

Prosecution as a Tool of Human Rights: Reflections on Dominic Ongwen

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Dominic Ongwen is the first person tried before the International Criminal Court for crimes he once suffered as a child. Conscripted as a soldier from a young age, Ongwen grew up under the violent regime of the Lord's Resistance Army only to then himself commit egregious crimes, including the use of child soldiers. This paper reflects on the case of Ongwen by focusing on how and why International Human Rights Law relies on International Criminal Law. It concludes that the human rights system continually turns toward criminalization to combat gross abuses. This paper calls into question the efficacy of criminal law as a human rights tool as its individualized modes of culpability and focus on extreme forms of violence obfuscate structural and systemic sources of atrocities. The paper focuses on Ongwen's trial as a case study showing the limits of criminal law in combatting violations of the rights of the child in the context of conflict.

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Dominic Ongwen est la première personne jugée par la Cour pénale internationale pour des crimes qu'il a subis alors qu'il était enfant. Enrôlé comme soldat dès son jeune âge, Ongwen a grandi sous le régime violent de l'Armée de résistance du Seigneur, pour ensuite commettre lui-même des crimes inqualifiables, y compris l'utilisation d'enfants-soldats. Cet article se penche sur le cas d'Ongwen en se concentrant sur la manière dont le droit international relatif aux droits de l'homme s'appuie sur le droit pénal international et sur les raisons de cet état de fait. Il conclut que le système des droits de l'homme recourt continuellement à la criminalisation pour lutter contre les violations graves. Ce document remet en question l'efficacité du droit pénal en tant qu'instrument juridique des droits de l'homme, car ses modes de culpabilité individualisés et sa focalisation sur les formes extrêmes de violence occultent les sources structurelles et systémiques des atrocités. L'étude du cas du procès d'Ongwen vise à montrer les limites du droit pénal dans la lutte contre les violations des droits de l'enfant dans le contexte d'un conflit.

I. Introduction: The Case of Dominic Ongwen

On February 4th, 2021, the International Criminal Court (“ICC”) handed down a highly anticipated judgement: Dominic Ongwen was found guilty on 61 counts of crimes against humanity and war crimes.¹ In the context of armed rebellion conducted by the Lord’s Resistance Army (“LRA”) in Northern Uganda, Dominic was found responsible for recruiting and using child soldiers.² On its face, the decision is a victory for human rights. Yet, there is a grey area in the conviction that raises important questions regarding the relationship between International Criminal Law (“ICL”) and International Human Rights Law (“IHRL”). Namely, Ongwen was a child soldier. Abducted at a young age on his way home from school, he was trained to fight and frequently forced to commit violence.³

Some commentators have discussed this complexity by focusing on whether it is meaningful to ascribe culpability to Ongwen.⁴ Yet, beyond discussions of criminal liability, what is notable in Ongwen’s case is the use of ICL as a response to the human rights problem of child soldiers. Despite being fundamentally distinct disciplines, IHRL has frequently turned toward ICL to meet its goals. This raises the following question: what role does ICL play in IHRL, and is this role effective in furthering the human rights agenda? This paper finds that IHRL relies on ICL as a form of direct intervention to prosecute egregious human rights violations where states are otherwise unwilling or unable to meet their obligations. Through this intervention, the wider international human rights system aims to prevent future abuses. However, as exemplified by Ongwen, this use of ICL may not be effective; criminalization does little to avert atrocity on either an individual or systemic level.

¹ See *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Trial Judgement (4 February 2021) (International Criminal Court, Trial Chamber IX), online (pdf): *Situation in Uganda* <www.icccpi.int/CourtRecords/CR2021_01026.PDF> [perma.cc/L38H-48PU] [*Prosecutor v Ongwen*].

² See International Criminal Court, Press Release, ICC-CPI-20210204-PR1564, “Dominic Ongwen declared guilty of war crimes and crimes against humanity committed in Uganda” (4 February 2021), online: <www.icc-cpi.int/Pages/item.aspx?name=pr1564> [perma.cc/G64F-BY3W].

³ See Erin Baines, “Complex political perpetrators: reflections on Dominic Ongwen” (2009) 47:2 *J Modern African Studies* 163.

⁴ See Raphael Lorenzo Aguilang Pangalangan, “Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals” (2018) 33:3 *Am U Intl L Rev* 605 at 619–29; Gamaliel Kan, “The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen” (2018) 5:1 *SOAS LJ* 70 at 78–83; Windell Nortje, “Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court” (2017) 17:1 *Intl Crim L Rev* 186 at 197–206.

Ongwen's trial concerned events which took place between July 2002 and December 2005; although, it is important to keep in mind the contextual background which sets the stage for his crimes. Ongwen's story goes hand in hand with his involvement in the LRA, first as a child soldier abducted at a young age, and then as a perpetrator in his own right. Even further still, the story of the LRA extends back decades and is linked to a history of ethnic conflict throughout Uganda. Far from a simple question of criminal culpability, this context paints a complex picture which raises questions about the relationship between ICL and the objectives of the international human rights system.

A. The History of the LRA

The ICC opens its judgement with a historical background on the birth of the LRA itself, which has been active in Northern Uganda since the 1980s.⁵ Yet, the social and political context that gave way to the LRA's insurgency is arguably older, involving longstanding systemic issues and a legacy of British colonialism which had sowed the seeds of ethnic division and violence in the region.

During colonialism, under a system of "divide and rule", the British engaged in an administrative strategy which pitted ethnic groups against one another in a competition for political control and economic gain. This method of governance strengthened tensions between groups and helped mold ethnic stereotypes.⁶ For instance, "Northerners", in particular the Acholi people, were seen as militaristic and best suited for soldiering in the colonial imagination.⁷ Indeed, British governance and policy was partly responsible for fashioning the modern Acholi ethnic identity,⁸ laying the foundations for the LRA's Acholi-centric ideology.

In particular, colonial rule created strong economic hierarchies which segregated Northern and Southern Uganda. The British focused economic development efforts in the South, and among the Baganda, who were historically supported under the "divide and rule" system as a way to

⁵ See *Prosecutor v Ongwen*, *supra* note 1 at 9–13.

⁶ See Chrispas Nyombi & Ronald Kaddu, "Ethnic conflict in Uganda's political history" (2015) at 6-7, online: SSRN <ssrn.com/abstract=2645055> [perma.cc/5NE9-NGN5].

⁷ See Ronald Atkinson, "From Uganda to the Congo and Beyond: Pursuing the Lord's Resistance Army" (2009) at 4, online (pdf): *International Peace Institute* <www.files.ethz.ch/isn/126886/uganda_to_congo_11_2009.pdf> [perma.cc/B9YQ-CFL7].

⁸ See Charles Amone & Okullu Muura, "British Colonialism and the Creation of Acholi Ethnic Identity in Uganda, 1894 to 1962" (2014) 42:2 *J Imperial & Commonwealth History* at 239.

overcome resistance from other ethnic groups. On the other hand, the people of Northern Uganda were often employed as soldiers and labourers, providing military strength and producing the raw materials necessary for building wealth in the South.⁹ This had a positive feedback loop effect, as the concentration of wealth away from the North would ultimately push the Acholi into military and policing roles, helping construct colonial myths into reality.¹⁰

These foundational divisions left by colonialism were central to fueling the growth of the LRA, which touted an ideology of freeing the Acholi people in Northern Uganda from the economic and political domination of the South.¹¹ In fact, the LRA traces its beginnings to the struggle against a rising tide of Southern political power during the 1980s. In 1986, the National Resistance Army (“NRA”), led by Yoweri Museveni, seized power from the Uganda National Liberation Army (“UNLA”).¹² Pursuing his enemies into the North, Museveni’s NRA committed gross human rights violations and engaged in the theft and destruction of Acholi property and wealth.¹³ It is no surprise then that, although widely popular in the South, Museveni and the NRA faced heavy opposition throughout the Northern Acholi areas of Uganda.

Following Museveni’s assertion of control over the Acholi regions, resistance groups began to spring up. One of these groups was the Uganda People’s Democratic Army (“UPDA”), which was partly made up of former soldiers fleeing the collapsing UNLA.¹⁴ Although, in 1988, the UPDA signed a peace agreement with Museveni’s government. Many individuals in the UPDA unwilling to surrender to Southern power turned their support to Kony and the LRA.¹⁵

Another key opposition group that played a pivotal role in the rise of the LRA was the cult of Alice Lakwena and her “Holy Spirit Movement.” Alice Lakwena was a spirit medium, healer and diviner who mixed Christian and

⁹ See Nyombi & Kaddu, *supra* note 6 at 6–8.

¹⁰ See Atkinson, *supra* note 7 at 4.

¹¹ See Ruddy Doom & Koen Vlassenroot, “Kony’s Message: A New *Koine*? The Lord’s Resistance Army in Northern Uganda” (1999) 98:390 *African Affairs* 5 at 7-12; Filip Strandberg Hassellind, “The International Criminal Trial as a Site for Contesting Historical and Political Narratives: The Case of Dominic Ongwen” (2020) *Soc & Leg Stud* 1 at 4, online: *Sage Journals* <journals.sagepub.com/doi/full/10.1177/0964663920971836> [perma.cc/N45L-8ZD2].

¹² See *Prosecutor v Ongwen*, *supra* note 1 at paras 2–3.

¹³ See Atkinson, *supra* note 7 at 6.

¹⁴ See *Prosecutor v Ongwen*, *supra* note 1 at para 3.

¹⁵ *Ibid* at paras 2–6.

local ideology. She claimed that she had been possessed by a Christian spirit named Lakwena, who instructed her that healing was impossible in Northern Uganda and directed her to wage war against the central government as well as other “witches” (Acholi and Northern soldiers considered to be “impure”).¹⁶ According to Lakwena, war was a form of healing through which the people of Northern Uganda could be purified. Her movement recruited from the local Acholi population in the North, the collapsing UNLA, and the UPDA. In October of 1987, Lakwena marched her army south. Her forces overwhelmed opposition along the way, although she was eventually defeated before reaching Kampala.¹⁷

It was during the height of the Holy Spirit Movement that Joseph Kony, the future leader of the LRA, first entered the picture. Kony was a young school dropout claiming to be a cousin of Alice Lakwena and possessed by the very same Christian spirit. In late 1986 or 1987, it is reported that he attempted to form an alliance with Lakwena’s movement but was rejected.¹⁸ While Lakwena marched south on Kampala, Kony began to forge his own spiritual movement by recruiting local soldiers. In the wake of Lakwena’s defeat, many of the returning soldiers joined Kony’s forces.¹⁹

Kony adopted the religious discourse and zeal Lakwena had created.²⁰ In particular, the LRA pedaled an ideology combining Acholi nationalism and Christian fundamentalism with the pursuit of a holy war aimed at defeating Museveni’s government.²¹ Alice Lakwena was successful at developing a coherent belief system which was rooted in symbolic languages and memories of the Acholi people. Through this system, violence was legitimized and an alternative to the abuses of the central government was offered. Kony, who claimed to descend from Alice’s movement, and at least partly inherited it, performed a similar function.

By the 1990s, after the defeat of Lakwena, Kony’s force was the only significant armed unit left fighting in the Acholi homelands. To survive, the group adapted a campaign of guerrilla warfare and terror tactics targeting the central government and its allies. Kony found support from Uganda’s neighbor, South Sudan, where the LRA positioned bases in exchange for

¹⁶ See Kevin C Dunn, “Killing For Christ? The Lord’s Resistance Army of Uganda” (2004) 103:673 *Current History* 206 at 207. See also *Prosecutor v Ongwen*, *supra* note 1 at paras 3–5.

¹⁷ See Dunn, *supra* note 16 at 207. See also *Prosecutor v Ongwen*, *supra* note 1 at paras 3–5.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ See Dunn, *supra* note 16 at 207–8.

assisting the Sudanese government's fight against the Sudan People's Liberation Army. The response of the Ugandan government was a counter-insurgency campaign and the movement of rural populations into towns, trading centers and eventually camps called Internally Displaced Person ("IDP") camps. Furthermore, with the support of the United States, Ugandan troops engaged in targeted attacks of LRA bases throughout South Sudan.²²

Since its inception, the LRA helped define a culture of violence throughout Northern Uganda. Even so, it is important to acknowledge that Museveni's government contributed to the development of this violent culture. The result is a complex and nuanced relationship between the LRA, the central government, and the Acholi people. As explained by Kevin Dunn:

[The] abuses by the government's representatives have deepened the north's historic distrust of, if not outright hostility toward, the central government. But it does not necessarily follow that these same people would support Kony and the LRA. Because LRA rebels have not successfully circulated a coherent political agenda, it is unclear whether they are truly fighting "for" the people in the north – in fact, the LRA has predominantly victimized their fellow Acholi and other Northerners.

This seemingly bewildering contradiction can be partly explained by the fact that, because government soldiers have behaved in an even worse manner than the LRA, some of the Acholi have tolerated the rebels. An even more nuanced image emerges by shifting the focus away from strict political considerations to the larger social belief systems in the north. The LRA draws on a traditional connection between healing and killing, and views the killing of a "witch" or agent of evil as a necessary act in the struggle to heal the Acholi and Uganda. The LRA employs a logic of "you are either with us or against us."²³

Uganda's struggle against the LRA would continue throughout the 1990s and into the 2000s, at which point Ongwen's crimes take place. It is within the context of a legacy of colonialism, long-standing ethnic tensions, political struggles for power, human rights abuses by the central government, interventions by other states and a deeply ingrained culture of violence, that Ongwen must be situated when discussing his role in the LRA and the abuses committed under his command.

²² See *Prosecutor v Ongwen*, *supra* note 1 at paras 7–14.

²³ See Dunn, *supra* note 16 at 209.

