The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen

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Abstract
This paper considers how the international criminal trial emerges as a site for contesting historical and political narratives, and how the proceedings against Dominic Ongwen in the International Criminal Court gives us yet another opportunity to do so. It focuses on how the criminal trial appears to reinforce the hegemony of some contested historical narratives over others in attempting to deal with the past. It is suggested that the conflict in Uganda as well as what is currently happening in the Ongwen trial cannot be understood in isolation from, on the one hand, interregional and factional struggles within the Ugandan territory and, on the other hand, a postcolonial logic. Departing from this nexus, the paper introduces, discusses, and analyzes the strategy of rupture as developed by Jacques Vergès. By scrutinizing the legal strategies employed by Ongwen and his defense team, the paper argues that their strategies demonstrate the ways in which historical and political narratives are susceptible to ‘rupture’ by counternarratives put forth by defendants who refuse to play their part in the global justice drama by pointing to the struggle for larger contextual issues. In the setting of the Ongwen trial, this paper argues that by tapping into the victim-perpetrator narrative, Ongwen’s defense team are, wittingly or unwittingly, ‘rupturing’ the binaries in international criminal law. The paper concludes by arguing that the Court may need to find a new approach to ‘courtroom historiography’ if it is going to survive, either with or without the Global South.

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Introduction
Dominic Ongwen was, together with Joseph Kony, Vincent Otti, Okot Odhiambo and Raska Lukwiya, one of the leaders of the Lord’s Resistance Army (LRA). The LRA, a rebel group originating from northern Uganda, has operated during the last 30 years with the ultimate goal of establishing a ‘biblical state’. It is estimated that the group has killed some 100,000 people and kidnapped more than 60,000 children during their active years (Burke, 2016). Owing in part to this, the International Criminal Court (ICC) issued arrest warrants for the five leaders. While Kony, Otti, Odhiambo and Lukwiya are either dead or at large, Ongwen surrendered himself to US troops stationed in the Central African Republic in January 2015. Following his surrender, he was indicted before the ICC pursuant to charges of war crimes and crimes against humanity with 70 counts of murder, pillaging and enslavement (Prosecutor v. Ongwen, 2016a). During Ongwen’s Trial Hearing in December 2016, he denied criminal responsibility on the basis that he, in fact, was ‘one of the people against whom the LRA committed atrocities’, having been abducted as a child, thus being only a pawn in a much larger game (Prosecutor v. Ongwen, 2016a: 17). In Ongwen’s defense, he sets out to display a broader historical and political understanding of his role in the trauma in Uganda than the one suggested by the prosecutor by pointing to his troubled past. At the same time, he does not deny that terrible things have happened, but rather strives to put them into what he considers a ‘correct’ historical, social and political context. The question of prosecuting subjects who have experienced child soldiering presents a difficult moral dilemma. Though feared by many for their brutality, most, if not all, of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators. How do they fit within the binary logic within the international criminal law (ICL) system where questions of guilt must be answered either ‘yes’ or ‘no’?

On the surface level, the trial against Ongwen is best viewed in light of the UN’s increasing engagement with international peacebuilding, with the overall aim of creating conditions that maintain lasting peace and stability. This form of peacebuilding invokes many important queries. Perhaps the most crucial one is the question of how a post-conflict society should deal with its ‘evil’ past, in order to ‘enable the state itself to function as a moral agent’ once again (Borneman, 1997: 23). The question embodies in many ways what is today known as ‘transitional justice’ in the ICL project. At the same time, the trial against Ongwen, like transitional justice processes generally, sheds light on how the wish to punish those who are believed to be individually responsible for large scale atrocities sits uneasily with historical knowledge-making in the courtroom. Judgments, which are what the ICC is established to deliver, are designed to either convict or acquit. To fulfill this objective, the Court must take note of complex historical, social and political questions as well as rule on them; questions all of which are inherently
ideologically salient. However, is there a possibility for the defendant to decline to participate in such endeavors and to suggest an alternate narrative on how to understand the past’s relation to the present?

Using this question as a point of departure, focusing on the trial against Ongwen, this paper introduces, discusses, and analyzes the ‘strategy of rupture’ as termed by Jacques Vergès, and the ways in which this legal defense has been applied in practice at the ICC by Ongwen’s defense team in order to not only resist the Court in itself, but also, and more generally, knowledge-making in Uganda’s transitional justice process. In particular, this paper argues that the disagreement over Ongwen’s culpability relates to strategies of rupture in that the chosen defense tactics are, wittingly or unwittingly, ‘rupturing’ the binaries in international criminal law and, by extension, negotiating a new legal subject comprised of the hybrid, entangled subject position of the victim-perpetrator.

Recently, much has happened in the proceedings. The trial had been stalled for some time due to the heavy load of witnesses called, but in early March 2020, the Prosecution and the Defense delivered their closing statements before the Trial Chamber. Going forward, it appears likely that the Chamber will deliver a judgment at least in early 2021. No international tribunal has yet considered the legal issues relating to the criminal responsibility of former child soldiers. Even though the proceedings in the Trial Chamber are drawing to a close, it is likely that the victim-perpetrator relationship in connection to individual criminal responsibility will continue to draw academic and political attention in the future. This piece seeks to document some of the complexities arising in this nexus in the setting of Uganda.

A Brief Exposition on the Historical, Political and Social Origins of the LRA

The conflict in Uganda has been raging for a long time. Parsing the historical, social and political context of the conflict can help in understanding the LRA and its characteristics. In early 1986, the National Resistance Movement (NRM), spearheaded by Uganda’s current president Yoweri Museveni, overthrew the dictatorship of General Tito Okello, which had briefly replaced the previous dictatorship of Milton Obote. Following NRM’s victory, Museveni and his forces brought an end to the Ugandan Bush War and seized control of the country. At the beginning, the NRM was touted as an alternative to multi-party democracy and was based in southern Uganda (Bailey, 2017: 251). After some time, however, the victors sought vengeance against ethnic and spiritual groups hailing from the north of Uganda, such as the Acholi people, of which the former dictator Tito Okello was a member.

