Child Soldier To Warlord Overnight: Sentencing *Ongwen* in The International Criminal Court

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In December 2022, the International Criminal Court (ICC) delivered its appeal decision in the case of Dominic Ongwen, a child solider-turned-commander in the Lord's Resistance Army in Northern Uganda who had been convicted and sentenced of numerous war crimes in 2021. The case has reopened a debate about how courts should deal with child soldiers-turned-perpetrators, or CSTPs. The ICC, the author contends, eschewed a protectionist approach towards children, and drew a "bright line" between children as victims, and adults as perpetrators. As the author examines, Ongwen's agency or ability to take action in the conflict setting was not fully explored by the Court. In the author's view, this was an opportunity missed. The author advocates for a more nuanced approach, which foregrounds agency, and places protectionism and "bright line" thinking in the background.

Keywords: Ongwen, International Criminal Law, International Criminal Court, Child Soldier, Sentencing, Appeals Chamber

1. Introduction

> *The phenomenon of perpetrator victims is not restricted to international courts. It is a familiar one in all criminal jurisdictions… But having suffered victimisation in the past is not a justification or an excuse to victimise others.*

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Each human being must be taken to be endowed with moral responsibility for their actions.[1]

On 6 May 2021, a majority of two out of three Judges of the International Criminal Court (ICC) sentenced former Lord's Resistance Army (LRA) commander Dominic Ongwen to 25 years in prison.[2] Earlier, on 4 February 2021, he had been convicted of 61 counts of war crimes and crimes against humanity, which included murder, torture, cruel treatment, enslavement, persecution, forced marriage, rape, sexual slavery, forced pregnancy, and conscripting children under the age of 15 and using them to participate actively in hostilities.[3] Ongwen was in his mid-20s during the period of the charged acts that took place in Northern Uganda, which spanned between 1 July 2002 and 31 December 2005.[4] He was abducted by the LRA in Uganda at around nine years old and became a child soldier under the control of people including the notorious LRA leader Joseph Kony. He was trained to commit crimes, including killing people, and rose through the ranks to commander of the Sinia Brigade.[5] It was a landmark decision, not least because Ongwen was himself a victim of the crimes he was convicted of, including conscription of children and enslavement.[6]

In sentencing Ongwen in accordance with the Rome Statute,[7] the ICC considered submissions that his past circumstances as a child soldier who had been abducted into the LRA in mitigation. The ICC noted that the gravity of his crimes would warrant a life sentence – the maximum available.[8] While

[1] International Criminal Court, *Prosecutor v Ongwen (Trial)*, Case No ICC-02/04-01/15, (Trial Chamber), 6 December 2016, (per Fatou Bensouda, Prosecutor).
[2] International Criminal Court, *Prosecutor v Ongwen,* Case No ICC-02/04-01/15, Sentence (Trial Chamber), 6 May 2021 ("*Ongwen Sentence*").
[3] International Criminal Court*, Prosecutor v Ongwen,* Case No ICC-02/04-01/15, Judgment (Trial Chamber), 4 February 2021 ("*Ongwen Trial Judgment*").
[4] Ibid para. 1.
[5] *Ongwen Sentence*, above note 2, paras. 85, 68, 73.
[6] Mark Drumbl, "Victims Who Victimise" *London Review of International Law* Vol. 4 No. 2, 2016, pp. 217, 236 ("Victims who Victimise"); Erin K Baines "Complex political perpetrators: Reflections on Dominic Ongwen" *Journal of Modern African Studies* Vol. 47, No. 2, 2009 pp. 163 -164.
[7] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) ("*Rome Statute"*). See especially Art. 78.
[8] See, e.g., *Ongwen Sentence*, above note 2, para. 386.

acknowledging that Ongwen committed the crimes as an adult, it concluded that in the circumstances of Ongwen's abduction and early experiences in the LRA, a reduction of a one-third in sentence would "generally be fitting and reasonable," depending on the particulars of each crime.[9] The Defence appealed against Ongwen's conviction and sentence in August 2021.[10] On 15 December 2022, the Appeals Chamber of the ICC handed down its decision, affirming the sentence given by the Trial Chamber.[11]

As will be explored, the ICC has presided over trials of defendants who have been convicted of recruitment, conscription and use of child soldiers. But what about the former child soldiers that have both suffered and perpetrated terrible crimes? This group of offenders, child soldiers-turned-perpetrators (CSTPs), have a unique offending profile: in Kwik's words, they have "walked through two phases of life: as a child soldier and, later, an adult soldier."[12] In 2021, Ongwen became the first CSTP the ICC sentenced. However, he is not the only CSTP who has faced criminal proceedings.[13] Ongwen has been dubbed a complex political perpetrator. He is responsible for his actions, but his accountability is mitigated by the circumstances that gave rise to his victim status.[14] The novel issue the ICC faced raised questions of a legal and moral nature, which could set a precedent for future cases involving CSTPs.

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[9] Ibid para. 88.

[10] International Criminal Court, "Ongwen case: hearing on the Defence appeals against verdict and sentence – Practical Information," 11 February 2022, available at https://www.icc-cpi.int/news/ongwen-case-earing-defence-appeals-against-verdict-and-sentence-practical-information (all internet references were accessed on or before January 2023).

[11] International Criminal Court, *Prosecutor v Ongwen*, Case No ICC-02/04-01/15, 15 December 2022, Sentence Appeal Judgment (Appeals Chamber) ('*Ongwen Sentence Appeal*').

[12] Jonathan Kwik "The Road to Ongwen: Consolidating Contradictory Child Soldiering Narratives in International Criminal Law" *Asia Pacific Journal of International Humanitarian Law* Vol. 1, No. 1, 2020, pp. 135, 136.

[13] In March 2022, the trial against Thomas Kwoyelo commenced in the High Court in Kampala. A former child soldier, abducted into the LRA, he faces 93 counts of war crimes and crimes against humanity, including recruitment of child soldiers. He unsuccessfully applied for his case to be transferred to the ICC: Grace Matsiko, "Uganda: Kwoyelo, 13 Years In Custody Without Trial" *Justice Info Net* , 4 April 2022, available at https://www.justiceinfo.net/en/89875-uganda-kwoyelo-13-years-custody-without-trial.html.