B. Ongwen's Involvement in the LRA

Dominic Ongwen was born in the village of Coorom, Northern Uganda. One day in 1987, on his way home from school, he was abducted by LRA soldiers. His exact age at abduction is unclear, although on the balance of the evidence the ICC accepted that Ongwen was only nine.²⁴ Upon capture, Ongwen was trained to fight and was used as a child soldier in support of the LRA's armed hostilities. As a combatant, he engaged in warfare against the armed forces of the Ugandan government as well as other local units scattered throughout Northern Uganda.²⁵ In addition, at least during the early stages of his abduction, Ongwen was frequently forced to commit violence against civilians.²⁶

Growing up under the LRA, Ongwen was exposed to a hierarchical structure that positioned Kony as the highest authority. The LRA was divided into four brigades, which were themselves further divided into battalions and then into companies. Orders from Kony were disseminated down this chain of command. New brigade fighters were obtained through the abduction of children like Ongwen.²⁷

Although hierarchical, the LRA's structure was not necessarily rigid or frozen. There was an extent to which brigade and battalion commanders acted with a certain degree of independence. Usually, when Kony was not physically present, commanders could often act on their own initiative.²⁸ Nonetheless, Kony held ultimate authority within the LRA. Under his cult of personality, he remained controlling over the organization's members. Many reported and believed Kony to have omnipresent powers – including an ability to read minds and take the form of animals to spy on those contemplating escape.²⁹ In this way, as put by Mark Drumbl, Kony “lorded over everyone.”³⁰ Indeed, one of Ongwen's (unsuccessful) arguments raised at his confirmation of charges hearing was that rank in the LRA meant nothing more than a measure of how well one survived. Kony directed everything and would remove any commanders that did not fall in line with his expectations.³¹

²⁴ See *Prosecutor v Ongwen*, *supra* note 1 at paras 26–31.

²⁵ See Kan, *supra* note 4 at 74–75.

²⁶ See Baines, *supra* note 3 at 163–64.

²⁷ See *Prosecutor v Ongwen*, *supra* note 1 at paras 123–25.

²⁸ *Ibid.*

²⁹ See Baines, *supra* note 3 at 170.

³⁰ See Mark A Drumbl, “Victims who victimise” (2016) 4:2 London Rev Intl L 217 at 238.

³¹ *Ibid.*

The ICC described this structure as a “violent disciplinary system guaranteeing adherence” to its leaders.³² As a new initiate, Ongwen witnessed and experienced beatings and forced killings. Severe punishments were prescribed for failure to follow orders, losing a gun or failing to prevent an abductee from escaping. In this context, escape or resistance meant threat of physical harm or death. Ongwen was trained in fighting skills and the use of firearms, and he would not have been taught to distinguish between civilians and combatants or between civilian and military objectives. The LRA further engaged in a program of indoctrination and propaganda, often lying about life outside the organization. Initiates, such as Ongwen, were taught to fear the Ugandan government and were prohibited from gaining access to any alternative sources of information.³³

At the same time, Kony rewarded those he trusted with praise, privileges and promotions. For instance, Kony often referred to Ongwen as a role model and rewarded him for each battle.³⁴ Over time, Ongwen was given rank and entrusted to execute increasingly more difficult missions. Although Ongwen began his involvement as a child soldier, he soon worked his way into Kony’s “inner circle” and was eventually appointed to leadership positions.³⁵ In 2002, at the age of 24, Ongwen became a battalion commander as part of the Sinia Brigade. By 2003, he was appointed as second in command of the Brigade, and later in 2004, Ongwen became commander of the Brigade.³⁶

It was during this time, when he occupied positions of leadership and control, that Ongwen shifted from victim to perpetrator. He was no longer an abductee – rather, Ongwen held power within the organization. As noted by the ICC, actions taken by Ongwen during this time were free of threat of imminent death or imminent or continuing serious bodily harm.³⁷ His actions were therefore his own. Ongwen was charged with and found guilty of multiple counts of war crimes and crimes against humanity that were committed between 2002 and 2005 in Northern Uganda. A great deal of those crimes were committed during attacks he conducted against four separate IDP camps, resulting in mass civilian casualties. Within this period, Ongwen also committed direct sexual and gender-based violence against

³² See *Prosecutor v Ongwen*, *supra* note 1 at para 131.

³³ *Ibid* at paras 129–33; see also Baines, *supra* note 3 at 169–71.

³⁴ See Baines, *supra* note 3 at 172, 175.

³⁵ *Ibid* at 163.

³⁶ See *Prosecutor v Ongwen*, *supra* note 1 at paras 134–38.

³⁷ *Ibid* at paras 2669–72.

seven women. Additionally, a portion of the crimes were systemic in nature, involving crimes against humanity and war crimes committed by members of the LRA under Ongwen's oversight. These crimes included forced marriages, torture, rape, sexual slavery, enslavement, the use of children under the age of fifteen in an armed group and the use of such children to participate actively in hostilities.³⁸

Ongwen's use of child soldiers stands out because Ongwen began his own involvement with the LRA as an involuntary and abducted child soldier. He spent his formative years under the group's violent regime, only to then perpetuate the same abuses he himself suffered. This experience would heavily factor into his defense before the ICC, one which challenged his agency and therefore his culpability.

C. The Victim-Turned-Perpetrator Dilemma

Ongwen is both victim and perpetrator – at one time a child soldier deserving of special protection under international law,³⁹ and at another responsible for committing horrible abuses of human rights. This dynamic raises questions about how to best handle situations of victim-turned-perpetrator and whether an international response involving prosecution is effective or meaningful.

Thijs Bouwknecht and Barbora Holá describe the verdict as being paradoxical, stating that Ongwen represents “both the ICC's success story and the antithesis of what it stands for and fights against.”⁴⁰ For instance, the lead prosecutor simultaneously accepted Ongwen's status as a victim but also his role as a willing, conscious and intentional tormentor. Bouwknecht and Holá write:

Perhaps the largest paradox in the Ongwen case is that both prosecutors and victims' lawyers have portrayed Ongwen as an incurable psychopath but at the same time deny he suffered from mental illness, trauma or post-traumatic stress disorder when he was causing atrocity – a diagnosis they otherwise effortlessly attach to the “30,000 abducted children in Uganda between 1986 and 2007”.⁴¹

³⁸ *Ibid* at paras 33, 3116. See also *Ibid* at paras 142–225.

³⁹ See Baines, *supra* note 3 at 177–78.

⁴⁰ See Thijs Bouwknecht & Barbora Holá, “Dominic Ongwen: The ICC's Poster and Problem Child”, *Justice Info* (16 March 2020), online: *Justice Info Net* <www.justiceinfo.net/en/44014-dominic-ongwen-icc-poster-and-problem-child.html> [perma.cc/L867-MQ9U].

⁴¹ *Ibid*.

This tension is further reflected in the tone adopted by Ongwen's defense counsel, who considered the trial to be a form of "proxy prosecution."⁴² In the absence of Kony, the architect of the LRA, the ICC is left with only Ongwen to answer for the group's rampant abuses.⁴³ The international community wanted to bring an end to the atrocities committed by the LRA and the prosecution had failed to bring Kony to justice. When Ongwen appeared, a chance arose to do so.⁴⁴ Consequently, Ongwen's own status as a victim became less pronounced.

On the other hand, some commentators, and, notably, victims of Ongwen's crimes reject this complexity and note that it detracts from the principles of accountability and justice.⁴⁵ In submissions before the Appeals Chamber, the prosecution noted that Ongwen's rights are not the only ones at stake; victims have a right to see effective prosecutions and to see those responsible for egregious violations brought to account.⁴⁶ Anushka Sehmi, who interviewed a few of Ongwen's victims, writes:

Many commentators familiar with the Ongwen case have pointed out the complex issues that arise as result of the victim-perpetrator dilemma in this case. Dominic Ongwen was also abducted as a child and grew up within the unforgiving confines of the LRA. However, for Peter, who was abducted at a similar age as Ongwen, the victim-perpetrator continuum poses no dilemma.

"He should be sentenced to death."

I point out to Peter that the possibility of a death sentence does not exist within the framework of the ICC Statute.

"Then life imprisonment."⁴⁷

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ See *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Appeal Hearing Day 1 (14 February 2022) (International Criminal Court, Appeals Chamber), online (pdf): *International Criminal Court* <www.icc-cpi.int/sites/default/files/Transcripts/CR2022_01004.PDF> [perma.cc/G96W-9ACJ] [*Ongwen Appeal Hearings Day 1*].

⁴⁵ See *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Appeal Hearing Day 4 (18 February 2022) (International Criminal Court, Appeals Chamber), online (pdf): *International Criminal Court* <www.icc-cpi.int/sites/default/files/Transcripts/CR2022_01626.PDF> [perma.cc/M73G-84FK] [*Ongwen Appeal Hearings Day 4*]; Anushka Sehmi, "Victims and Perpetrators: Reclaiming the victim narrative from Dominic Ongwen" (11 February 2021), online: *Justice in Conflict* <justiceinconflict.org/2021/02/11/victims-and-perpetrators-reclaiming-the-victim-narrative-from-dominic-ongwen/> [perma.cc/HX3E-PEEU].

⁴⁶ See *Ongwen Appeal Hearings Day 4*, *supra* note 45.

⁴⁷ See Sehmi, *supra* note 45.

For Peter, Tom and Ben, victims of Ongwen's crimes who were all abducted at a young age, the fact that Ongwen was also abducted is irrelevant. Giving the examples of their lived experiences in the LRA, they argue that even though Ongwen was abducted at a young age, rising through the ranks of the LRA involved an element of choice on his part.⁴⁸

There are solutions to this paradox to be found within international criminal law. For instance, as already noted, commentators have questioned whether the unique circumstances of Ongwen's case operate to displace criminal liability.⁴⁹ This was attempted by Ongwen's defense, which painted him as an enslaved prisoner of the LRA until his escape. According to this theory, Ongwen lacked the agency required to attract culpability. He was victimized by Kony and in turn ordered to victimize others. Lead defense counsel criticized the case against Ongwen as requiring him to be judged "as a reasonable man" after "arising from hell."⁵⁰ The ICC rejected this position and found that neither the defense of mental disease nor duress was properly made out.⁵¹ In any event, given the severity of Ongwen's crimes and the magnitude of their impact on his victims, an outright exclusion of criminal culpability hardly provides a satisfactory answer. As commented by Paul Bradfield:

Tragic as it was, Dominic Ongwen's conviction was correct, both morally and legally. His crimes demanded accountability. As we reflect on the complexities of this case, it's important that we do so with full reference to the facts of the case. And to those who reject this judgement as legally deficient or morally unjust, we must also ask them to specify what is their alternative – can it really be argued that once someone reaches a certain level of victimhood, that no accountability should be permitted?⁵²

This sentiment was carried through by the prosecution before the Appeals Chamber. Although it may not be always appropriate to convict victims for crimes directly resulting from their own trafficking, it cannot be seriously argued that such a principle would be designed to exclude multiple murders, rapes and enslavements repeated over many years and committed by a high-ranking commander.⁵³

⁴⁸ *Ibid.*

⁴⁹ See Pangalangan, Kan, & Nortje, *supra* note 4.

⁵⁰ See Bouwknecht & Holá, *supra* note 40.

⁵¹ *Ibid.* See also *Prosecutor v Ongwen*, *supra* note 1 at paras 2448, 2580–85, 2668–71.

⁵² See Paul Bradfield, "The moral and legal correctness of Dominic Ongwen's conviction" (10 February 2021), online: *Justice in Conflict* <justiceinconflict.org/2021/02/10/the-moral-and-legal-correctness-of-dominic-ongwens-conviction/> [perma.cc/N5QW-RTTU].

⁵³ See *Ongwen Appeal Hearings Day 4*, *supra* note 45 at 15–23.

Sentencing might provide another avenue for resolving the tension identified by Bouwknecht and Holá. As argued by Gamaliel Kan, rather than excusing liability, Ongwen's experience as a child soldier can serve as a mitigating factor to be considered by the Court.⁵⁴ Article 78 of the Rome Statute of the International Criminal Court ("Rome Statute") requires the ICC to balance the gravity of Ongwen's crimes against his individual circumstances.⁵⁵ In Canada, for example, under section 718.2(e) of the *Criminal Code* and the principles set out by the Supreme Court of Canada in *R v Gladue*, a court imposing a sentence on an Indigenous offender must take into account the particular circumstances of the Indigenous offender, including the unique background and systemic racism experienced by Indigenous peoples in Canada as a consequence of colonialism.⁵⁶ Similarly, the Ontario Court of Appeal held in *R v Morris* that social context evidence relating to an offender's lived experiences may be used, where relevant, to mitigate an offender's degree of responsibility during sentencing.⁵⁷ The Court noted that, although the methodology found under *Gladue* does not apply identically in the context of other racialized offenders, it may inform the approach to be taken when assessing the impact of, for example, anti-Black racism on an offender.⁵⁸ Perhaps international criminal law could respond to situations of victim-turned-perpetrator with similar factors, acknowledging Ongwen's unique experiences as a former child soldier when determining sentencing.

Although, as with direct accountability, reduction in sentencing carries similar problems given the egregious nature and scale of Ongwen's crimes. His victims, who submitted a joint brief, recommended a life sentence and maintained there were no mitigating circumstances that could justify a reduced sentence. They also fear that any early release may result in Ongwen rejoining the LRA to continue his abuses. The prosecution adopted a more nuanced view, recognizing the "genuinely complex" nature of Ongwen's case, and recommended 20 years.⁵⁹ Ultimately, Ongwen was

⁵⁴ See Kan, *supra* note 4 at 83.

