

**A Judgment like a Spiderweb:
Catching Dominic Ongwen in the Language of the International
Criminal Court**

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Abstract

This article argues that the victim-perpetrator binary to which International Criminal Law (ICL) remains committed is maintained and legitimised by the language of the International Criminal Court (ICC) judgment against Dominic Ongwen, a former child soldier and brigade commander in the Lord's Resistance Army (LRA). Through minute, delicate choices, the judgment's language sustains and legitimises a fragile binary upon which its findings depend. Drawing on literary methods of close analysis, and thereby extending possibilities for theorising ICL, I argue that the judgment creates a spiderweb-like structure of descriptions of suffering. Representations of individual testimonies encourage empathy, delineating figures of victims. Such personal testimonies are constantly knotted to a sense of the general, enabling a perception of collective victimhood. Against this spiderweb of victimhood, the court's language casts one perpetrator. Ongwen stands in contrast, his complexities held at a distance from the reader's perceptions and empathy. Caught like a fly, Ongwen becomes isolated and entangled within the court's singular understanding of him. I present the ICC and its modes of operation as a powerful, patient spider, building this web and catching this fly by crafting its own language. Throughout my analysis, I point towards the injustice of the judgment's tendencies towards unifying victim experiences and separating one perpetrator. These tendencies may reduce the accuracy of ICL's representations of suffering, obscuring complexity and contradiction. This may limit the ICC's ability to find and tell truths that reflect the individual experiences of those whose hopes for recovery and reconciliation it wishes to answer.

Keywords: child soldiers, close analysis, International Criminal Court, International Criminal Law, judgment, legitimacy, Lord's Resistance Army, Ongwen, symbolic prosecution, victim-perpetrator binary

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Introduction

Dominic Ongwen: Do you agree that I'm the leader of the LRA? Do you agree that my life was not ruined?

Presiding Judge Bertram Schmitt: You are not in the position to ask the court questions... Do you make an admission of guilt with respect to any charge?

Ongwen: In the name of God, I deny all these charges in respect to the war in Northern Uganda.

– *Prosecutor v. Ongwen* (Trial Opening)²

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The cobweb pleading of this case and the cobweb strategy of pleading everything, adopting everything, your Honours, has helped to muddy notice in this case, complicating the case. But it's a straightforward case... The case is that they want you to hold Ongwen responsible for the conduct of Joseph Kony.

– Charles Taku, Defence Counsel,
Prosecutor v. Ongwen (Closing Statements)³

Victims on one hand, perpetrators on the other: a binary to which International Criminal Law (ICL) remains committed.⁴ But what if the International Criminal Court (ICC) makes findings about events in which it seems

² *Prosecutor v. Ongwen*, 'Trial opening – part II' (*International Criminal Court*, 6 December 2016) <<https://youtu.be/jZS17HtZnF4>> accessed 13 August 2021 07:10.

³ *Prosecutor v. Ongwen*, 'Closing statements by the defence – part II' (*ICC*, 12 March 2020) <<https://youtu.be/JyUnliVT8zA>> accessed 13 August 2021 14:55; *Prosecutor v. Dominic Ongwen* (Transcript: Closing Statements – Courtroom 3) ICC-02/04-01/15 (12 March 2020) 35–6.

⁴ Elisabeth Baumgartner, 'Aspects of victim participation in the proceedings of the International Criminal Court' (June 2008) 90(870) *International Review of the Red Cross* 409; Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 214; International Criminal Court, Public Information and Outreach Section, 'Institutional Video: ICL at a Glance' (*ICC*, 24 July 2019) <<https://www.youtube.com/watch?v=UfCiRtsUsr8>> accessed 16 August 2021; ICC, 'Victims' (*ICC*, 2021) <<https://www.icc-cpi.int/about/witnesses>> accessed 16 August 2021; ICC, 'Understanding the International Criminal Court' (*Public Information and Documentation Section, Registry, ICC*, 2021) 44 <<https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>> accessed 16 August 2021.

unclear who is who?⁵ This article argues that the language of the ICC judgment against Dominic Ongwen sustains the victim-perpetrator binary, legitimising the court's findings.⁶ Such legitimacy, some have argued, is particularly sought by ICL, as young law seeking to prove itself to the international community.⁷ The judgment's language choices represent a coherent, unified victim experience, encouraging the reader's empathy while drawing together individual accounts of suffering.⁸ According to ICC procedure, a single perpetrator is then depicted.⁹ The judgment's language choices position Ongwen in contrast to victims, empathy with his experiences inhibited, and his own voice silenced, refracted and recreated.¹⁰

⁵ Mark Kersten, 'We Need to Talk About Ongwen: The Plight of Victim-Perpetrators at the ICC' (*Justice in Conflict*, 19 April 2016) <<https://justiceinconflict.org/2016/04/19/we-need-to-talk-about-ongwen-the-plight-of-victim-perpetrators-at-the-icc/>> accessed 19 August 2021; Carse Ramos, 'Dominic Ongwen on Trial: Problematizing Definitional Boundaries and Exploring the Possibilities of Socialization' in Mark A. Drumbl and Justine C. Barrett (eds), *Research Handbook on Child Soldiers* (Edward Elgar Publishing 2019).

⁶ *Prosecutor v. Ongwen* (Trial Judgment) ICC-02/04-01/15 (4 February 2021).

⁷ David Kennedy, 'Law and Political Economy of the World' (2013) 26 *Leiden Journal of International Law* 7,8; Mégret, 'International Criminal Justice: A Critical Research Agenda' in Christine Schwöbel-Patel (ed), *Critical Approaches to International Criminal Law – An Introduction* (Routledge 2015) 17, 26; Schwöbel-Patel, 'The market and marketing culture of International criminal law', in Schwöbel-Patel (ed), *Critical Approaches to International Criminal Law - An Introduction* (Routledge 2015) 265, 276. See also: Valerie Arnould, 'The limits of international criminal justice: lessons from the Ongwen case' (*Open Democracy*, 27 January 2015) <<https://www.opendemocracy.net/en/limits-of-international-criminal-justice-lessons-from-ongwen-case/>> accessed 19 August 2021; Béatrice Bonafé and Micaela Frulli, 'Testing the legitimacy, consistency and credibility of the International Criminal Court' (March 2020) 2 *Questions of International Law* 1; Marieke de Hoon, 'The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy' (June 2017) 17 *International Criminal Law Review* 591; Asad Kiyani, 'Legitimacy, Legality, and the Possibility of a Pluralist International Criminal Law' in Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017); Silje Aambø Langvatn and Theresa Squatrito, 'Conceptualising and Measuring the Legitimacy of International Criminal Tribunals' in Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017); Sergey Vasiliev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press 2017); United Nations Secretary General, 'International Criminal Court's Success Will Be Legacy for Future Generations, Secretary-General Says at Inauguration of Its Permanent Premises' SG/SM/17685-L/3255 (*United Nations Meetings Coverage and Press Releases*, 19 April 2016) <<https://www.un.org/press/en/2016/sgsm17685.doc.htm>> accessed 19 August 2021;

⁸ Jodi Halpern and Harvey M. Weinstein, 'Rehumanizing the Other: Empathy and Reconciliation' (August 2004) 26(3) *Human Rights Quarterly* 561, 581; Karen Jenni and George Loewenstein, 'Explaining the Identifiable Victim Effect' (1997) 14(3) *Journal of Risk and Uncertainty* 235; Andreea Deciu Ritivoi, 'Reading Stories, Reading (Others') Lives: Empathy, Intersubjectivity, and Narrative Understanding' (2016) 8(1) *Storyworlds: A Journal of Narrative Studies* 51.

⁹ Claire Felter, 'The Role of the International Criminal Court' (*Council on Foreign Relations*, 23 February 2021) <<https://www.cfr.org/background/role-international-criminal-court>> accessed 17 August 2021; ICC, 'How the Court Works' (ICC, 2021) <<https://www.icc-cpi.int/about/how-the-court-works>> accessed 17 August 2021; Sofia Stolk, 'A Sophisticated Beast? On the Construction of an 'Ideal' Perpetrator in the Opening Statements of International Criminal Trials' (2018) 29(3) *European Journal of International Law* 677.

¹⁰ Nguh Nwei Asanga Fon, 'Hunter or hunted: The paradoxical evolution of the ICC' (*International Association for Political Science Students*, 26 April 2021) <<https://www.iapss.org/2021/04/26/hunter-or-hunted-the-paradoxical-evolution-of-the-icc-by-nguh-nwei-asanga-fon/>> accessed 24 August 2021; Liana Georgieva Minkova, 'Expressing what? The stigmatization of the defendant and the ICC's institutional interests in the *Ongwen* case' October 2020) 34(1) *Leiden Journal of International Law* 223.

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In the Ongwen case, the victim-perpetrator binary appears particularly precarious.¹¹ Ongwen was a surname Dominic invented, to protect himself and his family, on the day of his abduction into the Lord's Resistance Army (LRA) aged nine.¹² Ongwen grew up under the wing of LRA leader Joseph Kony, who remains at large.¹³ He rose to the position of brigade commander, contributing to the LRA's decades of atrocities that terrorised Northern Ugandan communities.¹⁴ After a trial like a 'long walk', according to defence counsel Odongo, Ongwen was convicted of 61 war crimes and crimes against humanity – including attacks upon civilians such as murder, torture, enslavement and pillaging, sexual and gender-based

¹¹ Kjell Anderson, 'Dominic Ongwen: "It is very difficult to balance all that"' (*Justice in Conflict*, 2 February 2021) <<https://justiceinconflict.org/2021/02/02/dominic-ongwen-it-is-very-difficult-to-balance-all-that/>> accessed 17 August 2021; Ilse Derluyn, Wouter Vandenhoe, Stephan Parmentier and Cindy Mels, 'Victims and/or perpetrators? Towards an interdisciplinary dialogue on child soldiers' 15(28) (2015) BMC International Health and Human Rights 1; Drumbl, 'Victims who victimise' (June 2016) 4(2) London Review of International Law 217; Drumbl, 'Getting' an Unforgettable Gettable: The Trial of Dominic Ongwen' (*Justice in Conflict*, 5 February 2021) <<https://justiceinconflict.org/2021/02/05/getting-an-unforgettable-gettable-the-trial-of-dominic-ongwen/>> accessed 17 August 2021; Diane Enns, *The Violence of Victimhood* (Penn State University Press 2012); Kersten, *supra* note 5; Ramos, *supra* note 5.

¹² Erin K. Baines, 'Complex Political Perpetrators: Reflections on Dominic Ongwen' (June 2009) 47(2) The Journal of Modern African Studies, 163, 169; Erin K. Baines and Ojok Boniface, 'Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen' (*Justice and Reconciliation Project Field Note 7*, July 2008) <http://justiceandreconciliation.com/wp-content/uploads/2008/07/JRP_FN7_Dominic-Ongwen.pdf> accessed 19 August 2021.

¹³ Anderson, 'Child victim, soldier, war criminal: unpacking Dominic Ongwen's journey' (*The Conversation*, 10 February 2021) <<https://theconversation.com/child-victim-soldier-war-criminal-unpacking-dominic-ongwens-journey-154850>> accessed 17 August 2021; Ledio Cakaj, 'The Life and Times of Dominic Ongwen, Child Soldier and LRA Commander' (*Justice in Conflict*, 12 April 2016) <<https://justiceinconflict.org/2016/04/12/the-life-and-times-of-dominic-ongwen-child-soldier-and-lra-commander/>> accessed 17 August 2021; Kjersti Lohne, Anette Bringedal Houge and Martin Tegnader, 'Brought Up to Be a War Criminal' (PRIO Blogs, 11 May 2016) <<https://blogs.prio.org/2016/05/brought-up-to-be-a-war-criminal/>> accessed 19 August 2021.