In the wake of the horrible acts of violence committed by the new masters, various civilian resistance movements of spiritual, political character arose, which led to insurrections aimed at gaining regional independence (Allen, 2006: 37–44). One of the most prominent was the Holy Spirit Movement (HSM), led by Alice Lakwena. Lakwena, a self-proclaimed prophet, urged her acolytes to overthrow the newly established regime. After sustaining severe losses in 1987, the HSM’s forces dwindled and Lakwena took refuge in Kenya. Joseph Kony, himself a devoted member of the HSM, took the remnants of the cadres and formed what would later be known as the LRA. Soon, the LRA eclipsed
other armed groups operating in the northern portion of Uganda. The declared mission of Kony’s new rebel movement was initially to free the Acholi people of northern Uganda by overthrowing Uganda’s government in the south and installing a regime based on Kony’s interpretation of the Ten Commandments (Oloya, 2013: 58). During the early 1990s, Kony instead turned against the Acholi, who he blamed for the LRA’s problems and began a terror campaign against pockets of Acholi people (Bailey, 2017: 251).

The LRA has no popular base. Instead, it has employed a widespread practice of abducting children as recruits with the ambition to shape the group as ‘the nucleus of a new Acholi identity’ (Bailey, 2017: 252). These practices have garnered international notoriety with warlords typically forcing young boys to become soldiers and awarding young girls as wives to officers. This dual role of child soldiers as both perpetrators and victims is a key characteristic of the LRA’s culture of command and control. The LRA leadership deliberately preys on the innocence and vulnerability of children in order to transform them into a potent combination of docile subordinates and vicious killers (Akhavan, 2005: 407).

I would like to suggest that the conflict in Uganda as well as what is currently happening in the Ongwen trial cannot be understood in isolation from, on the one hand, interregional and factional struggles within the Ugandan territory and, on the other hand, postcolonial logic. The NRM government, which later was renamed the Ugandan People’s Defense Force (UPDF), was seen by the neighboring country Sudan – governed by the predominantly Arab National Islamic Front – as a threat to its control of the restive non-Islamic, non-Arab southern portion of the country. In addition, Sudan linked the new Ugandan government with the insurgent Sudan Peoples’ Liberation Army, largely comprising Christian/animist Dinka and Nuer peoples in the region bordering Uganda. As Payam Akhavan puts it, this volatile mix resulted in ‘an unlikely, Faustian alliance between the Islamist government of Sudan and a nominally “Christian” insurgency (the LRA) against Uganda’s government’ (Akhavan, 2005: 406).

But the complexities extend deeper still. Regional tension and fragmentation in Uganda can be illustrated by the fact that prior to the 14th century, the entire territory of the country had been under the control of a single kingdom until it was divided into four distinct kingdoms of Ankole, Toro, Bunyoro and Buganda by an invasion from the north. In the wake of colonization, Buganda, located in the south of the region, was edging ahead, due in large part to its location on the banks of Lake Victoria and frequent contact with caravans from the Arab world. The allocation of power to the southern portion of the territory resulted in tension. I would like to suggest that, when viewed from this perspective, the insurrections of the HSM and LRA movements, and by extension the conduct at issue in the Ongwen case, do not appear strikingly out of place in the history of Uganda.

The short exposition above does not in any way aspire to provide an exhaustive account of what actually has happened in Uganda, nor does it claim to serve as the authoritative statement on the matter. What I wish to underline is that the context surrounding the Ongwen case is complex and that there is reason to be reflexive in this setting. In my view, there is not one, but several, ways of approaching and understanding the circumstances that permeate this conflict.
The ‘Critical Turn’ in ICL

Individual criminal responsibility for any of the core international crimes is not a novelty. Today, it is well-known that individuals can be held responsible for international crimes. This was not always the case, however. It was in the International Military Tribunal at Nuremberg (IMT) that Judge Jackson famously declared that:

"crimes against international law are committed by men, not by abstract entities, and only in punishing individuals who commit such crimes can provisions of international law be enforced. (Judgment of the IMT, quoted in Duffy, 2005: 74)"

This liberal conceptualization of individual criminal responsibility, mirrored in many aspects in domestic criminal law, has been problematized by Hannah Arendt. In the wake of Nuremberg, she noted that ‘[i]t may as well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems’ (Arendt, 1963: 233). Her argument is that to hang Göring appears radically disproportionate to the million lives he was ultimately responsible for taking. In certain cases, a crime may be intertwined with issues of political, social and economic deprivation, and in effect, punishing specific individuals may not provide an adequate response. Dealing with such dimensions often emerges as challenging for ICL. These complexities are not previously uncharted. In connection to the trial of Adolf Eichmann, Karl Jaspers noted that these actions:

"stand outside the pale of what is comprehensible in human and moral terms, so the legal basis of this trial is dubious. Something other than law is at stake here – and to address it in legal terms is a mistake. (Jaspers as quoted in Kohler and Saner, 1992: 410)"

Jaspers’ argument points to some of the perils of viewing the international criminal process as a form of education and as a means to establish a historical narrative. It risks moving into an arena that has nothing to do with the criminal trial in an ideational sense. It is for the same reason that Arendt criticizes the Eichmann trial for being a ‘show trial’, enacted for political purposes rather than aiming to establish the innocence or guilt of the accused (Arendt, 1963: 251).

Even though the principle was developed in the wake of the Second World War, it was not until after the end of the Cold War that individual responsibility for international crimes in the international society gained momentum. The creation of several International Criminal Tribunals (for instance, in Rwanda, Yugoslavia, Sierra Leone, Lebanon, and Timor-Leste) and the establishment of the ICC in 2002 underline the rise of individual criminal responsibility once again.