[14] E Baines, above note 6, pp. 180-181.

Part 1 of this article provides the legal background to the proceedings against Ongwen by outlining age thresholds for lawful participation in armed conflict where the trend is a "bright line" approach, with only over-18s responsible for war crimes. It notes that protectionism[15] is the dominant paradigm in key international conventions and treaties concerning children in armed conflict. This is contrasted with a rights-based approach, where children as seen as active participants with evolving capacity.

In Part 2, International Criminal Law's (ICL's) "bright line" approach is further explored in the context of the Ongwen sentence. The Court's language in describing his actions before the age of 18 will be considered, with an emphasis on its protectionist overtones. The ICC also proffered that a large one-third reduction could be appropriate when sentencing CSTPs. The reasons of partly dissenting Judge Raul C. Pangalangan, who would have sentenced him to 30 years, are considered. It is argued that the Court did not fully interrogate Ongwen's agency as a CSTP, which in the author's view was an opportunity missed.

The article posits that the majority of the ICC's reasoning in Ongwen perpetuates a "bright line" approach to criminal liability in ICL, which positions adults as perpetrators and children as victims, in line with a protectionist approach. The Court's reasoning did not reflect the complex life of Ongwen, a CSTP, who had been both a child soldier and an adult perpetrator. Ultimately, the article argues that an assessment of a CSTP's agency should be at the foreground of a court's analysis, with the protectionist and "bright line" approaches in the background, so that CSTPs' complex histories can properly be reflected in sentencing.

2. Part 1: Child soldiers at law and in policy

2.1 International condemnation of the use of child soldiers

[15] Jill Stauffer, "Law, Politics, the Age of Responsibility, and the Problem of Child Soldiers" *Law, Culture and the Humanities* Vol. 16, No. 1, 2020, pp. 42, 44.

An estimated 250,000 to 300,000 children under the age of 18 are soldiers[16] in the world at any given time.[17] Child soldiers are not a monolithic phenomenon.[18] There is no easy formula for the types of conflicts or societies in which child soldiers are involved.[19] Child soldiering is not just an African issue,[20] and child soldiers have been utilised in diverse places such as Columbia, Haiti, the countries of the former Yugoslavia and Sri Lanka.[21] The traditional narrative is that child soldiering violates children's rights, and is linked to the psychological "destruction of childhood."[22] The ICC itself has previously acknowledged that becoming a child soldier can hamper a child soldier's healthy psychological development.[23]

In recent times, there has been a proliferation of treaties and other instruments in International Human Rights Law and International Humanitarian Law (IHL) and a flurry of jurisprudence of international

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[16] The term "child soldiers," where it appears throughout the article without further explanation, is taken to refer to a child under the age of 18 who is engaged in active combat on behalf of an armed group: PW Singer, *Children at War,* Pantheon Books, New York, 2005, p. 7. This also follows the approach of the 1989 Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989 (entered into force 2 September 1990) *("Convention on the Rights of the Child"* or *"CRC"*), which defines as a child as anyone under the age of 18. The United Nations recently reported that unfortunately, the Covid-19 crisis has created further risks of recruitment and use of children in armed conflict through factors including dwindling education opportunities: United Nations, "COVID fuelling risk of recruitment and use of children in conflict, UN and EU warn on International Day" *UN News*, 12 February 2021, available at https://news.un.org/en/story/2021/02/1084502.

[17] Michael Wessells, *Child Soldiers: From Violence to Protection,* Harvard University Press, Cambridge, Massachusetts, 2006, p. 9, cited in Matthew Talbert and Jessica Wolfendale, *War Crimes: Causes, Excuses, and Blame,* Oxford University Press, New York, 2018, p. 113.

[18] Renée Nicole Souris, "Child soldiering on trial: an interdisciplinary analysis of responsibility in the Lord's Resistance Army," *International Journal of Law in Context,* Vol. 13, No. 3, 2008, pp. 316, 318.

[19] David Rosen, "Child Soldiers, International Law and the Globalization of Childhood" *American Anthropologist*, Vol 109, 2007, pp. 296, 298.

[20] Wendy De Bondt and Rozelien Van Erdeghem, "Child Soldiers Caught in a Cultural Kaleidoscope" *The International Journal of Children's Rights*, Vol 30, 2022, pp. 785, 786.

[21] Steven Freeland, "Mere Children or Weapons of War — Child Soldiers and International Law" *University of La Verne Law Review*, Vol 29, 2007, pp. 19, 21.

[22] See PW Singer, above note 18.

[23] International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Sentencing Judgement (Trial Chamber), 12 July 2012, para. 41.

criminal courts and tribunals, extensively regulating[24] the use of child soldiers.[25] However, the definition of a child, and at what age a child can legally participate in hostilities, has been contentious.[26] The 1989 *Convention on the Rights of the Child* (CRC),[27] created a "child's rights regime." It is one of the world's most widely ratified treaties,[28] and provides in Article 1 that a child for the purposes of the CRC is anyone under the age of 18. Article 38 of the CRC requires States to take "all feasible measures" to ensure that any persons under 15 do not take an active part in hostilities[29] and to refrain from recruiting any person under 15 into their armed forces.[30] Further, Article 38(1) also requires States Parties to undertake to respect and ensure respect for the rules of IHL applicable in armed conflicts which are relevant to the child. In IHL, the situation is primarily governed by the 1949 Geneva Conventions and the Additional Protocols thereto.[31] Similarly, at IHL, the age of 15 serves

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[24] Matthew Happold, 'Child Soldiers in International Law: The Legal Regulation of Children's Participation in Hostilities' *Netherlands International Law Review*, Vol. 48, 2000, p. 27.

[25] J Kwik, above note 12, pp. 140-141.

[26] Sandhya Nair, "Child Soldiers and International Criminal Law: Is the Existing Legal Framework Adequate to Prohibit the use of Children in Conflict?" *Perth International Law Journal*, Vol. 2, No. 40, 2017.

[27] *Convention on the Rights of the Child*, above note 16.

[28] Julie McBride, *The War Crime of Child Soldier Recruitment*, Asser Press, The Hague, 2014, pp. 15, 98.

[29] See Art. 38(2).

[30] See Art. 38(3).