¹⁴ Adam Dolnik and Herman Butime, *Understanding the Lord's Resistance Army Insurgency* (World Scientific Publishing Company 2016); Wojciech Jagielski, *The Night Wanderers: Uganda's Children and the Lord's Resistance Army* (Seven Stories Press 2012); Elise Keppler, 'Litany of Horrors by LRA Leader: Ongwen Was No 'Puppet on A String'' (*Justice in Conflict*, 8 February 2021) <<https://justiceinconflict.org/2021/02/08/litany-of-horrors-by-lra-leader-ongwen-was-no-puppet-on-a-string/>> accessed 17 August 2021; Jeff Stoerber, *An Overview of the History of the Lord's Resistance Army* (Charles River Editions 2021); United Nations Organization Mission in the Democratic Republic of the Congo, 'Special Report: Summary of fact finding missions on alleged human rights violations committed by the Lord's Resistance Army (LRA) in the districts of Haut-Uélé and Bas-Uélé in Orientale province of the Democratic Republic of Congo' (*UN Office of the High Commissioner for Human Rights*, December 2009) <<https://reliefweb.int/report/democratic-republic-congo/special-report-summary-fact-finding-missions-alleged-human-rights>> accessed 24 August 2021; United Nations Security Council, 'Report of the Secretary-General pursuant to resolutions 1653 (2006) and 1663 (2006)' (*UNSC*, 29 June 2006) UN Doc S/2006/478; UNSC, 'Additional report of the Secretary-General on children and armed conflict in Uganda' (*UNSC*, 23 June 2008) UN Doc S/2008/409; UNSC, 'Report of the Secretary-General on the Lord's Resistance Army-affected areas pursuant to Security Council press statement' (*UNSC*, 4 November 2011) UN Doc S/2011/693; UNSC, 'Report of the Secretary-General on the activities of the United Nations Regional Office for Central Africa and on areas affected by the Lord's Resistance Army' (*UNSC*, 11 June 2012) UN Doc S/2012/421; UNSC, 'Report of the Secretary-General on the activities of the United Nations Regional Office for Central Africa and on the Lord's Resistance Army-affected areas' (*UNSC*, 6 May 2014) UN Doc S/2014/319; UNSC, 'Report of the Secretary-General on the situation in Central Africa and the activities of the United Nations Regional Office for Central Africa' (*UNSC*, 28 November 2016) UN Doc S/2016/996.

crimes, and recruiting child soldiers – and sentenced to 25 years in prison, which prosecutor Gumpert has since described as ‘a very, very long time’.¹⁵ A former child soldier, Ongwen became the first known person to be found guilty of crimes also committed against him.¹⁶ Had he, while growing up within the LRA, on the stroke of midnight on his 15th birthday, gained the ability to act as a morally responsible adult? His defence argued he had not.¹⁷ Yet Ongwen was answering alone to a hope of thousands of individuals whom the ICC classed as victims, many of whom had also been child soldiers.¹⁸ Within the trial, that hope, according

¹⁵ *Prosecutor v. Ongwen*, ‘Closing statements by the defence – part III’ (ICC, 12 March 2020) <<https://youtu.be/7g4ov6i-bEE>> accessed 17 August 2021 47:00; *Prosecutor v. Ongwen* (Sentence) ICC-02/04-01/15 (6 May 2021); *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6 [3116]; UBC School of Public Policy and Global Affairs, ‘After the Verdict: Dominic Ongwen & the Many Sides of Justice’ (UBC, 2 June 2021) <<https://www.youtube.com/watch?v=pY4KGIUqsM0>> accessed 16 August 2021 1:19:00. See also: Awol Allo, ‘The ICC’s problem is not overt racism, it is Eurocentricism’ (*Al Jazeera*, 28 July 2018) <<https://www.aljazeera.com/opinions/2018/7/28/the-iccs-problem-is-not-overt-racism-it-is-eurocentricism>> accessed 31 August 2021; Martti Koskenniemi, ‘Histories of International Law: Dealing with Eurocentrism’ (January 2011) 19(1) *Rechtsgeschichte - Legal History* 152; Souheir Edelbi, ‘The framing of the African Union in international criminal law: a racialized logic’ (*Völkerrechtsblog*, February 2018) <<https://voelkerrechtsblog.org/de/the-framing-of-the-african-union-in-international-criminal-law-a-racialized-logic/>> accessed 31 August 2021.

¹⁶ Baines, *supra* note 12, at 164–5; Donnas Ojok, ‘War Child or Warlord? The Justice Paradox in Ongwen’s ICC case’ (*LSE Blogs*, February 2015) <<https://blogs.lse.ac.uk/africaatlse/2015/02/23/war-child-or-warlord-the-justice-paradox-in-ongwens-icc-case/>> accessed 16 August 2021.

¹⁷ Jo Boyden, ‘The Moral Development of Child Soldiers: What do Adults have to fear?’ (2003) 9(4) *Peace and Conflict: Journal of Peace Psychology* 343; Andrew Mawson, ‘Children, Impunity and Justice: Some Dilemmas from Northern Uganda’ in Jo Boyden (ed), *Children and Youth on the Front Line: Ethnography, Armed Conflict and Displacement* (Berghahn Books 2004) 136; Jeff McMahan, ‘Child Soldiers: The Ethical Perspective’ in Scott Gates and Simon Reich (eds), ‘Building Knowledge about Children in Armed Conflict’ (*Ford Institute for Human Security Studies*, 2006) <https://documentation.lastradainternational.org/lisidocs/mc_mahan_07_child_ethical_0109.pdf> accessed 19 August 2021; *Prosecutor v. Ongwen*, ‘Closing statements by the defence – part I’ (ICC, 12 March 2020) <<https://youtu.be/AOMZbuU6Mes>> accessed 17 August 2021 14:00; *Prosecutor v. Ongwen* (Transcript: Closing Statements – Courtroom 3), *supra* note 3, at 5; Michael Wessells, *Child Soldiers: From Violence to Protection* (Harvard University Press 2006).

¹⁸ Grace Akello, ‘Child Agency and Resistance to Discourses within the Paris Principles in Rehabilitation and Reintegration Processes of Former Child Soldiers in Northern Uganda’ in Drumbl and Barrett, *supra* note 5; Evelyn Amony, *I am Evelyn Amony: Reclaiming my Life from the Lord’s Resistance Army*; Barrett, ‘Navigating the Mystical: Child Soldiers and Reintegration Rituals in Northern Uganda’ in Drumbl and Barrett, *supra* note 5; Christopher Blattman and Jeannie Anan, ‘On the Nature and Causes of LRA Abduction: What the Abductees Have to Say’ in Tim Allen and Koen Vlassenroot (eds), *The Lord’s Resistance Army: Myth and Reality* (Zed Books 2010); Paul Bradfield, ‘The moral and legal correctness of Dominic Ongwen’s conviction’ (*Justice in Conflict*, 10 February 2021) <<https://justiceinconflict.org/2021/02/10/the-moral-and-legal-correctness-of-dominic-ongwens-conviction/>> accessed 17 August 2021; Myriam Denov, ‘Children Born of Conflict-Related Sexual Violence within Armed Groups – A Case Study of Northern Uganda’ in Drumbl and Barrett, *supra* note 5; Stephanie Nolen, ‘Rebel army resumes campaign of abducting child fighters in Africa’ (*The Globe and Mail*, 25 April 2008) <<https://www.theglobeandmail.com/news/world/rebel-army-resumes-campaign-of-abducting-child-fighters-in-africa/article25579115/>> 19 August 2021; Opiyo Olya, *Child to Soldier: Stories from Joseph Kony’s Lord’s Resistance Army*, *supra* note 18; Phong Pham, Patrick Vinck and Eric Stover, ‘Abducted: The LRA and Forced Conscription in Northern Uganda’ (*Berkeley-Tulane Initiative on Vulnerable Populations*, June 2007) <<https://escholarship.org/uc/item/7963c61v>> accessed 19 August 2021 19.

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to the phrasing of victim representative Manoba, became a *singular*, or united, hope for understanding, reconciliation and recovery.¹⁹

I argue that intricate language choices stabilised the precarious binary in the Ongwen case. To describe the craft of the ICC's language, I extend the cobweb metaphor presented by Ongwen's defence.²⁰ The prosecution's was a cobweb kind of pleading, they stated, implying that the 490 combinations of charges and modes of liability raised against Ongwen was an 'overwhelming' – and so unfair – number to defend against, and that it distracted from the real source of responsibility: Kony.²¹ I argue that another web exists within the judgement itself, more like a spiderweb, in that it serves an active purpose. That spiderweb is the representation of a coherent, unified victim experience. Against it, and within it, one perpetrator was caught.²²

Over my first three chapters, I reveal three levels of this spiderweb, from detailed individual accounts at its centre, to analogies and rules connecting the personal to the general, to vocabularies and descriptions that draw in barely or undocumented suffering. In my fourth chapter, I ask what happens when into the spiderweb comes a fly. The reader can perceive one individual who is isolated from their empathy, entangled in the court's reasoning, so that the more he may struggle to be depicted fully, the harder it is for him to escape being seen in one way, hollowed of emotional substance and victimhood, and preserved in that way, perhaps to sustain the court, and its principles, operations and rationales, for some time to come.²³ Meanwhile, the spider, the many-eyed, many-limbed, patient entity of ICL itself, may rush off to start a similar project elsewhere, missing and catching other flies along the way.²⁴ Throughout my analysis, by highlighting strategies of unifying victims and isolating one perpetrator, I question ICL's ability

¹⁹ *Prosecutor v. Ongwen*, 'Closing statements of legal representatives of the victims – part I (ICC, 11 March 2020) (ICC, 11 March 2020) <<https://youtu.be/IHPSU-CRgsc>> accessed 13 August 2021 12:52.

²⁰ *Prosecutor v. Ongwen*, 'Closing statements by the defence – part II', *supra* note 3, 14:55; *Prosecutor v. Ongwen* (Transcript: Closing Statements – Courtroom 3) *supra* note 3, at 35–6.

²¹ *Prosecutor v. Ongwen* (Transcript: Closing Statements – Courtroom 3) *supra* note 3, at 57; Refugee Law Project, 'Ongwen's Justice Dilemma Part II - Ongwen's Confirmation of Charges Hearing: Implications and Way Forward?' (*Refugee Law Project, Makerere University*, 2016) <https://www.refugeelawproject.org/files/others/Ongwen_Justice_Dilemma_Part_II.pdf> accessed 16 August 2021.

²² Costas Douzinas, Shaun McVeigh and Ronni Warrington, 'The Alta(e)rs of Law: The Judgement of Legal Aesthetics' (1992) 9(4) *Theory, Culture & Society* 93, 115; Stolk, 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity' (2015) 13(1) *Journal of International Criminal Justice* 973, 986–7.

²³ 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(2) *Netherlands Journal of Legal Philosophy* 149.

²⁴ Kevin Jon Heller, Frédéric Mégret, Sarah M.H. Nouwen, Jens David Ohlin, and Darryl Robinson (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020).

to find, understand and tell accurate truths about the complex experiences of suffering to which it wishes to respond.²⁵

²⁵ Allo, *supra* note 15; Baines, *supra* note 12; Drumbl, ‘The Kapo on Film: Tragic Perpetrators and Imperfect Victims’ (2018) 6(1) *Griffith Journal of Law and Human Dignity* 229; United Nations Secretary General, *supra* note 7; Koskeniemi, *supra* note 15; Ojok, *supra* note 15. Immi Tallgren, ‘The Faith in Humanity and International Criminal Law’ in Martti Koskeniemi, Mónica García-Salmones Rovira and Paolo Amorosa (eds), *International Law and Religion: Historical and Contemporary Perspectives* (Oxford University Press 2017) 334; SABC News, ‘Joseph Kony’s former wife shares her new book “I am Evelyn Amony”’ (*SABC News*, 9 July 2016) <<https://www.youtube.com/watch?v=-5FWDhjmj6E>> accessed 16 August 2021; Sky News, ‘#TimeToAct: Poline Akello was Abducted by Joseph Kony’s Army’ (*Sky News*, 10 June 2014) <<https://www.youtube.com/watch?v=Rj4V9UKHE3g>> accessed 16 August 2021.

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The Language of the Court: A Note on Method

Juliane Okot Bitek: What does it mean to translate a sentence from Acholi into English?

Ruby Turok-Squire: It's a very abstract thing to say.

Okot Bitek: Very abstract.

– Interview with Okot Bitek, June 2021²⁶

In assessing how the ICC's Ongwen judgment represents victims and a perpetrator, I pursue a method of close analysis inspired by literary techniques. Essentially, I assume the presence and importance of the poetic within the judgment's language.²⁷ By poetic, I mean a variety of intricate elements, including the potential of language to create embodied experiences for the reader, the emotional effects of the musicality of language and imagery, the importance of voice (that is, who is speaking to who) in terms of what can be expressed, and the interconnectedness of form and content.²⁸ I aim to treat the court's language like a delicate silk, appreciating the syntactical knots holding it together. I am particularly inspired by Vendler's close analysis of poetry, in which she re-writes a line from a poem in several different ways, showing how the entire meaning of a line could change with the rearrangement of a syllable or two. Along the way, she reveals why the poet chose the words and the order of words that they chose.²⁹ I attempt to do justice to the judgment's language by believing in and then interrogating the intentionality of its minutest patterns and surprises. I see language as tied to its purpose, a notion that is being explored in the field of forensic linguistics, and I hope to add to this field with insights into the emotionality of legal language enabled by this poetic approach.³⁰

²⁶ Confidential interview with Juliane Okot Bitek (Conducted by Zoom, 14 June 2021).

²⁷ Douzinas, McVeigh and Warrington *supra* note 22, at 104, 106.

²⁸ Kamari Maxine Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press 2019); Adrienne Rich, *What is Found There: Notebooks on Poetry and Politics* (Virago Press 1995) 13; Helen Vendler *The music of what happens: poems, poets, critics* (Harvard University Press 1988).

²⁹ Vendler, *Ways into Shakespeare's Sonnets* (University of London Press 1990); Vendler, *Our Secret Discipline: Yeats and Lyric Form* (Oxford University Press 2007); Vendler, *Invisible Listeners: Lyric Intimacy in Herbert, Whitman, and Ashberry* (Princeton University Press 2009); Helen Vendler, *Poets Thinking* (Harvard University Press 2021).