Inspired by this development, the field of international criminal law experienced an increased momentum in academic scholarship and in public debate (Baaz, 2015a, 2015b, 2015c; Baaz and Lilja, 2016; Schwöbel, 2014: 169–170). A large portion of the contemporary discussion regarding international criminal law is, however, somewhat limited and often focuses on the positive contribution of ICL to various projects of reconciliation and reconstruction of peace, justice, legality, fighting impunity and
individual accountability. That is not to say that critique of ICL law is non-existent, but there is reason to call for an increased substantive engagement with various blind spots and correlations between transitional justice, international criminal law and issues such as ideology, imperialism, struggle over memory, exclusion, injustice and conflict (Baaz, 2015a: 161; 2015c: 674–675).

According to Christian Reus-Smit (2014: 286) a ‘body of critical international legal theory emerged to challenge the inherent liberalism of modern international legal thought’ in the 1980s. Advocates of the approach argue that ‘liberalism is stultifying international legal theory, pushing it between the equally barren extremes of “apology” – the rationalization of established sovereign order – and “utopia” – the naive imagining that international law can civilize the world of states’ (Baaz, 2015b: 676; see also Koskenniemi, 2016). These undertakings may take various forms. For instance, we can discern critical scholars who engage in a genealogy of the field (Elster, 2004; Zunino, 2019) and those who discuss the rise of a purported norm of individual criminal responsibility, or ‘justice cascade’ (Sikkink, 2011).

Traditional international criminal law is not only legalistic but also primarily ‘problem-solving’, which means that it takes the world order as it finds it for granted and accepts it as the given framework for action; the general objective is to facilitate this order by dealing effectively with various problems (Baaz and Lilja, 2016: 161). Critical theory and critical international criminal law are, however, ‘critical’ in a more concentrated manner. The lowest common denominator for these perspectives is that they seek to distance themselves from the existing world order to instead focus on the ways in which this order materialized, particularly by problematizing and questioning existing institutions and/or power relations, asking not only about their origins, but also whose interests they serve (Baaz, 2015b: 675; Cf. Baaz and Lilja, 2016: 145; Cox, 1986: 208–209). The objective is to expose power relations and to produce knowledge geared toward creating conditions for social change. Critical legal scholars, by extension, understand liberal international law as ideology and argue that ‘the motivation or “knowledge interest” of all critical research is “emancipatory”’ (Minkkinen, 2013: 119).

A recently emerging facet of the ‘critical turn’ in the setting of ICL has been to problematize the ability of international criminal law to deal with various national traumas, due to their vast historical, political and moral significance. In particular, it has been held that if trials against international delinquents should have any significance, then that must lie elsewhere than in solely punishing a few individuals (cf. Koskenniemi, 2011). At the same time, it could be argued that truth recovery is an auxiliary function of the international criminal justice project and that the main feature is to ascertain retribution and deterrence (cf. Nersessian, 2010: 192). I would like to suggest that all these rationales co-exist, and that in some cases, certain aspects are more prevalent than others. Still, history-making appears to be an important part of any international criminal law trial, regardless of whether one believes it to be the most or least important element of the international criminal law project.

From this perspective, one central aspect of Ongwen’s trial is that the judgment produces a narrative of the historical truth of his role in the conflict in Uganda. It emerges as a prism of truth of a complex series of events, regardless of whoever constructs this truth and which political and ideological interests are allowed to permeate it.
(Wilson, 2011: 1–23). This is not necessarily a controversial claim, taking into account the present state of the literature, but it appears wise to underline that criminal trials produce historical narratives, permeated with dissent (Heller and Simpson, 2013: 1).

At this point, I would note that legal and historical truths sometimes overlap, but they are often far from identical. From a legal perspective, strictly speaking, the most relevant question in a criminal trial is: can it be proved beyond reasonable doubt that the person accused actually committed the act of which they are accused? Broader questions, such as why he or she did it and in what context was the act committed, are of less, if any, interest. In transitional periods, however, the debate about why persons did what they did and what is to be considered an acceptable act, is contested. It is important to remember that for all major political events there are many stakeholders. To construct a narratival truth of events that could serve as meta-narrative for the future, to move beyond a traumatic event is, by definition, a ‘struggle over memory’ (see Baaz, 2015b: 319; Baaz and Lilja, 2016: 161; Dukalskis, 2011: 432). Ongwen’s defense team, as we shall see below, employs a defense strategy that brings this struggle over memory to the fore.

**Setting the Stage: On the Individualization of Guilt and the Strategy of Rupture**

The international criminal trial and its judgment have a unique capability to condemn, meaning that they will always bear strong connotations to value-based considerations. Exposing such undertones highlights the close connection between law and politics in ICL. In the same way as standard literature, the judgment creates and establishes narratives. The ‘story’ of the judgment is based on the perpetrator, but also mirrors and reflects the audience in their perception of atrocity and the perpetrators. Through these mechanisms, the judgment is not limited to reviewing past events, but also produces, creates and develops an understanding of atrocity for the future. In such operations, the judgment must link the past to the present to provide an explanation as to what has happened in the given context (Zunino, 2019: 21–58). As we saw above, Ongwen denies culpability on the basis that he is, apart from a perpetrator, also a victim. In this way, in the relevant case, the narrative of the victim-perpetrator hybrid and broader structural issues compete with liberal notions of self-determination, with the latter aspect downplaying the significance of structural mechanisms. How to fathom Ongwen’s actions depends on what one accepts as a reasonable explanation scheme. From this perspective, and drawing from Neha Jain (2018: 1163–1165), ICL is caught in a deadlock between two positions: the individual focus and the wider contextual narrative. How to solve the deadlock depends on what we believe international criminal law ought to accomplish, and is thereby a question of politics. However, following Kathryn Sikkink (2011: 10–15), I want to suggest that evaluating facts in international criminal law cannot be separated from evaluating context. Employing an individual-based focal point risks distorting the political context surrounding them. Conduct becomes simplified in terms of behavior and will of autonomous agents. Instead, I argue that conduct cannot be entirely isolated from structural explanations.