[31] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed
Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); supplemented by Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) ("Additional Protocol I"); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts , 1125 UNTS 609, 8 June 1977 (entered into force 12 July 1978) ("Additional Protocol II").

as a cut-off.[32] The CRC's four guiding principles are as follows: non-discrimination, the best interests of the child, the right to be heard and the right to life.[33] CRC Article 14 also provides a child's right to freedom of thought, conscience and religion, in line with their evolving capacities.[34] In the CRC, a balance was struck between recognising children's vulnerability, whilst also recognising their evolving competence and agency, along a continuum.[35] According to Derluyn et al, the CRC and children's rights law generally overemphasise children's vulnerability and need for protection, at the expense of acknowledgement of agency.[36]

Throughout the years, the internationally accepted minimum age for recruitment of children in armed conflict has trended towards a rise from 15 to 18 years.[37] Concomitantly, the language of several of the instruments has emphasised the special vulnerability of children and their status as victims. The *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*,[38] dated 2000, reinforces the CRC.[39] It did not

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[32] Cecile Aptel, "The Protection of Children in Armed Conflict" in Ursula Kirkelly and Ton Liefarrd (eds) *International Human Rights of Children,* Springer, New York, 2019, p. 524. Additional Protocol I (above note 31) asserts that State Parties shall take all feasible measures to ensure children under 15 do not take an active part in hostilities (Art. 77(2)). In respect of non-state armed forces, Additional Protocol II (above note 31) provides an absolute prohibition on States parties recruiting children under the age of 15 or allowing them to take part in hostilities (Art. 4(3)(c)).

[33] W De Bondt and R Van Erdeghem, above note 20, p. 813.

[34] Mark Drumbl and John Tobin, "The Optional Protocol on Children and Armed Conflict" in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press, Oxford, 2019, p. 1685 ("The Optional Protocol").

[35] As noted by the Committee, "the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing. Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests." See: CRC Committee, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), at UN Doc. CRC/C/GC/14, 29 May 2013.

[36] Ilse Derluyn, Wouter Vandenhole , Stephan Parmentier and Cindy Mels, "Victims and/or perpetrators? Towards an interdisciplinary dialogue on child soldiers'" *BMC International Health and Human Rights* Vol 1, 2015, p. 4.

[37] J Kwik, above note 12, p. 140.

[38] *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,* UNGA Res 54/263, UN Doc A/RES/54/263, 25 May 2000.

[39] It operates as a separate multilateral treaty to the CRC but reinforces the CRC: M Drumbl and J Tobin, "The Optional Protocol," above note 36, p. 1667.

completely achieve a "straight 18" approach, with Article 3 requiring States to increase the minimum age of voluntary recruitment from that set out under CRC Article 38, of 15 years of age, while failing to specify the age.[40] Article 4(1) requires States to raise the age to 18 for participation in hostilities and for voluntary recruitment. The idea of children as victims in need of protection is further echoed in non-binding instruments such as the 1997 *Capetown Principles*,[41] which posit that a minimum age of 18 years should be established "for any person participating in hostilities and for recruitment in all forms into any armed forces and armed groups." The 2007 *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, known colloquially as the Paris Principles,[42] proclaim at Principle 3.6 that children "should be considered primarily as *victims* of offences against international law; not only as perpetrators" (emphasis added).

Similarly, at ICL, while adults who recruit and use child soldiers are punished,[43] child soldiers under 18 are almost universally spared from responsibility. At ICL, the age of 18 is effectively the threshold for criminal responsibility.[44] The situation is similar in the *ad hoc* tribunals.[45] Almost all

[40] One common view is that this means that the minimum age has effectively been raised to 16: M Drumbl and J Tobin, "The Optional Protocol," above note 36, p. 1710.
[41] Symposium on the Prevention of Recruitment of Children into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa, "Cape Town Principles And Best Practice On The Prevention Of Recruitment Of Children Into The Armed Forces And Demobilization And Social Reintegration Of Child Soldiers In Africa" *UNICEF*, 2013, available at https://openasia.org/en/wp-content/uploads/2013/06/Cape-Town-Principles.pdf.
[42] Paris Principles Steering Group, "Principles And Guidelines On Children Associated With Armed Forces Or Armed Groups" *UNICEF*, 2007, available at https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf.
[43] See Art. 8 of the Rome Statute, which identifies as a war crime the "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities."
[44] The Rome Statute, in Art. 26, excludes from its jurisdiction persons who were under 18 at the time of the alleged commission of the crime.
[45] For example, the statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda did not cite a minimum age for criminal responsibility, but no one under 18 has appeared before the Tribunals. See *Statute of the International Criminal Tribunal for the Former Yugoslavia* (entered into force 25 May 1993); *Statute of the International Criminal Tribunal for Rwanda* (entered into force 8 November 1994). The *Statute of the Special Court of Sierra Leone* (entered into force 12 April 2002), limited the Court's

United Nations member states have agreed to formal processes to protect child soldiers from prosecution.[46] There is therefore an "impunity gap,"[47] whereby children between 15 and 18 can lawfully, at least under IHL and the CRC, in certain circumstances take part in armed conflict, but cannot be prosecuted for war crimes.

The common justification of the age of 18 as the cut-off for criminal responsibility, is that it is the generally accepted transition point to adulthood in modern societies.[48] However, the consensus in literature is that this is a Western view, and the choice of 18 as the onset of adulthood is not the case in all countries and cultures and obscures local cultural norms.[49] Rosen asserts that the "straight 18" position is an example of how a political agenda can be represented as an existing cultural norm. While child soldiers are a diverse group, Rosen posits that existing and competing definitions of childhood have been abandoned in favour of a single international standard. He posits that IHL adheres to "bright line" distinctions between childhood and adulthood that are, on the whole, indifferent to context.[50] In the author's view, excessive focus on chronology, in the words of Tobin and Drumbl, "may leave

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jurisdiction to defendants over 15 years at the time of the alleged offence, specifically stating in Art. 7 that should any person who was between 15 and 18 at the time of the alleged offence come before the court, amongst other things, he or she shall be treated with dignity and a sense of worth. However, the Special Court of Sierra Leone's first Chief Prosecutor said that prosecution of children under the age of 18 would never occur, as they did not bear the greatest responsibility. None have been prosecuted. See: Mark Drumbl and John Tobin, "Article 38 The Rights of Children in Armed Conflict" in John Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary*, Oxford University Press, New York, 2019, p. 1532; Gus Waschefort, *International Law and Child Soldiers*, Hart Publishing, Oxford, 2015, p. 137.