³⁰ Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*, *supra* note 28; Malcolm Coulthard and Alison Johnson, *An Introduction to Forensic Linguistics: Language in Evidence* (Routledge 2007) 1; Malcolm Coulthard and Alison Johnson (eds), *The Routledge handbook of forensic linguistics* (Routledge 2010); John Gibbons, *Forensic Linguistics: an introduction to language in the justice system* (Blackwell 2003) 132–3; Yon Maley, 'The language of the law' in John Gibbons (ed), *Language and the Law* (Routledge 1994) 11, 16. See

Why this central question of how language might legitimise the legal principle of the victim-perpetrator binary? The question has been inspired by my process of learning about language choices and translation in the Ongwen case. While the ICC's Ongwen judgment was circulated in English, many of the original witness statements that are quoted at length within it were collected in Acholi, a language commonly spoken in Northern Uganda, the site of the LRA's crimes.³¹ With a curiosity about potential differences between Acholi and English, I began my research by conducting four informal interviews and several email exchanges with people deeply connected to Acholi and the ICC. These experts are: Juliet Adoch, a speaker of Acholi and English who has worked with survivors and victims of the LRA war, Adina Nistor, PhD Candidate in international criminal law at the University of Groningen, Juliane Okot Bitek, an Acholi poet who has worked with the transcripts of interviews with women who survived abduction by the LRA, and Gladys Yama and Natalie Diu, English to French translators at the International Criminal Court.³² I made contact with them through colleagues and LinkedIn.

These interviews and connected correspondence were unstructured and developed in line with the experts' interests. I asked open-ended questions about qualities of Acholi, its differences from English, the ICC's methods of translation and interpretation, and how the ICC uses individual testimonies to address systemic crimes. The results of this work led me towards new perspectives and thereby guided the next stage of my research, as I will describe.

also: Maurizio Gotti, 'Text And Genre' in Lawrence M. Solan and Peter M. Tiersma, *Oxford Handbook of Language and Law* (Oxford University Press 2012); John J. Gumperz, 'Interactional Sociolinguistics: A personal perspective', in Heidi E. Hamilton, Deborah Schiffrin and Deborah Tannen (eds), *The Handbook of Discourse Analysis* (Blackwell 2003) 215–28; Michael A.K. Halliday, *An Introduction to Functional Grammar* (first published 1985, 2nd edn, Routledge 1994); Michael Halliday, *Learning How to Mean* (Edward Arnold 1975); Michael Halliday, *Spoken and Written Language* (Oxford University Press 1989); Chris Heffer, *The Language of Jury Trial: A corpus-aided analysis of legal-lay discourse* (Palgrave Macmillan 2005) 67; Risto Hiltunen, 'The Grammar And Structure Of Legal Texts' in Lawrence M. Solan and Peter M. Tiersma, *Oxford Handbook of Language and Law* (Oxford University Press 2012); Heikki E. S. Mattila, 'Legal Vocabulary', in Lawrence M. Solan and Peter M. Tiersma, *Oxford Handbook of Language and Law* (Oxford University Press 2012); Peter M. Tiersma, 'A History of the Languages of Law' in Lawrence M. Solan and Peter M. Tiersma (eds), *Oxford Handbook of Language and Law* (Oxford University Press 2012); Keith Walters, 'Language, the Law, and Forensic Linguistics' in Susan Conrad, Alissa Hartig and Lynn Santelmann (eds), *The Cambridge Introduction to Applied Linguistics* (Cambridge University Press 2021) 325.

³¹ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6; Leigh Swigart, 'Unseen and Unsung: ICC Language Services and their Impact on Institutional Legitimacy' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press 2019) 2.

³² Confidential interview with Juliet Adoch (Conducted by Zoom, 7 June 2021) (Recording held by the author); Confidential correspondence with Juliet Adoch (Conducted by WhatsApp, 19 May – 9 August 2021) (Records held by the author); Confidential correspondence with Natalie Diu and Gladys Yama (Conducted by LinkedIn, 31 May – 7 July 2021) (Records held by the author); Confidential interview with Adina-Loredana Nistor (Conducted by Zoom, 21 May 2021); Okot Bitek, *supra* note 26; Confidential interview with Gladys Yama (Conducted by Zoom, 31 May 2021) (Recording held by the author).

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While I was learning about the great importance for the ICC's lawyers of distinguishing exactly what meaning is being implied in any one context, I was also realising how hard it might be to discern such meanings accurately.³³ The differences between the languages involved in the Ongwen judgment appeared vast.³⁴ Acholi has fewer words than English, but its words can have many meanings, depending on intonation. It puts its words together like bricks; for example, 'justice' is said as 'right judgment' (*ngol matir*).³⁵ The meanings of its words depend on who is speaking and to whom.³⁶ Okot-Bitek commented to me, 'Acholi is the people, the land, and the language', demonstrating that the language is interwoven with a whole way of life.³⁷ To speak of translating Acholi is therefore abstract, without considering the who, when, why and where of a certain situation.³⁸ It became difficult *not* to conceive of the English renderings of statements within the Ongwen judgment as containing their own expressive possibilities and meanings, separate from those of the Acholi originals, and calling out to be examined.

My research was suggesting that there might be a language specifically *of the court*, devised within its parameters. I started to notice how heavily the ICC's lawyers might sometimes rely on interpreters while collecting evidence and questioning witnesses, and how interpretation might be more or less accurate depending on the people and resources available.³⁹ From Diu and Yama, I learnt about the ICC's strategy of 'harmonising' vocabulary. Certain English words are agreed on by the court's translation team and are always used as the translations for certain Acholi words, for example, that are deemed difficult to translate.⁴⁰ Given Acholi's small vocabulary and context-dependency, this technique appeared to have particular potential to reduce complexity of meaning. Each of these factors

³³ ICC, 'The Litigator' (ICC, 2021) <<https://www.icc-cpi.int/get-involved/justice-at-work/pages/story.aspx?name=the-litigator>> accessed 16 August 2021; Lorraine Smith van-Lin, 'When We Don't Speak the Same Language: The Challenges of Multilingual Justice at the ICC' in Evelyn A. Ankumah (ed), *The International Criminal Court and Africa: One Decade On* (Intersentia 2016).

³⁴ Adoch, *supra* note 32; Okot Bitek, *supra* note 26.

³⁵ Adoch, *supra* note 32.

³⁶ Adoch, *supra* note 32; Alexander Odonga, 'Introduction' in *Lwo-English Dictionary* (Fountain Publishers 2001); Okot Bitek, *supra* note 26.

³⁷ Okot Bitek, *supra* note 26; Okot p'Bitek, 'African Aesthetics - The Acholi Example' in *Artist, the Ruler: Essays on Art, Culture, and Values, Including Extracts from Song of Soldier and White Teeth Make People Laugh on Earth* (East African Publishers 1986) 25.

³⁸ Odonga, *supra* note 37; Okot Bitek, *supra* note 26; Okot p'Bitek, *supra* note 37.

³⁹ Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* (University of Chicago Press, 1990); Susan Berk-Seligson, 'Linguistic Issues in Courtroom Interpretation' in Lawrence M. Solan and Peter M. Tiersma (eds), *Oxford Handbook of Language and Law* (Oxford University Press 2012).

⁴⁰ Diu and Yama, *supra* note 32; ICC, 'Language Services: "Bridging the Language Divide"' in 'Behind the Scenes: The Registry of the International Court' (ICC, 2010) <<https://www.icc-cpi.int/iccdocs/PIDS/docs/behindTheSce.pdf>> accessed 18 August 2021, 25; Swigart, *supra* note 31, at 5.

seemed to “border” the evidence available to the court, by setting limits on what could be heard and then spoken by the court, and how.

Developing this notion of the ICC’s own language, from Nistor, I realised that the court had the potential to translate not only languages but concepts, by interpreting them within the barriers of its laws.⁴¹ For example, spiritualism – an element of LRA culture – was addressed by the ICC almost solely in terms of how it related to Ongwen’s mental health.⁴² This might have limited the court’s perception of spiritualism as it was and is understood in Northern Uganda.⁴³ As I appreciated meaning being limited on many levels, the idea of maintaining accuracy to “original” Acholi accounts began to seem illusory, and the English of the judgment full of different meaning, crafted with the ICC’s principles in the picture. Perhaps the ICC’s English was absorbing the ICC’s principles. I emerged from this research wishing to test that idea.

Appreciating differences between languages became a gateway to appreciating different perspectives on the victim-perpetrator binary. Conversations with Adoch and Okot Bitek emphasised its fragility and potential injustice. Here was a former LRA commander, in a suit, on television, and being held in a state-of-the-art facility, while those who had been injured by the LRA were struggling to feed, clothe and educate themselves.⁴⁴ Were the court’s victims benefiting, or its perpetrator?⁴⁵ What of ICL’s “deterrent effect”, the symbolic prosecution of one

⁴¹ Nistor, *supra* note 32.

⁴² Adina-Loredana Nistor, Andrew Merrylees and Barbora Holá, ‘Spellbound at the International Criminal Court: The Intersection of Spirituality & International Criminal Law’ in Julie Fraser and Brianne McGonigle Leyh (eds), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar Publishing Ltd. 2020) 147; *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [2506], [2513], [2599], [2517], [2521], [2541], [2556].

⁴³ Nistor *supra* note 32; Nistor, Merrylees and Holá *supra* note 42; Adina-Loredana Nistor, ‘Ongwen blog symposium: Culture as evidence and the construction of (un)certainly in the Dominic Ongwen trial’ (*Armed Groups and International Law*, 15 April 2021) <<https://armedgroups-internationallaw.org/2021/04/15/ongwen-blog-symposium-culture-as-evidence-and-the-construction-of-uncertainty-in-the-dominc-ongwen-trial/>> accessed 16 August 2021; Refugee Law Project, ‘Ongwen’s Justice Dilemma Part I - Perspectives from Northern Uganda’ (*Refugee Law Project, Makerere University*, 2015) <https://www.refugeelawproject.org/files/briefing_papers/ONGWEN'S_JUSTICE-DILEMMA_-_Perspectives_from_Northern_Uganda_-_Dialogue_Report.pdf> accessed 16 August 2021; Tim Kelsall, *Culture under Cross-Examination: International Justice and the Special Court for Sierra Leone* (Cambridge University Press 2009).

⁴⁴ Adoch, *supra* note 32; Okot Bitek, *supra* note 26.

⁴⁵ Maria Mabinty Kamara, ‘An Insider Look at Outreach Efforts in Bringing the Proceedings Closer to the Victims and Affected Populations in Northern Uganda’ (*Justice in Conflict*, 3 February 2021) <<https://justiceinconflict.org/2021/02/03/an-insider-look-at-outreach-efforts-in-bringing-the-proceedings-closer-to-the-victims-and-affected-populations-in-northern-uganda/>> accessed 17 August 2021; Sarah Kihika Kasande, ‘Beyond the Ongwen Verdict: Justice for Government Atrocities in Uganda’ (*Justice in Conflict*, 9 February 2021) <<https://justiceinconflict.org/2021/02/09/beyond-the-ongwen-verdict-justice-for-government-atrocities-in-uganda/>> accessed 17 August 2021; Refugee Law Project, ‘Fragile Resilience: “Post-Conflict” Environmental Battles in Northern Uganda’ (*Refugee Law Project, Makerere University*, 30 October 2019) <https://www.refugeelawproject.org/index.php?option=com_content&view=article&id=162:fragile-resilience-post-conflict-environmental-battles-in-northern-uganda&catid=27&highlight=WyJlZ2FuZGElLCJlZ2FuZGEncyIsInVnYW5kYSkiXQ==&Itemid=101> accessed

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individual to deter others? Was there much to it in practice?⁴⁶ Ongwen's defence had wondered, how would the hundreds of thousands of child soldiers still remaining in the world react to his 25-year sentence?⁴⁷ Would it deter their hope and ability to take back their lives and reintegrate into society?⁴⁸ I began to hope that looking into language might involve looking into ICL's principles in action. This, in turn, might allow a reassessment of ICL's victim-perpetrator binary and the tensions and risks that it was giving rise to.

I have chosen to focus on the language of the ICC's judgment due to the judgment's pivotal role in the court's proceedings. Schwöbel-Patel has pointed to ICL's need for – or recourse to – branding, as young law seeking international legitimacy.⁴⁹ As a conclusive record of the court's understanding, one that finds facts, re-records history, and is presented to the international community, it seems

16 August 2021; Refugee Law Project, 'Does the International Criminal Court's verdict offer psychological relief for Dominic Ongwen's victims in Northern Uganda?' (*Refugee Law Project, Makerere University*, April 2021) <https://www.refugeelawproject.org/index.php?option=com_content&view=article&id=243:does-the-international-criminal-court-s-verdict-offer-psychological-relief-for-dominic-ongwen-s-victims-in-northern-uganda&catid=27&highlight=WyJvbmd3ZW4iLCJvbmd3ZW4ncyJd&Itemid=101> accessed 16 August 2021.