Individualization of guilt will therefore always draw from broader contextual parameters, and context operates irrationally to construct notions of normality (Tallgren,
In situations of mass atrocity, says David Luban (2011: 624), actions are not committed in an anti-social way, but rather as a form of criminal normality, where ‘crime becomes law, law becomes crime’. The defense strategies chosen by Ongwen, as we shall see below, are effective in pinpointing the restraints inherent in the criminal trial through challenging its binaries; moving the trial into an arena where the tribunal must make contextual assessments, when it is precisely the context that is at dispute (cf. Drumbl 2005). This notion is closely linked to what Jean-François Lyotard referred to as the *différend*. The *différend* is actualized ‘between two parties as taking place when the “regulation” of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom’ (Lyotard, 1983: 9). However, as Lyotard notes, ‘one side’s legitimacy does not imply the other’s lack of legitimacy’ (Baaz and Lilja, 2016: 147). To that end, a pluralism of interpretations can co-exist in juxtaposition to each other. This is not possible in a criminal trial, however, where it is vital to choose and decide on one interpretation (Baaz and Lilja, 2016: 147; Baaz et al., 2017: 168). To accept this, the conditions under which the trial is performed, who should be the accused, what deeds to focus on and so forth, is ‘to accept one interpretation of the context among those between which the political struggle has been waged’ (Baaz and Lilja, 2016: 147) and by extension, bestowing this interpretation legitimacy.

Thus, if individualization of guilt must draw from contextual parameters, and it is this context that lies at the heart of the dispute, it is not surprising that the accused would attempt to ‘resist’ the framework of history construed by their opponents (Buchanan, 2008: 445). Applied to the present context, Ongwen can only attempt to offer alternative modes of explaining his role, his version of the ‘truth’, based on the structural context, and thus to perform a type of resistance against attempts of historical knowledge-making in the courtroom. Yet, it is not a form of resistance against a certain factual allegation (which happens in almost any criminal trial), it is a form of resistance to the trial itself.

The strategy employed by Ongwen and his defense team in many ways, echoes the defense strategies of Jacques Vergès. In *De la Stratégie judiciaire*, Vergès (1968) made the distinction between a trial of ‘connivance’ and ‘rupture’. The former consists in the defense counsel accepting the world of beliefs of the court. They connive in the overall setting in which the prosecution operates. In a systemic sense, the only argument available is to put forth extenuating circumstances and to seek as lenient a verdict as possible.

Vergès is perhaps best known for having defended high-profile names such as Klaus Barbie, ‘Carlos the Jackal’ and Khieu Samphan (Baaz and Lilja, 2016: 161). In defending the ‘indefensible’, Vergès took to using the strategy of legal ‘rupture’, a legal defense inspired by Marxism and post-colonial thought tradition. The kernel of the strategy is that the defense counsel reverses the legal process by turning it into an attack on the prosecutor and the dominating legal system. For Vergès, there is thus the aspiration of making the political dimension of judicial institutions overtly visible. The rationale is based on Vergès’ belief that the courtroom is ‘just another battleground’ (see Strandberg Hassellind and Baaz, 2020: 264). The legal system exists to serve the agendas of those in power; it is inherently political (Widell, 2012: 31, 99). The strategy of rupture draws from the aims of the subaltern and tries to point out two conflicting frameworks. Thus, it takes the *différend*, the imposition of a double silencing, as a starting point. As such, the
most important step in the strategy of what can be labeled legal rupture, in contrast to moral rupture, is to identify and explicate violations of existing principles by demonstrating that they are applied selectively or inappropriately and that the prosecutors and judges are (institutionally) biased. By extension, then, the existing legal order is neither just nor legitimate (Baaz and Lilja, 2016: 161). Therefore, despite the fact that the established social order maintains supremacy, there is the theoretical possibility of contesting and undermining its hegemony (Widell, 2012: 11, 100–101). When the legal system is undermined in this way by the identification and exploitation of inherent contradictions, the defense is given an opportunity to reverse the legal process, turning the defense of the defendant into an attack on the legal system as well as the interests that it serves (Bhandar, 2012a). In this way, Brenna Bhandar (2012b: 68) argues, ‘the strategy of legal rupture creates a space of political opposition in the courtroom that cannot be absorbed or appropriated by the legal order’. In Emilios Christodoulidis’ (2009: 4) view, it is this lack of co-option that is the core of the strategy of rupture.

The most well-known case where Vergès made use of the trial of rupture was in the defense of Klaus Barbie, ‘the Butcher of Lyon’, a former SS officer, before the Court of Assizes in Lyon in 1987. Barbie was charged with 41 counts of crimes against humanity for acts he committed while serving as the Gestapo chief in Lyon between 1942–1944 (Doman, 1989: 449). For many, the prime significance for convening the Barbie trial had to do with ‘truth’ and memory; to educate a new generation of French people as to the facts of the Nazi policy during the occupation years. Vergès accepted the trial being about history and ‘truth’. Hence, he sought to use the setting of the trial to bring to the surface atrocities committed by France during the Algerian war and also to shed light on violence that emanated from the French history of colonialism (Koskenniemi, 2011: 193). Barbie was found guilty and sentenced to the maximum penalty under French law (Doman, 1989: 449). However, Vergès’ trial of rupture made visible the intrinsic connection between politics and history in using international criminal law as a gateway for historic and didactic purposes. Through the trial of rupture, Vergès managed to steer the narrative of the trial into the precarious domain of history-writing. The lion’s share of Vergès’ defense consisted, not in contesting the acts for which Barbie was indicted, but rather challenging the broader historical context put forth by the French prosecutor. Against the background of the interpretative context of colonialism, the actions of Barbie do not appear strikingly out of place but rather come across as ‘a drop of European blood in the ocean of human suffering which therefore, only concerned the white man’ (Kaplan, 1992: 70). When the trial moves into that arena, the judgment with its binary means of response becomes more fragile. By contesting the frames for understanding historical events, the question of how to understand the acts of Barbie in the penumbra of French colonialist rule will not be precluded through the judgment. Thus, I would like to suggest that the strategy of rupture has more layers than just being implicated in making the establishment of individual guilt more cumbersome by taking issue with context. It can also be seen as a strategy that can be used to cast doubt over the legitimacy of the outcome of a trial.

