<sup>72</sup> Richard Delgado, "'Rotten Social Background'": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation, 3 *Law and Inequality* (1985), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2111695](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111695).

<sup>73</sup> 'Before Dominic Ongwen Commanded Child Soldiers, He Was One of Them', *supra* note 66. Kony ultimately did execute Otti.

<sup>74</sup> See Nolen and Baines, *supra* note 63; see also Gregory Warner, 'A Former Child Soldier will Stand Trial in The Hague for War Crimes', NPR (January 27, 2015), available at <http://www.npr.org/2015/01/23/379419891/international-criminal-court-to-try-former-child-soldier-with-war-crimes>.

<sup>75</sup> See <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/01/12/the-complex-story-of-a-child-soldier/>.

<sup>76</sup> 'Before Dominic Ongwen Commanded Child Soldiers, He Was One of Them', *supra* note 66 (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'.)

<sup>77</sup> 'To Forgive a Warlord', *supra* note 62, at p. 7 of print-out.

<sup>78</sup> *Id.* (reporting that both Ayot and Ongwen were 'captives'); see also <http://www.bbc.com/news/world-africa-30709581>.

<sup>79</sup> See <http://mg.co.za/article/2015-02-16-uganda-the-thin-line-between-victim-and-perpetrator>.

“goodhearted” person, who fought only to avoid punishment from ... commanders’.<sup>80</sup> 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.<sup>81</sup> Gulu is about an hour’s drive from Coorom.

Official amnesties played a pivotal role in weakening the LRA and demobilizing 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.<sup>82</sup> 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. 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, equally were constitutional.<sup>83</sup> Kwoyelo had argued, successfully before the Ugandan Constitutional Court, that he suffered discrimination because 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 disagreed. It held that amnesties cannot be granted for grave crimes as recognized 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 utterly implausible to interpret the evidence against Ongwen as failing to implicate crimes committed against innocent civilians or communities and, hence, as exceeding the scope of the furtherance of the armed conflict. The amnesty lies out of his reach. It remains so even though thousands of other fighters have grabbed it.

Some Ugandans, however, believe that Ongwen should receive an amnesty and participate in reintegration ceremonies. These feelings are strongest in Ongwen’s home region.

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<sup>80</sup> ‘To Forgive a Warlord’, *supra* note 62, at p. 1 of print-out.

<sup>81</sup> *Id.* at p. 2 of print-out.

<sup>82</sup> Uganda vs. Thomas Kwoyelo, Constitutional Appeal No. 1 of 2012 (April 8, 2015).

<sup>83</sup> Kwoyelo reportedly joined the LRA as a minor at the age of fifteen.

Ongwen apparently surrendered expecting to receive an amnesty.<sup>84</sup> Ongwen reacted, indignantly in his own words, to the pending ICC proceedings 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.<sup>85</sup>

On the other hand, many other Ugandans, including other former child soldiers, insist that Ongwen ‘went overboard’ and should be punished.<sup>86</sup> Calls for him to face trial and severe punishment abound in areas scarred by the violence he and his forces committed, including Lukodi, although in Lukodi the primary concern of community members reportedly lies in receiving compensation for their losses.<sup>87</sup> That said, in both Coorom and Lukodi an assessment survey also reveals the ‘great importance’ of ‘reconciliation and traditional justice’.<sup>88</sup> On a broader note, many northern Ugandans blame the Ugandan government for violence, for forcible resettlement, for not controlling the LRA, and for not protecting communities. Statistical data pertaining to governmental crimes is obscured. These popular concerns, nonetheless, will not (and cannot) be addressed by prosecuting Ongwen.