⁴⁶ Adoch, *supra* note 32; Ronald Akers, 'Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken' (1990) 81(3) *The Journal of Criminal Law and Criminology* 65; David Bosco, 'The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?' (2011) 19(2) *Michigan State Journal of International Law* 164; Okot Bitek, *supra* note 26; Heller, Mégret, Nouwen, Ohlin and Robinson, *supra* note 24; Kate Kronin-Furman, Amanda Taub, 'Lions, Tigers and Deterrence, Oh My. Evaluating Expectations in International Criminal Justice' in Yvonne McDermott and William Schabas (eds), *The Ashgate Research Companion to International Criminal Law, Critical Perspectives* (Routledge 2013); Leslie Vinjamuri, 'Deterrence, Democracy, and the Pursuit of International Justice' (June 2010) 24(2) *Ethics and International Affairs* 191; Hyeran Jo and Beth A. Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70(3) *International Organization* 443; Christopher W. Mullins and Dawn L. Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: a Theoretical Assessment' (2010) 10(5) *International Criminal Law Review* 771; Jennifer Schense and Linda Carter (eds), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (Torkel Opsahl 2017); David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23(2) *Fordham International Law Journal* 12.

⁴⁷ *Prosecutor v. Ongwen* (Transcript: Closing Statements – Courtroom 3), *supra* note 3, at 27, 53, 56; *Prosecutor v. Ongwen*, 'Closing statements by the defence – part III', *supra* note 15; 'Children Affected by Armed Conflict/Child Soldiers' (Youth Advocate Program International, 2021) <<http://yapi.org/youth-wellbeing/children-affected-by-armed-conflict-child-soldiers/>> accessed 17 August 2021.

⁴⁸ Amony, 'Writing Evelyn Amony', *supra* note 18, at xi; Jessica Hatcher-Moore, 'Is the world's highest court fit for purpose?' (*The Guardian*, 5 April 2017) <<https://www.theguardian.com/global-development-professionals-network/2017/apr/05/international-criminal-court-fit-purpose>> accessed 21 August 2021; Nikila Kaushik and Steven Freeland, 'Crimes Committed by Child Soldiers: An Argument for Coherence' in Drumbl and Barrett, *supra* note 5; Okot Bitek, *supra* note 26; Opiyo Oloya, 'Dwoggo Paco' in *Child to Soldier: Stories from Joseph Kony's Lord's Resistance Army* (University of Toronto Press 2018) 153.

⁴⁹ Schwöbel-Patel, 'The market and marketing culture of International criminal law', *supra* note 7, at 265; Schwöbel-Patel, 'The rule of law as a marketing tool: The International Criminal Court and the brand of global justice', *supra* note 7. See also: Arnould, *supra* note 7; Heller, Mégret, Nouwen, Ohlin and Robinson, *supra* note 24; David Kennedy, 'Law and Political Economy of the World' (2013) 26 *Leiden Journal of International Law* 7, 8; Naomi Klein, *No Logo: No Space, No Choice, No Jobs* (first published 1999, 10th anniversary edn, Fourth Estate 2010); China Miéville, 'Commodity-Form Theory of International Law', in Susan Marks (ed), *International Law on the Left: Reexamining Marxist Legacies* (Cambridge University Press 2008).

possible that the ICC's judgment might be crafted so as to uphold ICL's aims particularly strongly.⁵⁰

In my intention to reveal a craft of language upholding one of ICL's core principles, I align myself with Mégret's notion of 'understanding [the law's] understanding'.⁵¹ Rather than sustaining an overriding skepticism of ICL – which Mégret calls a realist approach – or attempting to improve its details while believing in its existing principles – which Mégret calls a liberal approach, and which, for Drumbl, may result in insightful but not structural criticism – I maintain a degree of skeptical detachment from ICL's aims.⁵² In taking that step back, I also hope to step forwards, that is, to expose ICL's inner workings more deeply. I aim not to recreate or improve ICL but to appreciate and challenge its tendencies, powers and limitations openly.⁵³

To develop Mégret's description, understanding ICL's understanding would seem to involve asking how various elements of ICL's understanding interact. Stolk has noted that the ICC is searching for its own understanding while enabling and relying on the understanding of witnesses.⁵⁴ The ICC finds truths while listening to truths, such that the relations between victims, the Court and the truth can become 'simultaneously interdependent and incompatible'.⁵⁵ It can become unclear where facts end and experiences begin, in the court's eyes.⁵⁶ I would add that divisions can blur between fact, experience, imagination and speculative reasoning.⁵⁷ Using literary close analysis has, I hoped, enabled me to ask how such tangles might be employed, through intricate language choices, to support a pre-existing victim-perpetrator divide.

In the back of my mind has been Nouwen's call for more rigorous and coherent theorising of ICL, including more direct address of foundational questions within ICL and a making-explicit of implicit theories of change within ICL's

⁵⁰ Lawrence Douglas, 'Perpetrator Proceedings and Didactic Trials', in RA Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros (eds), *The Trial on Trial (Volume 2): Judgment and Calling to Account* (Hart Publishing 2006) 191, 205; Stolk, 'The Record on Which History Will Judge Us Tomorrow': Auto-History in the Opening Statements of International Criminal Trials' (2015) 28 *Leiden Journal of International Law* 993.

⁵¹ Mégret, *supra* note 7, at 17.

⁵² Mark A. Drumbl, 'Review: Pluralizing International Criminal Justice', (2005) 103:6 *Michigan Law Review* 1295, 1304; Mégret, *supra* note 7, at 19–20; Heller, Mégret, Nouwen, Ohlin and Robinson, *supra* note 24.

⁵³ Mégret, *supra* note 7, at 19–20; Drumbl, *supra* note 5, at 1304. See also: Judith Butler, 'What is Critique? An Essay on Foucault's Virtue', in Judith Butler and Sara Salih (eds), *The Judith Butler Reader* (Wiley-Blackwell 2004); Michel Foucault, 'Qu'est-ce que la critique? (Critique et Aufklärung)' (1990) 84:2 *Bulletin de la Société Française de Philosophie* 35.

⁵⁴ Stolk, 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity', *supra* note 22, at 986–7.

⁵⁵ *ibid.* 987.

⁵⁶ *ibid.* 984; Joost Fontein, "'She appeared to be in some kind of trance": Anthropology and the question of unknowability in a criminal trial' (2014) 4(1) *HAU: Journal of Ethnographic Theory* 75.

⁵⁷ Nancy Amoury Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2010).

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rationales.⁵⁸ It seems that I have begun to develop an ‘external theory’ of ICL, to use Nouwen’s term, in that I am feeding insights from a non-legal field – literary analysis – into legal analysis.⁵⁹ This external theorising might create what Drumbl has called ‘second-generation dialogue’, which can challenge fixed ideas at the core of ICL.⁶⁰ Perhaps more so than other external theories, coming from the fields of political science, philosophy, economics, or anthropology, for example, this theory might allow a direct questioning of ICL’s core principles.⁶¹ Asking how tiny formations within the ICC’s language may support ICL’s principles, and revealing what exactly those formations are, might *in itself* become a questioning of ICL’s principles.⁶²

The metaphor of the spiderweb and the fly has guided my reading of the judgment. It has given me a framework within which my thoughts could take shape, both supporting and challenging them.⁶³ It became a metaphor to read by, allowing me to create a dialogue for myself, within my thinking, which I hope has deepened my analysis.⁶⁴ Like a flexible compass, it has given me orientation while adjusting its North in response to developing impressions that the judgment’s 1000+ pages left upon me.

⁵⁸ Sarah Nouwen, ‘International Criminal Law: Theory All Over the Place’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press 2018).

⁵⁹ *ibid.* 2.

⁶⁰ Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 27 June 2003).

⁶¹ Nouwen, *supra* note 58, at 11.

⁶² Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge University Press 2009); Douzinas, McVeigh and Warrington, *supra* note 22, at 94-6, 113; Heller, Mégret, Nouwen, Ohlin and Robinson, *supra* note 24.

⁶³ George Lakoff and Mark Johnson, ‘The Coherent Structuring of Experience’ in *Metaphors We Live By* (University of Chicago Press 1980) 77.

⁶⁴ *ibidem.*

I Inner Circles

The Chamber is mindful of the difference between the individual facts related to each of those witnesses and the facts at issue of the charge under consideration, which is systemic in nature...

– *Prosecutor v. Ongwen* (Trial Judgment)⁶⁵

This chapter examines what I term the inner circles of a metaphorical spiderweb of victim experiences constructed within the judgment. I present some of the detailed individual accounts that the judgment quotes and paraphrases as the very personal centre of the spiderweb. I argue that their language paints scenes in which readers can situate themselves and feel and see alongside witnesses. By encouraging empathy, their language enables victims to be clearly perceived.⁶⁶ In subsequent chapters, I will describe how the spiderweb remains connected to empathy, via the personal, while encompassing the general. I will argue that the judgment's language thereby constructs a coherent, unified representation of victim experiences. Finally, I will argue that this coherence of victim experiences enables a single perpetrator to be depicted in contrast.⁶⁷

All the while, I will point to a tension of which the ICC shows mindfulness in the above quote, but perhaps not sufficient mindfulness: the crucial role of individual accounts in the court's understanding of *systemic* charges reaching far beyond individuals.⁶⁸ I will ask how extrapolation from individual voices may lead to reduction and simplification of complex events. I will suggest that the more coherent the ICC's spiderweb of victim experiences, the less accurate its rendering of individual experiences may be.

⁶⁵ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [2097].

⁶⁶ Ritivoi, *supra* note 8; Jenni and Loewenstein, *supra* note 8.

⁶⁷ Clarke, 'The Rule of Law through Its Economies of Appearances: The Making of the African Warlord' (2011) 18(1) *Indiana Journal of Global Legal Studies* 7.

⁶⁸ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [2097]. See also: Paul Bradfield, 'Preserving Vulnerable Evidence at the International Criminal Court – the Article 56 Milestone in *Ongwen*' (2019) 19(3) *International Criminal Law Review* 373; Karin Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents* (Martinus Nijhoff Publishers 2006); Robert Cryer, 'Witness Evidence before the International Criminal Tribunals' (2003) 2 *Law & Practice International Courts & Tribunals* 41; ICC, 'Rules of Procedure and Evidence' (first published 2005, 2nd edn ICC 2013) ICC-PIDS-LT-02-002; Malcolm N. Shaw, 'The International Criminal Court - Some Procedural and Evidential Issues' (1998) 3(1) *Journal of Armed Conflict Law* 65.

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i) Encouraging empathy: A case study

Certain elements of testimonies recounted in the judgment encourage empathy by allowing the reader to see with witnesses' eyes and stand in their shoes. I define empathy, with Keen, as 'feeling what we believe to be the emotions of others', a 'sharing of affect', and, following Gadamer and Aristotle, as 'fellow feeling'.⁶⁹ Certain narrative choices can, I argue, facilitate empathy, particularly those that encourage, following Ritivoi, 'immersing readers in the textures of experiences'.⁷⁰ The more a reader empathises, I argue, the more they understand another's suffering – in other words, the more clearly they can perceive them as victims, whose choices, feelings and actions they could have taken part in.⁷¹

One testimony paraphrased in the judgment highlights two elements of the judgment's language that frequently enable empathy: the use of material detail and suspensions of subjectivity. I take it as a case study, before exploring how each element unfurls elsewhere.

... the Chamber recalls the testimony of LRA fighter P-0379 who stated that he saw a very young boy, who appeared to be a rebel, who was shot around the shoulders and on his head and was dead and it appeared he had been holding bubble gum in his hand but it fell next to him. While O-0379 does not explicitly estimate the age of the 'very young boy' that he saw, the description that he gave makes it plain that he spoke of a child below the age of 15. The Chamber thus notes P-0379's evidence as corroborative of the other evidence in relation to the participation of children under 15 years old in the LRA attack on Pajule IDP camp on 10 October 2003.⁷²

⁶⁹ Susan A. Bandes, 'Empathy, Narrative, and Victim Impact Statements', (1996) 63(2) *University of Chicago Law Review* 361. Mark H. Davis, 'A Multidimensional Approach to Individual Differences in Empathy', (1980) 10 *JSAS Catalog of Selected Documents in Psychology* 85; Hans-Georg Gadamer, *Truth and Method* (translated by Joel Weinheimer and Donald G. Marshall, first published 1960, 2nd edn, Continuum 2004); Lynne N. Henderson, 'Legality and Empathy' (1987) 85(7) *Michelin Law Review* 1574, 1579; Suzanne Keen, *Empathy and the Novel* (Oxford University Press 2007) 208.

⁷⁰ Jerome S. Bruner, *Actual Minds, Possible Worlds* (Harvard University Press 1986); Ritivoi, *supra* note 8, at 53–4.