At the risk of putting the cart before the horse, I wish to postpone the much-warranted discussion on the ethical complexities of pursuing a strategy of rupture. I will return to this aspect in the concluding remarks.
The Ongwen Case According to the Strategy of Rupture

Deploying ICL to construct a final judgment, almost in a religious sense, that can enable a society to move beyond cataclysm and toward reconciliation, is a complicated task. It is not only a challenging and delicate matter, but in order for these proceedings to function constructively, they need to be credible. If not, they risk being perceived as nakedly political in nature and as a mechanism for the implementation of ‘victor’s justice’ (cf. Strandberg Hassellind, 2020: 71). The proceedings in Ongwen are, as I have argued above, not only about ascription of responsibility but also, and perhaps more importantly, about establishing the truth of events in order to contribute to an understanding of what actually happened in Uganda at the start of the new millennium. By extension, the proceedings in themselves are about constructing a successful judgment that can serve as a point of departure with the ultimate goal of reconstructing the Ugandan state as a moral agent.

At the same time, I submit that no public trial can avoid having elements of a history lesson – it weighs historical acts, is held in public, and its outcome is disseminated. It is for this reason that a balanced outlook of the criminal proceedings is an essential point of departure. Of utmost importance in ‘doing’ ICL is also that the prosecutors and judges perform in a responsible, reflexive, transparent manner and strive to stay loyal to the truth-finding ambition of the court. In other words, these stakeholders should act in good faith (cf. Baaz, 2015a: 174).

Even when the Ongwen case was in the Pre-Trial Chamber, Michelle Oliel, one of Ongwen’s defense lawyers, gave an overall characterization of the LRA and what she believed to be at stake in the trial, noting that:

[...] children are to be protected, children should never have to bear the burden of war. [...] But Dominic, as discussed by the lead counsel, is a former child soldier abducted at the age of nine and a half years old. He was forced into a world that no child should ever have to bear witness to. In light of Dominic’s circumstances, [...] there are extremely pressing and relevant reasons to exclude any alleged criminal liability on the part of Dominic Ongwen. [...] Dominic was abducted on his way to primary school, beaten, tortured and subjected to unspeakable acts. From this day forward, Dominic was enslaved by the LRA and lost any sense of childhood, any sense of family, any sense of community. We must bear in mind that we are not talking about someone who went to school after the third grade, who had any sort of normal, what we perceive or deem to be normal in that society, development. [...] It is disingenuous to only recognize the immense suffering of child soldiers and the impact their experiences have on them as victims in one breath while in the other breath rejecting the same arguments in relation to Dominic. (Prosecutor v. Ongwen, 2016b: 3)

At face value, it is not apparent that the defense presented by Oliel relates to Vergès’ strategy of rupture and the political uses of the trial. It could be argued that the disagreement over Ongwen’s culpability has nothing to do with strategies of rupture but rather that it has to do with the ascription of responsibility, and that this is all there is to it. At the same time, Oliel’s argument consists in producing a counter-narrative in which Ongwen is cast as not fitting within the binaries of ICL. Rather, his subject position is entangled
and hybrid. He is a victim who became a perpetrator, but he remains a victim with blood on his hands nonetheless. By framing Ongwen as both a victim and a perpetrator of brutality against the background of his childhood, his historical role in the conflict in Uganda is contested.

This is achieved by bringing to the surface the process of interpretation underlying the prosecution’s characterization of him and, by extension, the interpretation promoted by the national authorities. In this way, a broader spectrum of political conflicts is imported into the courtroom where Ongwen’s role in the trauma of Uganda is placed in juxtaposition to a narrative of south Ugandan dominion; echoing the dissatisfaction and struggles which led to the establishment of the HSM by Lakwena in the first place. Viewed from the perspective of the Acholi struggle for freedom, Ongwen’s movement might possibly be dignified. By tapping into this rationale, it also appears plausible to argue that the violence committed by Ongwen can only be seen as drops of blood in the ocean of Ugandan suffering. Drawing from this logic, it could even be argued that the attempt to bring Ongwen to book relates more to the bolstering of the ex-NRM, Museveni led regime rather than anything else. This is important because it is similar to the point at which the original Vergès strategy is engaged, at least implicitly. Thus, the rationale pursued by the defense team brings to the fore the political considerations permeating the interpretation of Ongwen, moving the trial into a realm of conflict, underpinned by both implicit and explicit political-ideological agendas. Oliel’s overall objective, as I understand it here, is thus to point to the imposition of a différend, suggesting that two different frameworks or accounts exist and that the one promoted by the established social order must be questioned, deconstructed and added to. Here, I argue, we can perceive the starting points of a Vergèsian strategy of rupture. In this way, Oliel ‘ruptures’ the binaries of ICL by speaking of Ongwen’s situation as something that does not fall squarely within the given logic. Hence, at this point she is negotiating for the production of a new legal subject of the hybrid victim-perpetrator, a subjectivity that accommodates Ongwen’s situation and history. The validity of the argument is further bolstered in that the defense suggests that Ongwen exhibits ‘Stockholm Syndrome’ where he identifies with his abductor (Prosecutor v. Ongwen, 2018: 19–30).