⁵⁵ See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 at art 78, Can TS 2002 No 13, 37 ILM 999 (1998), (entered into force 1 July 2002) [*Rome Statute*].

⁵⁶ See *Criminal Code*, RSC 1985, c C-46, s 718.2(e); *R v Gladue*, [1999] 1 SCR 688 at paras 66, 93.

⁵⁷ 2021 ONCA 680 at para 13.

⁵⁸ *Ibid.*

⁵⁹ See Brianne McGonigle Leyh & Wayne Miller, "Ongwen blog Symposium: Two Sides of the Same Coin: The 'Child Soldier Experience' at the ICC" (14 April 2021), online: *Armed Groups and International Law* <www.armedgroups-internationallaw.org/2021/04/14/ongwen-blog-symposium-two-sides-of-the-same-coin-the-child-soldier-experience-at-the-icc/> [perma.cc/J2A3-4MS4].

sentenced to 25 years. The Appeals Chamber confirmed that Ongwen's personal history and abduction was a relevant factor bearing on the gradation of the sentence to be imposed.⁶⁰ Nonetheless, the Court highlighted Ongwen's agency, and observed that many others in Ongwen's position chose different paths:

As found in the Trial Judgement, the Chamber also recalls that throughout its long years of activity, the LRA abducted a great number [of] children ... only a small minority of them made such a steep and purposeful rise in the LRA hierarchy as Dominic Ongwen did. This must be acknowledged for fairness towards the many other people who, in circumstances oftentimes very similar to those in which Dominic Ongwen found himself, made choices different than him.⁶¹

Still, even if sentencing is optimally adjusted to take notice of Ongwen's circumstances, this arguably does not provide a complete answer regarding the fundamental tension in the case. The victim-turned-perpetrator dilemma reveals Ongwen's crimes are not his alone. They derive from, and are caused by, the very existence of Kony's LRA. And yet, in spite of the verdict, the LRA and Kony remain active. Notably, the Ugandan government has not prosecuted four former LRA members who held the same or higher rank as Ongwen – Kenneth Banya, Sam Kolo, Onen Kabule, and Odongo Acellam.⁶² None of these four were named in the arrest warrant issued by the ICC in 2005 – the same one which included Ongwen.⁶³ Instead, according to a former intelligence officer of the LRA on examination by Ongwen's defence lawyer, these key senior operators are free to move around in Uganda and have had no accusations levied against them.⁶⁴

Moreover, Sehmi observes that justice in Ongwen's case does not end with Ongwen's conviction. Economic justice, for instance, is required to allow Ongwen's and the LRA's victims to live dignified lives. Furthermore, redress for the crimes committed by Museveni's government remains another unresolved issue.⁶⁵ Sarah Kihika Kasande draws similar

⁶⁰ See *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Sentence (6 May 2021) (International Criminal Court, Trial Chamber IX), online (pdf): *International Criminal Court* <www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_04230.PDF> [perma.cc/DAS2-ZAXQ] [*Ongwen Sentence*].

⁶¹ *Ibid* at para 85.

⁶² See Tom Maliti, "Witness Tells Court About Former LRA Officers Senior to Ongwen Who are Free" (9 May 2017), online: *International Justice Monitor* <www.ijmonitor.org/2017/05/witness-tells-court-about-former-lra-officers-senior-to-ongwen-who-are-free/> [perma.cc/JE63-Y5FU].

⁶³ *Ibid*.

⁶⁴ *Ibid*.

⁶⁵ See Sehmi, *supra* note 45.

observations with respect to accountability for crimes committed by the Uganda People's Defence Force ("UPDF"):

Ongwen's conviction is bound to revive discussions about accountability for UPDF crimes in Northern Uganda. Members of the war-affected communities ask, why is it only the LRA and not the UPDF soldiers being held accountable?

UPDF atrocities against civilians have been documented extensively. These include the Namokora Massacre, where government soldiers killed 35 civilians; the Burcoro massacre where the 22nd battalion of the UPDF tortured, killed, and raped civilians; and the Mukura Massacre, in which the UPDF soldiers locked 300 civilians in a train wagon and suffocated 69 of them to death.⁶⁶

Ongwen's crimes were committed in the context of a wider conflict in Northern Uganda, one with a long history of human rights abuses and use of child soldiers. Ongwen's case provides a stark example of how the use of child soldiers perpetuates cycles of violence. The victim-turned-perpetrator dilemma is not unique to Ongwen and can arise in other contexts involving conflict and atrocity. The international response to such situations should not only be to deliver a sense that criminal justice has been served. Instead, its goals must be broader and involve the realization of fundamental human rights. The success or failure of Ongwen's verdict should, at least in part, be measured against the overall fight to end the LRA's reign of terror and the proliferated use of children in armed conflicts.

D. Exploring the Relationship Between ICL and IHRL

This contextual inquiry reveals that the issue of the LRA and the use of child soldiers is more complex than the actions of any one individual leader. Uganda's complex history involving colonialism, ethnic fragmentation, foreign intervention and political struggles for power, coupled with the "violent disciplinary system" in which child soldiers grow up, raises the question of whether a prosecution is the most effective or appropriate response for protecting and promoting human rights.

This paper will explore the interrelationship between international criminal law and international human rights law and consider the implications of this interrelationship in the context of Ongwen's case. It begins with background discussion on ICL and IHRL. Although the two

⁶⁶ See Sarah Kihika Kasande, "Beyond the Ongwen Verdict: Justice for Government Atrocities in Uganda" (9 February 2021), online: *Justice in Conflict* <justiceinconflict.org/2021/02/09/beyond-the-ongwen-verdict-justice-for-government-atrocities-in-uganda/> [perma.cc/8XRE-UTUL].

disciplines differ in important ways, IHRL frequently turns to ICL to further its aims. Part III discusses how ICL fits into IHRL as a form of intervention where states fail to uphold their human rights obligations. Part IV challenges the preventative value of this form of intervention. Finally, Part V revisits the conviction of Ongwen, taking it as a case study which illustrates the turn towards ICL in the fight against the use of child soldiers and why it may be an ineffective tool in protecting the rights of the child.

II. Background: Differences and Convergences Between ICL and IHRL

A. The Distinction Between the Two Disciplines

ICL and IHRL are distinct in their scope and focus. Even so, IHRL has often turned to and relied on criminalization and international criminal institutions to further its human rights objectives. To appreciate how IHRL uses ICL, it is important to parse the key differences between these two disciplines.

Admittedly, there are clear overlaps. Developed in the wake of atrocities committed by the Nazi regime during World War II, both are concerned with providing a base standard of humane treatment and have a direct impact on individuals. Moreover, human rights bear a heavy influence on the development of international crimes.⁶⁷ Notably, the Rome Statute requires its application and interpretation to be “consistent with internationally recognized human rights” and judges are required to have competence in the field of IHRL.⁶⁸ Yet, as explained by Darryl Robinson, these two disciplines are not necessarily interchangeable: “ICL practitioners often assume that the ICL norms are coextensive with their human rights or humanitarian law counterparts ... Such assumptions overlook the fact that these bodies of law have different purposes and consequences and thus entail different philosophical commitments.”⁶⁹ These different “philosophical commitments” are found in the fact that ICL is significantly more narrow than IHRL. As well, the former focuses on ascribing individual culpability, whereas the latter orients its focus towards state obligations.

⁶⁷ See Robert Cryer, Darryl Robinson & Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure*, 4th ed (Cambridge, UK; New York: Cambridge University Press, 2019) at 13–15.

⁶⁸ See *Rome Statute*, *supra* note 55, arts 21(3), 36(3)(b)(ii).

⁶⁹ See Darryl Robinson, “The Identity Crisis of International Criminal Law” (2008) 21:4 *Leiden J Intl L* 925 at 946.

Firstly, what constitutes a human right is much broader than what constitutes an international crime. This is captured in the observations of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in the case of *Kupreškić*, “[a]lthough the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.”⁷⁰

The Rome Statute defines only four crimes within the jurisdiction of the ICC, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.⁷¹ On the other hand, IHRL defines a much broader basket of rights belonging to individuals and peoples, both of a civil and political nature as per the ICCPR,⁷² as well as of an economic, social and cultural nature as per the ICESCR.⁷³ States often decide how to enforce human rights obligations. In most cases this may not necessarily mean criminalization.⁷⁴ For example, treaties such as the Convention on the Rights of Persons with Disabilities do not rely on prosecutions, but instead commit party states to amplify, through policy, the non-discrimination guarantee found within the UN Charter and in the ICCPR.⁷⁵

A second distinction consists in the fact that ICL ascribes individual accountability for criminal conduct while IHRL defines the human rights obligations of states vis-à-vis individuals within their jurisdiction. As explained by the ICTY in the *Kunarac* decision: “[Penal law] sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the state. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences.”⁷⁶

As seen in the *Bosnian Genocide Case* of the International Court of Justice (“ICJ”), an international crime can occur without state responsibility.⁷⁷

⁷⁰ See *The Prosecutor v Kupreškić (Lašva Valley Case)*, IT-95-16, Trial Judgement (14 January 2000) at para 618 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online (pdf): <ucr.irmct.org/scasedocs/case/IT-95-16#eng> [perma.cc/R9NN-CU8D].

⁷¹ See *Rome Statute*, *supra* note 55, art 5.

⁷² See *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (1967) (entered into force 23 March 1976).

⁷³ See *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 999 UNTS 3, Can TS 1976 No 46, 6 ILM 360 (1967) (entered into force 3 January 1976).

⁷⁴ See Cryer, *supra* note 67 at 13.

⁷⁵ See John H Currie, *International Law*, 2nd ed (Toronto: Irwin Law, 2014) at 602.

⁷⁶ See United Nations International Criminal Tribunal for the Former Yugoslavia, Press Release, JL/PIS/566-e, “Judgement of Trial Chamber II in the Kunarac, Kovac and Vukovic Case”, (2001), online: <www.icty.org/en/sid/8018 > [perma.cc/AWY3-22QJ].

⁷⁷ See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 [*Bosnian Genocide Case*].

Genocide was held to have occurred in Srebrenica, but Serbia itself was not held responsible for the perpetrators of that crime because the conduct could not be attributed to the state.⁷⁸

The objectives and remedies in IHRL further differ in fundamental ways from ICL. As explained by the Inter-American Court of Human Rights (“IACtHR”) in *Velásquez-Rodríguez*:

The international protection of human rights should not be confused with criminal justice. States do not appear before the court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages.⁷⁹

Conversely, ICL is concerned with ascribing culpability to perpetrators of egregious conduct. This approach is codified in the Rome Statute, which sets out the basis for individual criminal responsibility.⁸⁰ ICL is further distinguished from IHRL in that it establishes tribunals and courts that directly intervene in and prosecute instances of atrocity. The Rome Statute, for example, allows the direct intervention of the ICC in situations where a state is unable or unwilling to prosecute an international crime which occurred within its territory.⁸¹

B. Reliance on ICL by IHRL

As argued by Robinson, IHRL and ICL certainly entail very different “philosophical commitments.”⁸² IHRL is a more ambitious project targeted specifically at changing state behavior to improve the human condition and curtail abuses. Nevertheless, as observed by Robert Cryer, it would be misplaced to ignore the close relationship the two disciplines share: “Such development ought not to be taken to be evidence of the fragmentation of international law, as it may also be evidence of appropriate contextual interpretation of both areas of law, which operate in harmony.”⁸³

⁷⁸ *Ibid* at 159–76.

⁷⁹ See *Case of Velásquez-Rodríguez v Honduras* (1988), Inter-Am Ct HR (Ser C) No 4 at para 134, online (pdf): *Corte Interamericana de Derechos Humanos* <www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf> [perma.cc/3ECW-TDVH] [*Velásquez-Rodríguez*].

⁸⁰ See *Rome Statute*, *supra* note 56, art 25.

⁸¹ *Ibid*, art 17.

⁸² See Robinson, *supra* note 70 at 946.

⁸³ See Cryer, *supra* note 67 at 15.

One of the clearer ways the two disciplines operate in harmony is the incorporation of human rights principles in the procedural aspects of ICL. For instance, evidence obtained by means of violation of internationally recognized human rights is not admissible where the violation casts substantial doubt on the reliability of the evidence or the admission of the evidence would damage the integrity of the proceedings. Moreover, the application and interpretation of law pursuant to the Rome Statute must itself be consistent with internationally recognized human rights, and without any adverse distinction on grounds such as “gender ..., age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”⁸⁴

More significantly for the case of Ongwen and the situation in Uganda, the relationship runs the other way as well. ICL and IHRL go beyond simply operating “in harmony.” Human rights systems and movements have increasingly relied on ICL as a means of furthering and promoting the human rights agenda – including combatting the proliferation of child soldiers by armed groups and the atrocities committed in the context of such conflicts.

The instruments of IHRL, and its responses to human rights abuses generally, have frequently turned toward prosecutions. At the close of the Second World War, the human rights project was launched to signal that the international community would never again tolerate massive violations of human dignity as was perpetuated by the Nazi regime. The Supreme Court of Canada in *Newsun Resources Ltd v Araya* described IHRL as being the “phoenix that rose from the ashes of World War II and declared global war on human rights abuses.”⁸⁵ Yet, in inaugurating this ambitious project, one of the first international responses was criminal accountability. Specifically, the Nuremberg International Military Tribunal (“Nuremberg IMT”) was established and charged Nazi leadership with crimes against humanity, thereby directly addressing the murder, enslavement, persecutions and other inhumane acts committed against civilians by the regime.⁸⁶ Subsequently, the UN adopted its first human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”). Of note, the Genocide Convention explicitly references and

⁸⁴ See *Rome Statute*, *supra* note 55, arts 21(3), 69(7).