Ongwen deliberately chose extreme violence and sadism as a way to achieve power, status, and influence within the LRA. He participated eagerly. He ascended to the summit of power. Ongwen killed to thrive rather than merely to survive. On this latter note, Ongwen’s goal was not the desperate one of the *Kapos*, nor that of Schepschel to join the *Kesselwäscher*, but, rather to wend his way to the very top echelons of collective brutality. He led many attacks against civilians. He was the youngest LRA officer (28 years old at the time) that Kony promoted to Brigadier.<sup>89</sup> Ongwen’s is the true compass of the circularity of the victim-victimizer spectrum. Hence, his trial potentially explodes many of international criminal law’s verities and

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<sup>84</sup> ‘To Forgive a Warlord’, *supra* note 62, at p. 9 of print-out.

<sup>85</sup> Akena, *supra* note 57.

<sup>86</sup> *See supra* note 79.

<sup>87</sup> Oryem Nyeko and Harriet Aloyocan, *Community Perceptions on Dominic Ongwen*, Situational Brief, Justice and Reconciliation Project (May 2015).

<sup>88</sup> *Id. Cf* ICTJ, *supra* note 58, at 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 contextualized and nuanced.’)

<sup>89</sup> ‘Before Dominic Ongwen Commanded Child Soldiers, He Was One of Them’, *supra* note 66.

mythologies. The criminal law's quest for finality, clarity, and linearity may deform Ongwen's experiences when it is enlisted to narrate them.

Might Ongwen's 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 precisely 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 sentencing approach might apply.<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup>

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<sup>90</sup> International criminal law's reluctance to envision the minor as a subject of criminal proceedings suggests an underlying discomfort with addressing victim-perpetrator circularity only in sentencing. If it were otherwise, international penal institutions might be more inclined to prosecute a notorious child soldier and revert to clement sentencing (which is actually what the SCSL Statute suggests, but then in practice the SCSL's first Chief Prosecutor clearly announced that he would never prosecute a juvenile, and none had since been prosecuted).

<sup>91</sup> 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 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 (none of which had to do with Sesay's own forcible recruitment), but affirmed his total sentence of 52 years.

<sup>92</sup> See [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-21-01-2015.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-21-01-2015.aspx).

In the end, as I have argued elsewhere,<sup>93</sup> 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.

I fear that, by focusing the eyes of the world community on a boy soldier who became a leader of an infamous African rebel group, the Ongwen proceedings will reinforce sensationalism. Child soldiers, after all, are found on every continent and emerge in conflicts world-wide (including recently used by ISIS, and by other groups in Syria and Libya). Most child soldiers, moreover, are older adolescents. Many are abducted but many others come forth willingly to fight for what they see as a legitimate political cause. Great diversity arises regarding how children enter conflict and, once in conflict, what they do. Recognizing this diversity is essential to the success of individual reintegration. Roughly 40% of child soldiers world-wide are girls, many of whom are sex slaves but some of whom are combatants and even unit leaders.

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. It would be an even greater shame if the Ongwen prosecution transfixed that gaze towards well-worn stereotypes. This refraction, however, parallels criminal law's discomfort with victim-perpetrator circularity. If the defense 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 how the courtroom game is played. And criminal law, through verdict, must give an answer: innocent or guilty. It must condemn, or not.

#### 4. Conclusion: Justiciability and Invisibility

Leaders set the conditions through which atrocity occurs. They structure the incentives. This is why leaders and commanders are conventionally said to bear the greatest responsibility. But the industrialization 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 threads many of these stories is the circularity, rather than obversion, of victims and victimizers. The persecuted may persecute and persecutors themselves may become (or already be) the persecuted. Truly understanding atrocity requires an embrace of this bedeviling interstitiality and perennial liminality. If prevention flows from

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<sup>93</sup> Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (OUP, 2012).

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, this embrace could nourish the development of typologies of atrocity perpetrators – a hugely important task that others have begun to undertake.<sup>94</sup>

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. 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 criminal courts could be tweaked to transcend reductionism and deliver a richer narrative. Such a move would gesture towards an expressive justification for international criminal trials. The operation of international criminal law would thereby relax its condemnatory and denunciatory functions, which Frankl and Levi clearly repudiate in the case of imperfect victims, 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 etiological goals, namely, to clarify – rather than occlude – how atrocity spreads and in particular the roles that those who are dually victims and perpetrators play in that process.

