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Expressing what? The stigmatization of the defendant and the ICC's institutional interests in the *Ongwen* case

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Abstract

The potential of international criminal trials to express the wrongfulness of mass atrocities and instil norms of appropriate behaviour within communities has been subject to a lively theoretical debate. This article makes an important empirical contribution by examining the limitations to the expressivist aspiration of international criminal justice in the context of the message communicated by the International Criminal Court's Office of the Prosecutor (ICC-OTP) in the *Ongwen* case. A detailed analysis of the selection of charges, modes of liability, and the overall presentation of the Prosecutor's arguments at trial suggests that the ICC-OTP's limited capabilities to apprehend suspects and its dependency on state co-operation risk the excessive stigmatization of the few defendants available for trial for the purpose of demonstrating the Court's capability of prosecuting notorious criminals. As the only apprehended commander from the Lord's Resistance Army (LRA), Dominic Ongwen has been presented by the ICC-OTP as the 'cause' of crimes committed in Northern Uganda without due regard for the degree of his alleged involvement in those crimes compared to other LRA commanders, the role of other actors in the conflict, or the significance of his own victimization as a child. Ongwen's excessive stigmatization expressed the importance of the Ugandan investigation after a decade of showing no results. Yet, it also produced a simplistic narrative which failed to express the complexity of violence in Northern Uganda.

Keywords: Dominic Ongwen; expressivism; International Criminal Court; Prosecutor; stigmatization

1. Introduction

In 2018, the ICC-OTP closed its arguments in one of its most notorious cases¹ – the case against Dominic Ongwen, former brigade commander of the LRA, which had been operating for decades in Northern Uganda. While originally Ongwen had not attracted as much attention as other LRA suspects, such as the organization's leader Joseph Kony, when he became the first and *only* apprehended LRA commander, the Prosecutor sought to demonstrate to the Court's audience the importance of the trial against Ongwen. The ICC-OTP charged Ongwen as a principal perpetrator with a record number of 70 counts of crimes.² The Prosecutor's case revealed a story of seemingly inhuman

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¹*Prosecutor v. Dominic Ongwen*, Notice of the Prosecution's Completion of Evidence Presentation, ICC-02/04-01/15-1225, T.Ch. IX, 13 April 2018.

²*Prosecutor v. Dominic Ongwen*, Document Containing the Charges, ICC-02/04-01/15-375-AnxA-Red, Pre-T.Ch. II, 22 December 2015 (hereinafter DCC).

brutality, culminating with the statement that Ongwen had committed atrocities with ‘enthusiasm’.³ Even though Ongwen had himself been victimized by the LRA as a child, the Prosecutor’s case presented him as one of the most cruel perpetrators tried at the International Criminal Court (ICC or the Court). *Ongwen* transformed the Ugandan investigation, which had not produced results for over a decade, into a symbol of the ICC’s ‘crucial’ importance as a court of last resort.⁴ This article proceeds to analyse whether the case also managed to communicate in a meaningful way the complexities of mass atrocities in Northern Uganda and Ongwen’s personal experiences.

As confidence in the retributivist or deterrent potential of international criminal law (ICL) has gradually diminished, international criminal justice is said to have taken an ‘expressivist turn’, with many scholars examining the potential and the limits of international trials to serve as a tool for condemning mass atrocities as socially unacceptable.⁵ On the one hand, it has been suggested that by symbolizing the wrongfulness of such crimes, international trials could instil norms of non-violent behaviour.⁶ On the other hand, the rigid categories of ‘victims’ and ‘perpetrators’, inherent to the Western legal tradition on which ICL is based, have been argued to preclude a nuanced discussion of the interplay between structure and agency in international crimes⁷ and hamper the receptiveness of ICL’s ‘messages’ within local communities.⁸

This article makes an important empirical contribution to the lively theoretical debate on expressivism and its limits, by examining in detail the ‘messages’ that were communicated by the ICC-OTP in the *Ongwen* case in view of the ICC’s pragmatic considerations as a judicial institution embedded within international politics. While the analysis also makes references to the arguments presented by the defence and the judges, more specifically with reference to Ongwen’s victim-perpetrator status, the article mainly focuses on the Prosecutor’s allegations. The persuasiveness of the Prosecutor’s arguments is not preordained and the defence could significantly challenge it – indeed, the ability to present both sides to the story has been deemed an important virtue of the liberal trial.⁹ Nevertheless, the ICC-OTP is an actor of crucial significance for understanding ICL’s expressivist potential and its limits. The communicative value of the Prosecutor’s arguments far exceeds the field of legal experts because the Prosecutor is the actor who most often addresses the general public through the media, essentially acting as ‘the face of the court’.¹⁰ Furthermore, the Prosecutor has been described as the ‘*principal strategist*’ of

³Prosecutor v. *Dominic Ongwen*, Trial Transcript, ICC-02/04-01/15-T-26-ENG, T.Ch. IX, 6 December 2016 (hereinafter Transcript 26), at 61, lines 14–15. *Prosecutor v. Dominic Ongwen*, Trial Transcript, ICC-02/04-01/15-T-27-ENG, T.Ch. IX, 7 December 2016 (hereinafter Transcript 27), at 11, lines 17–18.

⁴Human Rights Watch, ‘ICC: First Lord’s Resistance Army Trial Begins’, 5 December 2016, available at www.hrw.org/news/2016/12/05/icc-first-lords-resistance-army-trial-begins.

⁵B. Sander, ‘The Expressive Turn of International Criminal Justice: A Field in Search of Meaning’, (2019) 32 LJIL 851. See M. Drumbl, *Atrocity, Punishment, and International Law* (2007), at 173–4; R. Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’, (2007) 43 *Stanford Journal of International Law* 39, at 83–4; C. Stahn, ‘Between “Faith” and “Facts”: By What Standards Should We Assess International Criminal Justice?’, (2012) 25 LJIL 251, at 279–80; M. Damaška, ‘What Is the Point of International Criminal Justice’, (2008) 83 *Chicago-Kent Law Review* 329, at 345.

⁶P. Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’, (2001) 95 *American Journal of International Law* 7, at 12–13; M. Aksenova, ‘Symbolism as a Constraint on International Criminal Law’, (2017) 30 LJIL 475, at 489–92.

⁷A. Branch, ‘Dominic Ongwen on Trial: The ICC’s African Dilemmas’, (2017) 11 IJTJ 30, at 34; M. Drumbl, ‘Victims who Victimise’, (2016) 4 *London Review of International Law* 217.

⁸M. Tripkovic, ‘Not in Our Name! Visions of Community in International Criminal Justice’, in M. Aksenova, E. van Sliedregt and S. Parmentier (eds.), *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (2019), 165.

⁹M. Osiel, ‘Making Public Memory, Publicly’, in C. Hesse and R. Post (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia* (1999), 217, at 249.

¹⁰S. Kochhar and M. Hieramente, ‘Of Fallen Demons: Reflection on the International Criminal Court’s Defendant’, (2016) 29 LJIL 223, at 237.

international criminal justice – selecting the suspects, the charges, and the scope of the cases.¹¹ The defence builds its case in response to the prosecution's allegations and its arguments are directly affected by the scope and volume of the prosecution's arguments.¹² Consequently, a detailed analysis of the Prosecutor's arguments serves as an important starting point for empirical research on expressivism in ICL and future research should further examine the role of the defence's arguments.

Few important studies have observed the international Prosecutor's communicative power to impact public perceptions of the defendant and the nature of violence, but the analysis has generally been limited to the Prosecutor's public declarations and the trial's opening statement.¹³ This article contributes to the literature by examining the communicative potential of those aspects of the prosecutorial discretion that have largely escaped rigorous analysis. The Prosecutor selects the charges and modes of liability against the defendant¹⁴ and decides whether and how to present certain evidence and what questions to pose to witnesses.¹⁵ All of these prosecutorial decisions impact the image of the defendant and communicate a message regarding the complexities of violence to the Court's broader audience. Consequently, along with the Prosecutor's opening statement, this article examines the arrest warrant, the Document Containing the Charges (DCC) against the accused, other ICC-OTP submissions, and the Prosecutor's witness questioning at trial.

Ongwen is a particularly intriguing case study to examine the expressivist aspirations of ICL in practice because of the accused's victim-perpetrator identity. On the one hand, the victim-perpetrator presents an opportunity for engaging with the complexities of mass atrocities and expressing not just condemnation, but an attempt at understanding the broader causes of violence at the international courtroom.¹⁶ On the other hand, pragmatic considerations, such as the challenges of apprehending suspects at the ICC, could render the case instrumental to demonstrating the Court's ability to 'put an end to impunity' for mass atrocities.¹⁷ The latter scenario is more likely to involve an excessive emphasis on the culpability of the defendant available for trial than a nuanced reading of the complexities of violence. The peculiar nature of the *Ongwen* case thus makes it an appropriate case study for examining the message that the ICC ends up projecting more generally in its cases: if even victim-perpetrators such as *Ongwen* are excessively dehumanized for the purpose of demonstrating the importance of the Court's work, it appears unlikely that the ICC-OTP would demonstrate sensitivity to the defendant's background circumstances in cases against 'ordinary' perpetrators who have not been formerly victimized.

Based on a comprehensive analysis of the charges, the modes of liability and the overall Prosecutor's case narrative in *Ongwen*, this article suggests that the limited possibilities for apprehending suspects and the dependency on government co-operation for investigations have resulted in the excessive stigmatization of *Ongwen* as the 'cause' of crimes committed in Northern Uganda. This has occurred without due regard for the *degree* of his alleged involvement in those crimes compared to other LRA commanders, or the role of other actors in the conflict,

¹¹L. Reydam, J. Wouters and C. Ryngaert, 'Introduction', in L. Reydam, J. Wouters and C. Ryngaert (eds.), *International Prosecutors* (2012), 1, at 2 (emphasis added).

¹²S. Vasiliev, 'Trial', in Reydam et al., *ibid.*, 700, at 731.

¹³See Kochhar and Hieramente, *supra* note 10; S. Mohamed, 'Of Monsters and Men: Perpetrator Trauma and Mass Atrocity', (2015) 115 *Columbia Law Review* 1157; S. Stolk, 'A Sophisticated Beast? On the Construction of an "Ideal" Perpetrator', (2018) 29 *EJIL* 677; E. Bikundo, 'The International Criminal Court and Africa: Exemplary Justice', (2012) 23 *Law Critique* 21; S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', (2011) 21 *EJIL* 941.

¹⁴K. Heller, 'The Role of the International Prosecutor', in C. Romano, K. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* (2014), 669, at 678–9.

¹⁵Vasiliev, *supra* note 12, at 714.

¹⁶Bikundo, *supra* note 13, at 30.

¹⁷1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Preamble.

such as the Government of Uganda (GoU) and the Uganda People's Defense Forces (UPDF). Following the deaths of several LRA suspects and the diminishing prospects of apprehending Joseph Kony, the case against Dominic Ongwen has transformed into a symbolic prosecution against the entire LRA, which has resulted in Ongwen's disproportionate stigmatization. Ongwen was neither the most senior, nor the most famous LRA member. Yet, by bringing 70 charges against him and alleging that Ongwen had perpetrated rather than assisted those crimes, the ICC-OTP presented Ongwen as one of the most notorious and ferocious perpetrators of crimes in Northern Uganda. Meanwhile, the significance of Ongwen's own childhood victimization as a child soldier was obscured. In effect, while the ICC Prosecutor could finally demonstrate the importance of its symbolic Ugandan investigation, the potential for expressing the complexities of violence and suffering has been precluded in *Ongwen*.