⁸⁵ See *Newsun Resources Ltd v Araya*, 2020 SCC 5, at para 1.

⁸⁶ See William A Schabas, *An Introduction to the International Criminal Court*, 5th ed (Cambridge: Cambridge University Press, 2017) at 5–8.

relies on criminalization – requiring state parties to domestically recognize genocide as a crime and to punish perpetrators accordingly.⁸⁷

Subsequent conventions continued to impose obligations on states to prosecute abuses; notably, with respect to apartheid, enforced disappearances and torture.⁸⁸ The 1993 Vienna Declaration and Program of Action (“Vienna Declaration”) later linked the development of criminal culpability with the protection of human rights, stating: “[a]ll persons who perpetrate or authorize criminal acts associated with ethnic cleansing are individually responsible and accountable for such human rights violations, and thus the international community should exert every effort to bring those legally responsible for such violations to justice.”⁸⁹

Consistent with this criminal dimension of IHRL, and echoing Nuremberg, the UN Security Council (“UNSC”) responded to a tide of severe human rights abuses and ethnic violence committed during the 1990s with the creation of *ad hoc* criminal tribunals. In both Rwanda and the former Yugoslavia, states could not agree on any form of military intervention to resolve the conflicts, and opted instead to intervene by holding perpetrators criminally responsible.⁹⁰ The response in Rwanda in particular exhibited a clear documented link between human rights objectives and prosecutions. The UNSC resolution creating the International Criminal Tribunal for Rwanda (“ICTR”) referenced and relied on the reports of the Special Rapporteur, René Degni-Séui, concerning human rights in Rwanda.⁹¹ In the report, Degni-Séui discussed the need for the cessation of human rights violations and directly called for the establishment of an international court for the prosecution of genocide as a response.⁹² Over time, IHRL’s reliance on criminal law has only grown. In what Kathryn Sikkink calls the “Justice

⁸⁷ See *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, Can TS 1949 No 27 (entered into force 12 January 1951) [*Genocide Convention*].

⁸⁸ See Currie, *supra* note 75 at 602–03.

⁸⁹ See Office of the United Nations High Commissioner for Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/157/23 (1993) Part II at para 23 [*Vienna Declaration*].

⁹⁰ See Karen Engle, “Anti-Impunity and the Turn to Criminal Law in Human Rights” (2015) 100:5 Cornell L Rev 1069 at 1076.

⁹¹ See SC Res 955, UNSCOR, 49th year, UN Doc S/RES/955 (8 November 1994), online (pdf): *United Nations Digital Library* <digitallibrary.un.org/record/198038/files/S_RES_955%281994%29-EN.pdf?ln=en> [perma.cc/BJJ6-AELU].

⁹² See *Situation on Human Rights in Rwanda: Note by the Secretary-General*, UNSCOR, 49th Sess, Annex, Agenda Item 100(c), UN Doc A/49/508/Add.1 & S/1994/1157/Add.1 at 18–19, online (pdf): *United Nations Digital Library* <digitallibrary.un.org/record/198186?ln=en> [perma.cc/UU69-6PA4].

Cascade”, the number of domestic and international prosecutions over human rights violations increased during the 1990s and 2000s.⁹³

The progressive development of this criminal dimension of IHRL was reflected in, and perhaps driven by, the practices of human rights activists and NGOs. During the 1970s and 1980s, the primary tactic of these movements was “naming and shaming” – i.e., putting pressure on states to end violations of human rights. Events in the former Yugoslavia and Rwanda shifted this view and generated broad based support for the use of criminal law as an instrument of human rights realization.⁹⁴ Advocates and organizations began placing their faith in, and directly advocated for, prosecutions.⁹⁵ Karen Engle, for example, observes this approach across various human rights NGOs as well as within the feminist movement’s push for “carceral feminism” to fight sexual violence.⁹⁶ These efforts culminated in the 1993 Vienna Declaration, where the international community called for domestic prosecutions, opposed amnesties and promoted the development of an international criminal court.⁹⁷ Beyond advocacy alone, human rights groups are also often the driving force behind the initiation of criminal prosecutions as a response to abuses.⁹⁸

Perhaps in part because of this close relationship, IHRL has repeatedly steered the development of ICL’s content. As a result, human rights have become one yardstick by which international crimes are understood. The International Convention on the Suppression and Punishment of the Crime of Apartheid (“Apartheid Convention”) defined apartheid as a crime against humanity long before the Rome Statute did.⁹⁹ The Apartheid Convention further defines apartheid to include legislative measures calculated to prevent racial groups from participating in the political, social, economic and cultural life of a country.¹⁰⁰ This includes a denial of civil and political rights, such as the right to freedom of opinion and expression, as well as socio-economic rights, such as the right to education.¹⁰¹ Further evidence of

⁹³ See Kathryn Sikkink, *Evidence for Hope: Making Human Rights Work in the 21st Century* (Princeton & Oxford: Princeton University Press, 2017) at 209–10.

⁹⁴ See Engle, *supra* note 90 at 1073–75.

⁹⁵ *Ibid* at 1077–79.

⁹⁶ *Ibid* at 1077–78.

⁹⁷ *Ibid* at 1112–13. See also *Vienna Declaration*, *supra* note 89 Part II at paras 23, 60, 92.

⁹⁸ See Charles Chernor Jalloh, “Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction” (2010) 21 *Crim LF* 1 at 22.

⁹⁹ See *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, 1015 UNTS 243, art 1 (entered into force 18 July 1976) [*Apartheid Convention*].

¹⁰⁰ *Ibid*, art 2.

¹⁰¹ *Ibid*.

this cross-pollination is seen in the *Draft Code of Crimes against the Peace and Security of Mankind*.¹⁰² Though not itself a treaty, in the *Furundžija* decision, the ICTY held that the Draft Code constitutes evidence of customary law, or at the very least reveals the views of eminent and qualified scholars representing the major legal systems of the world.¹⁰³ Commentary to the statute states that the prohibition against persecution on political, racial, religious or ethnic grounds, which constitutes a crime against humanity, may take the form of a denial of human rights and fundamental freedoms.¹⁰⁴ In further identifying the prohibition on arbitrary imprisonment, as well as rape, enforced prostitution and other forms of sexual abuse, the Draft Code linked these crimes as constituting breaches of the ICCPR and the Convention on the Elimination of All Forms of Discrimination Against Women.¹⁰⁵

While entailing “different philosophical commitments”, it is apparent that IHRL works in harmony with ICL. Its instruments and responses to human rights violations have often turned towards criminalization and prosecutions, and human rights have been used to shape and understand the contours of what constitutes international crimes. As a result, ICL arguably operates as a tool for IHRL, raising the question initially posed in the introduction of this paper: what role does ICL play in IHRL, and does this role truly serve the human rights agenda?

III. The Interventionist Role of ICL Within IHRL

Over the course of its history, IHRL has imposed obligations on states to domestically criminalize human rights violations. In this context, ICL’s role emerges as an alternative to state responsibility, opening a corridor to prosecutions where states are otherwise unwilling or unable to do so. IHRL thus treats ICL as a tool of intervention – a last resort for the most serious human rights abuses which states fail to address by one reason or another.

¹⁰² See *Report of the International Law Commission*, UNGAOR, 51st Sess, Supp No 10, UN Doc A/51/10 (1996) 9 at 93–104.

¹⁰³ See United Nations International Criminal Tribunal for the Former Yugoslavia, Press Release, JL/PIU/372-E, “Furundžija Case: The Judgement of the Trial Chamber Anto Furundžija found Guilty on Both Charges and Sentenced to 10 Years in Prison”, (1998), online: *United Nations, International Residual Mechanism for Criminal Tribunals* <www.icty.org/en/sid/7609> [perma.cc/4AFA-5MPA].

¹⁰⁴ See “Report of the International Law Commission on the work of its forty-eighth session” (UN Doc A/51/10) in *Yearbook of the International Law Commission 1996*, vol 2, part 2 (Geneva: UN, 1996) at 15–56.

¹⁰⁵ *Ibid.*

A. State Responsibility to Criminalize Human Rights Abuses

The law of state responsibility, which is sourced primarily in customary international law, provides a set of secondary obligations imposed on states whenever an underlying obligation is breached. Currently, a reliable restatement of these customary rules is found in the International Law Commission's "Draft Articles on the Responsibility of States for Internationally Wrongful Acts."¹⁰⁶ According to the Draft Articles, a state commits an "internationally wrongful act" where an action or omission attributable to the state breaches an international obligation of that state.¹⁰⁷ Absent defenses, the responsible state will be obliged to provide remedies including cessation, non-repetition and different modes of reparations.¹⁰⁸

This framework gives bite to IHRL, as states which fail to meet their human rights obligations owed under international law could attract responsibility. Theoretically, the state responsibility doctrine outlined above might impose obligations on states to pursue domestic prosecutions of human rights violations. Otherwise excluding IHRL from the law of state responsibility risks delegitimizing the field. As explained by Theodor Meron: "If we want international human rights law to become an authentic branch of international law ... we must create a conceptual structure in which we can invoke the same principles of state responsibility ..."¹⁰⁹

The "conceptual structure" is not difficult to make out. States have obligations, sourced from human rights conventions and treaties, to criminalize certain human rights abuses. For instance, the Genocide Convention requires state parties to prevent and punish the crime of genocide, specifically by undertaking to enact the necessary legislation.¹¹⁰ The Apartheid Convention further requires state parties to prosecute those responsible for the crime of apartheid.¹¹¹ The preamble to the Rome Statute itself makes a passing reference to these obligations, as state parties agree

¹⁰⁶ See "Report of the Commission to the General Assembly on the work of its fifty-third session" (UN Doc A/56/10) in *Yearbook of the International Law Commission 2001*, vol 2, part 2 (New York & Geneva: UN, 2007) at para 76 (UNDOC. A/CN.4/SER.A/2001/Add.1 (Part 2)).

¹⁰⁷ *Ibid*, art 2.

¹⁰⁸ *Ibid*, arts 20–25, 30–31, 34–37.

¹⁰⁹ See Theodor Meron, "State Responsibility for Violations of Human Rights" (1989) 83 *Proceedings Annual Meeting (ASIL)* 372 at 377.

¹¹⁰ See *Genocide Convention*, *supra* note 87, arts 1, 5.

¹¹¹ See *Apartheid Convention*, *supra* note 99, arts 1, 4(b).

“that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”¹¹²

States which fail to criminalize such abuses and pursue the appropriate prosecutions might be in breach of their human rights obligations. For example, as previously observed in the *Bosnia Genocide Case*, the ICJ held that Serbia was not directly responsible for the perpetrators of genocide committed in Srebrenica.¹¹³ Nevertheless, Serbia was held to be separately responsible under Article I of the Genocide Convention for a failure to prevent and punish the crime of genocide, specifically by failing to cooperate with the ICTY in assisting its own prosecutions.¹¹⁴ The ICJ also held that Article VI of the Genocide Convention “obliges the Contracting Parties to institute and exercise territorial criminal jurisdiction.”¹¹⁵ This did not apply to Serbia because the genocide did not occur within the Respondent’s territory at the time of commission.¹¹⁶ Even so, this ruling suggests that states would be obligated to domestically prosecute genocide where it occurred on their territory.

Human rights bodies have also increasingly held states responsible for failing to investigate, prosecute and punish violations of human rights. In what Alexandra Huneeus calls “international criminal law by other means”, regional human rights systems have ordered and supervised national prosecutions where states have been unable or unwilling to act.¹¹⁷ For instance, in *Velasquez-Rodriguez*, the IACtHR considered the role played by Honduras in the disappearance of a political activist.¹¹⁸ Instead of rooting state responsibility in a direct action by the state, the court ruled state responsibility could be sourced in the failure to investigate, prosecute and punish those involved: “[a]n illegal act which violates human rights ... can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”¹¹⁹

The Court has since expanded this approach by beginning to exhort states at the remedial stage of proceedings to open criminal investigations

¹¹² See *Rome Statute*, *supra* note 55.

¹¹³ See *Bosnian Genocide Case*, *supra* note 77 at para 405.

¹¹⁴ *Ibid* at paras 425–50.

¹¹⁵ *Ibid* at para 442. See also *Genocide Convention*, *supra* note 87, art 6.

¹¹⁶ *Ibid*.

¹¹⁷ See Alexandra Huneeus, “International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts” (2013) 107:1 *Am J Intl L* 1 at 1–2.

¹¹⁸ See *Velasquez-Rodriguez*, *supra* note 79 at paras 1–11.

¹¹⁹ *Ibid* at para 172. See also *ibid* at paras 173–76.

against perpetrators.¹²⁰ The European Court of Human Rights has moved towards similar obligations, holding that the European Convention on Human Rights creates a duty on states “to carry out an effective investigation into alleged breaches of the substantive limb of these provisions”, and that in some situations this may involve recourse to the criminal law.¹²¹ Likewise, human rights monitoring bodies have placed pressure on states to prosecute human rights violators. For instance, the UN Human Rights Committee and UN Committee Against Torture have issued decisions recommending states to investigate and punish abuses. Similarly, the Inter-American Commission often issues recommendations for states to prosecute, and monitors compliance with these recommendations.¹²²

B. The Intervention of ICL

Although the theory of IHRL and the practice of human rights bodies suggests a responsibility on states to prosecute and punish human rights offenders, governments are not always able to fulfill these obligations. As argued by Carlos Nino, “[v]iolations of human rights [are] a category of deeds which may, because of their magnitude, exceed the capacity of national courts to handle internally.”¹²³ For example, a transitional government may struggle with re-establishing a stable democracy and be ill-suited to prosecute perpetrators in previous regimes for human rights abuses. In other instances, there may be a concern of corruption within the government and judicial system that casts doubt on whether a fair investigation or prosecution is even possible. In the case of Ongwen, the relevant state obligation is the requirement to protect children from being trafficked as soldiers. Yet, in hearings before the Appeals Chamber, the defence called out the failures of the Ugandan government in meeting its treaty obligations under the United Nations Convention on the Rights of the Child and the Optional Protocol to the Convention on the Involvement of Children in Armed Conflict. The defence also called out the Ugandan government for failing to hold UPDF perpetrators to account.¹²⁴

In such cases, a gap exists in IHRL where states fail to meet their obligations and perpetrators take shelter. This sentiment was reflected in the

¹²⁰ See Engle, *supra* note 90 at 1080–84.