[46] Romeo Dallaire, *They Fight Like Soldiers, They Die Like Children,* Hutchinson, London, 2010, 124.

[47] This has been the subject of scholarly discussion, which is outside the scope of this paper. See, e.g., "International Criminal Court Continues Series Of Judgments Condemning Crimes Against Child Soldiers" *World Future Council*, available at https://www.worldfuturecouncil.org/judgments-against-child-soldiers; Linda Van Brakel, "Minding the Impunity Gap: Child Soldiers, International Law and Human Rights Policy," LLM thesis, Utrecht University, 2013.

[48] PW Singer, above note 18, p. 7.

[49] See, e.g., R Dallaire, above note 48, p. 157 and M Talbot and J Wolfendale, above note 17, p. 116.

[50] D Rosen, above note 21, p. 297.

unaddressed the thorny reality that agency and development operates along a continuum rather than a bright line."[51]

Agency here is defined as the extent a person is able to take action within a given context,[52] and also throughout this article, as personal autonomy. As will be advanced in the next section, ICL's sentencing regime appears to disregard the agency of a CSTP before their eighteenth birthday, which is problematic as it does not contextualise a CSTP's development of autonomy during their formative years.

2.2. Protectionism

As discussed above, the laws regulating the recruitment and use of children in conflict emphasise the need to protect children. As Rosen posits, the laws regarding child soldiers do not "consider any framework for understanding the agency of children other than extreme protectionist constructions of childhood."[53] Hanson agrees, and argues that "[c]ompeting emancipatory perspectives towards children or particular local understandings of childhood… were hardly invoked when the provisions regarding child soldiers were developed; the only framework of childhood for understanding the agency of children was a protectionist one."[54] The "faultless passive victim" trope, according to Drumbl, contradicts international human rights law's struggle to advance children's autonomy. He says this ubiquitous stereotype of the child soldier as a victim arouses sympathy.[55] Protectionism does not sit neatly with the rights-based approach that underpins the CRC. That is because protectionism assumes children have no agency.[56] The concept of children gradually gaining competence underpins the CRC.

[51] M Drumbl and J Tobin, "The Optional Protocol," above note 36, p. 1685.
[52] E Baines, above note 6, p. 165, citing Vigh.
[53] D Rosen, above note 21, p. 297.
[54] Karl Hanson, "International Children's Rights and Armed Conflict" *Human Rights and International Legal Discourse* Vol. 5, No. 1, 2011, pp. 40, 43, 50
[55] Mark Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Oxford University Press, Oxford, 2012, pp. 6 – 9, 36, 208 ("Reimagining").
[56] J Stauffer, above note 17, p. 44.

However, children's evolving competency does not appear to have been properly explored in the context of child soldiering[57] or in ICL.

2.3. Can child soldiers demonstrate agency?

The opening extract from Bensouda's opening statement, quoted at the beginning of this article, places Ongwen's moral responsibility at the foreground. Indeed, evidence suggests that child soldiers can show agency. The 2008 Survey for War Affected Youth study involving child soldiers from Northern Uganda (the SWAY study), cited by Drumbl, drew from a sample of males, including (but not limited to) abductees who were under 18 at the time of abduction.[58] It noted that among returnees, the vast majority had escaped, rather than having been rescued or released.[59] Stauffer noted that nearly one-third escaped in the disruption of battle or an ambush.[60] The research findings appeared to support the view that "however forcible the recruitment, some agency remains with the child or young adult."[61]

In Ongwen's case, it is arguable that he could have made other choices from the few good ones available to him.[62] As the Court said, "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."[63] The purpose of this paper is not to advocate for changes to the relevant statutes which prevent children 18 from being prosecuted for war crimes – for example, the Rome Statute. Rather, it is argued that recognising children's agency in the context of armed conflict is important, especially when their past as a child soldier is a major factor in mitigation in sentencing. It presents a more nuanced view of development than the "bright line" and protectionist approaches. While

[57] W De Bondt and R Van Erdeghem, above note 22, p. 812.
[58] M Drumbl, "Reimagining," above note 60, p. 67.
[59] Ibid.
[60] J Stauffer, above note 17, p. 45.
[61] M Drumbl, "Reimagining," above note 60, p. 69.
[62] E Baines, above note 6, pp. 163, 182.
[63] *Ongwen Sentence*, above note 2, para. 85.

stopping short of proposing a "blueprint" of how agency could factor into the sentencing processes, Part 2 argues that an analysis of young Ongwen's agency was lacking in the sentencing decision.

3. Part 2: Ongwen in the International Criminal Court

3.1. Background

This article argues that the ICC's reasoning treated Ongwen not as a perpetrator and an adult, but as a victim and a child.[64] In particular, that the Court considered Ongwen's past as a child soldier as a circumstance in mitigation through a protectionist lens, which failed to account for his complex prior life as a child soldier and any agency he possessed. The author contends that, had the Court included an analysis of Ongwen's agency during his formative years, that would have contextualised his criminal activity in adulthood.

At the outset, it is noted that Ongwen is the third of three offenders sentenced by the ICC for the recruitment and use of child soldiers. The other two defendants received sentences of varying lengths. In 2012, the ICC sentenced Thomas Lubanga Dyilo (Lubanga), former President of the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo of the Democratic Republic of the Congo (DRC). He was convicted of two charges of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities,[65] and was sentenced to 14 years' imprisonment.[66] In 2015, Bosco Ntaganda was found guilty of 18 counts of war crimes, including three counts of enlisting and conscripting of

[64] Mark Drumbl, '"Getting" an Unforgettable Gettable: The Trial of Dominic Ongwen' *Justice in Conflict*, 5 February 2021, available at https://justiceinconflict.org/2021/02/05/getting-an-unforgettable-gettable-the-trial-of-dominic-ongwen/.