The article is structured as follows: Section 2 engages with the literature on ICL's expressivist aspirations; Section 3 discusses the ICC-OTP's institutional need to demonstrate the importance of its work; Section 4 examines the excessive dehumanization and its implications in *Ongwen* in terms of the number of charges against the accused, the characterization of his criminal responsibility, and the negation of Ongwen's past victimization, highlighting the seeming influence of the ICC's socio-political environment on the Prosecutor's case; and Section 5 concludes. This article does not claim that Ongwen does not bear criminal responsibility – this is yet for the Trial Chamber to determine. Nor does it argue that the prosecution has violated the ICC's legal requirements by emphasizing Ongwen's agency, rather than the structural causes of violence. In fact, as will be discussed, the excessive stigmatization of the defendant is enabled by the rigid legal categories. Instead, by illuminating the significant challenges to obtaining expressivism in a meaningful sense in ICL, this article calls for greater sensitivity to the messages that are being communicated through international trials.

2. ICL's expressivist aspirations: Condemning international crimes

Attempts to justify international trials on the same grounds as domestic criminal law have seemingly failed due to the peculiar nature of international crimes.¹⁸ Retribution – punishing the guilty according to their just dessert – is among the most straightforward purposes of criminal law,¹⁹ but balancing the wrongs of mass atrocities with punishment is said to be 'unthinkable'²⁰ as 'no punishment can fit the most horrendous international crimes'.²¹ Further attempts have been made to justify international trials as contributors to the deterrence of mass atrocities.²² However, the low prospects of being prosecuted by an international tribunal are considered unlikely to enter the rational calculations of individual actors.²³

Such obstacles have led an increasing number of scholars to consider a justification which appears especially fitting in the ICL context: the 'expressivist'²⁴ or 'symbolic' power of punishment.²⁵ From this perspective, international prosecutions strengthen the 'faith in the rule of law among the general public'.²⁶ This is said to occur by framing the judgments of international

¹⁸I. Tallgren, 'The Sensibility and Sense of International Criminal Law', (2002) 13 EJIL 561; Sloane, *supra* note 5, at 44.

¹⁹H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1964), at 254.

²⁰K. Ambos, *Treatise on International Criminal Law. Vol. 1: Foundations and General Part* (2013), at 68.

²¹Sloane, *supra* note 5, at 81. See also D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 569, at 575.

²²Akhavan, *supra* note 6; T. Meron, 'From Nuremberg to the Hague', (1995) 149 *Military Law Review* 107, at 110–11.

²³D. Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', (1999) 23 *Fordham International Law Journal* 473, at 481.

²⁴Sander (2019), *supra* note 5; Drumbl (2007), *supra* note 5, at 173–4; Sloane, *supra* note 5, at 83–4; Stahn, *supra* note 5, at 279–80.

²⁵Aksenova, *supra* note 6.

²⁶Drumbl (2007), *supra* note 5, at 173. See also Sloane, *supra* note 5, at 44; M. Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997), at 18.

tribunals as a *symbol* of the universal condemnation of mass atrocities that is *relatable* to the general audience.²⁷ The symbolic power of international trials is argued to facilitate lawful behaviour within the general public, regardless of the actual risk of facing prosecution.²⁸ Hence, expressivism could be understood as a form of ‘pre-deterrence’,²⁹ or ‘positive general prevention’, which, by affecting the *beliefs* of the spectators of international trials about what is right and wrong, would prevent atrocities in the long run.³⁰ Thus, expressivism avoids the difficulties of apprehending suspects that render the classical criminal justice goals of retribution and deterrence difficult to obtain in ICL, as the trials of even a few individuals could communicate the wrongfulness of international crimes.³¹

But the communicative power of international punishment has not always been interpreted in ‘benign terms’.³² Due to the difficulties of apprehending suspects of mass atrocities and the media attention surrounding international trials, the few available defendants are at risk of being stigmatized as the ‘enemies of mankind’ or ‘enemies of all humanity’.³³ The excessive stigmatization of all defendants would express the message that an ‘ordinary’ human being could never become implicated in such conducts. Indeed, it has been suggested that the general public appears to prefer to receive *that* message.³⁴ Yet, criminological research has suggested that it does not take ‘intrinsically evil people’ to commit atrocious crimes,³⁵ reflecting on Hannah Arendt’s early observations on the ‘banality of evil’.³⁶ Mass atrocities have generally been explained with *the combined effect* of agency – the choice to act in a particular manner – and structural factors – e.g., human beings’ general predisposition to obedience and conformity with group norms, and the existence of harsh conditions of life.³⁷ Furthermore, it has been observed that during mass atrocities, individual persons seldom fit a particular category, such as ‘victim’, ‘perpetrator’, or ‘bystander’.³⁸ Those roles are often ‘*accumulated*’ as individuals act in a different manner according to the fast-changing situation.³⁹ Presenting all defendants as sadistic and delinquent could obstruct the ‘pre-deterrence’ impact of international trials, by reassuring the general public that they could never be a part of mass atrocities.

The nature of criminal trials, however, does not appear particularly suited for reflecting upon the interplay between agency and structure in mass atrocities. The central question of interest at trial is *whether*, not *why*, the defendant has committed the crime.⁴⁰ The preoccupation with determining the accused’s criminal responsibility has been argued to prevent a meaningful enquiry into the personal experiences of the survivors of mass atrocities, whether the latter participate in the proceedings as ‘defendants’⁴¹ or ‘victims’.⁴² The focus on agency has also been argued to obscure the role of structural

²⁷Aksenova, *supra* note 6, at 485.

²⁸Akhavan, *supra* note 6, at 12–13; Damaška, *supra* note 5, at 345.

²⁹Aksenova, *supra* note 6, at 491.

³⁰Ambos (2013), *supra* note 20, at 72.

³¹Aksenova, *supra* note 6, at 489.

³²Sander (2019), *supra* note 5, at 857.

³³Nouwen and Werner, *supra* note 13. See also L. Corrias and G. Gordon, ‘Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public’, (2015) 13 JICJ 97; I. Tallgren, ‘The Voice of the International: Who is Speaking?’, (2015) 13 JICJ 135, at 108.

³⁴A. Smeulers, ‘Historical Overview of Perpetrator Studies’, in A. Smeulers, M. Weerdesteijn and B. Holá (eds.), *Perpetrators of International Crimes: Theories, Methods, and Evidence* (2019), 11, at 21.

³⁵*Ibid.*, at 18.

³⁶Arendt, *supra* note 19.

³⁷Smeulers, *supra* note 34, at 18–19; S. Herrendorf, ‘Social Identity and International Crimes: Legitimate and Problematic Aspects of the “Ordinary People” Hypothesis’, in Aksenova et al., *supra* note 8, at 209–11.

³⁸K. Anderson, ‘The Margins of Perpetration Role-Shifting in Genocide’, in Smeulers et al., *supra* note 34.

³⁹*Ibid.*, at 136 (emphasis in the original).

⁴⁰T. Bouwknegt and A. L. Nistor, ‘Studying “Perpetrators” through the Lens of the Criminal Trial’, in Smeulers et al., *supra* note 34, at 111.

⁴¹*Ibid.*, at 91–2.

⁴²B. Sander, ‘The Expressive Limits of International Criminal Justice: Victim Trauma and Local Culture in the Iron Cage of the Law’, (2019) 19 *International Criminal Law Review* 1014, at 1021.

factors, such as colonialism, neo-liberal economic policies, and global capitalism in enabling the socio-economic conditions that are considered conducive to mass atrocities.⁴³

Nevertheless, suggestions have been made for obtaining expressivism within the limits of the international courtroom. For example, that the punishment of each defendant ‘should convey the right *degree* of international condemnation *relative* to other defendants’ at international courts.⁴⁴ It has often been argued that lower-level perpetrators should not be deemed as blameworthy as *leadership* figures,⁴⁵ or the ‘big fish’ in international criminal justice.⁴⁶ While the former are more likely to be involved in the physical commission of the crimes, the leaders are the ones who ‘set in motion’ the overall criminal plan.⁴⁷

Furthermore, to communicate the degree of the wrongfulness of a defendant’s conduct, it has been suggested that trials should better reflect the ‘individual circumstances of the defendant’.⁴⁸ The most challenging appears to be the case of victim-perpetrators who were conscripted as children, subjected to cruel treatment and forced to commit atrocious acts.⁴⁹ While the agency of victim-perpetrators is not denied, it has been described as a form of ‘constrained’ agency – victim-perpetrators are said to be choosing from a set of options constrained by their former victimization and/or ongoing vulnerability to victimization.⁵⁰ It is argued that, while such persons could bear criminal responsibility, their special personal circumstances could mitigate the degree of punishment⁵¹ and prevent the imposition of *the most* ‘radical’ degree of stigma.⁵² Hence, for ICL to succeed in expressing condemnation of mass atrocities in a meaningful way and instil norms of appropriate behaviour, international trials should not only condemn mass atrocities but also explain the complexity of violence,⁵³ and avoid the ‘easy’ stereotyping of all defendants as ‘enemies of mankind’.⁵⁴

The question of *who* is meant to receive that message, however, is equally problematic. One potential candidate is the ‘international community’ understood in a broad sense: as a ‘community of mankind’.⁵⁵ The members of the international community of mankind are considered to be related not on the basis of cultural or ethnic ties but simply as ‘fellow human beings’.⁵⁶ But the actual existence of such a community has been questioned.⁵⁷ Critical scholarship has perceived the invocation of the notions of ‘international community’ or ‘humanity’ not as a neutral act of identifying a *natural* world order, but as a political act of *creation* of a specific order by including some ideas and actors within the boundaries of ‘humanity’ and excluding others.⁵⁸ It has been observed that the ICL field has been dominated by Western liberal values, to the exclusion of more pluralist visions of justice.⁵⁹ In fact, ‘deep disagreement’ is said to exist internationally regarding

⁴³K. Clarke, ‘The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord’, (2011) 18 *Indiana Journal of Global Legal Studies* 7; C. Schwöbel-Patel, ‘Spectacle in International Criminal Law: The Fundraising Image of Victimhood’, (2016) 4 *London Review of International Law* 247, at 268–9.

⁴⁴Sloane, *supra* note 5, at 83 (emphasis in the original).

⁴⁵*Ibid.*; S. Stolk, ‘Cruel Men Can Do Kind Things and Kind Men Can Do Cruel Things: Reconsidering the Enemy of Humanity in Contemporary International Criminal Trial Discourse’, (2018) 47 *Netherlands Journal of Legal Philosophy* 149, at 152.

⁴⁶M. Osiel, *Making Sense of Mass Atrocity* (2009), at 2.

⁴⁷B. Bonafe, ‘Finding a Proper Role for Command Responsibility’, (2007) 5 *JICJ* 599, at 600.

⁴⁸Sloane, *supra* note 5, at 65.

⁴⁹Stolk, *supra* note 13, at 690–1; Bikundo, *supra* note 13, at 30.

⁵⁰Anderson, *supra* note 38, at 144.

⁵¹Sloane, *supra* note 5, at 87.

⁵²Stolk, *supra* note 45, at 154.

⁵³Drumbl, *supra* note 7, at 243–4.

⁵⁴Stolk, *supra* note 45, at 155.

⁵⁵Sloane, *supra* note 5, at 48.

⁵⁶A. Duff, ‘Authority and Responsibility in International Criminal Law’, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 589, at 601.

⁵⁷P. Roberts and N. McMillan, ‘For Criminology in International Criminal Justice’, (2003) 1 *JICJ* 315, at 330.

⁵⁸Corrias and Gordon, *supra* note 33, at 104–8; Tallgren (2015), *supra* note 33, at 138.