At this point, a few words need to be devoted to the defense of duress, which has generated ample discussion among ICL scholars. Yet, little in the way of practice exists. Prior to the adoption of the Rome Statute, only the ICTY Appeals Chamber’s verdict in Erdemović (see Prosecutor v. Erdemovic, 1997: para. 19) dealt with this issue. It held that duress is not an available defense where the killing of innocent civilians is involved, but did accept that duress may be a mitigating factor in sentencing. Yet, the codification of duress pursuant to Article 31(1)(d) of the Rome Statute appears to overrule the majority view in Erdemović and, instead, construes four strict conditions that must be met for duress to be satisfied as a defense. It is, however, highly likely that no possible interpretation of the Rome Statute could lead to an accepted defense of past life experiences. Ongwen was not a child, but rather around 30 years old when he allegedly, during a 3-year period, committed the crimes at issue in the ICC. A duress defense would necessitate proving threats of imminent risk of death or serious bodily injury during 3 years, something which is possible for Ongwen in theory, but not likely in practice.
The prosecutor, presumably aware of the subversive power of the victim-perpetrator narrative proposed by the defense team, responded swiftly to the argument: ‘[i]n the present case, the fact that Mr. Ongwen had been abducted at a young age does not absolve him from criminal responsibility. There is certainly no legal basis for such outlandish claim’ (Prosecutor v. Ongwen, 2016c: 32–33). Using this as a point of departure, the prosecutor sought to disassemble the victim-perpetrator argument. My interpretation of the argument is that it seeks to cast doubt on the defense’s strategy as a way to quench the rupture attempt. In this vein, Deputy Prosecutor Benjamin Gumpert sought to cast doubt over the uniqueness of the victim-perpetrator narrative, arguing that:

[the phenomenon of the perpetrator victim is not restricted to international courts such as this one. It’s familiar in all criminal jurisdictions. Drug dealers rarely boast serene untroubled childhoods; child abusers are overwhelmingly likely to have been abused themselves as children. But this is no reason to expect that crimes can be committed with impunity. The Prosecution’s case is that each human being must be taken to be endowed with moral responsibility for their actions. We have a choice as to how we behave. And when that choice is to kill, to rape and to enslave, we must expect to be held to account. Dominic Ongwen became one of the highest-ranking commanders of the LRA. He did so by his enthusiastic adoption of the LRA’s violent methods and through demonstrations that he could be more active and more brutal in his methods against the population of northern Uganda than other LRA officers. (Prosecutor v. Ongwen, 2016d: 19–20; the same passage is cited in Branch, 2017: 46)

Gumpert’s argument appears to rely on the notion of a ‘moral responsibility’ to choose, more or less, ‘correctly’. The claim seemed to have garnered the support of the Pre-Trial Chamber, which notes in its decision to confirm the charges that:

Dominic Ongwen could have chosen not to rise in hierarchy and expose himself to increasingly higher responsibility to implement LRA policies. Instead, the available evidence demonstrates that Dominic Ongwen shared the ideology of the LRA, including its brutal and perverted policy with respect to civilians it considered as supporting the government. (Prosecutor v. Ongwen, 2016c: 68)

The Pre-Trial Chamber’s chosen depiction feeds into a narrative that the current government of Uganda has projected for a long time, namely that the resistance organizations against the national authorities pursue brutal and perverted policies (cf. Apuuli, 2008: 801). In this view, the LRA’s policies have nothing to do with the setting in which the conflict took place. They have nothing to do with the HSM, with NRM and colonial oppression in the divide between north and south Uganda. In addition, I suggest, the chosen depiction puts little value on Ongwen’s abduction as a child and portrays him in quite simplistic terms, as a ‘brutal and perverted’ monster that acts solely on his own rational convictions.

**Toward a New Critical Subject Position**

I have shown above how it is possible to characterize the defense strategy employed by Ongwen’s defense team as one that echoes Vergès rupture strategy. In this section, the
focus shifts to the negotiation of a new disruptive legal subject position for the child soldier. An extension of this argument in the context of Ongwen is that contesting the place of the child soldier in the ICL discourse also means contesting the easy assumption that the Ugandan state is in the right and the opposition to it is, in simple terms, in the wrong.

The contextualization of Ongwen’s person as a victim-perpetrator as suggested by the defense team does not really appear to be rejected by the prosecution. They do, however, reject the conclusions that should be drawn from it. It is compelling to argue that these contestations will carry over to the continued process and that the later proceedings in the Appeals Chamber will reify the tension between the victim-perpetrator distinction in understanding Ongwen’s role in the LRA and, by extension, his role in the conflict in Uganda. Over and above this, it is reasonable to believe that these contestations will not be thwarted by the judgment itself. This is because the moment international criminal law steps into the arena of evaluating broader contextual matters, it moves into a realm of conflict, where there exists a plurality of ‘truths’. The mere political dimension is not necessarily negative as such, but there is reason to be wary of interests that are accepted as ‘neutral’ as a consequence (Strandberg Hassellind, 2020: 72).

It is reasonable to believe that the ICC will take note of historical, contextual, and structural complexities in the adjudication of the core crimes, and will unavoidably do so in the trial of Ongwen. Taking a position on how to understand such issues (e.g. what data is relevant and how the relevant data ought to be viewed) when ascribing individual responsibility will be an ideological venture and an extension of the conflict that lies at the heart of the proceedings. Seeking to ensure the continued remembrance of atrocities is fine, but the remembrance of such events should not be attached to the proceedings before courts of law. It is, of course, necessary to establish in some way what kind of organization the LRA was, but this is not a responsibility the ICC should take on. Classic evidence in criminal law cannot be equated with memory. Arranging and rationalizing evidentiary material in order to construct historical narratives includes operations of placing weight and evaluation which are endeavors easily subject to critique. What courts set out to do is to convict or acquit. That standpoint, in a legal sense, will be final, especially when an appeal is not pursued or has been concluded, but its foundational assessments will always be open for scrutiny. This line of reasoning resonates with previous theories on truth-making through international criminal tribunals. As Nigel Eltringham (2017: 8) argues, such an analysis introduces a ‘sorely needed dose of realism to balance naïve claims regarding the value of “historical records” generated by international trials’. In Ongwen’s case, this means that it risks coming across as one of various interpretations of how to understand the historical context surrounding the LRA and child soldiering. From this perspective, says Eltringham (2017: 8), ‘[d]issent is inevitable. The question is how to manage it?’.