⁷¹ Mieke Bal, *Narratology: Introduction to the Theory of Narrative* (first published 1978, 2nd edn, University of Toronto Press 1997); Noel Carroll, 'On the Narrative Connection' in Willie Van Peer and Seymour Chatman (eds), *New Perspectives on Narrative Perspective* (State University of New York Press, 2001) 21; Andrea L. McArdle, 'Using a Narrative Lens to Understand Empathy and How It Matters in Judging' (2012) 9(1) *Legal Communication & Rhetoric: JALWD* 173; Susan A. Bandes, 'Empathetic Judging and the Rule of Law' (2009) *Cardozo Law Review* 133, 136; Halpern and Weinstein, *supra* note 8; Jenni and Loewenstein, *supra* note 8; Michael E. Morrell, *Empathy and Democracy: Feeling, Thinking, Deliberation* (Penn State University Press 2010); Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press 2003); Adam Smith, *Theory of Moral Sentiments* (first published 1753, Cambridge University Press 2002); Karsten Stueber, *Rediscovering Empathy: Agency, Folk Psychology, and the Human Sciences* (MIT Press 2010).

⁷² *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [1239].

Being able to recall a detail such as bubble gum may suggest to judges that witnesses are or are not telling the truth, depending on the level of detail with which it is believed that someone should or should not remember an event that happened at a particular temporal distance from them. But in another way, I argue, the material detail of the gum serves a legal function.

This gum is part of a scene mixing the seen with the imagined. The witness did not see the boy holding the gum, but *imagined* he might have been holding it. The gum fell, the witness imagined, from the very young boy's hand, next to him. The witness only saw the gum on the ground, presumably, but the ground itself is not mentioned. The court includes the gum's journey to the ground as if it definitely happened: 'but it fell next to him'. We do not read as follows.

The witness recalled there was gum on the ground next to the boy and imagined it had fallen out of his hand when he was shot.

It appeared to the witness that he had dropped the gum.

Instead, one long sentence runs on. By the end, the subjectivity and incompleteness of the witnesses' perspective has been briefly suspended. The reader can inhabit a scene, in which a very young boy is brought briefly back to life, holding bubble gum as he may well every day; then, shots throwing him to the ground, releasing the muscles of his hand. We can almost reach out to hold that boy's hand as it opens. Via material detail and association with the boy's embodied experience, an opportunity for empathy is fostered.

This young boy was arguably part perpetrator, part victim, but the word 'rebel' passes almost unnoticed – he 'appeared' to be a rebel (an LRA soldier), just as he 'appeared' to have been holding gum, although the latter of these events, at least, seems imagined.⁷³ There is no information about what made him appear as a rebel. Instead, his victimhood is emphasised, by engaging empathy.

Finally, the account is linked to other evidence 'in relation to the participation of children' in this attack.⁷⁴ *Which* other evidence is unspecified. Having been encouraged to see with the witnesses' eyes, and almost to fall with that boy – a child soldier, as Ongwen once was – the possibility of applying that empathy to other evidence is presented in an open-ended way. Generalisation may emerge from this personalised account, a tendency I will examine in later chapters.

⁷³ *ibidem*.

⁷⁴ *ibidem*.

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ii) Material detail

As in the above example, material detail encourages empathy elsewhere in the judgment. Amidst estimates of huge numbers of people being attacked and long lists of the dead, there are single mentions of individuals accompanied by single material details. Whether it is a mention of someone carrying soda on their head, a sack of beans tied at the top, or a bag of maize flour with ‘World Food Program’ written on it, these details sustain the possibility for the reader to become immersed in human-sized scenes, and so to empathise.⁷⁵ One crate of soda on someone’s head: one life depending on it staying there. A sack of beans *tied at the top* – who tied it and with what care? The phrase ‘World Food Program’: who needed that food to survive? Through such details, windows are opened onto complex individual lives unravelling within a war. The following moments provide examples.

Charles Amodo testified that he was given sesame to carry, although the bag was weak and the items poured out in front of the house before he could carry it⁷⁶

Hear the sesame seeds rattling, sliding, cascading, dripping to the ground... The event becomes tangible, as if happening again.

I laid down [on the ground] and yet I was able to see those things. The bullets were cutting grasses and the grasses were falling on me⁷⁷

Ongoing harsh consonants make ongoing violence tangible: ‘yet... bullets... cutting’. Direct repetition also creates immersion. With the phrase ‘grasses and the grasses’, we can sense grasses literally falling over us.⁷⁸

If empathy is engaged through such relationships between materials and individuals, I will later suggest that it can be developed to secure a reader’s perception of victims.⁷⁹

⁷⁵ *ibid.* [1293], [1462].

⁷⁶ *ibid.* [1987].

⁷⁷ *ibid.* [1965].

⁷⁸ *ibidem.*

⁷⁹ Keen, *supra* note 69, at 208; Ritivoi, *supra* note 8.

iii) Suspensions of subjectivity

Sometimes, the judgment carefully acknowledges the subjective viewpoints from which testimonies were made, stating ‘[someone] testified’ at the beginning of practically every sentence of its paraphrasing of an account.⁸⁰ But *when* it does this seems unpredictable. At points scattered throughout, subjectivity is briefly suspended. These, I argue, become opportunities for empathy. One example runs as follows.

P’Oyoo Lakoch, a local teacher... saw the LRA rebels from about 100 metres, moving through the camp, carrying guns, shooting as they went along; they advanced through the camp, shouting and firing at civilians, running around while firing their guns.⁸¹

Here, a semicolon makes a subjective recollection sound immersive and definitive. The sentence runs away in the present continuous, recreating commotion. One pictures soldiers running through the camp. The ‘I’ that saw these events from a distance briefly disappears.

When the judgment tells of children crying alone all night, until no sound came out, or guarding bodies of loved ones, it tells of scenes that were not witnessed but imagined, however highly likely it is that they happened.⁸² Whole nights rather than mornings are conjured; immersion and empathy are enabled. At one point, an account of an LRA attack begins with a woman dreaming of an attack.⁸³ It is as if her imagination becomes part of the facts of the event, recalling that tangle of fact and experience that Stolk noticed emerging in the court’s findings.⁸⁴ Another such extension of subjectivity is also perceptible in the following account.

They say, ‘Just stay calm. Don’t think about any other thing. There’s no going back. Just stay with us.’⁸⁵

One witness compiles the voices of many women who greeted and comforted her upon her abduction into the LRA – part experience, part imagination, surely – and renders them in the present tense. It seems that this miraculous *they*, speaking

⁸⁰ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [1580], [1987], [1990].

⁸¹ *ibid.* [1447].

⁸² *ibid.* [1825], [1541].

⁸³ *ibid.* [2014].

⁸⁴ Stolk ‘The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity’, *supra* note 22, at 987; Combs, *supra* note 57.

⁸⁵ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [2033].

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with one voice, also speaks to and comforts the reader – as if the reader *becomes* the abductee. By quoting this account in this way, the judgment suspends a reader's awareness of there being a *different* viewpoint from theirs and so enables immersion. Victims, those with whom one identifies and whose feelings one can understand, I argue, are thus presented.⁸⁶

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In this analysis, I have noticed how individual accounts of suffering are rendered in language that encourages a reader's empathy. I have suggested that empathy enables the perception of victims, as figures whose experiences the reader can imagine inhabiting.⁸⁷ When it becomes clear that the smallest word choices might facilitate such empathy, the findings emerging from those choices become questionable. Perhaps material detail blows certain accounts out of proportion. Perhaps the subjective is suspended a step too far. Are readers being asked to empathise to the extent of trusting dreams, and imagining beyond what it is possible to know?

Appreciating the action of empathy within the judgment's language will now allow me to analyse moments that generalise while speaking in connection to the personal. I will proceed to argue that as the judgment's language depicts collective experiences of suffering, it continuously excavates and employs empathy. Witness accounts are drawn together, like knots, into a coherent representation of victimhood.

⁸⁶ Halpern and Weinstein, *supra* note 8; Keen, *supra* note 69, at 208; Jenni and Loewenstein, *supra* note 8; Ritivoi, *supra* note 8.

⁸⁷ *ibidem*.

II Widening Orbits

Having argued that encouraging empathy within representations of individuals' testimonies allows victims to be perceived, I now notice how individual accounts become points from which generalisations are made, or implied. Those generalisations depict a collective victimhood, I argue, that remains in touch with the personal as a source of empathy. As these moments connect the personal to the general, I call them the widening circles of the judgment's spiderweb of victim experiences.

I demonstrate the judgment's tendency to generalise by noticing how it seeks out and finds rules for behaviours and emotions in the LRA within individual accounts. I argue that the frequent use of the second person to present such "law" of the LRA connects a reader's empathy to a collective experience, by calling upon us individually while acting as a general statement. The spiderweb of victim experiences expands: the personal connection to suffering, upon which I suggest the clear depiction of victims relies, is maintained. At the same time, the suffering of many – with experiences that have been witnessed by the court to varying degrees – is drawn into the judgement's structure.

i) "Law" of the LRA

One might emerge from reading the Ongwen judgment with the impression that there is, or was, a "law" of the LRA, experienced by many if not all rebels, defining their suffering. Such "law" seems repeatedly extracted from personal accounts. The court's understanding of victimhood, while rooted in the individual, thus tends towards depicting a collective experience.

Witness accounts frequently mention specific events as if they always happened. Such events include procedures surrounding young women who were abducted and distributed to men, and their treatment; unofficial "marriage" and sexual relations; methods of attacks; the degree of Kony's control over other commanders; and treatment of child soldiers.⁸⁸ Sometimes equally-generalised rationales are given for these "laws", such as changing people's natures, or 'beating the civilian out of them' upon abduction, or showing them what would happen to them should they try to escape.⁸⁹

The judgment does not appear to question or exhibit a mindfulness of its tendency to imply that such extrapolations from individual accounts can occur without difficulty. It does not appear to acknowledge dangers that generalisations

⁸⁸ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [54], [216], [217], [218], [219], [220], [862], [1930], [2180], [2182], [2228], [2282], [2313], [2145].

⁸⁹ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [2373], [2377], [2379].

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might pose to accurate representations of individuals' complex experiences of suffering.⁹⁰ It identifies 'succinct', 'clear' descriptions of policies without acknowledging that such descriptions might be reductive.⁹¹ It identifies 'one clear aim' to the abduction and training of children under 15, namely, 'to use them as fighters', without acknowledging that other aims *may* have gone unclarified.⁹² At one point, it presents a handful of testimonies as a 'microcosm' of an overall coercive environment that 'all women and girls faced in the LRA' – without exception, the language suggests.⁹³ At another point, it describes a few individuals' experiences as 'simply a more specific expression of the general system of control that existed in the LRA to ensure obedience by its members'.⁹⁴

It *may* be possible to generalise to an extent based on the evidence, but if the judgment's language ties experiences of suffering together via portrayals of rules, does that constructed coherence come at the expense of accuracy? When one witness says, certain rules were general rules for all, and the judgment quotes that statement without qualification, is the court excessively encouraging its readers to believe them?⁹⁵ Perhaps, in the court's eyes, generalising serves an aim that overrides its danger, by allowing the presentation of coherent victim experiences, and so supporting the idea of victims as distinct from a perpetrator.

ii) The singular and plural *you*

Such "law" of the LRA is often articulated within the judgment in the second person. The pronoun *you* has a special capacity to sound both plural and singular, general and personal. It can present things in no uncertain terms, while engaging a reader's empathy by making it sound as if *you* are the one taking certain decisions, following certain courses of reasoning and feeling certain emotions.⁹⁶ According to my correspondence with Adoch and Okot Bitek, the *you* voice is commonly used in Acholi, particularly when telling stories; this element of Acholi may have been

⁹⁰ Baines, *supra* note 12; Baines and Boniface, *supra* note 12; Drumbl, *Reimagining Child Soldiers in International Law and Policy*, *supra* note 4, at 214; Drumbl, 'Victims who victimise', *supra* note 11; Enns, *supra* note 11; Parmentier and Mels, *supra* note 11; Ramos, *supra* note 5.

⁹¹ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [895].

⁹² *ibid.* [2415].

⁹³ *ibid.* [2028].

⁹⁴ *ibid.* [218].

⁹⁵ *ibid.* [956].

⁹⁶ Patricia E. O'Connor, "'You could feel it through the skin": agency and positioning in prisoners' stabbing stories' (1994) 14(1) *Text* 45; Lisa Deringer, Volker Gast, Florian Haas and Olga Rudolf, 'Impersonal uses of the second person singular: an exploratory corpus study of English, German and Russian' in Laure Gardelle and Sandrine Sorlin (eds), *The Pragmatics of Personal Pronouns* (John Benjamins Publishing 2015) 311; Volker Gast, Lisa Deringer, Florian Haas and Olga Rudolf, 'Impersonal uses of the second person singular: A pragmatic analysis of generalization and empathy effects' 88 *Journal of Pragmatics* 148; Lesley Stirling and Lenore Manderson, 'About *you*: empathy, objectivity and authority' (2011) 43(6) *Journal of Pragmatics* 1581.

preserved through translation.⁹⁷ But within the judgment, I argue, this *you* voice takes on a particular function. The frequency of its use within accounts of LRA “law” allows a personal centre to be maintained while the court develops its understanding of (and perhaps desire for) a unified, coherent picture of victimhood.