⁵⁹Corrias and Gordon, *ibid.*, at 108.

the appropriateness of international trials as means to address atrocities.⁶⁰ The structural inequality of the international realm, resulting in the lack of reciprocal participation in ICL's development and enforcement, is said to render the image of an international community 'defective'.⁶¹ Instead of a harmonious international community, ICL's uneven application has aroused 'suspicion' that international trials could serve powerful countries to exert control over less powerful ones.⁶²

Another logical recipients of the messages communicated by international trials appear to be the communities afflicted by violence.⁶³ In the aftermath of mass atrocities, however, the receptiveness of local communities could be precluded by the existence of 'internal' narratives whereby each community perceives itself as the victim of the crimes committed by other groups and evades responsibility for crimes committed by its own members.⁶⁴ It has been suggested that international trials could improve their communication with the afflicted communities by reaching out to them and explaining the reasoning behind judicial decisions.⁶⁵ Yet, comprehensive studies of the attitudes among afflicted populations have revealed that the expressivist potential of ICL has been lost to them, not because those communities fail to understand legal proceedings, but because of the entrenched feeling of a lack of local *ownership* over those proceedings.⁶⁶

Nevertheless, it has been acknowledged that there is room for reform that could, over time, improve the receptiveness of ICL's messages. Some scholars have suggested that the ICL field should become more open about its 'troubled past' marked by power inequalities and that the discipline should demonstrate a commitment to change.⁶⁷ This would involve departure from the uncritical application of Western norms or ideals⁶⁸ and demonstrating greater sensitivity to the plurality of local cultures and laws.⁶⁹ ICL's failure to accommodate non-Western norms of evidence and procedure has been described as 'far from inevitable',⁷⁰ which suggests a potential for reform.

Overall, ICL has been argued to hold an important potential to express the wrongness of mass atrocities. Yet, the expressivist goal has also been problematized in view of the failure of criminal trials to explain the role of structural factors in mass atrocities and the potential lack of receptiveness of ICL's messages. To enhance ICL's expressivist potential, it has been suggested that international trials should demonstrate the ability to differentiate between degrees of criminal responsibility for mass atrocities, sensitivity to the background circumstances of each defendant, and acceptance of non-Western perspectives of accountability. The following section discusses, however, the extent to which the pragmatic considerations of the ICC's institutional survival could challenge the realization of meaningful expressivism.

3. The ICC-OTP's pragmatic considerations: Demonstrating the Court's effectiveness

Significantly high expectations have been vested in the ICC, perceived as the culmination of a long process of developing ICL since Nuremberg.⁷¹ The Rome Statute has been considered the

⁶⁰B. Roth, 'Coming to Terms with Ruthlessness: Sovereign Equality, Global Pluralism, and the Limits of International Criminal Justice', (2010) 8 *Santa Clara Journal of International Law* 231, at 239.

⁶¹Tallgren, *supra* note 33, at 152–5.

⁶²K. Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice* (2019), 219.

⁶³Drumbl, *supra* note 5, at 175.

⁶⁴B. Sander, 'History on Trial: Historical Narrative Pluralism Within and Beyond International Criminal Courts', (2018) 67 *International & Comparative Law Quarterly* 547, at 570.

⁶⁵Damaška, *supra* note 5, at 349.

⁶⁶Tripkovic, *supra* note 8, at 174; Lohne, *supra* note 62, at 218.

⁶⁷Tallgren, *supra* note 33, at 154.

⁶⁸Roberts and McMillan, *supra* note 57, at 330. See also Corrias and Gordon, *supra* note 33, at 111.

⁶⁹Damaška, *supra* note 5, at 349.

⁷⁰Sander, *supra* note 42, at 1042.

⁷¹See E. Van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), 4–5; A. Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. I, 3, at 3 (hereinafter *The Rome Statute*).

‘pinnacle of the institutionalization and universalization’ of ICL enforcement.⁷² Since its creation, the permanent international penal court has aspired to be ‘about much more than just punishing the perpetrators’.⁷³

However, over time, those high expectations have increasingly appeared unrealistic and commentators have pointed to the end of the ‘honeymoon’ for international criminal justice.⁷⁴ After a decade, the Court had served just one judgment, despite having spent nearly one billion US dollars.⁷⁵ The ICC-OTP recently experienced several significant defeats, including the acquittals of Congolese political figure Jean-Pierre Bemba Gombo⁷⁶ and the former Ivoirian president Laurent Gbagbo.⁷⁷ While, in domestic settings, acquittals should still be perceived as a sign of a functioning court,⁷⁸ given the ICC’s promise to put an end to impunity for mass atrocities, such outcomes were not well-accepted by NGOs concerned that the victims’ suffering had not been recognized in those trials.⁷⁹ The Prosecutor has also experienced challenges in relation to opening investigations. Recently, ICC judges defined the requested *proprio motu* investigation in Afghanistan as ‘doomed to failure’⁸⁰ given the lack of state co-operation and the Prosecutor’s limited resources.⁸¹

The ICC’s operational struggles have resulted in the disenchantment of many with international criminal justice. The difficulties of apprehending suspects due to the lack of an ICC police force and the reluctance of the US, China, and Russia to join the Court have led commentators to conclude that the ICC was ‘an unworkable ide[a] in the world we live in’.⁸² Even proponents of the Court have cautioned that at the current rate of investigations and prosecutions the ICC risks remaining a ‘ruined monument to lost illusions’.⁸³ NGOs, which had been among the most ardent advocates of the Court’s establishment,⁸⁴ perceived the Court’s inability to deliver results in the face of increasing demands for international justice as a threat to its legitimacy.⁸⁵ Scholars have observed that even

⁷²Cassese, *supra* note 71, at 18.

⁷³S. H. Song, ‘Remarks at the Opening Session’, 10 December 2012, at 3, available at www.icc-cpi.int/iccdocs/pids/statements/121210pgacap-iccspeech.pdf.

⁷⁴D. Luban, ‘After the Honeymoon. Reflections on the Current State of International Criminal Justice’, (2013) 11 JICJ 505; B. Sander, ‘International Criminal Justice as Progress: From Faith to Critique’, in M. Bergsmo et al. (eds.), *Historical Origins of International Criminal Law* (2015), Vol IV, 749, at 774.

⁷⁵J. Silverman, ‘Ten years, \$900m, one verdict: Does the ICC cost too much?’, *BBC*, 14 March 2012, available at www.bbc.co.uk/news/magazine-17351946.

⁷⁶*Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo, ICC-01/05-01/08-3636-Red, A.Ch., 8 June 2018 (hereinafter *Bemba Decision*).

⁷⁷*Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Delivery of Decision, ICC-02/11-01/15-T-232-ENG, T.C. I, 15 January 2019 (hereinafter *Gbagbo and Blé Goudé Decision*).

⁷⁸M. Jackson, ‘Commanders’ Motivations in Bemba’, *EJIL:Talk!*, 15 June 2018, available at www.ejiltalk.org/commanders-motivations-in-bemba/.

⁷⁹Amnesty International, ‘CAR: Acquittal of Bemba a blow to victims’, 8 June 2018, available at www.amnesty.org/en/latest/news/2018/06/car-acquittal-of-bemba-a-blow-to-victims/; Coalition for the ICC, ‘Côte d’Ivoire: Laurent Gbagbo and Charles Blé Goudé Acquitted by ICC and Released on Conditions’, 16 January 2019, available at www.coalitionfortheicc.org/news/20190116/cote-divoire-laurent-gbagbo-and-charles-ble-goude-acquitted-icc.

⁸⁰*Situation in the Islamic Republic of Afghanistan*, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan’, ICC-02/17-33, Pre-T.Ch. II, 12 April 2019, para. 90.

⁸¹*Ibid.*, paras. 94–5.

⁸²D. Rieff, ‘The End of Human Rights? Learning from the failure of the Responsibility to Protect and the International Criminal Court’, *Foreign Policy*, 9 April 2018, available at foreignpolicy.com/2018/04/09/the-end-of-human-rights-genocide-united-nations-r2p-terrorism/.

⁸³M. Ignatieff, ‘International Justice Possible Only When in the Interest of Powerful States’, *ICTJ*, 9 February 2015, available at www.ictj.org/debate/article/justice-interests-of-powerful-states.

⁸⁴Z. Pearson, ‘Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law’, (2006) 39 *Cornell International Law Journal* 243.

⁸⁵E. Evenson and J. O’Donohue, ‘The International Criminal Court at Risk’, *Open Democracy*, 6 May 2015, available at www.opendemocracy.net/en/openglobalrights-openpage/international-criminal-court-at-risk/.

ICC officials have recognized that expectations of what the Court could achieve should be ‘managed’.⁸⁶

In order to survive as an institution within such a challenging context, the ICC has to demonstrate the significance of not just international criminal justice, but also its own as ICL’s *necessary institutional embodiment*. According to the ICC’s current president:

Even if prevailing circumstances seem to make impunity possible for the meantime, perpetrators and their accomplices will – now – have to recognise that their impunity will always be actionably illicit in the eyes of the world . . . *as long as we have a permanent international criminal court that will ask questions of accountability* . . .⁸⁷

In such context, the defendants standing trial at the Court become instrumental to communicating the ICC-OTP’s ability to hold *at least* some persons accountable for mass atrocities.

The scarcity of available defendants and the ICC’s institutional interests significantly limit the potential of ICC trials to communicate the wrongfulness and complexity of mass atrocities in a meaningful manner. It has been suggested that the fewer perpetrators a tribunal tries, the more evil they *have to* appear.⁸⁸ Recognizing the ICC suspects as ‘enemies of mankind’ increases the Court’s chances of obtaining international co-operation in investigations and arrests.⁸⁹ Consequently, the small number of persons available for international trials could result in charging any defendant with as much destruction as possible.⁹⁰ Notably, high-level defendants have proven particularly challenging to prosecute at the ICC. The Prosecutor has so far failed to link leadership figures, such as Bemba and Gbagbo, to the crimes committed on the ground by their subordinates or supporters.⁹¹ The diminishing opportunities of convicting high-level defendants, risks subjecting the lower-ranking ones, who have been present on the ground and are more likely to be proven guilty, to bear an even higher proportion of the stigma associated with the collective conduct.

Another limitation to the expressivist potential of ICL stemming from the ICC-OTP’s pursuit of its institutional interests is the potential politicization of the messages sent to the aspired-to international community.⁹² It has been observed that the ICC is ‘entirely dependent’ on state co-operation to conduct investigations and apprehend suspects.⁹³ If the Court was to accommodate state interests by avoiding prosecutions against certain actors on which the ICC-OTP relies for co-operation, as many have suggested to be the case,⁹⁴ this could lead to focusing exclusively on the few available defendants as the ultimate causes of violence, without due regard to the multiplicity of actors involved in mass atrocities. The excessive stigmatization of the defendants could thus produce a simplistic representation of the reality of mass atrocities by juxtaposing the perceived ‘enemies of mankind’ – the few individuals selected for prosecution – against the ‘friends of the international community’ – the warring parties whose political and military interests align

⁸⁶S. Kendall, ‘Commodifying Global Justice: Economies of Accountability at the International Criminal Court’, (2015) 13 JICJ 113, at 130.

⁸⁷C. Eboe-Osuji, ‘Speech to the United Nations General Assembly by Judge Chile Eboe-Osuji’, 4 November 2019, at 8, available at www.icc-cpi.int/iccdocs/presidency/191104-ICC-President-speech-UNGA-eng.pdf (emphasis added).

⁸⁸Stolk, *supra* note 13, at 691 (emphasis added).