¹²¹ See William A Schabas, “Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights” (2011) 9:3 *J Intl Crim Justice* 609 at 618.

¹²² See Huneeus, *supra* note 117 at 26.

¹²³ See Engle, *supra* note 90 at 1114.

¹²⁴ See *Ongwen Appeal Hearings Day 1*, *supra* note 44 at 10.

Report of Louis Joinet, UN Special Rapporteur on the Impunity of Perpetrators of Violations of Human Rights, prepared for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to investigate impunity surrounding human rights violations: “[i]mpunity arises from a failure by states to meet their obligations to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished.”¹²⁵

As further observed by Engle, the language of human rights movements paint impunity as not only a failure to remedy abuses, but as a unique cause of them.¹²⁶ In this context, individual criminal responsibility and prosecution emerges as a necessary response to egregious human rights violations. ICL offers a remedy to the issue of impunity and fits into the wider human rights system by filling in the gaps of state responsibility. It authorizes direct prosecutorial intervention by the international community where states fail to meet their human rights obligations and hold perpetrators accountable domestically.

This understanding of ICL’s role within IHRL is consistent with, and perhaps bourn out of, the theoretical and doctrinal justifications for ICL. For instance, Larry May puts forth the “security principle” as a basis for making ICL initially plausible and justified. He notes that a state which deprives its subjects of physical security or subsistence, or is unable or unwilling to protect its subjects from harm, will have limitations placed on its sovereignty and will face intervention from international bodies that seek to protect those subjects.¹²⁷ Similarly, Alejandro Chehtman grounds the foundation of international crimes in the fact that certain criminal rules cannot be enforced in a given state unless at least some extraterritorial authority holds a concurrent power to account. For example, torture, a crime against humanity, is either typically committed by the state or otherwise the state is powerless to prevent it. This was the case in the Argentinian dictatorship, where the military had significant power of detention and individuals had little hope of recourse. In these situations, the intervention

¹²⁵ See *Questions of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, UNESCOR, 49th Sess, Annex, Agenda Item 9, UN Doc E/CN.4/Sub.2/1997/20/Rev.1 (1997) at 22, online (pdf): *United Nations Digital Library* <digitallibrary.un.org/record/245520/files/E_CN.4_Sub.2_1997_20_Rev.1-EN.pdf?ln=en> [perma.cc/28XS-9C69].

¹²⁶ See Engle, *supra* note 90 at 1077–78.

¹²⁷ See Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge, UK: Cambridge University Press, 2004) at 68.

of an international court is needed to enforce the prohibition on torture.¹²⁸ Thus, ICL represents one form of intervention into state sovereignty, prosecuting egregious human rights abuses where the state fails to do so. In this fashion, as described by David Luban, ICL's role is to pierce "the veil of sovereignty."¹²⁹ It is therefore no coincidence that the "security principle" approach to ICL echoes the Responsibility to Protect in IHRL – a political commitment to end the worst forms of violence and persecution. The principle was adopted by the General Assembly in 2005 and commits the international community to using appropriate diplomatic, humanitarian and other peaceful means to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹³⁰

While the failure of the state to protect its citizens may call for some form of intervention, such intervention need not necessarily amount to prosecution. To justify the effects criminal culpability has on the accused, and to justify intrusions into state sovereignty, the violation of human rights must be particularly egregious. Michael Giudice and Matthew Schaeffer observe that most theoretical defences of ICL justify intervention by international tribunals only where human rights abuses are sufficiently serious and widespread.¹³¹ May, who developed the "security principle" discussed above, noted this principle can only justify criminal law for violations of the most basic of human rights.¹³² Indeed, as previously discussed, human rights responses, instruments and activism resort to criminal intervention in the worst cases. The formation of criminal tribunals as a response to atrocities committed in former Yugoslavia and Rwanda, as well as the Genocide Convention, illustrate this point well. Juan Pablo Pérez-

¹²⁸ See Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford, UK: Oxford University Press, 2010) at 100-01.

¹²⁹ See David Luban, "A Theory of Crimes Against Humanity" (2004) 29 *Yale J Intl L* 85 at 117-18, online (pdf): [Yale Law School Legal Scholarship Repository <openyls.law.yale.edu/bitstream/handle/20.500.13051/6479/06_29YaleJIntlL85_2004_.pdf?sequence=2&isAllowed=y>](http://openyls.law.yale.edu/bitstream/handle/20.500.13051/6479/06_29YaleJIntlL85_2004_.pdf?sequence=2&isAllowed=y) [perma.cc/6SPV-YLTD].

¹³⁰ See United Nations, "Responsibility to Protect" (last visited 19 February 2023), online: *United Nations Office on Genocide Prevention and the Responsibility to Protect* <www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml> [perma.cc/K9FH-FZEX]. See also 2005 *World Summit Outcome*, GA Res 60/1, UNGAOR, 60th Sess, UN Doc A/60/L.1 (2005) at paras 138-139, online (pdf): *United Nations Peacemaker* <peacemaker.un.org/sites/peacemaker.un.org/files/GA_World%20Summit%20Outcome%20Document_ARES601%28english%29_0> [perma.cc/Z9AN-QHC5].

¹³¹ See Michael Giudice & Matthew Schaeffer, "Universal Jurisdiction and the Duty to Govern" in François Tanguay-Renaud & James Stribopoulos, eds, *Rethinking Criminal Law Theory* (Oxford, UK: Hart, 2012) at 233.

¹³² See May, *supra* note 127 at 75.

León Acevedo further observes that serious human rights violations have typically been transcribed as crimes against humanity.¹³³ For instance, the Apartheid Convention defines the human rights abuses caused by apartheid policy as a crime against humanity, and this language was later included in the Rome Statute.¹³⁴ Therefore, the theory and doctrine of ICL position it as a tool of intervention where a state fails to protect its citizens against the most egregious human rights abuses. In the context of state responsibility discussed above, this would include the failure of states to criminally prosecute abuses as required under IHRL.

Not only its theory, but the practice of ICL also supports the idea that it serves as a form of human rights intervention. For instance, the first two principles which governed the conduct of the Nuremberg IMT were:

Principle I: any person who commits an act which constitutes a crime under international law is responsible therefor and liable to be punished.

Principle II: The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.¹³⁵

Birthing from these two principles was the idea that the failure of a state to criminalize abuses of human rights would no longer mean perpetrators could escape accountability. Indeed, subsequent human rights treaties began to anticipate the intervention of international tribunals as an alternative route to domestic prosecution. The Genocide Convention, the Apartheid Convention and the International Convention for the Protection of All Persons from Enforced Disappearances, all required persons charged with these crimes to be tried before a tribunal of the state or before an international penal tribunal.¹³⁶

The *ad hoc* tribunals in former Yugoslavia and Rwanda represented the first true instance of this direct intervention. Both were established pursuant

¹³³ See Juan Pablo Pérez-León Acevedo, "The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses" (2017) 17 *AMDI* 145 at 184, online: *Science Direct* <www.sciencedirect.com/science/article/pii/S1870465417300326> [perma.cc/DE3C-MXYZ].

¹³⁴ See *Apartheid Convention*, *supra* note 99, art 1; *Rome Statute*, *supra* note 55, art 7(1)(j).

¹³⁵ See International Law Commission, "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, 1950", online: *International Committee of the Red Cross* <ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/390?OpenDocument> [perma.cc/2YT2-SMMN] [*Nuremberg Principles*].

¹³⁶ See *Genocide Convention*, *supra* note 87, art 6; *Apartheid Convention*, *supra* note 99, art 5; *International Convention for the Protection of All Persons from Enforced Disappearances*, 20 December 2006, UN Doc A/61/488 (2006), arts 9(2), 11(1) (entered into force 23 December 2010).

to Chapter VII of the UN Charter,¹³⁷ which allows the UNSC to authorize actions breaching the domestic jurisdiction of a state.¹³⁸ In particular, articles 8(2) of the ICTY and 9(2) of the ICTR establish that the tribunals have primacy over national courts.¹³⁹ When the validity of this “primacy” principle was challenged in *Tadic*, the ICTY Appeals Chamber affirmed the power of the UNSC to subvert sovereignty in situations of human rights abuses:

It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as protection for those who trample underfoot the most elementary rights of humanity.¹⁴⁰

The ICTY went on to observe that, without primacy, the proceedings would be at risk of being “designed to shield the accused” or may not be diligently prosecuted.¹⁴¹

The Rome Statute provided further ground-breaking work in establishing the ICC’s role as an intervention tool where states fail to prosecute. However, unlike the ICTY and ICTR, which operated under the principle of “primacy”, the ICC was constituted as a court of last resort under the principle of “complementarity” to encourage more domestic prosecutions.¹⁴² Article 17 prevents the ICC’s intervention unless the state which has jurisdiction is otherwise unwilling or unable to carry out the investigation and prosecution.¹⁴³ States which cannot hold perpetrators accountable may refer their case to the ICC prosecutor. If they fail to do so,

¹³⁷ See “About the ICTY”, online: *United Nations International Criminal Tribunal for the former Yugoslavia* <icty.org/en/about> [perma.cc/EQ5Y-HCXG]; UNHCR, “International Criminal Tribunal for Rwanda (ICTR)”, online: *refworld* <refworld.org/publisher,ICTR,,,50ffbce4b4,0.html> [perma.cc/D3WA-Z7AA].

¹³⁸ See *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, art 2.

¹³⁹ See SC Res 827, UNSCOR, 48th year, UN Doc S/RES/827 (25 May 1993), online (pdf): *ICTY* <www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf> [perma.cc/A6X6-P6EV]; See also SC Res 955, *supra* note 91.

¹⁴⁰ See *Prosecutor v Dusko Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) at para 58 (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber), online: *IRMCT* <icty.org/x/cases/tadic/acdec/en/51002.htm> [perma.cc/3BP2-Q3HR].

¹⁴¹ *Ibid.*

¹⁴² See Harold Koh, “International Criminal Justice 5.0” (2013) 38 *Yale J Intl L* 525 at 538, online (pdf): *Yale Law School Legal Scholarship Repository* <openlys.law.yale.edu/bitstream/handle/20.500.13051/4375/International_Criminal_Justice_5.0_38_Yale_Journal_of_International_Law_525_2013_.pdf?sequence=2&isAllowed=y> [perma.cc/F696-MF2J].

¹⁴³ See *Rome Statute*, *supra* note 55, art 17.

the prosecutor can initiate an investigation. Alternatively, the UNSC may refer a case directly to the prosecutor under its Chapter VII powers.¹⁴⁴ The combined effect of this regime is to open a path to prosecution for the international human rights system where states are unwilling or unable to do so domestically, by pressuring states, the UNSC or the office of the prosecutor to initiate a case before the ICC.

For example, the situation in Darfur provides a telling illustration of ICL's interventionist role in the human rights agenda. The ICC's investigation into the situation was first opened pursuant to a referral from the UNSC, acting under its Chapter VII powers. Alongside a referral, the UNSC further required the Government of Sudan, and other parties to the conflict, to cooperate with the investigation. In so doing, it considered the report of the International Commissions of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur.¹⁴⁵ The report documented the grave violations of human rights occurring in the region and discussed the commission of international crimes linked to these abuses.¹⁴⁶ After remarking on the inability of the Sudanese criminal justice system to handle these abuses, the Commission recommended a referral to the ICC, saying "[t]he Sudanese judicial system has proved incapable, and the authorities unwilling, of ensuring accountability for the crimes committed in Darfur. The international community cannot stand idle by, while human life and human dignity are attacked daily and on so large a scale in Darfur."¹⁴⁷

The Commission goes on to characterize the ICC as the first institution "capable of trying individuals of serious violations of international humanitarian law and human rights law."¹⁴⁸ The report and the UNSC's resolution led to the opening of an investigation, resulting in the issuance of an arrest warrant against President Omar Hassan Al-Bashir for genocide, crimes against humanity and war crimes.¹⁴⁹

¹⁴⁴ *Ibid.*, arts 13–15.

¹⁴⁵ See SC Res 1593, UNSCOR, 60th year, UN Doc S/RES/1593 (31 March 2005), online (pdf): *United Nations Digital Library* <digitallibrary.un.org/record/544817/files/S_RES_1593%282005%29-EN.pdf?ln=en> [perma.cc/2J38-JWX8].

¹⁴⁶ See *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, UN Doc S/2005/60 at 2–5, online (pdf): *United Nations Digital Library* <digitallibrary.un.org/record/540780/files/S_2005_60-EN.pdf?ln=en> [perma.cc/4RVQ-266P].

¹⁴⁷ *Ibid.* at 155–56.

¹⁴⁸ *Ibid.*

¹⁴⁹ See Mahmood Mamdani, "The New Humanitarian Order" (2009) 36:122 *ROAPE* 621 at 621, online: *JSTOR* <www.jstor.org/stable/27756317> [perma.cc/6Z3V-QFB4].