To illustrate this point, even though the Pre-Trial Chamber fervently rejected the victim-perpetrator narrative suggested by Ongwen’s defense team, arguments based on this disruptive legal subject position resurfaced in a later hearing in the Trial Chamber. Indeed, Ayena Odongo, one of Ongwen’s defense lawyers, invoked the victim-perpetrator narrative yet again, noting that:
Dominic Ongwen was a victim, rather than a perpetrator of the political interplay in this conflict between the protagonists. [...] One cannot be a victim and, still under the grips of the same system that victimized him, become a perpetrator. (Prosecutor v. Ongwen, 2018: 19)

Odongo thus responds to the arguments of the prosecutor. He points to various facts he believes to be important in understanding contextual matters that are central to the proceedings; how he believes certain historical, social, and ideological issues should be approached. Odongo’s statement can be contrasted with the prosecutor’s argument that ‘each human being must be taken to be endowed with moral responsibility for their actions’. It could, of course, be argued that Odongo’s contention just plays on the other pole of the opposition between perpetrator and victim, but still, he does not ‘connive’ in the setting of the court. In that sense, he embodies the strategy of rupture. Nonetheless, by pointing to various circumstances the judgment is unable to subsume, the defense team appears to decline participating in historical knowledge-making in the courtroom, seeking to negotiate for a new legal subject within ICL. In this way, Odongo drives deeper into the defense team’s counter-argument as a means to challenge the binaries of individual criminal responsibility.

I suggest that what we are witnessing is different actors working on the basis of incompatible narratives in the negotiation of how to handle this new disruptive legal subject position that is the victim-perpetrator. In this logic lies the key insight of this paper – the ‘rupture’ employed by Ongwen and his defense team consists in negotiating a new hybrid or entangled critical subject position within the ICL discourse. This position embraces characteristics of both ‘victim’ and ‘perpetrator’, which is played out and made visible to the general public and the stakeholders in the trial as a way to call for reflection on moral conundrums within the global justice drama.

Bearing in mind the conflicting methodologies of the various subject positions at stake in the Ongwen case, it seems appropriate to argue in favor of a skepticism toward the final product – the legal ‘truth’ of Ongwen’s role in the conflict in Uganda. In the words of Jakob v. H Holtermann (2017: 226), ‘the only viable version of this skepticism is not as a blanket rejection, but simply a call for moderation in our ambitions with regard to truth’. I would like to connect Holtermann’s claim to Eltringham’s argument, that dissent is inevitable, but how to manage it appears to be the more critical issue. The re-emergence of the contestations as we saw in the Trial Chamber suggest that historical narratives are susceptible to rupture by historical counternarratives put forth by defendants who decline to play their part in the drama of international criminal law by invoking the struggle for larger contextual issues (Branch, 2017: 63).

The resurfacing of narratives based on the disruptive victim-perpetrator subject in the Trial Chamber (even though the Pre-Trial Chamber discounted the argument) points to the strong likelihood that, by phrasing a specific agenda that Ongwen and his defense team deem being ‘on trial’, they will give momentum to that agenda. It is through this logic, I want to suggest, that the disagreement over Ongwen’s culpability connects to a Vergèsian strategy of rupture. Whether the defense team is successful or not is, I believe, beside the point. Rather, it opens discursive possibilities for the future of ICL and adds colors to the palette of the international lawyer. The narrative of the victim-perpetrator
has been given a martyr that can be used to contest, contrast, and resist the ‘truth’ that is presented by the prosecution. In turn, Ongwen’s defense, informed by the strategy of rupture, works as a counterpoint to the prevailing positivistic ideal of individual criminal responsibility.

That is not to say, however, that the strategy of rupture somehow explodes the binarism of the victim-perpetrator distinction. In my view, it is not credible to claim that Ongwen’s defense deconstructs the binaries and places itself outside those deployments completely. Instead, my point is that the form of rupture employed provides a means to provide additional nuance to the official picture. It is a way of negotiating a new critical legal subject providing a perpetrator with additional layers (Drumbl, 2013: 61). Therefore, in my view, it is important to note that a rupture strategy does not have to undo existing categorizations altogether, but could instead have a theoretical capability to expose and help deal with the ‘blind spots’ in the practice of ICL. Within the realm of international politics, it will not be possible to achieve any absolute truth, and a contextualized picture may provide a more satisfactory outcome in order to retain legitimacy for ICL (Gidley and Turner, 2018: 52). From this perspective, the strategy of rupture, I argue, could offer adequate tools in achieving Eltringham’s and Holtermann’s calls for reflectiveness and moderation in our ambitions with regard to truth.

In Ongwen’s case, the rupture consists in negotiating a new critical legal subject. It may not be clear as to what precise disclosure the strategy of rupture is meant to be achieving in this context. While Vergès employed it in order to denounce colonialism, I believe what is happening in the Ongwen case is that, by disrupting the legal binary between victim and perpetrator, a space is opened for the broader disruption of the political context, enabling a challenge to the LRA bad/NRM good binary. As I have argued above, a broader spectrum of political conflicts is imported into the courtroom where Ongwen’s role in the trauma of Uganda is placed in juxtaposition to a narrative of south Ugandan dominion. This enables a logic in which Ongwen’s movement, perhaps, can be dignified and, in this way, the proceedings can be seen to have more to do with the bolstering of the Museveni led regime than anything else. This becomes particularly plausible bearing in mind that no one from NRM/UPDF is currently in the dock at the ICC.