⁸⁹Nouwen and Werner, *supra* note 13, at 963.

⁹⁰A. Danner and J. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, (2005) 93 *California Law Review* 75, at 95.

⁹¹The *Bemba* Appeals Chamber found by majority that the accused’s material ability to control his subordinates as a ‘remote commander’ had not been established beyond reasonable doubt. *Bemba* Decision, *supra* note 76, paras. 171, 191–2. In *Gbagbo* the Prosecutor failed to establish that the former president had contributed to the crimes committed by his alleged supporters. *Gbagbo and Blé Goudé Decision*, *supra* note 77, at 3, lines 3–17.

⁹²Damaška, *supra* note 5, at 360–1.

⁹³D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (2014), 4.

⁹⁴*Ibid.*; S. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (2013); A. Branch, ‘Uganda’s Civil War and the Politics of ICC Intervention’, (2007) 21 *Ethics & International Affairs* 179; Nouwen and Werner, *supra* note 13.

with the ICC-OTP's investigation.⁹⁵ This article goes beyond the level of case selection and examines the seeming influence of the Prosecutor's dependency on government co-operation on the decisions concerning the *content* of the selected cases.

The rest of this article examines the limitations imposed by the ICC's pragmatic considerations on the expressivist potential of the *Ongwen* trial. On the one hand, being the only apprehended LRA suspect for over a decade, Ongwen presented the only tangible opportunity for the ICC-OTP to demonstrate effectiveness in relation to its symbolic first investigation in Uganda, which risked the defendant's excessive stigmatization. On the other hand, several factors would suggest the mitigation of Ongwen's stigmatization *if* the proportionality aspirations of expressivism were upheld – Ongwen's lower rank *vis-à-vis* the other LRA suspects and his abduction and victimization by the LRA at an early age. The presentation of the defendant in *Ongwen* then would be particularly elucidating for the limits of the expressivist aspirations of international criminal justice in practice. If the Prosecutor had engaged with the continuities of violence during Ongwen's life, that have transformed the former victim into an alleged perpetrator, and expressed condemnation of the defendant that is proportionate to his conduct, the trial could have communicated a strong message about the complexities of mass atrocities and resonated with the understandings of the conflict held by local communities in Northern Uganda. However, as will be discussed, the Prosecutor instead conferred upon the defendant the stigma associated with the LRA overall, seemingly as a result of the pragmatic decisions to demonstrate the ICC's ability to effectively prosecute notorious criminals.

The following section first analyses the practical challenges faced by the ICC-OTP during the Ugandan investigations, which resulted in the apprehension of only one LRA suspect – Dominic Ongwen – and the international pressure on the Court to deliver successful prosecutions, which appear to have influenced Ongwen's excessive stigmatization as *the* enemy of mankind in relation to the atrocities in Northern Uganda. Next, the section examines the various ways in which Ongwen's dehumanization has played out – in the selection of charges and the modes of Ongwen's alleged criminal responsibility, and in the reluctance to engage with the complexities of Ongwen's past victimization. The main implications observed are the seemingly disproportionate degree of the stigma associated with the LRA's overall criminal conduct that is currently vested upon Ongwen and the simplification of the roots of violence in Northern Uganda.

4. ICL expressivism v. ICC-OTP expressivism: The *Ongwen* case

4.1 The ICC's challenging socio-political environment

In its early days in 2003 the ICC-OTP received a referral letter from the GoU concerning crimes committed by the LRA against the Acholi civilian population in Northern Uganda.⁹⁶ This appeared to be a promising opportunity for successful prosecutions, as the ICC-OTP considered that self-referrals expressed states' 'political will' to co-operate in investigations.⁹⁷ In 2005, the Court issued arrest warrants against five LRA commanders: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen,⁹⁸ which became the highly symbolic first ICC case. From an expressivist perspective, the Prosecutor's original strategy appeared sound – bringing charges against several persons at various levels within the LRA command, which reflected the different degrees of their involvement in its criminal activities and implied a different

⁹⁵Nouwen and Werner, *ibid.*

⁹⁶Nouwen, *supra* note 94, at 114.

⁹⁷ICC-OTP, 'Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications', 2003, at 5, available at www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf.

⁹⁸*Situation in Uganda*, Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58, ICC-02/04-01/05-1-US-Exp, Pre-T.C. II, 8 July 2005 (hereinafter Arrest Warrants).

degree of condemnation. Rather than charging all these commanders with the same conduct, as will be discussed in the next section, each arrest warrant specified a different number of charges concerning crimes committed in the context of specific LRA attacks.

However, early signs of compromising proportionality by focusing excessively on one side of the conflict appeared in the selection of defendants. While the ICC-OTP declared its commitment to investigate all crimes,⁹⁹ it did not start proceedings against the government or the UPDF, stressing that the LRA's crimes were of higher gravity.¹⁰⁰ Yet, the government's policy of forcibly relocating the Acholi population into camps for internally displaced persons (IDPs) has had devastating consequences¹⁰¹ and UPDF abuses have been well documented.¹⁰² The decision to prosecute only the LRA raised concerns over politicizing justice.¹⁰³ While the OTP seemed to be following a pragmatic 'sequenced' approach – prosecuting firstly the cases made 'feasible' by the availability of government co-operation and then proceeding with the more challenging-to-investigate cases¹⁰⁴ – it did not bring charges against other actors within the Ugandan conflict.

Subsequent developments in the ICC's socio-political environment have made the recognition of potential government involvement in the Prosecutor's cases in general even more challenging. The ICC co-operation with the GoU and other African countries deteriorated over time. Disagreements between the ICC and the GoU began with the Juba peace talks between the government and the LRA in 2006¹⁰⁵ and intensified on a regional level after the Court issued arrest warrants against former Sudanese President Al-Bashir¹⁰⁶ and opened a *proprio motu* investigation in Kenya.¹⁰⁷ Despite the arrest warrants, the GoU hosted Al-Bashir twice,¹⁰⁸ and Uganda's President even stated that he no longer supported the ICC.¹⁰⁹ Many African governments appeared concerned with the stigmatization of only African leaders as the perpetrators of mass atrocities and the perception of ICC bias against Africa gained traction in regional discourses.¹¹⁰ The African Union increasingly challenged the ICC¹¹¹ and set out to create its own African Criminal Court.¹¹² Meanwhile, two ICC defendants united in a coalition and won the Kenyan elections on a platform which, *inter alia*, portrayed the ICC as a neo-imperialist institution,¹¹³ and in 2017 Burundi became the first country to leave the ICC.¹¹⁴

⁹⁹Statement by the Chief Prosecutor on the Uganda Arrest Warrants', 14 October 2005 (hereinafter Statement), at 2, available at www.icc-cpi.int/nr/rdonlyres/3255817D-fd00-4072-9F58-fdb869F9B7cf/143834/lmo_20051014_English1.pdf.

¹⁰⁰Statement at the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs', 24 October 2005, at 7, available at www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf.

¹⁰¹Branch, *supra* note 94, at 181.

¹⁰²Human Rights Watch, 'Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda', 2005, 24–35, available at www.hrw.org/sites/default/files/reports/uganda0905.pdf.

¹⁰³See Branch, *supra* note 94; Nouwen, *supra* note 94, at 114–16.

¹⁰⁴S. Rosenberg, 'The International Criminal Court in Côte d'Ivoire: Impartiality at Stake?', (2017) 15 JICJ 471.

¹⁰⁵Nouwen, *supra* note 94, at 124.

¹⁰⁶R. Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal', (2013) 14 *Melbourne Journal of International Law* 670.

¹⁰⁷G. Lugano, 'Counter-Shaming the International Criminal Court's Intervention as Neocolonial: Lessons from Kenya', (2017) 11 IJTJ 9.

¹⁰⁸L. Owor Ogora, 'Uganda's Ambiguous Relationship with the ICC Amidst Ongwen's Trial', *IJM*, 11 December 2017, available at www.ijmonitor.org/2017/12/ugandas-ambiguous-relationship-with-the-icc-amidst-ongwens-trial/.

¹⁰⁹'Walkout at Ugandan President's Inauguration over ICC Remarks', *Guardian*, 12 May 2016, available at www.theguardian.com/world/2016/may/12/walkout-at-ugandan-presidents-inauguration-over-icc-remarks.

¹¹⁰K. Mills, "'Bashir is Dividing Us": Africa and the International Criminal Court', (2012) *Human Rights Quarterly* 404, at 421.

¹¹¹Cole, *supra* note 106, at 687.

¹¹²C. C. Jalloh, 'The Nature of the Crimes in the African Criminal Court', (2017) 15 JICJ 799, at 809.

¹¹³Lugano, *supra* note 107, at 11.

¹¹⁴'Burundi Becomes the First Nation to Leave the International Criminal Court', *Guardian*, 28 October 2017, available at www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court.

The challenges of obtaining state co-operation, however, have not alleviated the pressure on the ICC-OTP, now into its second decade of operation, to demonstrate results. Not only did human rights activists demand prosecutions, but they demanded prosecutions *for a broad set of crimes*. The first ICC-OTP strategy, which consisted of ‘focused investigations’ targeting only a sample of crimes per case,¹¹⁵ proved unpopular with NGOs as it was seen to fail to fully reflect victims’ suffering.¹¹⁶

In such a turbulent context, Ongwen was apprehended in 2015. During the decade since the LRA arrest warrants were issued, the prospects of expressing the power of the rule of law by punishing the alleged perpetrators of the atrocities in Northern Uganda had been gradually decreasing. Lukwiya and Odhiambo had died,¹¹⁷ Otti was considered dead,¹¹⁸ and the prospects of capturing Kony were diminishing. Yet, Ongwen’s apprehension provided an opportunity for demonstrating the importance of the Ugandan investigation. Ongwen’s trial transformed the LRA cases from a failure of the ICC-OTP into a symbol of the Court’s persistence, as evident in Prosecutor Bensouda’s statements:

The wheels of justice *may turn slowly but turn, they surely will* . . . Let us embrace the independent and impartial judicial process offered by the Court as a means of bringing healing and closure for victims of mass crimes and to ensure the atrocities that devastated communities in Northern Uganda will never happen again.¹¹⁹

Furthermore, the *Ongwen* case could establish the Court’s effectiveness while avoiding further confrontations with African governments, as it involved a rebel instead of a state official. In fact, the GoU provided materials to support the charges, including intercepted LRA radio communications.¹²⁰ Ugandan agencies helped the prosecution to break the codes used by the LRA and identify commanders by their voices.¹²¹ Yet, the GoU’s bold decision to host Al-Bashir as the *Ongwen* proceedings were unfolding may have made the ICC-OTP cautious about losing Ugandan assistance.

This complex socio-political environment within which the ICC operates led to the instrumentalization of Ongwen as a means to demonstrate the effectiveness of the ICC-OTP and its potential for co-operation with African governments. However, this instrumentalization obstructed ICL’s expressivist aspirations by leading to Ongwen’s disproportionate stigmatization through the selection of charges and the characterization of his criminal responsibility, which ultimately cast Ongwen as the ‘cause’ of suffering in Northern Uganda.

4.2 The charges against Ongwen

The 2005 LRA arrest warrants included 33 counts of crimes¹²² in connection to six LRA attacks.¹²³ The arrest warrants demonstrated sensitivity to the degree of criminal responsibility of the

¹¹⁵ICC-OTP, ‘Report on Prosecutorial Strategy’, 14 September 2006, at 5–6, available at www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf.

¹¹⁶Human Rights Watch, ‘Joint letter to the Chief Prosecutor of the International Criminal Court’, 31 July 2006, available at www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern.