In the case of Darfur, human rights abuses were identified as having been committed. The Sudanese government was unable to meet its obligations under IHRL to hold the perpetrators criminally responsible. In response, the UNSC turned towards the ICC's prosecutorial intervention powers as an avenue for the protection and enforcement of human rights. This illustrates how ICL serves as a form of human rights intervention in states that are otherwise unable or unwilling to protect their population from egregious abuses. Generally, IHRL places obligations on states to criminalize violations of human rights within their domestic jurisdiction. Where states fail to do so, the wider human rights system can and does turn to international criminal institutions as an instrument to facilitate the prosecution of perpetrators. The question about whether this reliance on ICL is effective and achieves the objectives of human rights will be explored in the following section.

IV. Limits of ICL Intervention in Protecting Human Rights

ICL boasts an ability to deter atrocity. This is exemplified by a statement of Antonio Cassese, former president of the ICTY, noting that impunity for perpetrators of the Armenian genocide signalled a "nod and wink to Adolf Hitler and others to pursue the Holocaust some twenty years later."¹⁵⁰ As indicated in the preamble to the Rome Statute, state parties are "determined to put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes."¹⁵¹ This preventative function aligns with IHRL's goal of securing a world where human rights are respected. The preamble to the Vienna Declaration, for instance, calls on the international community to "prevent the continuation of human rights violations resulting therefrom throughout the world."¹⁵² In light of this, it is no wonder that IHRL has developed a level of dependency on ICL, since its proposed deterrent value makes it a logical tool of intervention for the global human rights agenda. Amnesty International, a staunch advocate of the ICC, exemplified this attitude in its 1991 policy statement where it wrote "the

¹⁵⁰ See Tor Krever, "International Criminal Law: An Ideology Critique" (2013) 26 *Leiden J Intl L* 701 at 710, online (pdf): *Cambridge University Press* <legalform.files.wordpress.com/2017/08/krever-ideology-critique-of-icl.pdf> [perma.cc/FM5Q-82KG].

¹⁵¹ See *Rome Statute*, *supra* note 55.

¹⁵² See *Vienna Declaration*, *supra* note 89.

phenomenon of impunity is one of the main contributing factors to persistent patterns of gross human rights violations."¹⁵³

As will be discussed, there is reason to doubt that IHRL can achieve this preventative effect through ICL's intervention. Prosecutions do little to deter individuals from committing abuses and are ill-suited to respond to the root causes of atrocities.

A. Deterrence at an Individual Level

ICL claims to have a deterrent effect on individual perpetrators. Hyeran Jo and Beth Simmons break this down into two components: "prosecutorial deterrence" and "social deterrence."¹⁵⁴ The former means the threat of investigation, liability and punishment for engaging in conduct prohibited under international law. The current international criminal justice system provides for this effect through two avenues. The first involves the risk that the United Nations will respond to mass atrocity by establishing specialized tribunals, such as the ICTY, the ICTR or hybrid courts such as the Special Tribunal for Lebanon. Secondly, prosecutorial deterrence can arise directly from the intervention of the ICC through referrals by states, the UNSC or through the initiation of an investigation by the prosecutor.

On the other hand, social deterrence involves costs for the commission of crimes which arises from the "broader social milieu."¹⁵⁵ Payam Akhavan explains this further when he argues that prosecution threatens the political demise of perpetrators and sends a message regarding the "cost of ethnic hatred and violence as an instrument of power."¹⁵⁶ In the former Yugoslavia, the ICTY was essential for delegitimizing the ethno-nationalist leadership of Milosevic; likewise in Rwanda, the ICTR was critical in preventing Hutu extremists from rehabilitating their leadership.¹⁵⁷ Social deterrence may also take effect in international relations. Governments or rebel groups that seek legitimacy, foreign aid and positive relations with other nations must respect a base level of conduct. For instance, it was partly because of such

¹⁵³ See Engle, *supra* note 90 at 1072, 1077.

¹⁵⁴ See Hyeran Jo & Beth Simmons, "Can the International Criminal Court Deter Atrocity?" (2016) 70 Int Organ 443 at 444, online (pdf): *Scholar Harvard Edu* <scholar.harvard.edu/files/bsimmons/files/josimmons_deteratrocity_io_2016.pdf> [perma.cc/R5B3-M8YK].

¹⁵⁵ *Ibid* at 443-44.

¹⁵⁶ See Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" (2001) 95 Am J Intl L 7 at 7-8, online: *JSTOR* <www.jstor.org/stable/2642034> [perma.cc/SM29-Y4PG].

¹⁵⁷ *Ibid* at 9.

international pressure that Indonesia came to investigate criminal abuses which occurred in East Timor.¹⁵⁸

Nevertheless, there is strong reason to doubt ICL's value proposition. A deterrent effect presumes that perpetrators are rational and possess individual agency. Based on this assumption, the threat of punishment and social stigmatization acts as a cost to committing prohibited conduct. But, as argued by Immi Tallgren, this ignores the fact that deterrence requires internalization of moral standards.¹⁵⁹ In the context of widespread and systemic violence, offenders may be absorbed in environments and cultures where group values encourage the violation of human rights.¹⁶⁰ Drumbl notes this is likely to occur where atrocities are not understood by perpetrators as being obviously deviant.¹⁶¹ For example, the Chilean government engaged in human rights abuses covertly, reflecting a cognizance by political leaders that their conduct was wrongful.¹⁶² Conversely, the Rwandan genocide was conducted openly and killing was seen by perpetrators as a civic duty.¹⁶³ The "social milieu" described by Jo and Simmons may normalize violence, making internalization of moral standards difficult. In such situations, it is questionable whether prosecutorial deterrence or social deterrence function to discourage perpetrators.

B. Prevention at a Systemic Level

Beyond the issue of deterrence on an individual level, a more stark criticism is that ICL is ill-suited to address systemic causes of human rights abuses. The international criminal system often focuses its lens both on individual culpability and on extreme instances of violence. By doing so, ICL has a tendency to decontextualize mass atrocities and obscure the root causes of violence. As a result, the material conditions which lead to egregious human rights violations remain unchallenged. Where these material conditions persist, so to does the risk of continued violence.

¹⁵⁸ *Ibid* at 28–29.

¹⁵⁹ See Immi Tallgren, "The Sensibility and Sense of International Criminal Law" (2002) 13 *Eur J Intl L* 561 at 570–73, online: *Oxford Academic* <academic.oup.com/ejil/article/13/3/561/467132?login=false> [perma.cc/ZKX4-ZXJD].

¹⁶⁰ *Ibid*.

¹⁶¹ See Mark Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity" (2005) 99:2 *Nw UL Rev* 539 at 549–50, online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=530182> [perma.cc/LB86-6P2F].

¹⁶² *Ibid* at 568–69.

¹⁶³ *Ibid*.

The first limitation on ICL's ability to uncover root causes is situated in its over-individualized focus. In general, criminal law understands crime as a social problem resulting from the choices and actions of individuals. Akhavan, for example, demonstrates this view in the context of ICL when he writes:

Contrary to the simplistic myths of primordial "tribal" hatred, the conflicts in the former Yugoslavia and Rwanda were not expressions of spontaneous blood lust or inevitable historical cataclysms. Both conflicts resulted from the deliberate incitement of ethnic hatred and violence by which ruthless demagogues and warlords elevated themselves to positions of absolute power.¹⁶⁴

Under this approach, the criminal trial moves the spotlight away from social problems and hones its attention on the actions of individual "demagogues and warlords." From its very beginnings in the Nuremberg IMT, ICL has viewed crimes as being "committed by men, not abstract entities."¹⁶⁵ The IMT's third principle, for instance, focuses responsibility on individual action rather than government action: "[t]he fact that a person who committed an act which constitutes a crime under international law, acted as Head of State or responsible government official, does not relieve him from responsibility under international law."¹⁶⁶

The former chief prosecutor for the ICTY also embodied this approach when emphasizing that it would be individuals put on trial for crimes committed in former Yugoslavia, not the Serb nation.¹⁶⁷ The individualized lens was ultimately carried forward into the Rome Statute itself.¹⁶⁸

Compounding this is the criminal trial itself. Martti Koskenniemi observes that trials only ask the question *did the accused do it* rather than *why did he do it*.¹⁶⁹ Contextual inquiries into understanding why conflict and atrocities emerge are largely irrelevant.¹⁷⁰ Albeit, the trial does offer the accused an opportunity to contextualize their actions and tell a story about their own accountability. For example, Milosevic argued the role played by

¹⁶⁴ See Akhavan, *supra* note 156 at 7.

¹⁶⁵ See Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"*, 1st ed (New York: Vintage Books, 2017) at 352.

¹⁶⁶ See *Nuremberg Principles*, *supra* note 135.

¹⁶⁷ See Engle, *supra* note 90 at 1120.

¹⁶⁸ See *Rome Statute*, *supra* note 55, art 25.

¹⁶⁹ See Martti Koskenniemi, "Between Impunity and Show Trials" in J.A Frowein & R. Wolfrum, eds, *Max Planck Yearbook of United Nations Law*, (Netherlands: Kluwer Law International, 2002) 1 at 12, online (pdf): <www.mpil.de/files/pdf1/mpunyb_koskenniemi_6.pdf> [perma.cc/FE4C-REBL].

¹⁷⁰ *Ibid.*

Western policies in fueling the conflict in former Yugoslavia.¹⁷¹ Likewise, Ongwen's case highlighted his long involvement in the LRA since he was abducted, offering context for his role within the group and the crimes he committed. Be that as it may, the result of such contextualization is arguably narrow – either criminal responsibility is excluded, or sentencing is reduced. The individualized lens adopted by ICL does not provide the appropriate forum for examining, critiquing and therefore challenging structural sources of conflict, which themselves give rise to human rights violations. Material conditions which produce atrocities, whether societal, economic or political, remain unscrutinised and not responded to by prosecutions.¹⁷²

The problem is not only that ICL neglects to investigate such root causes, but also that it might risk obscuring them altogether. By assigning individual liability, prosecution aims to bring a sense of finality. It perpetuates a narrative that justice has been dealt. For example, Tor Krever identifies an “enchantment” in popular discourse with ICL that places ever-growing faith in criminal trials as a suitable response to violence, stating “[t]he triumphalism surrounding ICL and its adequacy to deal with conflict and violence ignores the factors and force ... that shape or even help establish the environment from which such conflict and violence emanate.”¹⁷³

As put by Tallgren, the effect this has is to naturalize and “exclude from the political battle” the systemic problems that both lead to atrocity and maintain the stability of existing global power relations.¹⁷⁴

For example, Mahmood Mamdani has criticized the decision of Luis Moreno Ocampo, the former ICC chief prosecutor, to reduce the atrocities committed in Darfur as being entirely attributable to Omar al-Bashir.¹⁷⁵ Ethnic violence between the Furs and Arabs had been occurring long before al-Bashir came to power.¹⁷⁶ Although al-Bashir did promote hatred and polarization between tribes, racialization and ethnic cleansing in the region was rooted in a legacy of British colonialism and environmental degradation.¹⁷⁷ By seeking to indict and arrest al-Bashir, responsibility is localized in one individual and questions into these root causes are avoided.

¹⁷¹ *Ibid* at 17–18.

¹⁷² See Krever, *supra* note 150 at 706.

¹⁷³ *Ibid* at 703–04.

¹⁷⁴ See Tallgren, *supra* note 159 at 594–95.

¹⁷⁵ See Mamdani, *supra* note 146 at 621–23.

¹⁷⁶ *Ibid.*

¹⁷⁷ See Mamdani, *supra* note 149 at 621–23.

In the same vein, Mamdani observes that the racialization of Hutus and Tutsis in Rwanda, which formed the foundations of the genocide, could trace its origins to Belgium Colonialism.¹⁷⁸ Importantly, the international legal order at the time was a vital component of protecting Belgian rule through the trusteeship system.¹⁷⁹ Nonetheless, by prosecuting orchestrators behind the Rwandan genocide, responsible though they are, these historical causes remain unaddressed.

Beyond root causes in history, even current global structures that fuel conflict remain out of the spotlight. For example, Engle observes that the US is a primary supplier of arms globally to numerous governments that are involved in conflicts.¹⁸⁰ Where these conflicts result in the commission of atrocity, ICL will always concentrate blame on individual perpetrators and obscure the contributions of US arms sale in fueling conflict around the world. What remains important throughout these examples is that the cyclical and endemic issues which birth atrocities persist after the criminal trial is over. It thereby remains doubtful whether ICL can fulfill its preventative and deterrent role.

A second limitation on ICL's ability to uncover root causes of human rights abuses is its tendency to respond only to extreme forms of violence. Consequently, criminal trials overlook structural and ongoing forms of violence, which themselves often erupt into conflict and atrocity. Admittedly, international legal theory more broadly exhibits an overt focus on moments of crisis as opposed to critiquing systemic issues.¹⁸¹ For example, Francisco-José Quintana and Justina Uriburu have noted that approaches to state responsibility for the COVID-19 pandemic have glossed over how international law contributed to the outbreak.¹⁸² This problem is arguably exacerbated in the criminal context, particularly due to ICL's alignment with neoliberalism. The policy prescription of neoliberalism involves economic liberalisation and skepticism of government

¹⁷⁸ *Ibid* at 624–25.

¹⁷⁹ *Ibid*.

¹⁸⁰ See Engle, *supra* note 90 at 1122.

¹⁸¹ See Krever, *supra* note 150 at 722. See also Hilary Charlesworth, "International Law: A Discipline of Crisis", (2002) 65 Mod L Rev 377 at 386, online: *Wiley Online Library* <www.jstor.org/stable/1097579> [perma.cc/D4FJ-WG6M].