[65] International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment, (Trial Chamber), 5 April 2012. He was found guilty of two charges, which related to separate timeframes, respectively, from early September 2002 to 2 June 2003 and from 2 June to 13 August 2003.

[66] International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Sentencing Judgment (Trial Chamber), 12 July 2012. The sentence was appealed. The 14-year sentence was upheld by the Appeals Chamber on 1 December 2014: International Criminal Court, *Prosecutor v Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgement (Appeals Chamber), 1 December 2014 ("Lubanga Sentencing Appeal Judgment").

children under the age of 15 years and using them to participate actively in hostilities, in the Ituri region of the DRC. [67] On 17 November 2019, he was sentenced to 30 years' imprisonment, the maximum available under the Rome Statute.[68]

3.1.1. Sentencing framework

The Rome Statute has the power to impose a term of imprisonment on a convicted person, up to life. Article 76 states, "[i]n the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence." Pursuant to Article 77 of the Rome Statute, the Court has the power to impose on a person who has been convicted of a crime under the Statute, either imprisonment, which may not exceed a maximum of 30 years ((1)(a)), or a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person ((1)(b)).[69] The sentencing framework is set out in Article 78 of the Rome Statute, and Rule 145 of the Court's *Rules of Procedure and Evidence* ('the Rules').[70]

Article 78(3) of the Statute mandates a two-step[71] sentencing process: to pronounce a sentence for each crime of which the convicted person was convicted, and a joint sentence specifying the total period of imprisonment.

[67] International Criminal Court *Prosecutor v Ntganda*, Case No. ICC-01/04-02/06, Judgment (Trial Chamber), 8 July 2019.
[68] International Criminal Court, *Prosecutor v Ntganda,* Case No. ICC-01/04-02/06, Sentencing Judgment (Trial Chamber), 7 November 2019. This was appealed and the sentence was upheld by the Appeals Chamber on 30 March 2021: International Criminal Court, *Prosecutor v Ntganda*, Case No. ICC-01/04-02/06 (Sentencing Appeal Judgment (Appeals Chamber), 31 March 2021.
[69] Art. 110(3) of the Rome Statute sets a high threshold, at 25 years, for a review when a period of life imprisonment is imposed. See Diletta Marchesi, 'Imprisonment for Life at the International Criminal Court' *Utrecht Law Review* Vol. 14, No. 1, 2018, p. 97.
[70] International Criminal Court, *Rules of Procedure and Evidence*, Doc No ICC-ASP/1/3, 9 September 2002 ("*The Rules"*). For a critical examination of the ICC sentencing framework and Rule 145 see Shahram Dana, "Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing" *Journal of International Criminal Law & Criminology* Vol. 99, No. 4, 2009, pp. 905-924.
[71] *Ongwen Sentence*, above note 2, para. 136.

According to Article 78(1), in imposing a sentence, the Court may take into account factors such as the gravity of the crime and the individual circumstances of the convicted person,[72] echoing the language of Article 77. Pursuant to Rule 145(1)(a), the Court must bear in mind that the totality of the sentence "must reflect the culpability of the convicted person." Rule 145(2) sets out mitigating and aggravating factors the Court must take into account.[73]

As acknowledged by the Trial Chamber in *Prosecutor v Jean-Pierre Bemba Gongo* (Bemba),[74] the Court must first identify and assess the relevant factors in Article 78(1) and Rule 145(1)(c)[75]. It must then balance all relevant factors[76] pursuant to Rule 145(1)(b) and pronounce a sentence for each crime, as well as a joint sentence specifying the total period of imprisonment.[77] In Ongwen, the Court noted the Lubanga Appeals Chamber's statement that the Court's texts do not lay down any explicit requirements for how the factors should be balanced, noting that "the weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a Trial Chamber's exercise of discretion."[78]

3.1.2. Parties' submissions

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[72] This is echoed in Rule 145(3), which refers to these factors and adds, "as evidenced by the existence of one or more aggravating circumstances."

[73] See Rule 145(1)(b), which requires the Court to balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.

[74] International Criminal Court, *Prosecutor v Jean-Pierre Bemba Gongo*, Case No ICC-01/05-01/08, Sentencing Judgment, (Trial Chamber), 21 June 2016, para. 12 ("*Bemba Sentence*").

[75] A number of factors for the Court's consideration are set out at Rule 145(1)(c), including relevantly, 'and the age, education, social and economic condition of the convicted person.

[76] Stated to include any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime.

[77] The sentencing court in Bemba acknowledged there were several possible approaches, but ultimately considered that the Rule 145(1)(c) factors were relevant to an assessment of the Article 78(1) factors, noting that some of the Rule 145(1)(c) factors may instead be relevant to an assessment of the mitigating and aggravating circumstances identified in Rule 145(2). *Bemba Sentence,* above note 79, para. 13.

[78] *Ongwen Sentence*, above note 2, para. 50, citing Lubanga Sentencing Appeal Judgment, above note 71, para. 43.

The Prosecution contended for a joint sentence for all the crimes of at least 20 years, but lower than 30 years.[79] The Prosecution submitted that the extreme gravity of Ongwen's crimes, numerous aggravating circumstances, and Ongwen's key role in the crimes, would ordinarily warrant a sentence at the highest range available under Article 77(1) of the Rome Statute. However, it submitted that one circumstance which merited a reduction in the sentence was Ongwen's abduction into the LRA. The prosecution conceded Ongwen's years as a child and adolescent in the LRA must have been extremely difficult. While noting that Ongwen's circumstances did not directly diminish his responsibility, and that any sympathy for his misfortune should be balanced with respect for the victims,[80] it submitted that, in its view, the circumstances warranted approximately a one-third reduction in the length of the sentence to be imposed on Ongwen.