¹¹⁷ICC, ‘Case Information Sheet: Situation in Uganda, The Prosecutor v. Joseph Kony and Vincent Otti’, April 2018, available at www.icc-cpi.int/CaseInformationSheets/KonyEtAlEng.pdf.

¹¹⁸The Prosecutor officially confirmed his death at the *Ongwen* trial opening. Transcript 26, *supra* note 3, at 27, line 1.

¹¹⁹ICC, ‘Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, at a press conference in Uganda: justice will ultimately be dispensed for LRA crimes’, 27 February 2015, available at www.icc-cpi.int/Pages/item.aspx?name=otp-stat-27-02-2015-ug (emphasis added).

¹²⁰Transcript 26, *supra* note 3; at 42, lines 19–20.

¹²¹*Ibid.*, at 47, lines 24–5; at 48, lines 1–4.

¹²²Arrest Warrants, *supra* note 98, at 2.

¹²³*Situation in Uganda*, Warrant of Arrest for Joseph Kony Issued on 8 July 2005, as Amended on 27 September 2005, ICC-02/04-01/05-53, Pre-T.Ch. II, 27 September 2005 (hereinafter *Kony Arrest Warrant*), para. 13.

different suspects. As the persons holding the highest positions in the LRA, Kony¹²⁴ and Otti were charged with all counts in relation to all six attacks.¹²⁵ Odhiambo was charged with nine counts¹²⁶ and Lukwiya with three counts.¹²⁷ Ongwen's arrest warrant included seven counts of crimes in relation to one attack only – that on the Lukodi IDP Camp.¹²⁸ He was mentioned last when then Prosecutor Moreno-Ocampo discussed the case¹²⁹ and attracted the least attention among the LRA suspects. When Ongwen was apprehended, his case was severed from the case against the rest of the LRA suspects,¹³⁰ which enabled the Prosecutor to build a case specifically against Ongwen.

The 'narrative' of the case considerably transformed, seemingly as a result of the unavailability of other LRA suspects for trial.¹³¹ The new case against Ongwen had significant implications for the degree of stigma which the accused was to bear. In September 2015 the ICC-OTP filed a notice on the intended charges against Ongwen involving 67 counts.¹³² The final DCC included 70¹³³ – the largest set of charges at the ICC. The number of charges was remarkable. For comparison, the *Milošević* trial, which raised much attention due to the high number of charges, involved 66 counts. *Ongwen* surpassed that number, even though the former case concerned a head of state and included allegations of crimes committed during three different wars, over nearly a decade.¹³⁴ While Ongwen had entered the ICC bearing the stigma of allegations concerning seven counts of crimes committed in the course of one attack, he now appeared as a person of the same rank as some of the most notorious international defendants.

The charges listed in the DCC against Ongwen differed from those in the arrest warrant not only in terms of quantity but also in quality. The DCC charges reflected crimes committed by the organization as a whole and bore particular resemblance to the charges against the leader – Kony. The narrative originally used by the ICC-OTP around Kony was redeployed for the case against Ongwen after his apprehension. Moreno-Ocampo had argued that Kony had ordered attacks against civilians and abductions of children, held abducted girls in his household, and distributed women to LRA commanders,¹³⁵ themes that became central to *Ongwen* in 2015. The Prosecutor added to the charges against Ongwen, attacks on three other IDP camps apart from Lukodi¹³⁶ and allegations of recruiting and using child soldiers.¹³⁷ The Prosecutor held further that Ongwen had personally abused women in his household¹³⁸ and distributed women to other LRA fighters.¹³⁹

¹²⁴*Ibid.*, para. 14.

¹²⁵*Situation in Uganda*, Warrant of Arrest for Vincent Otti, ICC-02/04-01/05-54, Pre-T.Ch. II, 8 July 2005, paras. 14–15.

¹²⁶*Situation in Uganda*, Warrant of Arrest for Okot Odhiambo, ICC-02/04-01/05-56, Pre-T.Ch. II, 8 July 2005 (hereinafter *Odhiambo Arrest Warrant*), paras. 13–14.

¹²⁷*Situation in Uganda*, Warrant of Arrest for Raska Lukwiya, ICC-02/04-01/05-55, Pre-T.Ch. II, 8 July 2005 (hereinafter *Lukwiya Arrest Warrant*), paras. 13–14.

¹²⁸*Situation in Uganda*, Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/05-57, Pre-T.Ch. II, 8 July 2005 (hereinafter *Ongwen Arrest Warrant*), paras. 13–14.

¹²⁹Statement, *supra* note 99, at 6.

¹³⁰*Prosecutor v. Dominic Ongwen*, Decision on the Confirmation of Charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, Pre-T.Ch. II, 23 March 2016, (hereinafter *Ongwen Confirmation*), para. 5.

¹³¹M. Gawronski, 'International Criminalisation as a Pragmatic Institutional Process: The Cases of Dominic Ongwen at the International Criminal Court and Thomas Kwoyelo at the International Crimes Division in the Situation in Uganda', in Aksenova et al., *supra* note 8, at 62.

¹³²*Prosecutor v. Dominic Ongwen*, Public Redacted Version of 'Notice of Intended Charges Against Dominic Ongwen' 18 September 2015, ICC-02/04-01/15-305-Conf, ICC-02/04-01/15-305-Red2, T.Ch. IX, 27 May 2016.

¹³³DCC, *supra* note 2.

¹³⁴O. Kwon, 'The Challenge of an International Criminal Trial as Seen from the Bench', (2007) 5 JICJ 360, at 362.

¹³⁵Statement, *supra* note 99, at 4–5.

¹³⁶DCC, *supra* note 2, para. 15, 27, and 54.

¹³⁷*Ibid.*, paras. 136–8.

¹³⁸*Ongwen Confirmation*, *supra* note 130, para. 102.

¹³⁹DCC, *supra* note 2, para. 133.

Overall, the new charges were no longer limited to one attack, but reflected *patterns* of LRA criminality: systemic attacks, abductions of children, and the abuse of women.

The expansion of the set of charges against Ongwen, which also occurred in other ICC cases (albeit not to the same degree),¹⁴⁰ seemed to be influenced by the calls of human rights activists demanding the condemnation of specific crimes at the ICC. The OTP was highly criticized for excluding sexual and gender-based crimes (SGBC) from the charges in *Lubanga*.¹⁴¹ The lack of stigmatization at the Court of such crimes has been perceived by gender justice advocates as signalling that SGBC are of lesser importance than other international crimes.¹⁴² By contrast, the *Ongwen* charges have served to condemn a large set of SGBC. The Prosecutor expanded the SGBC charges by adding allegations of the crime of 'forced marriage' *in addition* to those of sexual slavery.¹⁴³ The Special Court for Sierra Leone had left an inconclusive legacy regarding the crime, with some Chambers treating it as a distinct crime and others as subsumed within the notion of sexual slavery.¹⁴⁴ In *Ongwen*, the ICC judges agreed with the Prosecutor that forced marriage was a distinct crime,¹⁴⁵ which was perceived as an achievement for gender justice and earned NGOs' valuable approval.¹⁴⁶

While charging Ongwen with so many SGBC might signal to NGOs that the ICC-OTP is *able* to successfully prosecute such crimes, it obstructs the socio-pedagogical aspirations to express the wrongfulness of such crimes. The focus of the case shifted from the actual events – Ongwen's alleged violence against his wives – to abstract categories such as 'enslavement', 'sexual slavery', and 'forced marriage', the difference between which would be probably hard to discern by a non-specialist audience. The excessive stigmatization of Ongwen as the alleged perpetrator of SGBC through such charging practices risks conveying the problematic message that a *human* being could never perpetrate such acts. By allowing the case to be influenced by human rights NGOs' politics, the ICC-OTP (intentionally or not) impeded its socio-pedagogical potential.

From an expressivist perspective, the significant stigmatization resulting from the large set of charges against Ongwen could have been offset by ensuring that it was proportionate to the defendant's degree of criminal responsibility for the overall LRA criminal conduct. Yet, it is not clear that has been the case. As observed by ICC judges, criminal responsibility for international crimes often *rises in tandem* with the defendant's rank.¹⁴⁷ Not only did the *Ongwen* DCC contain the same themes of crimes as the case against the LRA's infamous leader, but Ongwen ended up being charged with more than twice the number of charges as Kony.¹⁴⁸ While it is possible that Kony will one day stand trial at the ICC, it is unclear whether increasing the *quantity* of charges against the LRA's leader would make the charges against Ongwen seem proportionate

¹⁴⁰The number of charges against Bosco Ntaganda was increased from three to 18. *Prosecutor v. Bosco Ntaganda*, Document Containing the Charges, ICC-01/04-02/06-203-AnxA, Pre-T.C. I, 10 January 2014.

¹⁴¹Women's Initiatives for Gender Justice (WIGJ), *Legal Filings Submitted by the Women's Initiatives for Gender Justice to the International Criminal Court* (2010), at 98–104, available at iccwomen.org/publications/articles/docs/LegalFilings-web-2-10.pdf.

¹⁴²L. Green, 'First-Class Crimes, Second-Class Justice: Cumulative Charges for Gender-Based Crimes at the International Criminal Court', (2011) 11 *International Criminal Law Review* 529, at 532.

¹⁴³*Ongwen* Confirmation, *supra* note 130, para. 87.

¹⁴⁴H. Van der Wilt, 'Slavery Prosecutions in International Criminal Jurisdictions', (2016) 14 *Journal of International Criminal Justice* 269, at 278–81.

¹⁴⁵*Ongwen* Confirmation, *supra* note 130, para. 95.

¹⁴⁶L. Owor Ogora, 'Ongwen's Trial has Highlighted SGBV Crimes, Says Gender Activist in Uganda', *International Justice Monitor*, 9 January 2020, available at www.ijmonitor.org/2020/01/ongwens-trial-has-highlighted-sgbv-crimes-says-gender-activist-in-uganda/. WIGJ, 'Gender Report Card 2018', available at 4genderjustice.org/ftp-files/publications/Gender-Report_design-full-WEB.pdf, at 123.

¹⁴⁷*Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, Pre-T.Ch. I, 30 September 2008 (hereinafter *Katanga and Ngudjolo* Confirmation), para. 503.

¹⁴⁸Case Information Sheet, *supra* note 117.

because, in terms of the *quality* of charges, Ongwen already bears the stigma of standing trial for a variety of the most heinous LRA conducts.