¹⁸² See Francisco-José Quintana & Justina Uriburu, "Modest International Law: COVID-19, International Legal Responses and Depoliticization" (2020) 114:4 Am J Intl L 687 at 687, online: *Cambridge University Press* <www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/modest-international-law-covid19-international-legal-responses-and-depoliticization/0B2BC5FD00BF59DC9945CA14759C09D0> [perma.cc/93DD-WCMG].

involvement.¹⁸³ Not all state intervention is criticized, though. In fact, neoliberalism promotes the expansion of penal systems. Engle observes that the rise of modern global neoliberal capitalism came hand in hand with the exportation of America's criminal justice model – one centered on retribution.¹⁸⁴ Under a doctrine that encourages minimal state involvement, criminal intervention is only justified in the most severe cases.¹⁸⁵ This is perhaps exacerbated in the international context, where the value of intervention by an international tribunal is also counterbalanced against concerns of state sovereignty. Consequently, the intervention of ICL becomes only justifiable in the most egregious situations involving extreme violence and crisis.

As a result of this overt focus, inquiries into systemic violence are subverted. Michelle Burgis-Kasthala describes this effect as “the inevitable emphasis will be on understanding the link between ... individuals and acts of extreme and direct violence, rather than more elusive forms of structural or ‘slow’ violence that often contribute to the particular offences under scrutiny.”¹⁸⁶

A stark example of the subordination of “structural” and “slow” violence is found in South Africa's Truth and Reconciliation Commission, which, as argued by Mamdani, was established as a “surrogate of Nuremberg.”¹⁸⁷ Rather than investigating the violence endemic in the apartheid state, the commission “focused on the excesses of its operatives.”¹⁸⁸ It is true that perpetrators were brought to account for extreme physical violence committed on individuals. Yet, the systemic racism harming broader populations was not brought to task.¹⁸⁹

Another example of the obfuscation of root causes by ICL is found in the international response to the conflict in former Yugoslavia, embodied in the creation of the ICTY. Scholars have identified the importance of neoliberal

¹⁸³ See Samuel Moyn, “A Powerless Companion: Human Rights in the Age of Neoliberalism” (2014) 77:4 *Law & Contemp Probs* 147 at 149–50, online: *Duke Law Scholarship Repository* <scholarship.law.duke.edu/lcp/vol77/iss4/7/> [perma.cc/DCK2-JNBA].

¹⁸⁴ See Engle, *supra* note 90 at 1076–1107, 1125–26.

¹⁸⁵ See Luban, *supra* note 129 at 118–19.

¹⁸⁶ See Michelle Burgis-Kasthala, “Scholarship as Dialogue? TWAAIL and the Politics of Methodology” (2016) 14:4 *J Intl Crim Justice* at 935–36, online: *Oxford Academic* <academic.oup.com/jicj/article-abstract/14/4/921/2236024?redirectedFrom=PDF&login=false> [perma.cc/QUK6-XDF4].

¹⁸⁷ See Mahmood Mamdani, “The Logic of Nuremberg” (7 November 2013) 35:21 *LRB* at 33, online: *London Review of Books* <www.lrb.co.uk/the-paper/v35/n21/mahmood-mamdani/the-logic-of-nuremberg> [perma.cc/7HRQ-V75Q].

¹⁸⁸ *Ibid* at 34.

¹⁸⁹ *Ibid*.

policies and economic liberalization in fostering the conditions that lead to the outbreak of ethnic violence.¹⁹⁰ As described by Susan Woodward:

The conflict . . . is the result of transforming a socialist society to a market economy and democracy. A critical element of this failure was economic decline, caused largely by a programme intended to resolve a foreign debt crisis. More than a decade of austerity and declining living standards corroded the social fabric and the rights and securities that individuals and families had come to rely on.¹⁹¹

Former Yugoslavia is not unique in this regard. According to a study by Christopher Cramer, much violent conflict is a reaction to the failure of liberalisation and deregulation, policies which are often encouraged by international financial institutions.¹⁹²

In the case of former Yugoslavia, the ICTY was not well positioned to investigate, unpack and critique the ruling international neoliberal order which arguably contributed to the conflict. After all, the tribunal did not put Western leaders, international financial institutions or wider economic systems on trial. As stated by the UNSC in the enabling resolution, the ICTY would be established for “the prosecution of persons responsible for serious violations of international humanitarian law.”¹⁹³ The sole question asked was whether the crime was committed, not why the crime was committed. Of course, the accused could attempt, through their defense, to situate their actions in particular contexts. This was done by Milosevic, who blamed the destruction of former Yugoslavia, and the atrocities committed therein, on Western policies.¹⁹⁴ However, as explained by Koskenniemi, “[t]he fact that Milosevic is on trial, and not Western leaders, presumes the correctness of the Western view of the political and historical context.”¹⁹⁵

Of course, there is an important distinction to be drawn between Milosevic – who knowingly supported the commission of mass atrocities – and “Western leaders”. Certainly, there must be room for accountability against the “ruthless demagogues and warlords” who deliberately incite hatred and violence for political aims.¹⁹⁶ Likewise, there must be room to hold Ongwen accountable for crimes committed while he occupied positions

¹⁹⁰ See Krever, *supra* note 150 at 715.

¹⁹¹ *Ibid* at 716.

¹⁹² *Ibid* at 718.

¹⁹³ See SC Res 808, UNSCOR, 48th year, UN DOC S/RES/808 (22 February 1993), online (pdf): <digitallibrary.un.org/record/243008/files/S_RES_808%281993%29-EN.pdf?ln=en> [perma.cc/4W3W-XU4A].

¹⁹⁴ See Koskenniemi, *supra* note 1769 at 17–18.

¹⁹⁵ *Ibid*.

¹⁹⁶ See Akhavan, *supra* note 156 at 7.

of power and control within the LRA. It is not satisfactory to exclude criminal culpability altogether in these situations. Even so, it is important to note that the trial's focus on the actions of individual perpetrators and moments of extreme violence does not make it an effective forum for critiquing larger structural forces, such as the role played by neoliberal policies in nurturing conflict within former Yugoslavia. Criminal law does not allow the chain of causality to be simply displaced by deeper structural issues. The Rome Statute only allows the exclusion of criminal responsibility in cases of mental disease or defect, intoxication, self defense and duress resulting from a threat of imminent death or serious bodily harm.¹⁹⁷ These are narrow defenses which focus on individual agency and are not likely to translate into meaningful structural critique.

In a similar fashion to the ICTY, and as discussed previously, ICL would be limited in its ability to probe the role which post-colonial conditions and international law played in fueling conflict in Rwanda or Darfur. Likewise, no trial would meaningfully examine how American arm sales constructs the conditions necessary for the commission of atrocities to begin with. Ongwen himself, in a direct address to the Appeals Chamber, attempted to highlight that the very guns fueling the LRA's conflict in North Uganda were imported from Europe.¹⁹⁸ The issue of the supply of the LRA's weapons, however important a point of discussion, could never detract from, or excuse the severity of, the egregious crimes he committed. Yet it is centrally important for human rights systems to examine larger structural causes underpinning the rise of the LRA and perpetrators like Ongwen in the first place.

ICL is limited in its ability to provide the preventative effect sought by human rights systems. On both an individual and systemic level, prosecutions of international crimes do not unpack nor change the conditions that result in the commission of atrocities and human rights violations. In the next part, the recent conviction of Dominic Ongwen is taken as a case study to illustrate this problem. Although IHRL has relied on ICL to protect against the use of child soldiers, the case of Ongwen demonstrates why this reliance may be misplaced.

¹⁹⁷ See *Rome Statute*, *supra* note 55, art 31.

¹⁹⁸ See *Ongwen Appeal Hearings Day 4*, *supra* note 45 at 45–46.

V. Dominic Ongwen Revisited and Protecting the Rights of the Child Through ICL

In its recent decision, the ICC convicted Dominic Ongwen of crimes against humanity and war crimes committed during his involvement with the LRA.¹⁹⁹ One of these crimes is the recruitment and use of child soldiers.²⁰⁰ Ongwen is the first person charged before the ICC with crimes that he himself suffered, having been abducted by the LRA as a child.²⁰¹ This feature of Ongwen's case offers insight into how IHRL uses the intervention of ICL and why ICL is ineffective in securing protection for the rights of the child in the context of violent conflict.

A. IHRL and Criminalizing the Use of Child Soldiers

The recruitment and use of child soldiers constitutes a war crime under the Rome Statute, whether committed in the context of an international armed conflict or not.²⁰² It is also distinctly an issue of international human rights and entails certain obligations with respect to states. The Universal Declaration of Human Rights identifies childhood as being entitled to special care and protection.²⁰³ Based on this, the Convention on the Rights of the Child was drafted.²⁰⁴ Under the Convention, state parties are obligated to refrain from recruiting child soldiers.²⁰⁵ Parties are also required to take action to protect children from being recruited by non-state armed forces, including taking all feasible measures to ensure children do not take direct part in hostilities.²⁰⁶ This forms part of a broader duty of state parties to protect children from all forms of exploitation prejudicial to any aspect of the child's welfare.²⁰⁷

As has been discussed in this paper, IHRL frequently turns towards criminalization to meet its objectives. This is as true for the Genocide

¹⁹⁹ See *Prosecutor v Ongwen*, *supra* note 1.

²⁰⁰ See ICC Press Release, *supra* note 2.

²⁰¹ See Kan, *supra* note 4 at 76.

²⁰² See *Rome Statute*, *supra* note 55, arts 8(2)(b)(xvii), (e)(vii).

²⁰³ See *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), art 25(2), online: *refworld* <www.refworld.org/docid/3ae6b3712c.html> [perma.cc/JM9C-YB39].

²⁰⁴ See *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Preamble (entered into force 2 September 1990), online (pdf): <treaties.un.org/doc/treaties/1990/09/19900902%2003-14%20am/ch_iv_11p.pdf> [perma.cc/W6NU-L7YR] [*Convention on Rights of Child*].

²⁰⁵ *Ibid*, art 38.

²⁰⁶ *Ibid*, art 38.

²⁰⁷ *Ibid*, arts 36, 39.

Convention as it is for child soldiers. States have an obligation under IHRL to criminalize and prosecute individuals that recruit and use child soldiers. This is made clear by Article 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (“Optional Protocol”): “[s]tates parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.”²⁰⁸

The Optional Protocol entered into force in 2002 and specifically referenced criminal law by name as a measure for states to take. Arguably, the obligation to criminalize and prosecute predates the Optional Protocol. Article 32 of the Convention on the Rights of the Child requires states to protect children from any work likely to be hazardous or to interfere with the child’s physical, mental, spiritual, moral or social development.²⁰⁹ This protection includes a requirement to take legislative measures, including appropriate penalties, to ensure effective enforcement.²¹⁰ Such penalties presumably include criminal culpability. Although at face value the provision seems to deal with child labor, the international community widely understands that the use of child soldiers is simply one extreme form of such exploitation. For instance, Article 3 of ILO Convention 182 defines the use of children in armed conflicts as one of the worst forms of child labor.²¹¹

The state’s obligation to criminalize the use of child soldiers went hand in hand with the development of ICL as a mechanism for achieving prosecutions where they were otherwise not possible. This, once again, forms part of ICL’s role as a tool of intervention within IHRL. The preamble to the Optional Protocol makes direct reference to the ICC and its jurisdiction over the war crime of conscripting or enlisting children.²¹² In 2007, at a UNICEF-hosted meeting in Paris, 59 states participated and

²⁰⁸ See *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, 2173 UNTS 222, Can TS 2002 No 5, (200) 39 ILM 1285 (entered into force 12 February 2002), online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-convention-rights-child-involvement-children> [perma.cc/MK6N-RWKJ] [*Optional Protocol*].

²⁰⁹ See *Convention on Rights of Child*, *supra* note 204, art 32.

²¹⁰ *Ibid.*

²¹¹ See *International Labor Organization Convention No 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 17 June 1999, 2133 UNTS 161, Can TS 2001 No 2, (1999) 38 ILM 1207, (entered into force 19 November 2000), online: *International Labour Organization* <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182#A3> [perma.cc/6R9C-H9FU].

²¹² See *Optional Protocol*, *supra* note 208.

endorsed two documents that focused on children and war.²¹³ One of these documents, named the Paris Principles, urged states to ratify the Rome Statute and thereby import the criminalization of the recruitment of child soldiers into national legislation.²¹⁴ The principles emphasized the dual role played by domestic and international prosecutions: “[n]ational justice mechanisms and the adoption and implementation of laws to uphold international law, as well as international or hybrid tribunals to address violations of humanitarian and human rights law, should be supported at all times.”²¹⁵

The intervention of the ICC in Uganda, where Ongwen operated, reflected the use of ICL as a form of last resort human rights intervention. The Ugandan Government referred the situation of the LRA to the ICC in 2003 after 17 years of failure to control Kony’s widespread abuses.²¹⁶ As explained in their letter to the ICC, the Ugandan government turned to the assistance offered by ICL after exhausting every other means of bringing an end to the conflict.²¹⁷

As has been seen in other contexts, the turn toward criminalization to control the use of child soldiers was rooted in a hope that prosecution would provide a deterrent effect. For instance, the Paris Principles centered prevention as the primary goal of states when combatting use of child soldiers.²¹⁸ This indicated the need for the adoption of criminalization and enforcement measures under international law.²¹⁹ Similar to the attitudes of organizations, such as Amnesty International, the Paris Principles linked the fight to end impunity with a deterrent effect: “[e]nding impunity for those responsible for unlawfully recruiting or using children in armed conflict,

²¹³ See Tracey Begley, “The Extraterritorial Obligation to Prevent the Use of Child Soldiers” (2012) 27:3 *Am U Intl L Rev* 613 at 621–22, online (pdf): *American University Washington College of Law* <digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1799&context=auilr> [perma.cc/K4PS-7AW5].