One moment demonstrates the immersive potential of *you*, aligning readers with the movement of a particular (yet somehow also collective) individual.

You keep on moving. You find another corpse; you jump over it and keep on moving.⁹⁸

The reader can feel themselves, I suggest, making decisions and movements, jumping with the help of the (unspoken yet written) semicolon into this scene. Throughout the judgment, this immersive potential of the *you* voice – or, its potential to simulate – enables personal, yet general, descriptions of rules behind the LRA’s actions, threats and punishments.⁹⁹ Statements are presented regarding how you do not release people; you abduct whoever you think can fight; you have to carry the loads given to you; if you escape ‘you will walk in circles and be confused’; and if you refused to do certain things, that would mean you would die.¹⁰⁰ It feels as though it might be *you* thinking and deciding. The common use of the present tense adds to the immersive potential of *you*, as in the examples below.

... if you’re strong enough you’re given a gun. But if you look weak then they do not arm you...¹⁰¹

If you’re 11 or 12... they will let you actually mature a little bit, but with the rest of them they will just abduct you and make you a wife at a very young age.¹⁰²

While these statements of rules come from individual accounts, they sound immediately general. Empathy remains possible, I argue, due to their connection with personal experiences, while a perception of unified victimhood is encouraged.

⁹⁷ Adoch, *supra* note 32; Okot Bitek, *supra* note 26.

⁹⁸ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [1731].

⁹⁹ Deringer, Gast, Haas and Rudolf, *supra* note 96, at 150; Chisato Kitagawa and Adrienne Lehrer, ‘Impersonal uses of personal pronouns’ (1990) 1 *Journal of Pragmatics* 739; Sofia Malamud, ‘Impersonal indexicals: one, you, man and du’ (2012) 15 *Journal of Comparative Germanic Linguistics* 1; Friederike Moltmann, ‘Generalizing detached self-reference and the semantics of generic one’ (2010) 25(4) *Mind and Language* 440.

¹⁰⁰ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [897], [907]-[915], [930], [1985], [2206].

¹⁰¹ *ibid.* [2423].

¹⁰² *ibid.* [2040].

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Reasons for LRA “law” are also given in the *you* voice. One reads that you have to do certain things otherwise they will kill you; you have to perform a punishment otherwise you will be punished; if you released abductees you would give away your location; and a punishment was a way of showing you what would happen if you tried to escape.¹⁰³ *Explaining* the existence of such “law” in such ways might make it seem even more coherent.

Such “law” extends beyond the logical, to the emotional, as in the accounts analysed below.

In the bush there was nowhere you could form friendship. Because if you stay close to each other they would think you are either planning to escape and it was therefore difficult for you to create friendship with others.¹⁰⁴

The reader can go through processes of reasoning and come to conclusions alongside witnesses, while appreciating such reasoning as generally-applicable. Empathy thus enables a collective victim experience to be perceived. Perhaps extreme statements, such as there being ‘nowhere’ to form friendship, become more accepted due to the familiarity of the *you* voice, which might excuse absence of detail and encourage trust. That familiarity is illustrated by the phrase ‘you know’, which accompanies several such accounts.¹⁰⁵

You were just wondering whether you would be the next victim or you would be shot and you couldn’t ask. You were only hearing gunshots everywhere. And you would feel hungry. You wouldn’t be able to say anything. You wouldn’t even—you’ll only be waiting for death.¹⁰⁶

The reader may wonder, hesitate and listen alongside the witness. Such feelings are rendered as if they were – or *are* – unanimously present. The account veers into the future tense, as if events are still happening and you are still imagining whether you will survive them.

Sometimes when the commanders were passing, and the escorts were also moving them, as they are passing by they would kick you. You

¹⁰³ *ibid.* [917], [930], [958], [1834].

¹⁰⁴ *ibid.* [101].

¹⁰⁵ *ibid.* [897], [1905].

¹⁰⁶ *ibid.* [1807].

wouldn't even know they are passing by because you'd be burdened by your load. But these people would really do anything on you.¹⁰⁷

The past tense morphs into the present; as before, the *you* voice gives the feeling of specific events unfurling around the reader, while representing events that happened often, or generally.¹⁰⁸

In the middle of one account regarding an individual trying to talk to LRA rebels, the *you* voice intervenes in a first-person account: 'I couldn't stop them' develops into 'you cannot stop them'.¹⁰⁹ One individual's memory is brought close to the reader's own experiences, whilst presenting a general experience, or even fact (*which* becomes unclear).¹¹⁰ At such moments, we empathise *while* appreciating a "law". A sense of collective victimhood is developed; the spiderweb grows.

*

In this chapter, I have shown how elements of the court's language provoke readers to imagine general experiences of suffering that remain connected to the possibilities for empathy that accompany individual accounts. The judgment's spiderweb grows while remembering its centre: the personal allows in the general, and the general keeps the personal in mind. Readers can imagine it is them – or *you* – making decisions and feeling emotions associated with a collective victim experience.¹¹¹

Is the court's apparent assumption that generalisations are possible justified? If so, to what extent? By highlighting – or crafting – general truths to experiences, does the judgment's spiderweb of victim experiences forfeit accuracy? On one hand, detailed individual accounts contain the richness and credibility that enables the judgment to progress towards its conclusions.¹¹² On the other hand, if a handful of experiences are taken as representative of others that are not considered with the same scrutiny, those conclusions may be skewed.

This exploration of generalisation from individual voices will allow me to show that at greater distances from personal recollections, the judgment's language sustains empathy, so that as people become numbers, they remain perceptible as

¹⁰⁷ *ibid.* [1336].

¹⁰⁸ *ibid.* [1905], [1336].

¹⁰⁹ *ibid.* [1563].

¹¹⁰ Stolk, 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity', *supra* note 22, at 984.

¹¹¹ O'Connor, *supra* note 96; Gast, Deringer, Haas and Rudolf, *supra* note 96; Kitagawa and Lehrer, *supra* note 99; Moltmann, *supra* note 99; Malamud, *supra* note 99; Stirling and Manderson, *supra* note 96.

¹¹² *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [255].

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victims. Revealing the judgment's coherent depictions of suffering will then lead me to show how one individual can be held against this spiderweb and caught within it, as a perpetrator.

III The Periphery

This chapter examines how the judgment draws vast numbers of individuals into its spiderweb of victim experiences. When perhaps haphazard lists of the dead document so-called ‘haphazard’ events; when in such lists people go unnamed; and when there is no voice of *I* or *you* to sound, the judgment’s language continues, I argue, to unify victim experiences. I extend the points developed in the previous chapter regarding the importance of empathy and the judgment’s tendency to generalise. I suggest that certain language choices enable empathy to be evoked for experiences of suffering that are without great detail or context. I then suggest that certain forms of language encourage the reader to imagine and include undocumented suffering within their perception of victims.

The judgment extends its spiderweb of victim experiences, I argue, through its use of vocabulary that generalises while encouraging empathy, and its use of cadence to encourage one to imagine and include undocumented suffering within an understanding of victimhood. These elements of its language exist at what I am calling the spiderweb’s periphery: that part of the judgment’s understanding at which documented suffering borders on invisible suffering.

i) “Vocabulary” of the LRA

The judgment appears to establish a “vocabulary” of the LRA by defining words that took on new meanings within the LRA. For example, it states that ‘work’, within the LRA, meant fighting, killing, abducting, looting, burning, and finding and stealing food.¹¹³ Being ‘cautious’ might mean shooting at houses.¹¹⁴ ‘Resting’ meant death, and being asked if you would like to rest was a threat.¹¹⁵ Crying meant wanting to die.¹¹⁶ ‘Marriage’ and ‘wife’ meant women being distributed without choice and often being tortured and abused.¹¹⁷ References to such definitions are copious and scattered throughout.¹¹⁸

The prosecution’s closing statement revealed something of the significance of this vocabulary-forming. Having encouraged the judges to remember ‘what it means to collect food’ for the LRA, one prosecutor summarised witness evidence as follows.¹¹⁹ ‘Collecting food’ included ‘taking it by force from civilians’, with

¹¹³ *ibid.* [1210], [1696], [1867].

¹¹⁴ *ibid.* [1494]–[1495].

¹¹⁵ *ibid.* [925], [1978].

¹¹⁶ *ibid.* [2021].

¹¹⁷ *ibid.* [2215].

¹¹⁸ *ibid.* [1038], [1095], [1407], [1478], [2143], [2395], [2400], [2420].

¹¹⁹ *Prosecutor v. Ongwen*, ‘Closing statements by the prosecution – part III’ (ICC, 10 March 2020) <<https://youtu.be/MmVBBC7YyhY>> accessed 20 August 2021 58:00.

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‘guns, bayonets and machetes’, ‘attacking civilians in camps’, ‘shooting, stabbing, beating, hacking civilians to death...locking civilians inside their homes and setting those homes on fire’ and leaving those who weren’t killed to face ‘potential starvation and certain deprivation’.¹²⁰ Understanding ‘collecting food’ was crucial to acknowledging the spectrum of crimes committed under that term.

Vocabulary-building may have another effect, I argue. Establishing vocabulary could assist in unifying individual experiences. Emphasising single meanings for single words – even if those meanings have a degree of flexibility – could suggest that similar experiences took place again and again. While the judgment’s tendency to define is arguably necessary, to appreciate context, reiterating and solidifying *single* meanings for certain words could obscure different, *truly* context-specific meanings. Vocabulary-building may reveal both the judgment’s tendency to unite victim experiences and the reductive potential of that tendency.

Also visible within the judgment is a subtle but persistent presence of poetic “vocabulary”, by which I mean, the employment of metaphor and simile. This may seem ornamental, but I argue that it serves a significant purpose. It encourages an immersive appreciation of collective events. Bodies and wounded people are referred to as luggage, and children as carrying luggage like ‘loaded donkeys’.¹²¹ The judgment describes recordings of Kony asking soldiers to kill people like ‘sweeping up white ants during the night’, and LRA rebels calling one camp for internally-displaced persons a beehive from which they would harvest honey.¹²² Soldiers are described as being tools for Ongwen, a metaphor seemingly invented by the judgment’s writers themselves.¹²³

Metaphor and simile, in engaging readers’ imaginations, might encourage emotional connections to events.¹²⁴ They also might encourage a unification of representations of experiences, in that if some children are described as being like donkeys, one can easily imagine other children suffering similarly. If some attacks were like sweeping up ants, the idea is present that others were like that too. One can include any number of victims among the ants or bees. As such, these descriptive moments might present the reader with opportunities to comprehend and empathise with victims collectively.

¹²⁰ *ibid.* 59:00; *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [1407].

¹²¹ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [1752], [1863], [1983], [2406].

¹²² *ibid.* [1859], [1863].

¹²³ *ibid.* [2914].

¹²⁴ Jeffrey H. Millstein, ‘Renewing Empathy with Imagery and Metaphor’ (2020) 7(3) *Journal of Patient Experience* 305; Halpern and Weinstein, *supra* note 8, at 581.

ii) Cadences of anonymity

Not only word choice, but the *positioning* of certain words assists the judgment, I argue, in unifying many diverse experiences of suffering. Again and again, lists of those killed or injured in LRA attacks begin with those whose names are known and end with those about whom only a stray detail is available. I call these moments cadences of anonymity, as such paragraphs reliably end with a description of an anonymous victim followed by a visible space. One wades through almost endless names of individuals and then is left simply with images of this kind.

a girl found by the river¹²⁵
 a woman shot in the mouth¹²⁶
 one child was left on a rubbish pit¹²⁷
 an unnamed girl with a burnt leg¹²⁸

As paragraphs crescendo towards these moments, the reader's imagination is encouraged to look beyond what the judgment can see towards all those others who may not have been found by a river, or in a rubbish pit, whose injuries were not noticed by a passer-by, but whose lives were nonetheless ruined or ended.

The importance of the pause has been explored with regards to spoken aspects of law, and I am suggesting that such pauses also take place on the page.¹²⁹ Space is created around anonymous individuals by placing them at the ends of paragraphs. This enables the reader to imagine a victimhood that reaches beyond that which the court has documented. The ends of paragraphs involve a kind of resonant silence, memorialising what has gone unwritten. Even undocumented suffering might thus become included within the judgment's picturing of victimhood.

As such cadences recur often, one senses the judgment seeking to remember more suffering than it can describe.¹³⁰ These, I suggest, are the edges – perhaps tattered – of its spiderweb of victim experiences.

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¹²⁵ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [168].

¹²⁶ *ibid.* [169].

¹²⁷ *ibid.* [173].

¹²⁸ *ibid.* [184]. See also: *ibid.* [172], [1546], [1553], [2902].

¹²⁹ James E.K. Parker, 'Listening to the law' in *Acoustic Jurisprudence: listening to the trial of Simon Bikindi* (Oxford University Press 2015), 15.

¹³⁰ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [168], [169], [172], [173], [184], [1546], [1553], [2902].

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As it ties up the loose ends of its evidence of suffering with the help of the reader's imagination, the Ongwen judgment seems underpinned by a yearning for coherence. Elements of its language assist in unifying experiences of suffering, by pointing towards recurring events and actions through the establishment of "vocabulary" and by encouraging readers to imagine the suffering of unknown individuals. A collective experience of victimhood is presented.