Notably, the disproportionate charging is not *prima facie* a source of concern from a strictly legal perspective. International prosecutors are not obliged to charge different defendants consistently in relation to the same factual incidents.¹⁴⁹ New evidence could arise over time that supports adding charges, as specified in *Ongwen*.¹⁵⁰ Consequently, the analysis of *Ongwen* supports one of the main theoretical propositions made by the scholarship on expressivism – that the technical nature of the Western legal tradition poses an important limitation to the didactic potential of international trials.¹⁵¹

4.3 *Ongwen's criminal responsibility*

The degree of Ongwen's stigmatization was further increased when the Prosecutor alleged that the defendant was the *principal perpetrator* of the crimes committed by LRA troops under his command, rather than a mere *accessory* to them. The status of the principal perpetrator carries unique stigma.¹⁵² The Nuremberg and Tokyo tribunals did not distinguish between principals and accessories.¹⁵³ The UN tribunals were criticized for insufficiently differentiating between the criminal responsibility of the participants within a 'joint common enterprise'.¹⁵⁴ By contrast, ICC jurisprudence has distinguished between principal liability pursuant to Article 25(3)(a) ICC Statute and accessory liability pursuant to Article 25(3)(b)-(d) ICC Statute.¹⁵⁵ The ICC considers principals those who have decisive influence on the crime's commission.¹⁵⁶ The person acting 'through another' person, the 'indirect perpetrator', is considered a principal perpetrator even if she is not the physical perpetrator.¹⁵⁷

The ICC's differentiative approach generates a powerful discursive tool for presenting the defendant's criminal responsibility. To establish the indirect perpetrator's control over the crime, the ICC uses the control over an organization (*Organisationsherrschaft*) theory.¹⁵⁸ The indirect perpetrator should control a hierarchical power apparatus with numerous subordinates, to ensure that her orders would be carried out 'if not by one subordinate, then by another'.¹⁵⁹ The physical perpetrator thus becomes 'a mere gear' in a machine controlled by the indirect perpetrator – the mastermind.¹⁶⁰ This mechanized model, which corresponds with the image of anonymous bureaucracies indulging in mass atrocities created in the aftermath of the Second World War,¹⁶¹ dehumanizes both the physical perpetrators – who appear almost as 'soulless humans'¹⁶² – and the indirect perpetrator portrayed as a powerful mastermind with seemingly unhuman level of control over the rank-and-file. The unnatural image of the indirect perpetrator controlling a criminal organization is enhanced by the fact that, according to ICC judges, the act of issuing orders in any context different from such a criminal apparatus constitutes merely

¹⁴⁹Sander, *supra* note 64, at 599.

¹⁵⁰Transcript 26, *supra* note 3, at 41, line 22.

¹⁵¹Sander, *supra* note 42, at 1017.

¹⁵²Van Sliedregt, *supra* note 71, at 73.

¹⁵³A. Eser, 'Individual Criminal Responsibility', in Cassese et al., *supra* note 71, at 781.

¹⁵⁴J. Ohlin, 'Joint Intentions to Commit International Crimes', (2011) 11 *Chicago Journal of International Law* 693, at 715.

¹⁵⁵*Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, Pre-T.Ch. I, 29 January 2007 (hereinafter *Lubanga Confirmation*), para. 320.

¹⁵⁶Van Sliedregt, *supra* note 71, at 71–2.

¹⁵⁷*Ibid.*, at 63–4.

¹⁵⁸*Katanga and Ngudjolo Confirmation*, *supra* note 147, para. 498.

¹⁵⁹*Ibid.*, para. 512.

¹⁶⁰*Ibid.*, para. 515.

¹⁶¹H. Van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility', (2009) 7 *JICL* 307, at 311–12.

¹⁶²N. Jain, 'The Control Theory of Perpetration in International Criminal Law', (2011) 12 *Chicago Journal of International Law* 159, at 175.

accessory liability.¹⁶³ Characterizing the defendant's criminal responsibility as principal liability based on the *Organisationsherrschaft* theory, thus, appears to confer a higher degree of stigma compared to accessory liability for issuing orders.

The OTP took this approach after Ongwen's apprehension. Many of the charges involved allegations that Ongwen had ordered his troops to commit crimes. The 2005 arrest warrant characterized Ongwen's criminal responsibility as accessory liability pursuant to Article 25(3)(b) of the ICC Statute.¹⁶⁴ In the DCC and at trial, the ICC-OTP continued to rely on evidence of Ongwen's orders, alleging that Ongwen had ordered his subordinates to pillage camps,¹⁶⁵ kill people,¹⁶⁶ burn houses,¹⁶⁷ abduct and beat women,¹⁶⁸ and conscript children into the Sinia brigade.¹⁶⁹ Unlike in the arrest warrant, however, in 2015 the ICC-OTP characterized Ongwen's orders in the first instance as principal liability in the form of indirect perpetration or indirect co-perpetration (acting jointly with other co-perpetrators)¹⁷⁰ in connection to 59 charges.¹⁷¹ Consequently, in the DCC the Prosecutor adopted the language of *Organisationsherrschaft*, the ICC approach to distinguishing orders constituting principal liability from orders constituting accessory liability. The LRA was presented as a mechanized hierarchical apparatus where troops automatically complied with the leadership's orders.¹⁷² The legal discourse of *Organisationsherrschaft* transformed Ongwen from a brigade commander into one of the LRA's masterminds. The original arrest warrant defined his criminal responsibility in simple terms: 'in his capacity as a Brigade Commander ... Dominic Ongwen ordered the commission of several crimes'.¹⁷³ The 2015 DCC presented a far more comprehensive narrative: 'He mobilized his *authority and power* in the LRA ... to *secure compliance* with his orders and *cause* his subordinates to carry out the conduct.'¹⁷⁴ By defining Ongwen's criminal responsibility as principal liability in the DCC, the Prosecutor presented him as one of the most notorious LRA commanders.

Yet, as with the selection of charges, Ongwen's principal perpetrator status appeared to carry disproportionate degree of stigmatization compared to other LRA commanders. As described in the arrest warrants, Ongwen had held lower rank than the other suspects. At the top of the LRA had been the 'High Command', followed by the commanders of its four brigades: Gilva, Sinia, Trinkle, and Stockree, each composed of a number of battalions.¹⁷⁵ Kony had been the leader, Otti – the Vice Chairman,¹⁷⁶ and Lukwiya – the Army Commander.¹⁷⁷ Odhiambo had served successively as commander of two brigades and as Deputy Army Commander.¹⁷⁸ As a Commander of the Sinia brigade,¹⁷⁹ Ongwen had occupied the lowest rank among the five.¹⁸⁰ Moreover, during the 2003 Pajule attack, included in the DCC, Ongwen had still been serving

¹⁶³Katanga and Ngudjolo Chui Confirmation, *supra* note 147, para. 517.

¹⁶⁴Ongwen Arrest Warrant, *supra* note 128, para. 30.

¹⁶⁵*Ibid.*, para. 17.

¹⁶⁶Transcript 26, *supra* note 3, at 65, lines 20–3. *Ibid.*, at 66, lines 12–13.

¹⁶⁷*Ibid.*, at 83, lines 24–5.

¹⁶⁸DCC, *supra* note 2, para. 133.

¹⁶⁹*Ibid.*, para. 139.

¹⁷⁰Katanga and Ngudjolo Confirmation, *supra* note 147, para. 492.

¹⁷¹DCC, *supra* note 2, at 12–14, 18–21, 25–8, 32–4, 43–5, 47–8.

¹⁷²*Ibid.*, paras. 10–11.

¹⁷³Ongwen Arrest Warrant, *supra* note 128, para. 10.

¹⁷⁴DCC, *supra* note 2, para. 13 (emphasis added).

¹⁷⁵ICC-OTP, 'The Investigation in Northern Uganda', 14 October 2005, at 5, available at www.icc-cpi.int/NR/rdonlyres/E996F31C-5AB0-43C7-B518-69A13844FBAD/143734/Uganda_PPpresentation.pdf (hereinafter *Investigation*).

¹⁷⁶Kony Arrest Warrant, *supra* note 123, para. 8.

¹⁷⁷Lukwiya Arrest Warrant, *supra* note 127, para. 8.

¹⁷⁸Odhiambo Arrest Warrant, *supra* note 126, para. 9.

¹⁷⁹Ongwen Arrest Warrant, *supra* note 128, para. 8.

¹⁸⁰*Investigation*, *supra* note 175, at 8.

as a battalion commander.¹⁸¹ Ongwen himself apparently considered that the highest degree of criminal responsibility fell on the leadership figure and stated at the trial opening that: ‘the charges I do understand as being brought against LRA but not me, because I’m not the LRA. The LRA is Joseph Kony’.¹⁸² Some civil society representatives in Northern Uganda also observed that more senior commanders had not been brought to trial and that Kony should instead be held responsible for LRA crimes.¹⁸³

To counter any doubts in Ongwen’s criminal responsibility as a principal perpetrator, at trial, the ICC-OTP specified that, instead of being ‘under Kony’s thumb’,¹⁸⁴ Ongwen had enjoyed full ‘discretion about how to carry out the attacks that his troops conducted’.¹⁸⁵ Yet, this does not imply that Ongwen had held the same *degree* of control over the LRA’s crimes, and hence should bear the same *degree* of stigma as Kony. Research into the LRA has found that for years the cult of Kony’s personality has been reinforced by the belief in his mystical supernatural powers and fear of his ruthless responses to defections.¹⁸⁶ Many LRA members believed that Kony could read their minds and anticipate their attempts to escape.¹⁸⁷ Ongwen had himself been abducted by the LRA as a child¹⁸⁸ and despite his progress within its hierarchy, it is difficult to imagine that the young commander had not feared Kony’s mystical powers or had enjoyed the same authority as the notorious leader. The prosecution acknowledged that Kony had been the LRA’s ‘undisputed leader’¹⁸⁹ and the original author of the orders to commit crimes,¹⁹⁰ which were then ‘relayed’ down the chain of command by ‘senior LRA commanders’.¹⁹¹ The ICC-OTP further noted that LRA commanders, including Ongwen, occasionally reported incorrectly the results of their attacks ‘to avoid Kony’s wrath’¹⁹² and that Ongwen had to request permission from Kony to conduct attacks.¹⁹³ Nevertheless, the Prosecutor maintained that Ongwen had also exerted power over the crimes’ commission, which justified charging him as a principal perpetrator,¹⁹⁴ regardless of the potential excess of stigma which that label carried by virtue of treating Ongwen’s criminal responsibility for LRA crimes on an equal footing with Kony’s. Therefore, the expressivist potential of the *Ongwen* case to explain the complexities of violence in Northern Uganda has been limited by the ethnocentric bias of Western legalism towards evidence demonstrating material control, rather than the mystical structures of power.¹⁹⁵

Another implication from the instrumentalization of the defendant for the purposes of the Court’s institutional interests was the simplified depiction of the politics of violence in Northern Uganda in the Prosecutor’s narrative. The ICC-OTP alleged that, as a principal

¹⁸¹Transcript 26, *supra* note 3, at 56, lines 15–17.

¹⁸²Transcript 26, *ibid.*, at 17, lines 4–6.

¹⁸³L. Owor Ogora, ‘Just or Unjust? Mixed Reactions on Whether Ongwen Should be on Trial’, *IJM*, 24 April 2017, available at www.ijmonitor.org/2017/04/just-or-unjust-mixed-reactions-on-whether-ongwen-should-be-on-trial/.

¹⁸⁴Transcript 27, *supra* note 3, at 9, line 25.

¹⁸⁵*Ibid.*, at 10, lines 4–5.

¹⁸⁶L. Cakaj, ‘The Lord’s Resistance Army of Today’, *Enough Project*, November 2010, at 6, available at enoughproject.org/files/publications/lra_today.pdf.

¹⁸⁷T. Allen and M. Schomerus, ‘A Hard Homecoming: Lessons Learned from the Reception Center Process in Northern Uganda: An Independent Study’, 2006, at 16, available at eprints.lse.ac.uk/28888/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_Schomerus_M_Hard_homecoming_Schomerus_Hard_homecoming_2014.pdf.

¹⁸⁸*Prosecutor v. Dominic Ongwen*, ‘Defence Brief for the Confirmation of Charges Hearing’, ICC-02/04-01/15-404-Red2, Pre-T.Ch. II, 3 March 2016 (hereinafter Defence Brief), para. 1.

¹⁸⁹*Ongwen Confirmation*, *supra* note 130, para. 56.

¹⁹⁰Transcript 26, *supra* note 3, at 62, lines 15–16; at 64, lines 11–14; at 65, lines 1–3.

¹⁹¹*Ibid.*, at 64, lines 16–17.

¹⁹²*Ibid.*, at 46, line 10.

¹⁹³*Ibid.*, at 83 lines 10–11.