A related question then becomes, where, if not the courtroom, should the struggle over the meaning of these larger contextual issues take place? Although falling outside of the immediate scope of this article, it appears appropriate to flesh out, at least tentatively, a possible answer to this question. To begin these reflections, I would note that historians rarely agree on how to write the past. Moreover, there are likely few historians who subscribe to the view that the ‘clash of bias and counter-bias favors truth discovery’ (Damaska, 2008: 333; Koskenniemi, 2011: 179). In fact, the more complicated the subject matter and investigation is, the more partisan the polarization. The context of a trial cannot be presumed to manifest good faith on all participating parties’ part. Nevertheless, the problem with covering our ‘evil past’ in a legal veneer comes to the surface when it is filled with inflated implications that go beyond the restraints of the law. Where legal narratives are portrayed, overtly or not, as definitive means of containing dispositive realities, jurisprudence may succumb to a broader ‘temptation of closure’ (Friedlander, 1994: 261). The risks associated with this are tied to creating a chimera of
empathy and ‘progress’ while not dealing with the painful work of transformation in the aftermath of cataclysm. That is not to say that we are best served to see violent perpetrators of horrendous acts as victims. Instead, it is a call for a more reflexive and nuanced understanding of them. All the mentioned difficulties point to the strong possibility that the traditional format of tribunals simply cannot grapple with these conundrums. The best that can be expected of them is to provide fragmentary material ‘as a scaffolding for subsequent historical research’ (Damaska, 2008: 338).

**Concluding Remarks**

The story of the victim-perpetrator is complex. It holds several intertwined layers and cannot be understood in binary terms. This realization leads us back to Arendt’s doubt concerning the ability of the international criminal trial to encapsulate the ‘truth’ of a complex series of events. The defense strategies pursued by Ongwen’s defense team, which I would argue is critical to international law in practice, provides valuable and unique insight regarding how the strategy of rupture can help, at least theoretically, to paint a more nuanced picture of historiography in the international courtroom, or at the very least, negotiating and challenging the official picture.

The strategy of legal rupture is thus employed by Ongwen as a means to resist not only the proceedings per se, but also, and perhaps more importantly, the binaries in ICL. He argues for the rethinking of individual criminal responsibility within the international setting. He produces counter-narratives through which a new critical legal figure comes into sight. By proposing the counter-narratives based on the victim-perpetrator, Ongwen is ‘resisting’ the metanarrative suggested jointly by international society and the prosecutor, thus contesting political power. In his defense, he also tries to display a broader political understanding of his role in the trauma in Uganda than the one suggested by those in power. His chosen defense strategy does not deny that terrible things have happened, but rather strives to put them into, what he considers, a ‘correct’ historical and political context – to problematize how we view human agency in this setting.

It is difficult to move beyond the impression that in bringing Ongwen to book (and by extension, the LRA), the ICC is feeding a metanarrative that the Museveni regime has projected for a long time, namely that the resistance organizations against the national authorities have pursued brutal and perverted policies, in contrast to the agency of the NRM/UPDF led by Museveni himself. In my view, and to contextualize the Ongwen trial in contemporary Uganda, the depiction of the Ugandan conflict in this fragmented manner risks reinforcing (or perhaps even being an extension of) the north-south divide in Uganda that lays at the heart of the insurgencies at the end of the 1980s. This risk is especially noticeable in light of how the Court has neglected to investigate state-perpetrated atrocities in Uganda. As part of this, Ongwen’s defense team have tried to undermine one of the unwritten political goals in the setting of the trial, which is to establish a gap between the LRA and the manifold resistance movements that at one time existed in Uganda, in order to ‘enable the state itself to function as a moral agent’ (cf. Borneman, 1997: 23) once again.

To conclude this paper, I wish to devote space for some ethical aspects of using the Vergèsian rupture as a strategy. The consequences of such a response are pervasive and
may even be perceived as belligerent, not only by the prosecutor and the judges, but also by the many people in Uganda and Sudan who have suffered from serious abuses committed by the LRA. It is easy to mobilize sympathy for those who have suffered. To feel sympathy for those responsible for causing pain and suffering is often much harder. Yet, it is often difficult to grasp why the harrowing past actually happened. Often, we appear to approach it in terms of a simple good-evil storyline in order to cope with it. It could be argued that discussion of a single, unfinished, international criminal trial does not take us very far. Nevertheless, it is important to remember that this single case is not isolated in its context. By tracing and parsing various patterns against this specific background, we are able to peer beneath the façade of narrative construction in the courtroom.

It is important that the broader goals of international criminal justice relating to, *inter alia*, memorialization and education are not defined or defended by the ones charged with various international crimes, or the persons defending them. These goals are forced upon them. It does not make sense to hold these individuals and their defenders responsible for accommodating a process with as little resistance as possible. I would like to suggest that the real struggle in the Hague, at least in this case, is not about whether Ongwen should be released or not, but rather concerns the historical and didactic aspects of the trial. The prime significance in the trial against Ongwen lies in its contribution to the ongoing construction of memory and truth in Uganda regarding what happened in the conflict and why, as well as who – such as child soldiers who, by circumstance, rose in the ranks – should be held responsible.

In the end, Ongwen will either be convicted or acquitted. The ICC will either accept or reject his explanation and set a precedent for the future. Today, with various states either withdrawing from the Court or raising concerns about its existence, it appears particularly important to scrutinize the narrative construction process of the European ICC in the adjudication of global problems. This is a notion that relates to the perennial question of the legitimacy of the institution that is the ICC, which has busied itself nearly exclusively with perpetrators from various states in Africa. As a consequence, the Court may need to find a new approach to history-making, if it is going to survive, either with or without the Global South. In this regard, many questions remain uncharted and many stones are left unturned. However, it does point to some theoretical findings that can inform future research projects. For instance, does it make sense to go through this process of challenging historical narratives? Is it viable to appropriate our ‘evil past’ through the paradigmatic legal positivist vocabulary? These queries, while falling outside the scope of this paper, remain highly relevant to consider.

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