While victimhood and perpetration *might* exist along one spectrum, I have argued that at various levels of resolution, the judgment's presentations of witness accounts serve to create a distinct and coherent sense of victimhood. This may assist in upholding one side of the ICC's victim-perpetrator binary. It may also involve disproportionate consideration of some accounts, reductive understanding of experiences of suffering, and reduced reliability of findings based upon that understanding.

I will go on to argue that this singular presentation of victimhood presents the possibility for a contrast. A fly can be positioned, a single perpetrator, the character that Dominic Ongwen becomes within ICL's cast.¹³¹ The other half of the victim-perpetrator binary also appears upheld – perhaps unjustly – through the craft of the court's language.

¹³¹ Anderson, 'Dominic Ongwen: "It is very difficult to balance all that"', *supra* note 11; Baines, *supra* note 12; Baines and Boniface, *supra* note 12; Clarke, 'The Rule of Law through Its Economies of Appearances: The Making of the African Warlord', *supra* note 67; Minkova, *supra* note 10; Stolk, 'A Sophisticated Beast? On the Construction of an 'Ideal' Perpetrator in the Opening Statements of International Criminal Trials', *supra* note 9.

IV The Fly

That boy. I want to constantly call him a boy because... the wheels of his life stopped on the day he was abducted... By the end of this process, and God forbid if he should serve some sentence, the best part of his life will have gone.

– Charles Taku, Defence Counsel,
Prosecutor v. Ongwen (Closing Statements)¹³²

In this final chapter, I argue that the judgment positions a single perpetrator in contrast to its unified representation of victim experiences. Where empathy was encouraged regarding those presented as victims, empathy appears inhibited regarding Ongwen. Where many experiences of suffering were presented as shared, Ongwen's experiences appear isolated, as the judgment's language draws attention to his personal and sole awareness of crimes and his intentional actions.¹³³ Ongwen's voice seems partly silenced, partly re-framed, and his character presented in one light only: as that of someone capable of organising and committing atrocities.

Ongwen's defence may have tried to remind the ICC's judges of the victimhood with which Ongwen's experiences in the LRA began, as in the quote above.¹³⁴ Within the judgment's language, however, I argue that this history became subordinated to and separated from the court's portrayal of Ongwen as perpetrator. The judgment holds at a distance the complexities of Ongwen's character suggested by some accounts and by his own statement to the court.¹³⁵ Ongwen becomes a fly, caught against the court's coherent spiderweb of victim experiences so as to stand out, isolated by and entangled in the court's reasoning, hollowed of his own emotional substance and victimhood, and preserved as a perpetrator. The judgment's particular and limited "Ongwen" sustains the other side of the victim-perpetrator binary upon which its findings depend.

¹³² *Prosecutor v. Ongwen*, 'Closing statements by the defence – part III', *supra* note 15, 49:00; *Prosecutor v. Ongwen* (Transcript: Closing Statements – Courtroom 3), *supra* note 3, at 77.

¹³³ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [131], [132], [214], [216], [873], [964], [971], [978], [979], [1041], [1288], [1295], [2921].

¹³⁴ *Prosecutor v. Ongwen*, 'Closing statements by the defence – part III', *supra* note 15, 49:00; *Prosecutor v. Ongwen* (Transcript: Closing Statements – Courtroom 3), *supra* note 3, at 130.

¹³⁵ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [2506], [2513], [2599]; *Prosecutor v. Ongwen*, 'Sentencing hearing, Session 1' (ICC, 15 April 2021) <<https://www.youtube.com/watch?v=YaybHDhE4Cc>> accessed 16 August 2021.

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i) Isolation

Small language choices combine in the reader's mind to form an impression of Ongwen as distinct from victims. Ongwen 'personally' issued commands and threats, the judgment declares on several occasions, the word 'personally' making those commands seem intimate to and inseparable from him.¹³⁶ Ongwen 'meant' for atrocities to happen, the judgment declares, at various points repeating the word 'meant' five or six times in single paragraphs, drilling home his conscious decisions and his (unquestionable?) awareness of the extent of his actions.¹³⁷ These repetitions, I argue, begin cementing a notion of Ongwen as separate from others involved in atrocities.

Delicate exaggerations then sustain Ongwen's separation. One witness is quoted as saying, '[t]here was no other person other than Ongwen' involved in coordinating certain events.¹³⁸ Of course there were others involved, more generally, and the judgment does acknowledge the LRA as a collective project.¹³⁹ But the phrase 'no other' sounds undeniably extreme, almost as if Ongwen were an entirely separate kind of human being. Similarly, the judgment records Ongwen as being 'fully aware' of the organisational features of his brigade.¹⁴⁰ The phrase imparts upon him a kind of superhuman awareness, which is so 'full'. Ongwen begins to look like someone very different from others.

Interspersed throughout the judgment, these language choices slowly isolate one "Ongwen" for the reader to see, who acted with awareness and who was alone in that awareness. Once the subtleties of these choices are appreciated, a characterisation that appeared convincing might begin to seem fragile.¹⁴¹

ii) Entanglement

While Ongwen's agency seems emphasised in the moments analysed above, other aspects of his character seem hidden in plain sight. I call this the entanglement of the fly, because the more the reader hears about Ongwen's complex character, the more we see him as a perpetrator. This happens as many

¹³⁶ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [131], [132], [214], [216], [971], [978], [979], [1041], [1288], [1295].

¹³⁷ *ibid.* [2867], [2921], [2967], [3014].

¹³⁸ *ibid.* [1295].

¹³⁹ *ibid.* [873]

¹⁴⁰ *ibid.* [964].

¹⁴¹ Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, *supra* note 62; Douzinas, McVeigh and Warrington, *supra* note 22, at 94-6, 113; Heller, Mégret, Nouwen, Ohlin and Robinson, *supra* note 24.

accounts of Ongwen are presented in the context of legal reasoning that is already committed to assessing him as a potential perpetrator.

The judgment records that Ongwen had various qualities that could lead one to empathise with his decisions and actions in a coercive environment. Accounts describe how he would hesitate and needed to plan and consult before deciding on courses of action.¹⁴² He would care for those around him, especially before he was promoted to a commander, when he became in certain settings ‘tough on the rules’.¹⁴³ One witness recalled that he often sat with people of lower rank, joked with them, and played cards with youngsters.¹⁴⁴

...because of his love for the people, that is why he would come down to that level and stay with those people as well.¹⁴⁵

He was ‘a carefree person’, the same witness recalled.¹⁴⁶

He – he led a kind of childish life. He had a lot of jokes and fun making. That was what I saw about him... I mean to say that he was a very simple person, who was down to earth.¹⁴⁷

These insights into Ongwen’s actions suggest a complex character and might encourage a reader’s empathy for him. Such potential empathy, I argue, is inhibited by the surrounding legal reasoning. These accounts are presented in the context of revealing Ongwen’s mental health and the agency that might flow from it. Ongwen could plan, which is incompatible with severe mental disorder, the judgment reasons; he could not have hidden such a disorder for so long; and none of these witnesses mentioned anything in Ongwen resembling a mental disorder.¹⁴⁸ Instead of perceiving Ongwen as emotionally complex and relating to him, which might lead to perceiving him as a victim, the reader seems encouraged to see him one way, as in the following account. After Ongwen held a knife to his chest and ordered others to hit him on the head, one witness recalled as follows.

From that day I knew who Dominic Ongwen was and never forgot him¹⁴⁹

¹⁴² *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [2599].

¹⁴³ *ibid.* [2506].

¹⁴⁴ *ibid.* [2513].

¹⁴⁵ *ibidem.*

¹⁴⁶ *ibidem.*

¹⁴⁷ *ibidem.*

¹⁴⁸ *ibid.* [2517], [2521], [2541], [2556].

¹⁴⁹ *ibid.* [965].

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The idea of knowing *who Ongwen was* suggests that through and through, he was this one way. Testimonies showing other elements of Ongwen are presented, but held at a distance from the reader. One Ongwen dominates: a terrifying commander, and no-one and nothing else.¹⁵⁰

iii) Preservation

Continuing with the metaphor of Ongwen as the trapped, entangled fly, I take preservation to mean enabling something to remain, but in a somewhat different form from the original. There is also a certain hollowing-out, or emptying, involved with preservation. The judgment, I argue, enacts a preservation of Ongwen's voice, and with it, secures the reader's perception of him as a perpetrator.

Firstly, Ongwen's voice is hollowed in the sense of hardly being present in the judgment. As far as I am aware, Ongwen's own two-hour statement to the court, detailing some of his formational experiences in the LRA, and in which he arguably exhibited diverse emotions, is not quoted in the published judgment.¹⁵¹ When his voice does appear, it is often through others' accounts of what he said.¹⁵² His voice arrives like a ghost, occasionally haunting the judgment's record of understanding. Surely, a voice that is hardly present cannot be adequately heard.

Secondly, when Ongwen's voice does sound, what he says suggests someone remorseless. Some of those rare moments are as follows.

... warming the body of the boys' [by fighting]¹⁵³

[On receiving abductees and hearing one had been released] Thank you. You should have brought even the other girl. Why did you let her go?¹⁵⁴

[Regarding new abductees being beaten] LRA have to remove the civilian [from them]¹⁵⁵

¹⁵⁰ Anderson, 'Dominic Ongwen: "It is very difficult to balance all that"', *supra* note 11; Baines, *supra* note 12; Baines and Boniface, *supra* note 12; Clarke, 'The Rule of Law through Its Economies of Appearances: The Making of the African Warlord', *supra* note 67; Minkova, *supra* note 10; Stolk, 'A Sophisticated Beast? On the Construction of an 'Ideal' Perpetrator in the Opening Statements of International Criminal Trials', *supra* note 9.

¹⁵¹ *Prosecutor v. Ongwen*, 'Sentencing hearing, Session 1', *supra* note 135.

¹⁵² *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [966], [2001], [2023], [2188].

¹⁵³ *ibid.* [2001].

¹⁵⁴ *ibid.* [2023].

¹⁵⁵ *ibid.* [2188].

The perceptions given by such moments seem to be of someone compassionless, who can present crimes as pleasant activities, who seeks more ruin and who seeks to empty other people of their humanity and social relations. This “Ongwen” seems fundamentally different and separate. That difference – and with it, I argue, Ongwen’s characterisation as a perpetrator – is preserved.¹⁵⁶

Thirdly, Ongwen’s voice is hollowed by becoming something not his own. The judgment re-imagines, or hijacks, his voice in order to think through alternative actions that he could have taken. In assessing Ongwen’s decisions to rape women in private, the court reported as follows.

The chamber found this a persuasive argument: he could have said, Actually, I am not so wicked and monstrous as to rape a young girl like you. I have only done this to satisfy Joseph Kony. But if you lie here quiet and safe, we can pretend in the morning we had sex.¹⁵⁷

By showing what Ongwen was *not*, what he *was* like – deliberate, and moreover, perhaps monstrous and wicked – seems suggested. A realistic representation of Ongwen might be lost, as his voice is imagined rather than heard.

In summary, Ongwen’s voice seems crafted by the judgment to highlight one side of his character and to hide others. A different, threatening, compassionless perpetrator is presented, accuracy threatening to be lost along the way.

*

In his statement to the court, Ongwen expressed amazement at the ‘mystery’ of his survival.¹⁵⁸ His suffering exceeded that of Christ, he proposed.¹⁵⁹ No other soldier, he asserted – not even an elephant – has ever survived 11 bullets like him.¹⁶⁰ At one point, he asked simply, ‘Why am I still alive? What’s the meaning behind this? Why am I special?’¹⁶¹ These extreme statements isolate Ongwen, playing into the court’s casting of him as fundamentally different. But alongside those outbursts, Ongwen acknowledged the similarity of his suffering to others’

¹⁵⁶ Anderson, ‘Dominic Ongwen: “It is very difficult to balance all that”’, *supra* note 11; Baines, *supra* note 12; Baines and Boniface, *supra* note 12; Clarke, ‘The Rule of Law through Its Economics of Appearances: The Making of the African Warlord’, *supra* note 67; Drumbl, ‘Getting’ an Unforgettable Gettable: The Trial of Dominic Ongwen’, *supra* note 11; Minkova, *supra* note 10; Stolk, ‘A Sophisticated Beast? On the Construction of an ‘Ideal’ Perpetrator in the Opening Statements of International Criminal Trials’, *supra* note 9.

¹⁵⁷ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [2666]–[2667].

¹⁵⁸ *Prosecutor v. Ongwen*, ‘Sentencing hearing, Session 1’, *supra* note 135, 29:00.

¹⁵⁹ *ibid.* 21:45.

¹⁶⁰ *ibid.* 23:40.

¹⁶¹ *ibid.* 25:40.

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suffering. He urged the court to believe that he also bleeds and he is also human.¹⁶² He spoke as follows.

