



## Letting a war criminal off the hook

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Thirteen years after 9/11, it is hard to fathom that the United States may not have the requisite legal tools to criminally prosecute a war criminal in its custody. Yet that is exactly the predicament the Department of Justice faced with the recent capture of Dominic Ongwen, the second-in-command of the notorious Lord's Resistance Army (LRA). Ongwen turned himself in last week to the United States military in the Central African Republic.

In 2011, President Obama deployed at least 100 special operations forces to assist an African Union task force in capturing the leaders of the LRA and ending its reign of terror. The LRA, under the command of Joseph Kony, has killed and abducted thousands of civilians in northern Uganda, the Democratic Republic of Congo, South Sudan and the Central African Republic. The LRA has used machetes to cut off the limbs of those who resist, enlisted boys as child soldiers and abducted girls as sex slaves.

Ongwen's capture was a moment to cheer, but it was also a test for the rule of law as the United States, Uganda, the Africa Union and the United Nations decided next steps. While there were a few options on the table on how, where and whether to hold Ongwen criminally accountable, Uganda announced on Tuesday that Ongwen will be transferred to The Hague to be tried by the International Criminal Court (ICC).

The ICC has charged Ongwen and four other senior LRA leaders with war crimes and crimes against humanity and stands ready to prosecute Ongwen for his crimes. The ICC is a court of last resort that only operates when the national courts are unwilling or unable to prosecute.

The ICC prosecution faces many hurdles. The United States, which is holding Ongwen, is not a member of the ICC, though the Obama Administration has increased cooperation with the court. At an ICC meeting in Kampala in May and June 2010, the United States pledged that it would assist the ICC in its investigation and prosecution of LRA leaders. According to United States officials, the United States is attempting to orchestrate a transfer of Ongwen to the ICC via the Central African Republic or Ugandan authorities, both of whom are members of the ICC.

Uganda could also have chosen to prosecute Ongwen domestically. Although Uganda referred the crimes committed by the LRA to the ICC in 2003, Ugandan President Yoweri Museveni is a vocal opponent of the ICC, alleging that the court is targeting African nations. Uganda and the United States have what is known as an Article 98 agreement under the Rome Statute that purports to prevent one state from surrendering a member of the other state to the ICC without

consent. Uganda could have tried to prevent the transfer by invoking this agreement.

Uganda has claimed that it is ready and able to prosecute Ongwen in its national courts. Some observers doubted the assertion due to Uganda's failure to successfully prosecute any LRA member to date. Furthermore, many argued that the ICC is a more appropriate venue given that the LRA has terrorized several other countries in central Africa as well. Uganda has not filed criminal charges against Ongwen, though it could. Uganda also passed an amnesty law in 2000 that has amnestied more than 10,000 former LRA members. As a person indicted before the ICC, it is not clear whether Ongwen would qualify for amnesty, but the question muddies the waters.

President Museveni also faces domestic political opposition to prosecuting Ongwen at all. Some members of the Acholi community, the community targeted by Kony in Uganda, believe that Ongwen should be forgiven for his crimes because he was abducted when he was only 10 years old and was a child soldier himself. Others believe he should stand trial for those atrocities he committed as an adult. And others believe he should face a traditional justice system called Mato-Oput where tribal leaders from his community would bring him before his victims, make him drink bitter herbs and apologize, before being forgiven. Given the above, it is not surprising that Uganda has agreed to have Ongwen tried before the ICC.

The United States could have also attempted to prosecute Ongwen, since the war criminal is in United States custody. But, the United States does not have a crimes against humanity law that would authorize the Department of Justice to bring criminal charges against Ongwen. Nor does its war crimes statute reach conduct committed overseas by and against non-United States citizens. In theory, the United States could have filed criminal charges against Ongwen under the Child Soldier Accountability Act (CSAA) for recruiting child soldiers, a tad ironic given that Ongwen was himself a child soldier. The United States could have also thrown at him the catch-all criminal charge of material support for terrorism given that LRA is a designated terrorist organization. However, neither the CSAA nor material support charges would have been as clean and clear as a bill that specifically codified criminal charges for crimes against humanity.

Congress should consider a crimes against humanity bill before any other cases like this arise. Imagine if the United States were to capture one of Assad's top lieutenants, or any of the militants of ISIL. It is not beyond the pale that some of them may find themselves one day safely within United States borders having fled their homes and sought safe haven here. By some estimates there are at least 1,000 suspected human rights abusers from 85 countries living in the United States who have committed torture, genocide or other serious human rights abuses. Our immigration system is not fool proof. Whether ultimately found inside United States borders, or captured abroad, the United States should have the requisite legal tools to bring those who commit crimes against humanity to justice.

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