Counsel for the defence advocated for a sentence of 10 years. The Defence noted circumstances that militated in favour of a lenient sentence for Ongwen,[81] including that he was abducted during a developmental age and continued to develop in the bush in an unfavourable environment under the control of Joseph Kony.[82]

Citing the relevant test in Articles 77(1)(b) and 78(3) of the Rome Statue, and Rule 145(3) of the Rules, the Court said that the representatives for the victims asked for a life sentence as a single joint sentence.[83] The Court said that the victims noted that the crimes for which Ongwen was convicted were committed as an adult, after rising through the ranks of the LRA and becoming commander of the Sinia Brigade.[84] The victims' representatives said they did not intend to minimise the fact that Ongwen was abducted at a young age and faced many sufferings, but that, in their view, such did not justify the path he chose to take in the LRA or warrant any reduction of his

[79] *Ongwen Sentence*, above note 2, para. 9.
[80] Ibid para. 66.
[81] Ibid para. 10.
[82] Ibid para. 67.
[83] *Ongwen Sentence,* above note 2, para 383.
[84] Ibid para. 68.

sentence.[85] They opined that Ongwen would not have committed the crimes he did between 2002 and 2005 had he escaped from the LRA or chosen to behave in a different manner while in a position of power in the LRA.[86]

3.1.3. Sentencing process

The ICC followed the "two-step" sentencing process outlined above. In the core of the judgment, the Court pronounced sentences for each of the charges, including the highest individual sentence of 20 years of imprisonment. The ICC considered the gravity of the crime and the circumstances of the defendant, noting that Ongwen was in no way forced to commit the crimes.[87] In determining the length of each individual sentence, the Court said that it was required to strike a balance between competing considerations. It then went on to list a number of circumstances which it said must be given a certain weight, including his upbringing in the LRA – in particular his abduction as a child, the interruption of his education, the killing of his parents, and his socialisation in the extremely violent environment of the LRA.[88] The Court accepted that Ongwen's prior history as a child soldier who had been abducted was relevant as a mitigating factor.[89]

At various times throughout the 139-page decision, it appeared that the Court was going to sentence Ongwen to life imprisonment, but that his history as a child abductee saved him.[90] Ongwen's childhood circumstances were compelling, the Court said (repeated in its entirety here as it usefully sums up the Court's reasoning):[91]

> The fact that Dominic Ongwen did not, at first, choose to be part of the LRA, but was abducted and integrated into it when

[85] Ibid.
[86] Ibid.
[87] Ibid para. 86.
[88] Ibid para. 87.
[89] Ibid para. 370.
[90] Carmel Rickard, "Ongwen Sentenced by ICC: Court's Intricate Balancing Task" *African Lii,* 6 May 2021, available at https://africanlii.org/article/20210506/ongwen-sentenced-icc-court's-intricate-balancing-task.
[91] *Ongwen Sentence,* above note 2, para 388.

> he was still a child, whose education was thus abruptly interrupted and replaced by socialisation in the extremely violent environment of the LRA, in no way justifies or rationalises the heinous crimes he wilfully chose to commit as a fully responsible adult; however, these circumstances, in the view of the Chamber, make the prospective of committing him to spend the rest of his life in prison (despite the hypothetical early release or reduction of sentence after 25 years of imprisonment under Article 110 of the Statute) excessive.

Ultimately, the majority of Judge Bertram Schmitt and Judge Péter Kovács decided to reduce what they said would otherwise have been a life sentence or a sentence of up to 30 years, to 25 years, due to Ongwen's circumstances.[92] The Court noted that the object of sentencing was not revenge as such,[93] but rather, retribution and deterrence, which it said were the primary purposes of sentencing.[94] It said Ongwen's history in the LRA as an abductee was one circumstance that set the case apart from others tried before the Court, and therefore some reduction in the sentence was warranted.[95]

In the Trial Chamber, the majority of the Court said Ongwen's circumstances included 'the circumstances, purported by the Defence to act in mitigation of the sentence to be imposed on Dominic Ongwen, concerning his childhood and, more generally, his personal background, his current family circumstances and his alleged good character,[96] and in turn focussed on his abduction as a child as his most relevant "individual circumstance," cross-referring to its discussion regarding his abduction as a child several

[92] See, e.g., Ibid para. 386.
[93] Ibid para. 389.
[94] Ibid. For a critical reflection of deterrence on perpetrators like Ongwen see Shahram Dana, "The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?" *Penn State Journal of Law & International Affairs* Vol. 3, No. 1, 2014, p. 30
[95] *Ongwen Sentence,* above note 2, para. 389.
[96] Ibid paras. 65 – 88.

times in arriving at individual sentences,[97] as part of the "two-step" sentencing process. In the author's view, the majority's focus on young Ongwen's passive victimhood during his youth missed an opportunity to answer an important question: what agency did young Ongwen possess while he grew up within a setting of extreme brutality?[98] As a CSTP, he may have demonstrated agency and autonomy in his decision-making, leading to higher moral capability and less mitigating factors in sentencing. The inquiry is complex, but in leaving this out, the Court omitted a factor that was highly relevant to the sentencing exercise.

Ultimately, the majority decided to reduce to 25 years what they said would otherwise have been a life sentence or a sentence of up to 30 years, as a result of all the relevant circumstances.[99] The Court accepted that Ongwen possessed agency as an adult. It stressed that the issue was not whether Ongwen should be held criminally responsible in light of his personal history, as he had been found guilty of committing the relevant crimes when he was a fully responsible adult.[100]

Earlier on in the decision, the Court supported the Prosecution's recommendation to consider Ongwen's circumstances, as a "broad indication," as warranting approximately a one-third reduction, in the length of the sentences that Ongwen would otherwise receive, obviously depending on the particulars of each crime.'[101] Perhaps the Court's use of general words was an attempt to underscore the case-by-case basis of its sentencing task, but its equivocalness undermines its potential value as a possible sentencing precedent. Further, the majority did not apply a one-third reduction – that is, a reduction from the maximum of 30 years to 20 years. It simply reduced his sentence from a hypothetical life sentence as noted above, or a maximum of 30 years, to 25 years. In the author's view, that limits the one-third rule's potential usefulness in the future. Further, if the majority had reduced the sentence from the maximum of 30 years to 20 years, the resulting sentence

[97] See, e.g., Ibid, paras. 152, 156, 168.
[98] E Baines, above note 6, p. 164.
[99] See, eg, *Ongwen Sentence*, above note 2, para. 386.
[100] Ibid para. 69.
[101] *Ongwen Sentence,* above note 2, para. 88.

would be quite low, in comparison to others such as Ntaganda, although he was not a CSTP, as will be discussed below. If applied, it would have advanced a strong protectionist agenda towards CSTPs.