All these things that happened to me happened to my fellow children – you heard different witnesses.¹⁶³

This conflict between Ongwen’s feelings of difference and similarity to others seems excluded from the judgment. Instead, I have argued, the reader is shown only the difference. Ongwen becomes one “Ongwen” for the ICC. That character is held in contrast to the spiderweb of victim experiences, as someone with whom empathy is not encouraged.

Who is to say that there was no friendship for Ongwen in the bush, as one witness stated was the case for LRA soldiers in general?¹⁶⁴ Who is to say that Ongwen too did not fear at least some of the punishments, including spiritual punishments, that other soldiers feared?¹⁶⁵ Such questions go unasked and unanswered. The judgment risks being constructed so as not to allow the thoughts of them. “Ongwen as perpetrator” risks becoming a premise, rather than an open question.

Having described the judgement’s spiderweb of victim experiences, I have shown that a fly can be caught within that web. Certain language presents one individual in contrast to victims, as playing one different role. This helps to uphold that notion of a clear, lone perpetrator central to ICL’s victim-perpetrator binary.¹⁶⁶ In the process, the judgment might become blind and deaf to ‘that boy’ highlighted by the defence, that grown-up child soldier buried underneath the name “Ongwen”.¹⁶⁷ It may not respond to his suffering. What justice can emerge from findings made upon such exclusions would seem to require further questioning.

¹⁶² *ibid.* 27:40.

¹⁶³ *ibid.* 26:00–27:00.

¹⁶⁴ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [897], [1905].

¹⁶⁵ *ibid.* [907]–[915], [917], [929]–[930], [958], [1834], [1985], [2206].

¹⁶⁶ Drumbl, “‘Getting’ an Unforgettable Gettable: The Trial of Dominic Ongwen”, *supra* note 11; Drumbl, *Reimagining Child Soldiers in International Law and Policy*, *supra* note 4, at 214; Minkova, *supra* note 10; Stolk, ‘A Sophisticated Beast? On the Construction of an ‘Ideal’ Perpetrator in the Opening Statements of International Criminal Trials’, *supra* note 9.

¹⁶⁷ Baines, *supra* note 12, at 169; *Prosecutor v. Ongwen*, ‘Closing statements by the defence – part III’, *supra* note 15, 49:00; *Prosecutor v. Ongwen* (Transcript: Closing Statements – Courtroom 3), *supra* note 3, at 77.

Conclusion: The Spider

This trial can be a great message to all those... who wish to act in the same way that Mr. Ongwen and others have acted.

– Joseph Manoba, Legal Representative of Victims,
Prosecutor v. Ongwen (Closing statements)¹⁶⁸

This article has presented the spiderweb and the fly as a metaphor for how the ICC's language structures its presentations of victims and perpetrators in the Ongwen judgment. I began by arguing that detailed personal accounts are presented in language that encourages empathy. Empathy, I argued, assists in allowing the reader to perceive clear victims.¹⁶⁹ I then argued that the judgment draws together many experiences of suffering through techniques of generalisation and extrapolation that remain in touch with the personal, and so in touch with the possibility for empathy and the perception of victims.¹⁷⁰ In this way, the judgment's language aids in presenting a unified, coherent spiderweb of victim experiences, which maintains the victim side of the victim-perpetrator binary.¹⁷¹

In contrast to this structuring of victim experiences, the judgment's language presents one perpetrator, whose emotional substance it hides behind the barriers of its own reasoning, with whom a reader's empathy is inhibited, and whose voice it shapes rather than representing it in its full complexity.¹⁷² The more Ongwen and his defence might struggle to make his history seen, a history that would challenge the ICC's victim-perpetrator divide, the more he appears trapped, like a fly, within the ICC's single way of seeing him. One perpetrator emerges, one who can uphold the far side of the victim-perpetrator binary and so the legitimacy of the ICC's findings.

¹⁶⁸ ICC, 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, following the conviction of Mr Dominic Ongwen: "Today was an important milestone in the journey to bring justice to the people of Uganda."' ICC-CPI-20210204-PR1565 (ICC, 4 February 2021) <<https://www.icc-cpi.int/Pages/item.aspx?name=pr1565>> accessed 19 August 2021; *Prosecutor v. Ongwen*, 'In the Courtroom: Closing Statements' (ICC, 10–11 March 2020) <<https://youtu.be/ye3MDdCLwvc>> accessed 17 August 2021 17:00.

¹⁶⁹ Bandes, 'Empathy, Narrative, and Victim Impact Statements', *supra* note 69; Davis, *supra* note 69; Gadamer, *supra* note 69; Halpern and Weinstein, *supra* note 8; Henderson, *supra* note 69; Jenni and Loewenstein, *supra* note 8; Keen, *supra* note 69; Ritivoi, *supra* note 8.

¹⁷⁰ *ibidem*.

¹⁷¹ Drumbl, *Reimagining Child Soldiers in International Law and Policy*, *supra* note 4, at 214; Fon, *supra* note 10; Kersten, *supra* note 5; Ramos, *supra* note 5.

¹⁷² Anderson, 'Dominic Ongwen: "It is very difficult to balance all that"', *supra* note 11; Baines, *supra* note 12; Baines and Boniface, *supra* note 12; Clarke, 'The Rule of Law through Its Economies of Appearances: The Making of the African Warlord', *supra* note 67; Minkova, *supra* note 10; Stolk, 'A Sophisticated Beast? On the Construction of an 'Ideal' Perpetrator in the Opening Statements of International Criminal Trials', *supra* note 9.

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One might picture Ongwen himself as a metaphorical spider, helping to organise a web of crimes affecting thousands of people over many years.¹⁷³ Indeed, the ICC has sought to prove his responsibility for systemic and systematic actions.¹⁷⁴ Instead, so as to pursue a structural criticism of ICL, I have pictured the ICC as the spider, a patient architect weaving together accounts in its own, delicate, silk-like language, adapting to include the available evidence while recreating one form of truth-finding and truth-telling again and again, adhering to and limited by the principle of discrete victims and perpetrators.¹⁷⁵ In the process, the judgment could be said to contribute to ICL's quest for legitimacy and to become part of ICL's branding, by reflecting and reinforcing its core principle of the victim-perpetrator binary.¹⁷⁶ Language gives legitimacy to law.

What are the consequences of such a structuring of experiences, for both the individuals seeking understanding and justice through the trial, and for the accused individual at its centre? As the judgment represents unified victim experiences, representations of complexity might be forfeited; as it clarifies and separates one perpetrator, his own victimhood may disappear. Language choices may excessively encourage readers to believe in the general applicability and believability of limited personal viewpoints; extrapolations, poetic paraphrasing, certain orderings of testimonies and legal reasoning may provoke or inhibit empathy. Developing Stolk's notion of the fact/experience mix within the judgement, the pooling of fact, experience, imagination and reasoning that I have pointed to throughout may cast some as those one can empathise with, and someone as separate and guilty.¹⁷⁷

Appreciating the craft of the judgment's language, and how it may support a victim-perpetrator binary, might lead to realising that the judgment's legitimacy relies on such craft. Realising this may, in turn, call into question that legitimacy.¹⁷⁸ Would one conclude that the emerging message of the trial is in fact 'great', as Manoba suggested above, and if so, in what sense?¹⁷⁹ Is it accurate and far-reaching, or overbearing and simplistic?

Having identified a potentially reductive structuring to both the court's presentation of those it seeks to assist and the individual it seeks to hold accountable, my analysis presents several questions for further exploration. Firstly, might it be possible to think of the ICC's language as sustaining and also

¹⁷³ Bradfield, *supra* note 18; Keppler, *supra* note 14.

¹⁷⁴ *Prosecutor v. Ongwen* (Trial Judgment), *supra* note 6, [2097], [3116].

¹⁷⁵ Drumbl, *Reimagining Child Soldiers in International Law and Policy*, *supra* note 4, at 214; Kersten, *supra* note 5; Minkjova, *supra* note 10; Parmentier and Mels, *supra* note 11; Ramos, *supra* note 5.

¹⁷⁶ Arnould, *supra* note 7; Kennedy, *supra* note 7, at 8; Mégret, *supra* note 7, at 26; Schwöbel-Patel, 'The market and marketing culture of International criminal law', *supra* note 7, at 276.

¹⁷⁷ Stolk, 'The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity', *supra* note 22, at 984; Combs, *supra* note 57.

¹⁷⁸ Arnould, *supra* note 7; de Hoon, *supra* note 7; Langvatn and Squatrito, *supra* note 7.

¹⁷⁹ *Prosecutor v. Ongwen*, 'In the Courtroom: Closing Statements', *supra* note 167, 17:00.

developing the principles of ICL?¹⁸⁰ The intricacy with which notions of victims and a perpetrator appear to have been established within this judgment is such that one might suggest that the victim-perpetrator binary is itself being clarified and deepened through the judgment's language. When investigating such a question, it might be important to assess whether the linguistic choices that aid in presenting victims and a perpetrator in one ICC case are also visible in other cases, and whether lines of influence can be traced.

Secondly, how is the expressive potential of the ICC's language defining the ICC's cast of victims and perpetrators more generally? While research in the field of forensic linguistics has explored the tendencies of legal language towards formality, chronology and measurement, and how those can accentuate and enable its purposes, I have learnt from those close analyses while assessing new qualities within legal language.¹⁸¹ I have suggested that it is actually imaginative expressiveness, along with the evocation and inhibition of empathy, and various degrees of informality and familiarity, that sustain the victim-perpetrator divide in this judgment.¹⁸² How else might ICL's language be drawing on its audience's emotions in order to reinforce its principles?

Lastly, how could ICL learn from the dangers of its current mode of understanding that seem revealed through my analysis?¹⁸³ ICC judgments might cultivate more mindfulness of the power of their language, in terms of the great impact such language can have on representations of individuals and communities. Furthermore, awareness of how language may sustain the victim-perpetrator binary may challenge the strength of that binary, and so may call for the binary to be more overtly justified or developed within the ICC's findings. Could such a justification or development take place, as part of the development of ICL, and if so, how?

Douglas has reminded us that however courts may try to control controversial proceedings and present them in certain ways through their judgments, trials become cultural artifacts, and articles of collective memory, in ways that cannot be controlled – or, I might add, foreseen.¹⁸⁴ As the young Ongwen trial finds its place in our collective memory, criticism that appreciates its judgment as an artifact,

¹⁸⁰ Heller, Mégret, Nouwen, Ohlin and Robinson, *supra* note 24.

¹⁸¹ Coulthard and Johnson, *An Introduction to Forensic Linguistics: Language in Evidence*, *supra* note 30; Coulthard and Johnson, *The Routledge handbook of forensic linguistics*, *supra* note 30; Gibbons, *supra* note 30; Maley, *supra* note 30, at 16.

¹⁸² Bandes, 'Empathy, Narrative, and Victim Impact Statements', *supra* note 69; Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback*, *supra* note 28; Davis, *supra* note 69; Gadamer, *supra* note 69; Halpern and Weinstein, *supra* note 8; Henderson, *supra* note 69; Jenni and Loewenstein, *supra* note 8; Keen, *supra* note 69; Ritivoi, *supra* note 8.

¹⁸³ Heller, Mégret, Nouwen, Ohlin and Robinson, *supra* note 24; Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, *supra* note 62.

¹⁸⁴ Douglas, *supra* note 50, at 205.

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with *artifice* to it, may enable more detailed assessments of its significance and validity.¹⁸⁵

The more the patterns within the ICC's language are revealed, the more the limitations to justice imposed by ICL's principles might be revealed. By describing spiderwebs – by which I mean, previously unseen structures upholding the court's principles – within the court's language, wherever they spring up, it might even be possible to fly around such structures. Such criticism could encourage conceptions of spectra of responsibility and more context-dependent responses.¹⁸⁶ For now, against the persistent victim-perpetrator binary, part of the work of ICL's criticism might be to keep a close enough eye on the ICC's language to ensure that appreciating its exclusions and imagining alternatives remains possible.

¹⁸⁵ Douzinas, McVeigh and Warrington, *supra* note 22, at 104, 106.

¹⁸⁶ Baines, *supra* note 12, at 186–7; Giorgia Donà, “Situated Bystandership” During and After the Rwandan Genocide (2018) 20(1) *Journal of Genocide Research* 1; Filip Strandberg Hasselind, ‘The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen’ (November 2020) 20(10) *Social and Legal Studies* 1; Linda M. Keller, ‘The False Dichotomy of Peace versus Justice and the International Criminal Court’ (2008) 3(1) *Hague Justice Journal* 12; Joseph A. Manoba and Anushka Sehmi, ‘What the Dominic Ongwen trial could mean for traditional justice mechanisms in the ICC’ (*LSE Blogs*, 26 July 2021) <<https://blogs.lse.ac.uk/africaatlse/2021/07/26/dominic-ongwen-trial-traditional-justice-mechanisms-uganda-international-criminal-court-icc/>> accessed 19 August 2021; Peace Direct, ‘Acholi Religious Leaders Peace Initiative’ (*Peace Insight*, 2021) <<https://www.peaceinsight.org/en/organisations/arlpi/?location=uganda&theme>> accessed 16 August 2021.