²¹⁴ See United Nations Children’s Fund, “Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups” (30 January 2007) at para 6.4.4, 8.3, online (pdf): *UNICEF* <unicef.org/mali/media/1561/file/ParisPrinciples.pdf> [perma.cc/U9F7-JWCN] [*Paris Principles*].

²¹⁵ *Ibid* at para 8.2.

²¹⁶ See Sarah Nouwen, “The ICC’s Intervention in Uganda: Which Rule of Law Does it Promote?” (2012) 22/2012 *SSRN* at 7–8, online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2139311> [perma.cc/PJ4Q-KZ4E].

²¹⁷ *Ibid*.

²¹⁸ See *Paris Principles*, *supra* note 214 at para 6.0.

²¹⁹ *Ibid* at para 6.1.

and the existence of mechanisms to hold such individuals to account can serve as a powerful deterrent against such violations."²²⁰

The same conference that produced the Paris Principles also resulted in another document, the Paris Commitments to Protect Children from Unlawful Recruitment or Use by Forces or Armed Groups, which committed states to "fight against impunity" in the recruitment of child soldiers.²²¹

As expected, the reliance on ICL's supposed preventative value would be central in Ongwen's case. After his arrest, the chief prosecutor stated "Ongwen's transfer brings us one step closer to ending the LRA's reign of terror . . . [and] sends a firm and unequivocal message that no matter how long it will take, the Office of the Prosecutor will not stop until the perpetrators of the most serious crimes of concern to the international community are prosecuted."²²²

As the reach of the ICC expands, and the prosecutor secures more arrests and convictions, the theory is that the use of child soldiers will be deterred and eventually stopped. Therefore, the situation of child soldiers thoroughly tracks the common pattern observed in the harmonious relationship between ICL and IHRL discussed throughout this paper. States owe an obligation to combat the use of child soldiers through criminalization. The objective is to rely on criminal law as a tool of deterrence, thereby building a future where perpetrators are prevented from using children as combatants. Where states are unable to meet this obligation, as was the case in Uganda, recourse is had to the intervention of the ICC to pursue prosecution – and by doing so, provide the sought after deterrent effect. However, as encapsulated by the example of Ongwen, the preventative value of ICL for ending use of child soldiers is doubtful.

B. Limits of the ICL Response in Ongwen's Case

As this paper has argued, the turn toward criminal law does little to realistically deter or prevent perpetrators of egregious human rights abuses. Both on an individual level and on a systemic level, the ICC may be ill-

²²⁰ *Ibid* at para 8.1. See also Engle, *supra* note 90 at 1072, 1077.

²²¹ See The International Committee of the Red Cross, "The Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups" (28 February 2007) at 2, online (pdf): ICRC <www.icrc.org/en/doc/assets/files/other/pariscommitments_en.pdf> [perma.cc/37F6-6MHG].

²²² See Adam Branch, "Dominic Ongwen on Trial: The ICC's African Dilemmas" (2016) 11:1 Intl J Transitional Justice 30 at 31, online: *Oxford Academic* <academic.oup.com/ijtj/article-abstract/11/1/30/2919404?redirectedFrom=fulltext&login=false> [perma.cc/AZ2B-S2CG].

equipped to change the conditions which result in the recruitment and use of child soldiers. The unique case of Ongwen, who is both perpetrator and victim, demonstrates this complexity. None of this is to excuse or remove liability from Ongwen or other similar perpetrators. In fact, as aforementioned, an exclusion of culpability is inappropriate given the severity of Ongwen's crimes and the impact on his victims. Room must be made to bring perpetrators to account and provide justice to victims. Rather, as argued by Erin Baines, context makes the atrocities committed intelligible.²²³ Unpacking the experience of Ongwen, and how he became a perpetrator to begin with, reveals the conditions fostering atrocity and sheds light on how ICL may be ill-equipped to provide the preventative effect sought by the human rights system.

On the individual level, there is arguably little that the ICC's involvement can do to deter perpetrators like Ongwen. Recalling the lessons from Tallgren, widespread and systemic violence can create environments where social values encourage human rights abuses.²²⁴ This issue is perhaps most pronounced for child soldiers. As indicated by Cynthia Chamberlain Bolandos, the participation of children in war immerses them in the "rule and culture of violence."²²⁵ The associated trauma from serving as a soldier contributes to a child soldier's penchant for conflict.²²⁶ Raphael Lorenzo Aguilung Pangalangan argues that this culminates in a defense of "rotten social background" which might remove the agency required to justify ascribing culpability "in recognizing the relationship between environmental adversity and criminal propensity . . . a person's criminal behavior may at times be caused by extrinsic factors beyond his or her control."²²⁷

A related issue is the culture of indoctrination experienced by Ongwen and other child soldiers. Entering the LRA as an impressionable child, he learned behavior and ideologies from his violent environment.²²⁸ The power structures within the LRA reinforced these learnings through perverse incentives, strengthening the organization's propaganda. As explained by Baines, "'[g]ood on the LRA side' means that with each promotion, personal security improved. Rising to a higher rank improves access to food and

²²³ See Baines, *supra* note 3 at 164.

²²⁴ See Tallgren, *supra* note 159 at 570–73.

²²⁵ See Pangalangan, *supra* note 4 at 607.

²²⁶ *Ibid.*

²²⁷ *Ibid* at 609.

²²⁸ *Ibid* at 616–19.

shelter, knowledge and information, escorts and spies for protection, . . . and forced 'wives' for domestic service, sexual gratification and the production of children for status."²²⁹

Whether or not this "rotten social background" is sufficient to lift criminal responsibility is beside the point. The real issue is the fact that criminal responsibility may do very little to penetrate this context and thus provide the deterrent effect necessary to stop the use of child soldiers and the commission of crimes. Immersed within a "social milieu" which is "rotten", the prosecutorial and social deterrence discussed by Jo and Simmons may have no effect on a child like Ongwen, who grows into the role of perpetrator.

Beyond individual deterrence, there are deeper root problems which have fueled the conflict in Uganda and the operations of the LRA. Many states continue to struggle with the use of child soldiers. In Uganda alone, Ongwen was only one of thousands of children conscripted. Baines explains that these generations of children remain uninitiated into the politics of the state, and so violence becomes their mode of political expression.²³⁰ As child soldiers become alienated from the political life of a nation, their immersion in conflict gives rise to endemic violence whereby, as put by Nancy Scheper-Hughes and Phillippe Bourgois, "violence gives birth to itself."²³¹ The intervention of ICL may hold an individual perpetrator responsible, but it does little to examine or change the violent conditions which fuel cycles of atrocity.

Similarly, there are important structural, economic and political causes of the LRA's conflict which remain outside the capability for the ICC to address. As indicated by Baines, Ongwen's case must be situated within its proper context: "[t]his narrative is set against a wider backdrop of crisis in northern Uganda, the role of regional and international parties in that crisis, and the role of the overt and structural violence that shapes the decisions of Ongwen."²³²

One such cause is the absence of the Ugandan state, which has been unable to extend protection or provide basic goods to its own population. Children excluded from state care find social, political or economic solutions through war.²³³ Further, deeper historical causes can be traced to the roots

²²⁹ See Baines, *supra* note 3 at 174.

²³⁰ *Ibid* at 164.

²³¹ *Ibid* at 181.

²³² *Ibid* at 164.

²³³ *Ibid* at 180.

of the LRA in colonialism. As canvassed in the introduction, ethnic fragmentation, tension and stereotypes in Uganda are a product of Britain's historic "divide and rule" strategy. Moreover, colonial rule created socio-economic divisions that marginalized the North and created resentment against Southern power. These factors laid the groundwork for the rise of the LRA and its Acholic-centric ideology which sought to usurp southern power.²³⁴

Furthermore, responsibility for the Ugandan conflict can in part be traced to actions taken by the international community. Filip Strandberg Hassellind identifies the role Uganda's neighbours played in striking an alliance with the Christian LRA insurgency to undermine Uganda's regional power.²³⁵ For instance, as discussed previously, the LRA has been able to house bases in South Sudan. Meanwhile, Branch notes the West has long escaped scrutiny despite arguably fostering conflict in the region.²³⁶ Human rights activists have disapproved of the involvement of US special forces in Uganda.²³⁷ Likewise, the Ugandan military, a US proxy, has been accused themselves of committing atrocities.²³⁸ But rather than being criticized, Branch observes these actions have been accepted as humanitarian law enforcement.²³⁹

All these root causes are, as previously discussed, the "factors and forces" that lead to widespread human rights abuses and the commission of atrocities. Yet, through the individualized lens of criminal law, the material conditions fueling the use of child soldiers is neither unpacked nor directly addressed. ICL is unable to explore these complexities because its primary focus is modes of individual culpability and extreme forms of violence. The Rome Statute does not recognize a defense of "rotten social background", and so the criminal trial cannot and does not explore Ongwen's social background to determine how it became so rotten in the first place, and how wider systemic issues enabled the LRA's reign of terror.

Despite this, and similar to Milosevic, Ongwen's defense contested the historical and political narratives involved in his criminalization. He pointed to the broader context to situate and explain his involvement in Uganda.²⁴⁰

²³⁴ See Doom & Vlassenroot; Hassellind, *supra* note 11.

²³⁵ See Hassellind, *supra* note 11 at 4.

²³⁶ See Branch, *supra* note 222 at 32.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ See Hassellind, *supra* note 11 at 2-3.

The response of the trial chamber to this defense exemplifies the limits of ICL in this respect. The defense only raised only two grounds for excluding responsibility, namely mental disease and duress.²⁴¹ The court held the former could not be made out based on the expert evidence available.²⁴² With respect to duress, the defense is narrowly constrained to the presence of a threat of imminent death or serious bodily harm, as well as whether the accused is in a position of complete subordination.²⁴³ This defense, though useful in the context of assessing an individual's agency and culpability, is not broad enough to critique how context and structural forces can lead to the commission of human rights violations.

Ultimately, Ongwen's status as a former child soldier did not heavily factor into an assessment of the defense. The ICC had this to say:

Dominic Ongwen committed the relevant crimes when he was an adult and, importantly, that, in any case, the fact of having been (or being) a victim of a crime does not constitute, in and of itself, a justification of any sort for the commission of similar or other crimes . . . a rule that would immunize persons who suffer human rights violations from responsibility for all similar human rights violations that they may themselves commit thereafter manifestly does not exist in international human rights law.²⁴⁴

Where the trial court embodies one extreme, Ongwen's defense embodies the other. On appeal, when the defense was asked whether Ongwen's actions attracted *any* degree of individual criminal responsibility, the answer was a harsh 'no':

Joseph Kony was the alpha and the omega. We begin from the premise of how he emerged as the leader of that organization. He came as a messiah from God and that was his strength. Throughout the vicissitudes and the vacillations of the LRA atrocities, Kony was right in the middle of it . . . arising from that control – centralized control of the LRA, nobody, not even Dominic Ongwen – who only came to prominence at the tail end of the war in Northern Uganda – had any role at all. So for that matter, Ongwen was a mere appendage to the system and he played no role.²⁴⁵

In this answer, Ongwen's defence did not bring a satisfying and measured solution to the victim-turned-perpetrator dilemma. It is clear enough Ongwen played some role for which he is rightly called to account.

²⁴¹ See *Prosecutor v Ongwen*, *supra* note 1 at para 2448.

²⁴² *Ibid* at paras 2580–85, 2668–71.

²⁴³ *Ibid* at paras 2580–85, 2668–71.

²⁴⁴ *Ibid* at para 2672.

²⁴⁵ See *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, Appeal Hearing Day 3 (16 February 2022) (International Criminal Court, Appeals Chamber) at 66–67, online (pdf): *International Criminal Court* <www.icc-cpi.int/sites/default/files/Transcripts/CR2022_01632.PDF> [perma.cc/5TQK-X6DA].

Nonetheless, it is simultaneously true that he was an appendage to a larger system of child abuse and conflict in Northern Uganda – one involving many players, components and causes. The fact that Ongwen grew up in an environment that encouraged a cycle of atrocity is centrally important to the human rights dialogue. ICL's subversion of such inquiries risks obscuring causes of violence and may inhibit the international communities' ability to prevent them. If IHRL truly seeks to protect against the use of child soldiers, heavy reliance on criminal law may do little to uncover and usurp the patterns of abuses that lead to this behavior.

VI. Conclusion

The end of World War II birthed the project of human rights aimed at ending the once-common atrocities of history. It has since expanded through advocacy, declarations, conventions and human rights bodies. Within this broad system, IHRL has often turned towards criminalization and prosecutions to realize its objectives. International criminal institutions have been developed as a popular response to egregious violations. For Ongwen and child soldiers, one such response has been the prosecution of war crimes at the ICC.

As this paper has argued, IHRL uses ICL as a form of human rights intervention. Where states fail to uphold human rights obligation to criminalize abuses, the international community will respond through direct prosecution. Although this intervention is aimed at creating a deterrent effect, there is strong reason to question its efficacy. In particular, ICL is ill-suited to penetrate the social contexts in which perpetrators exist and it is not designed to explore the root causes of atrocity. Although perpetrators such as Ongwen are held responsible, the conditions which foster the creation and rise of perpetrators are not challenged or addressed.

As noted with Ongwen, the implication is not to suggest that criminal responsibility cannot and should not play some role. The goal is not to excuse atrocity, but rather to understand it. Beyond traditional questions of displacing liability or reduced sentencing, Ongwen's case reveals why ICL may not be an effective or singular response for IHRL and for the promotion of human rights. The global system of human rights should be skeptical of overly relying on international criminal law, and instead adopt a comprehensive response to mass atrocity – one which examines the social context and structural issues which promote violence, conflict, and

widespread abuses. Such a response may help prevent the once-common abuses of history that the global human rights system seeks to fight.