3.2. The ICC's "intricate balancing exercise"[102]

The majority's sentence sits in the middle of the prosecution's 20-to-30-year range, which indicates that the Court was persuaded by the prosecution's submissions. It is well above the defence's contended-for 10-year sentence and is less than the victims' proposed life sentence and less than the maximum of 30 years. The closest ICC sentencing comparator is Ntaganda, who received a 30-year sentence for similarly reprehensible crimes, although it is noted he was only convicted of 18 counts as opposed to Ongwen's 61. While not explicitly referred to by the Court as comparable, the Ntaganda sentencing decision lends weight to the view that a life sentence, namely, a sentence of 30 years, was certainly open to the ICC's sentencing court in Ongwen. Unlike Ongwen, Ntaganda did not have a prior history as a child soldier who had been abducted.

One of the judges, Judge Raul C. Pangalangan would have sentenced Ongwen to 30 years, the maximum available. In his partly dissenting opinion, he acknowledged Ongwen's unfortunate circumstances of being abducted as a child.[103] Invoking the language of Article 78(1) of the Rome Statute, Judge Pangalangan's primary rationale for an elevated sentence was balancing the rights of the victims and the "extreme gravity of the crimes."[104] The author notes that that is a separate axis of sentencing, which is unrelated to the CSTP victim and perpetrator dichotomy. He pointed out that the majority found that the "extreme gravity" threshold[105] required for a term of life imprisonment had been met. He concurred with this, notably the degree of Ongwen's culpable conduct and the deep and permanent physical and

[102] C Rickard, above note 90.
[103] International Criminal Court, *Prosecutor v Ongwen*, Case No ICC-02/04-01/15, Annex to Sentence, (Trial Chamber) 6 May 2021, (Judge Pangalangan) ("Partly Dissenting Opinion of Judge Raul C. Pangalangan") para. 10.
[104] Partly Dissenting Opinion of Judge Raul C. Pangalangan, above note 103, para. 13.
[105] *Ongwen Sentence*, above note 2, para. 384.

psychological harm caused to the victims and their families. He opined, "the mere fact of not imposing a life sentence pursuant to Article 77(1)(b) of the Statute and Rule 145(3) of the Rules already takes into account the truly unfortunate personal situation of Dominic Ongwen."[106]

The author's view is that this reflects a more precise reading of the Statute than the majority's reasons. As the majority acknowledged, a term is life imprisonment is an exceptional punishment, when both normative criteria of grave crimes and individual circumstances are met.[107] Weighing up Ongwen's main mitigating factor of his traumatic upbringing, Judge Pangalangan plausibly noted the scale and cruelty of the crimes meant that any sentence that is not life imprisonment was defensible. A harsher sentence, in the author's view, could subtly foreground agency by emphasising that Ongwen could have made better choices. It is contended this was an opportunity missed.

3.3. The ICC's "bright line" approach

The author contends that the sentencing Court commented on the activities of young Ongwen, using both a protectionist lens and "bright line"' language. In the author's view, this failed to highlight the degree of agency the young Ongwen possessed. Citing a witness' evidence that highlighted his status as an innocent child before his abduction, the Court noted the evidence of Joe Kakanyero, who was abducted together with Ongwen, who said that he had been "a very good child," calm and well-behaved.[108] The ICC cited testimony that even though he was still young at the time, Ongwen was soon trained in how to be a soldier.[109] The Court said that Ongwen's early experiences in the LRA "brought to him great suffering, and led to him missing out on many opportunities which he deserved as a child."[110]

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[106] Partly Dissenting Opinion of Judge Raul C. Pangalangan, above note 103, para. 15.
[107] See also Rule 145(3) of the Rules, which states "Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances."
[108] *Ongwen Sentence*, above note 2, para. 72.
[109] Ibid para. 78.
[110] Ibid para. 83.

The Court's language shifted when it details his conduct after he turned 18,[111] around when he began his rise through the LRA's ranks,[112] to that which emphasised his agency. As noted in the sentencing judgement (footnotes omitted; emphasis added):[113]

> … [B]y around 1996, when Dominic Ongwen was approximately 18 years old, his *performance* as an LRA fighter started to be *recognised in the LRA*, and Dominic Ongwen *began his rise through the ranks.* … [B]y the late 1990s, Dominic Ongwen was already a significant member of the LRA *with some status*….

The Court then expressly acknowledged, through its language, that the age of 18 is age at which his responsibility crystallised (emphasis added): "whereas during the first years following his abduction, Dominic Ongwen's stay in the LRA was extremely difficult, he was soon noticed for his good performance as a commander – already in the mid-1990s, *at approximately 18 years old*."[114]

As noted, in adopting witnesses' language, the Court adopted a protectionist lens for young Ongwen. Conveniently in line with the "bright line" approach, the author argues that the Court also did not refer to any crimes committed before the abduction, rape and forced marriage Ongwen committed close to his eighteenth birthday. The Court did not hear evidence of any crimes committed while Ongwen as under 18.[115] In contrast, the ICC did not reserve sympathy for Ongwen in his activities as an adult, describing them in detail, and noting that his actions were condemned in the eyes of the international community.[116] It was as if Ongwen went from child soldier to

[111] Ongwen was born in approximately 1978. See *Ongwen Sentence*, above note 2, para. 71.
[112] Ibid para. 79.
[113] Ibid paras. 79 - 80.
[114] Ibid para. 84.
[115] Everisto Benyera, "Child victim, Loyal war spirit medium or war criminal: shifting the geography and logic of historical accountability in Dominic Ongwen's ICC trial" *African Identities* Vol. 1, 2021, p. 7. The author notes that the Court was also jurisdictionally precluded from considering any crimes possibly committed by Ongwen before he turned 18.
[116] See, e.g., *Ongwen Sentence*, above note 2, para. 389.

warlord overnight. That does not reflect the continuum of development of young people explored above and espoused in the CRC.