Taking etiological expressivism seriously could lead to rethinking certain aspects of the mechanics of international criminal process. 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 circularity. So, too, could duress.<sup>95</sup> Sentencing also might engage with the trauma that perpetrators endure.<sup>96</sup> Or, perhaps, a failure to suffer properly<sup>97</sup> 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

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<sup>94</sup> Cf Alette Smeulers’ research on compromised perpetrators. See Alette Smeulers, Chapters VI- IX, in A. Smeulers & F. Grünfeld, *International crimes and other gross human rights violations*, Leiden: Martinus Nijhoff Publishers 203-330 (2011).

<sup>95</sup> Dražen Erdemović, another tragic victim-perpetrator who was among the ICTY’s first convicts, was unsuccessful in arguing duress as a defense but was successful in raising it as mitigating circumstance.

<sup>96</sup> For a powerful argument for humanizing our understandings of perpetration, including addressing perpetrator trauma and attendant rehabilitation, see Saira Mohammed, ‘Of Monsters and Men: Perpetrator Trauma and Mass Atrocity’, 115 *Columbia Law Review* 1157, 1215 (2015).

<sup>97</sup> To invoke Frankl for a purpose that Frankl himself would reject.

and, thereby, crystallize this circumstance as aggravating in the sentencing of the most responsible. Yet, throughout all of these instances, the criminal law still remains embedded in condemning and denouncing, rather than explaining, such that the incorporation of etiological expressivism would be half-hearted.

Pursuit of etiologically expressive goals also could 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’.<sup>98</sup> It was the Eichmann trial, ultimately, that fulfilled nation-building purposes. Legal discourse in *Eichmann* migrated from the ‘guilt of the victim’ to the ‘guilt of the murderer’.<sup>99</sup> At Eichmann’s trial, reliant as it was on *viva voce* testimony, *Kapos* and other former inmates unpacked trilemmas of survival, resistance, and agency. They recounted how *Kapo* discretion was exercised both mercifully and cruelly. 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.<sup>100</sup> Ultimately, the Eichmann trial – traditional as it was – cemented and humanized the position of Holocaust survivors in Israeli society. 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 etiological 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 extracted.<sup>101</sup>

International criminal law, however, also could take etiological expressivism 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 boundaries and, in turn, be non-

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<sup>98</sup> Yablonka, *supra* note 37, at 12.

<sup>99</sup> *Id.* at 22.

<sup>100</sup> *See generally id.* at 17-19.

<sup>101</sup> Appreciations to Sergey Vasiliev for this insight.

justiciable.<sup>102</sup> Law could respect imperfect victims and sympathetic 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.

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 – the *juris silentium* – can echo with listening and thereby encourage the dissemination of other stories of atrocity and support those vehicles – whether institutional or individual – that deliver them within a transitional justice paradigm.<sup>103</sup> The non-justiciable would then become visible. Most immediately, the pursuit of etiological expressivism might prompt international criminal law to engage differently with what it currently stylizes as 'alternate' justice mechanisms – such as truth commissions<sup>104</sup> and ritualistic ceremonies – and approach them more as colleagues and less as foils, in particular, when these mechanisms memorialize the porousness of atrocity and the limits of judgment.

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<sup>102</sup> On law's boundaries, see e.g. Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (OUP, 2013)

<sup>103</sup> Thanks to Wouter Werner for introducing the concept of *juris silentium* to me.

<sup>104</sup> For thoughtful discussion of how truth and reconciliation commissions, were they to discuss 'failing to resist', might engage Levi's 'gray zone', see Bronwyn Leebaw, *Judging State-Sponsored Violence, Imagining Political Change* (2011) at 147-156.