¹⁹⁴DCC, *supra* note 2, para. 13.

¹⁹⁵Sander, *supra* note 42, at 1041.

perpetrator Ongwen had ‘cause[d]’ his subordinates to commit the crimes.¹⁹⁶ Consequently, the role of other actors apart from the LRA who had exacerbated the crisis in Northern Uganda was completely excluded from the Prosecutor’s narrative. One ICC-OTP witness testified that he was unaware of UPDF atrocities.¹⁹⁷ This triggered criticism from members of local communities, recollecting that the National Resistance Army (NRA), the UPDF’s predecessor, had committed crimes against civilians even before the LRA became operational,¹⁹⁸ such as the NRA abuses in Namokora¹⁹⁹ and in Burcoro.²⁰⁰ The exclusive focus on Ongwen as the ‘cause’ of suffering in Northern Uganda also obfuscated the role of government policies in enabling and perpetuating violence in terms of rendering civilians vulnerable to LRA attacks by encamping them in poorly protected villages.²⁰¹ The poor water and sanitation conditions in those camps also led to the spread of diseases. Reportedly, malaria and AIDS were the most frequent causes of death among civilians, with violence coming third.²⁰²

The narrow focus on LRA violence, with Ongwen stigmatized as the personification of that violence, might have strengthened state co-operation with the ICC-OTP, but it also expressed to the aspired-to international community the message that the roots of mass atrocities could be traced to the cruel plots of a few individuals,²⁰³ and resonated with the long history of portraying African warlords as ‘savages’.²⁰⁴ Burdening the defendant with a disproportionate degree of stigma for mass atrocities could undermine the confidence of local communities in international justice because the abyss between legal presumptions of decontextualized individual criminal responsibility and local recollections of suffering could be perceived by the affected communities as an ‘impunity gap’.²⁰⁵ Furthermore, the ICC-OTP’s reductionist approach alleviates any pressure on the aspired-to international community of mankind to take measures regarding systemic dimensions of suffering during mass atrocities, including by monitoring government policies and the implementation of humanitarian programs.

While the characterization of Ongwen’s criminal responsibility as a principal perpetrator might seem disproportionate and politicized, just as with the selection of charges, it did not violate the *legal* requirements of ICC jurisprudence. The Prosecutor complied with the requirement to present evidence of Ongwen’s control over the crime in order to charge him as a principal perpetra-

¹⁹⁶DCC, *supra* note 2, para. 13 (emphasis added).

¹⁹⁷*Prosecutor v. Dominic Ongwen*, Trial Transcript, ICC-02/04-01/15-T-117-Red-ENG, T.Ch. IX, 3 October 2017, at 7, lines 23–4.

¹⁹⁸L. Owor Ogora, ‘Community Members React to ICC Witness’s Testimony That He Did Not Know of Atrocities by Ugandan Government Soldiers’, *IJM*, 23 October 2017, available at www.ijmonitor.org/2017/10/community-members-react-to-icc-witness-testimony-that-he-did-not-know-of-atrocities-by-ugandan-government-soldiers/.

¹⁹⁹Justice and Reconciliation Project, ‘Occupation and Carnage Recounting Atrocities Committed by the NRA’s 35th Battalion in Namokora Sub-County in August 1986’, March 2014, available at justiceandreconciliation.com/wp-content/uploads/2014/04/Namokora-FN-Final-lq.pdf.

²⁰⁰Justice and Reconciliation Project, ‘The Beasts at Burcoro: Recounting Atrocities by the NRA’s 22nd Battalion in Burcoro Village in April 1991’, July 2013, available at justiceandreconciliation.com/wp-content/uploads/2013/07/Burcoro-Final_SM-2013-07-25.pdf.

²⁰¹As observed by the defence expert witnesses: *Prosecutor v. Dominic Ongwen*, Trial Transcript, ICC-02/04-01/15-T-218-ENG, T.Ch. IX, 27 May 2019, at 34–5. See also S. Perrot, ‘Northern Uganda: A “Forgotten Conflict”, Again? The Impact of the Internationalization of the Resolution Process’, in T. Allen and K. Vlassenroot (eds.), *The Lord’s Resistance Army: Myth and Reality* (2010), at 194–5.

²⁰²Ministry of Health, Uganda, ‘Health and Mortality Survey among Internally Displaced Persons in Gulu, Kitgum and Pader Districts, Northern Uganda’, July 2005, at 17, available at reliefweb.int/sites/reliefweb.int/files/resources/461F14718C3CD52885257077006E2350-govuga-uga-31jul.pdf.

²⁰³A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (2011), at 182.

²⁰⁴M. Mutua, ‘Savages, Victims and Saviors: The Metaphor of Human Rights’, (2001) 42 *HILJ* 201.

²⁰⁵K. Clarke, ‘Refiguring the Perpetrator: Culpability, History and International Criminal Law’s Impunity Gap’, (2015) 19 *IJHR* 592, at 609.

tor,²⁰⁶ but she did not have to prove that Ongwen had been a principal perpetrator at the same level as other LRA suspects. According to ICC jurisprudence, persons at various positions within an organization's hierarchy could be deemed principals to the respective crime.²⁰⁷ It has been acknowledged that *Organisationsherrschaft* fails to reflect on different degrees of control over the crime,²⁰⁸ which has important implications for defining the criminal responsibility of mid-level commanders. They have to be 'interchangeable' in order to secure the control of the top leadership over the organization, but their replaceability impedes their control over low-ranking members, as their orders could at any point be invalidated from above.²⁰⁹ Nevertheless, despite the failure of the ICC's legal requirements for establishing principal liability to reflect degrees of blameworthiness, and consequently, stigmatization, many have perceived those requirements to be better in comparison to those imposed by the Court's predecessors in terms of compliance with criminal law principles.²¹⁰ Thus, *Ongwen* has demonstrated once again that strict compliance with legal requirements does not protect the few available-for-trial defendants from excessive stigmatization and instrumentalization for the ICC-OTP's institutional interests, and could in fact preclude the expressivist potential of ICC trials.

4.4 The child soldier turned 'enthusiastic' perpetrator

Yet, despite the seeming impact of the Court's socio-political environment which had rendered Ongwen the only apprehended LRA commander and challenged the recognition of other actors in the trial narrative, the significant degree of stigmatization conferred upon Ongwen was not pre-ordained. According to the defence, Ongwen was himself abducted by the LRA at the age of nine.²¹¹ Not only did Ongwen reject the status of a perpetrator, but he considered himself an LRA victim.²¹² As the defendant did not fit the traditional 'perpetrator' concept, *Ongwen* challenged ICL's 'black-and-white' concepts of guilt and innocence.²¹³ It has been suggested that by virtue of Ongwen's peculiar background circumstances the Prosecutor would not engage in excessive stigmatization of that particular defendant.²¹⁴ Yet, Ongwen's objectification for the purpose of demonstrating the importance of the ICC-OTP's work resulted in such excessive stigmatization that the defendant no longer appeared 'human'.

The dehumanization of Ongwen was both passive and active. It was passive in the sense that neither the Prosecutor, nor the judges expressed willingness to engage with the question of the continuities of violence in the defendant's past. Rather, both judges and prosecution appeared interested in the matter only in relation to the question of whether, *regardless* of Ongwen's past victimization, he could still be held criminally responsible. It was briefly observed that Ongwen's past victimization did not absolve him from criminal responsibility for the crimes he had committed as an adult.²¹⁵ The defence's argument that Ongwen had acted under duress while at the LRA,²¹⁶ subjected to systematic indoctrination and threats made by other persons, including by

²⁰⁶DCC, *supra* note 2, paras. 9–13.

²⁰⁷*Prosecutor v. Bosco Ntaganda*, 'Decision on the Prosecution Application for a Warrant of Arrest', ICC-01/04-02/06-1-Red-tENG, Pre-T.Ch. I, 6 March 2007, para. 59.

²⁰⁸T. Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept', (2011) 9 JICJ 91, at 100.

²⁰⁹K. Ambos, 'Command Responsibility and Organisationsherrschaft: Ways of Attributing International Crimes to the "Most Responsible"', in A. Nollkaemper and H. van der Wilt (eds.), *System Criminality in International Law* (2009), 127, at 147.

²¹⁰K. Ambos, 'Joint Criminal Enterprise and Command Responsibility', (2007) 5 JICJ 159, at 181–2.

²¹¹Defence Brief, *supra* note 188, paras. 1–2.

²¹²Transcript 26, *supra* note 3, at 17, lines 12–13.

²¹³Branch, *supra* note 7, at 34; Drumbl, *supra* note 7, at 218.

²¹⁴See Stolk, *supra* note 45, at 154.

²¹⁵Transcript 26, *supra* note 3, at 37 lines 1–10; *Ongwen* Confirmation, *supra* note 130, para. 150.

²¹⁶Defence Brief, *supra* note 188, paras. 50–57.

Kony,²¹⁷ was examined in the same legalistic manner. The judges were interested only in whether the LRA's brutal regime had constituted 'a threat of *imminent death or continuing or imminent serious bodily harm*' against Ongwen,²¹⁸ quoting verbatim the Rome Statute requirements for establishing duress. Once it was established that the facts presented by the defence did not meet that legal standard,²¹⁹ their potential significance for shedding light on the system of indoctrination within which the defendant had been brought up appeared irrelevant for the judges. As Drumbl observes, the judges in *Ongwen* departed from their colleagues in *Lubanga* where the defendant was charged with recruiting and using child soldiers. In that case the judges emphasized the pernicious ongoing effect of early-age conscription in an armed group. By contrast, the judges in *Ongwen* examined the defendant's agency 'as if he had never been a child, let alone a child in the LRA'.²²⁰ Consequently, ICC judges appeared to recognize the impact of childhood victimization when it came to the victims of crimes, but not the defendant on the dock. Overall, Ongwen's past victimization was reduced to a potential hurdle to his prosecution, which once overcome, opened the door to treating the defendant as no different than any other accused of international crimes.

Establishing that Ongwen's past victimization was no bar to his prosecution, by implication established that there was no bar to his dehumanization. The prosecution actively maintained that not only did Ongwen's past fail to exculpate him, but the defendant also personally enjoyed committing crimes. The ICC-OTP emphasized Ongwen's promotions after successful attacks²²¹ and argued that he initiated operations²²² and abused women 'enthusiastically'.²²³ The Prosecutor underlined that, despite his own victimization, Ongwen used child soldiers. One witness testified that when he met the accused in 2006,²²⁴ Ongwen refused to release the children escorting him. Ongwen allegedly responded: 'You call them children. I call them my soldiers.'²²⁵ Not only was the impact of Ongwen's own abduction and upbringing within the LRA on his subsequent behaviour not examined, but his alleged conduct as an adult seemed to be interpreted as negating his past victimization. The image of the commander acting with 'unwavering loyalty and ferocity'²²⁶ countered that of the victimized ex-child soldier. Consequently, in the Prosecutor's narrative Ongwen emerged not merely as an ordinary perpetrator, rather than a victim-perpetrator, but as one of the cruelest perpetrators the Court had seen.

While the defendant's excessive dehumanization may have not been an intended strategy by the ICC-OTP, it seems to be influenced by the pressure of demonstrating the latter's ability to prosecute the figures most responsible for international crimes. Back in 2005, when the case concerned five LRA commanders, the ICC-OTP referred to Ongwen simply as a 'Brigade Commander'.²²⁷ It was only after Ongwen emerged as the most promising opportunity for completing a successful prosecution in relation to the Uganda investigation that the more vibrant, and more shocking, picture of his character was presented. The new image of Ongwen not only suggested that he was one of the persons most responsible for the LRA's atrocities and, hence, the trial against him could bring meaningful justice for those crimes, but also enabled the Prosecutor to reconcile the extraordinary number of charges and Ongwen's principal perpetrator status with his personal image. The high number of charges and the principal liability allegations simultaneously

²¹⁷*Ibid.*, paras. 54, 56.

²¹⁸*Ongwen* Confirmation, *supra* note 130, para. 154 (emphasis added).

²¹⁹*Ibid.*, para. 156.

²²⁰Drumbl, *supra* note 7, at 242.

²²¹Transcript 26, *supra* note 3, at 58, lines 16–18.

²²²*Ibid.*, at 61, lines 14–15.

²²³Transcript 27, *supra* note 3, at 11, lines 17–18.

²²⁴*Ibid.*, at 38, lines 18–23.

²²⁵*Ibid.*, at 38, lines 24–5.

²²⁶Transcript 26, *supra* note 3, at 26, lines 15–16.

²²⁷Statement, *supra* note 99, at 6.

constructed the image of the ferocious commander and were justified by it. None would have been sustained without the other.

Moreover, emphasizing Ongwen's ferocity had the effect of further decontextualizing violence and obfuscating the GoU's role, as his putative eagerness to commit crimes excluded questions about his political motivations. This image was transferred onto the overall LRA: the depoliticized depiction of violence as an end for the organization was made to appear natural since one of its masterminds had allegedly personally enjoyed committing crimes, even though according to expert commentators, the LRA had a commonplace political ideology, which it combined with indoctrination and fear to control its members.²²⁸ Scholars have defined the LRA as a rational organization, which employed violence as 'a means to an end rather than an end in itself'.²²⁹ However, acknowledging the LRA's complicated political relationship with civilians would have disrupted the narrative of the government's innocence.²³⁰ President Museveni had for decades referred to the rebels in Northern Uganda as primitive criminals, denying the conflict's political dimension and contrasting the opposition against the rational and modern government.²³¹ By suggesting that Ongwen has engaged in violence for its own sake and avoiding questions into his political beliefs, the ICC-OTP perpetuated that narrative.

Thus, Ongwen's ferociousness and pleasure in violence became the keystone that held the Prosecutor's case together. Focusing the narrative on those features of the defendant that *differentiate* him from all other persons who have lived in the same harsh environment but do not stand trial, enables the Prosecutor to make a more convincing case as to why that person deserves punishment. In *Ongwen*, the prosecution took the approach that enabled it to best structure the case against the defendant, a case that complied with ICL's narrow legal requirements for conducting a fair trial, but offered a simplified and partial reading of the causes of violence and suffering in Northern Uganda to the aspired-to international community. Whether that case would be also successful for the purposes of conviction, however, is up to the Trial Chamber.

5. Conclusions

This article problematized the expressivist aspirations of international criminal justice – a topic of lively theoretical debate – from the perspective of the socio-political reality within which the ICC-OTP operates. As the *Ongwen* case has demonstrated, the pragmatic needs of the ICC to secure its institutional survival significantly limit the opportunities for pursuing expressivism in a meaningful way at the Court. In 2017 the US and Ugandan military ended their search for Kony, described by one commentator as 'abandoning the international effort to bring him to justice'.²³² This could have been a major loss for the ICC-OTP, had the Court not already apprehended Ongwen. As a senior NGO official observed, Ongwen's trial constituted 'a significant first on justice for LRA atrocities'.²³³ The inability to apprehend any other LRA suspects, especially Kony, transformed Ongwen into the symbolic representative of the LRA's violent campaign at the Court, despite the fact that at the time relevant to the charges, Ongwen had held the lowest rank among the five suspects. While some commentators suggested that Ongwen's own victimization as a child

²²⁸E. Baines, 'Complex Political Perpetrators: Reflections on Dominic Ongwen', (2009) 47 *Journal of Modern African Studies* 163, at 170; C. Blattman and J. Annan, 'On the Nature and Causes of LRA Abduction: What the Abductees Say', in Allen and Vlassenroot, *supra* note 201, at 133.

²²⁹C. Dolan, *Social Torture: The Case of Northern Uganda 1986-2006* (2009), at 90; K. Titeca, 'The Spiritual Order of the LRA', in Allen and Vlassenroot *ibid.*, at 61.

²³⁰Branch, *supra* note 7, at 45.

²³¹S. Finnström, 'An African Hell of Colonial Imagination? The Lord's Resistance Army in Uganda, Another Story', in Allen and Vlassenroot, *supra* note 201, at 80.

²³²H. Cooper, 'A Mission to Capture or Kill Joseph Kony Ends, Without Capturing or Killing', *New York Times*, 15 May 2017, available at www.nytimes.com/2017/05/15/world/africa/joseph-kony-mission-ends.html.

²³³Human Rights Watch, *ICC: First Lord's Resistance Army Trial Begins*, *supra* note 4.

might reduce the stigma of being accused of international crimes,²³⁴ in practice it has been the other way around – the excessive dehumanization of Ongwen in the Prosecutor’s narrative has negated the significance of his personal experience. The exclusive focus on the LRA’s crimes was seemingly compounded by the need to sustain the co-operation of the GoU during the proceedings. In effect, Ongwen emerged from the Prosecutor’s narrative as the ‘cause’ of the crimes committed in Northern Uganda, which led to double excess in stigmatization – firstly, by symbolically embodying the criminal responsibility of the entire LRA for the crimes and, secondly, by absorbing the impact of other causes of suffering such as UPDF abuses and government policies, which had devastated the civilian population.

The Prosecutor’s arguments in *Ongwen* not only failed to explain the complexities of violence in Northern Uganda, but also to move away from the Western norms of narrow legal rationality in the assessment of background information. The legalistic approach of the case demonstrated in both the Prosecutor’s narrative and the Pre-Trial Chamber’s reasoning compounded the impact of the pragmatic considerations to demonstrate the Court’s effectiveness and further precluded the realization of expressivism in a meaningful manner. Each aspect of the Prosecutor’s case against Ongwen complied with the requirements of establishing individual criminal responsibility. The complications stem from what the law *does not* require from the prosecution. The OTP is free to bring as many charges as desirable as long as they are supported by sufficient evidence but is not required to ensure that the quantity or quality of charges is proportionate to the role of the accused within the respective criminal organization. In fact, from a strictly legalistic perspective, this could be resisted as an instance of politicization of the law. Similarly, the ICC-OTP could charge the defendant as a principal perpetrator if the elements of principal liability premised on the notion of *Organisationsherrschaft* are established, but the doctrine itself fails to differentiate between the degree of criminal responsibility of principals at different levels of the organization. The implications of the legalistic approach, however, are most evident in the reductionist nature of individual criminal responsibility – unless the specific background circumstances of each perpetrator constitute a bar to prosecution, those facts are irrelevant for the determination of the guilt or innocence of the accused. It is in the silence of the law that the socio-political challenges faced during international prosecutions play out and result in the excessive dehumanization of the accused.

The analysis of *Ongwen* suggest that a first step to obtaining ICL’s expressivist aspirations in a socially beneficial manner should involve modesty from the ICC-OTP, in terms of acknowledging the lower rank of certain defendants, in order to reflect their participation in the crimes in a more proportionate manner. A more significant step would involve the readiness to lose the co-operation of some governments – that would enable a more balanced narrative of the causes of suffering. The ICC’s socio-political environment might render such an approach significantly challenging but as *Ongwen* demonstrates, the strategy of decontextualizing violence and overemphasizing the accused’s agency might not be a particularly successful one for the Court either.

The ‘messages’ communicated by the ICC-OTP through the *Ongwen* proceedings have been received with mixed reactions. Different audiences, as varied as local communities, civil society organizations, and international scholarship, have questioned the expressivist value of the trial. Local communities in Northern Uganda have debated not only whether Ongwen should be held criminally responsible in the first place, but also whether the measures taken against him have been proportionate, considering the broader context of violence,²³⁵ and whether Ongwen should have been tried in Uganda instead.²³⁶ Scholarly works have also expressed concerns with the

²³⁴Stolk, *supra* note 45, at 154.

²³⁵Drumbl, *supra* note 7, at 240; Owor Ogora, *Just or Unjust*, *supra* note 183.

²³⁶L. Owor Ogora, ‘How the Trial of Dominic Ongwen Has Shaped Attitudes Toward International Criminal Justice in Uganda’, *International Justice Monitor*, 17 August 2017, available at www.ijmonitor.org/2017/08/how-the-trial-of-dominic-ongwen-has-shaped-attitudes-toward-international-criminal-justice-in-uganda/.

inability of the Prosecutor's narrative to engage in a meaningful way with Ongwen's victim-perpetrator identity.²³⁷

The *Ongwen* trial also sends a distorted message to the abstract 'international community of mankind': that atrocities, such as those committed in Northern Uganda, could only be perpetrated by someone exceptionally cruel and ferocious – a person who commits crimes with 'enthusiasm'. The effect of the defendant's stigmatization appears to be to 'ease the frustration' of the aspired-to international community by providing a simplistic explanation for otherwise incomprehensible events and to divert attention from the socio-political structures behind those events in which the general public might also be complicit.²³⁸

The *Ongwen* case further reaffirms the image of the 'enemy of mankind' as non-white, male, strong, gruesome, and particularly barbaric²³⁹ – an image produced by the overall selection of suspects at the Court. The Prosecutor's geographical focus on Africa has been defended on legal or pragmatic grounds²⁴⁰ but the selection of defendants has, nevertheless, been perceived by some as 'arbitrary' because the few Africans who have been prosecuted at the ICC do not have 'the monopoly on international criminality (not even in Africa)'.²⁴¹ The exclusive focus on the alleged conduct of the few African nationals put on trial has obfuscated the role of developed countries in perpetuating the economies of violence and structures of inequality contributing to the commission of mass atrocities.²⁴² While the geographical focus of the ICC-OTP's investigations has been gradually expanding, which could mitigate the association of the perpetrators of international crimes specifically with Africa, unless the Prosecutor engages with the complexities of violence peculiar to mass atrocities ICC trials will continue to produce simplistic narratives to the detriment of a few individuals.

Nevertheless, it would be misleading to suggest that the ICC's institutional interests and the narrow legalistic focus on personal guilt *inevitably* prevent meaningful expressivism. While the Prosecutor's ability to choose might be significantly constrained by the unavailability of state co-operation, the ICC-OTP still retains important power in formulating the messages that are being sent through international trials. To conclude that the excessive stigmatization of the few defendants available for trial is inevitable at the ICC would, therefore, absolve the OTP from any accountability for its choices regarding the selection of cases, their content and presentation. As the face of the Court, the ICC-OTP should take into consideration not only the legal implications of its arguments, but also their broader social impact. In fact, it might be in the ICC's institutional interests to do so, as this could enable it to improve its communication with local communities and the global audience more generally.

²³⁷Drumbl, *supra* note 7; Branch, *supra* note 7; Bouwknecht and Nistor, *supra* note 40, at 92–3.

²³⁸Tallgren, *supra* note 18, at 593–4; Bikundo, *supra* note 13, at 29.

²³⁹Schwöbel-Patel, *supra* note 43, at 256–7; Mutua, *supra* note 204.

²⁴⁰K. Ambos, 'Expanding the Focus of the "African Criminal Court"', in W. A. Schabas, Y. McDermott and N. Hayes (eds.), *Ashgate Research Companion to International Criminal Law: Critical Perspectives* (2012), 499, at 510–14.

²⁴¹Bikundo, *supra* note 13, at 28.

²⁴²Clarke, *supra* note 43.