Problematically, the young Ongwen's agency was unfortunately not fulsomely addressed by the ICC. One school of thought is that Ongwen was a victim of the political system of the LRA:[117] that Ongwen was robbed of a chance to develop his own conscience when he was indoctrinated by the LRA,[118] and was groomed to commit the crimes of which he was convicted. The other school of thought is that Ongwen had agency that he did not exercise – reflected in his decision to stay with the LRA.[119] In its reasons, the ICC emphasised the former school of thought, to the detriment to the latter. The Court observed there were opportunities for Ongwen as an adult to voluntarily escape from the LRA, noting other high-ranking commanders who left.[120] The Court conceded his development had not been impaired.[121] However the Court did not analyse the Defence's point that he chose to take a certain path to become an LRA leader, presumably before he was 18. The Court, unfortunately, likewise, did not take the issue of Ongwen's possible moral awakening in his youth any further.

The Court had scope within the sentencing paradigm to explore Ongwen's agency in more detail than it did. In particular, Article 78(1) of the Rome Statute and Rule 145(1)(b) of the Rules, focus on an individual's circumstances, and therefore accommodate offenders with complex background profiles, such as Ongwen. As noted above, when discussing Ongwen's abduction as a child as an individual circumstance in mitigation, "the majority simply said: "The Chamber considers that the issue of Dominic Ongwen's personal history is relevant among the factors bearing – as a circumstance concerning the convicted person – on the appropriate gradation

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[117] E Benyera, above note 115, p. 12.
[118] Ibid p. 6.
[119] This is acknowledged by E Benyera, above note 115, p. 6.
[120] *Ongwen Sentence*, above note 2, para. 86.
[121] The Court noted medical evidence tendered at trial that Ongwen had attained the highest level of moral development and had above average intelligence, and that he had matured developmentally 'against all odds', and that favourable early experiences had contributed to his resilience: Ongwen *Sentence*, above note 2, para. 81.

of the sentence to be imposed on him."[122] The author's view is that the Court missed an opportunity[123] to interrogate the concept of Ongwen's potential agency in his youth in its reasoning. While it is outside the scope of this paper to propose a fulsome conception of agency for judicial consideration, it is suggested that one aspect could be whether young Ongwen developed the capacity to appreciate the immorality of his conduct,[124] and if so, at what point in time that occurred. That is, exploring Stauffer's[125] query of at what point Ongwen passed the line between too young to be responsible and old enough to have known better.

The Chamber also considered a number of other purported mitigating factors, which skirted around the issue of young Ongwen's agency. Defence posited, both in the Trial Chamber and before the Sentencing Court, that Ongwen committed the crimes in a state of "substantially diminished mental capacity" at the relevant time, and that this amounted to a defence under Article 31 of the Statute. In the Trial Chamber, the Defence made submissions on the status of Ongwen as a former victim of the LRA. The Court said that Ongwen was responsible for the criminal activities he participated in, as they took place when he was an adult. Regarding Ongwen's abduction and early treatment by Kony, the Court said that it did not amount to duress in respect to his crimes committed as an adult, as it occurred outside the period of the charges[126]. The Trial Chamber of the ICC found that as an adult, Ongwen exercised agency, was not completely dominated by Kony, and was a self-confident commander who took his own decisions depending on what he thought right or wrong.[127]

[122] Ibid para. 70.
[123] Indeed, Benyera laments that the ICC sent a message that the circumstances under which one became a child soldier are irrelevant as long as one committed atrocities as an adult. E Benyera, above note 115, p. 13.
[124] R Souris, above note 20.
[125] J Stauffer, above note 17, p 43.
[126] W De Bondt and R Van Erdeghem, above n 22, p. 809.
[127] *Ongwen Trial Judgment*, above no 3, paras. 2602, 2672. Defence counsel raised that Ongwen sustained duress throughout his time in the LRA, because of Kony's actions and punishments, which it said was a mitigating factor in sentencing, although not a complete defence under Art. 31(1)(d). The Chamber also rejected this argument saying duress would have to be proven during the period of the charges, not when he was a child: paras. 111, 2592.

During the sentencing hearing, Defence attempted to relitigate a number of these issues. The Court rejected a series of submissions and found, "it is clear that Dominic Ongwen suffered following his abduction into the LRA, even though – as found in the Trial Judgment – this trauma did not lead to a mental disease or disorder and had no lasting consequences from that viewpoint."[128] The Court said while it was greatly impressed by the account given by Ongwen at the sentencing hearing, speaking for one hour and 45 minutes about the events to which he was subjected upon his abduction when he was 9, it concluded that Ongwen's current mental health could not be taken into account as a mitigating circumstance with respect to his sentencing.[129] In finding that Ongwen was lucid and spoke fluidly, the Court lent further weight to the hypothesis that Ongwen developed normally during his formative years in the LRA – during his youth and young adulthood. The Court, which was jurisdictionally precluded from prosecuting Ongwen for activities that occurred before he was 18, then took a protectionist approach to his activities before his eighteenth birthday. It did not explore his developing agency as a child. Indeed, the Court's reasoning did not seem to deem Ongwen's experience as a child solider truly relevant to the case, which left many questions unanswered.[130]

3.4. The Appeals Chamber

The Appeals Chamber upheld Ongwen's 25-year sentence. The Court consisted of presiding Judge Luz del Carmen Ibáñez Carranza, and Judges Piotr Hofmański, Solomy Balungi Bossa, Reine Alapini-Gansou, and Gocha Lordkipanidze. The Court, in its reasoning, considered a number of arguments raised by defence. Relevant to the discussion in this paper, these included alleged errors in the Trial Chamber's failure to rule on mental incapacity as a mitigating or personal circumstance, as well as its reliance on

[128] *Ongwen Sentence*, above note 2, para. 84.
[129] Ibid para. 105. It is noted that the Trial Chamber's reliance on Ongwen's statement was challenged by the Defence before the Appeals Court, who argued that the Trial Chamber erred by using Ongwen's unsworn statement, which he made in court, against him. That was ultimately rejected. See paras. 272 – 276.
[130] W De Bondt and R Van Erdeghem, above note 22, pp. 812 - 813.

Ongwen's personal statement,[131] and alleged errors by disregarding evidence on duress as a mitigating circumstance.[132] Having not found any error in the findings below, the Appeals Chamber dismissed both of these grounds of appeal. The majority of the Court did not examine whether the Trial Chamber exercised its discretion properly when taking into account the individual circumstances of Mr Ongwen related to his abduction.[133] In the author's view, the majority did not incorporate any greater acknowledgement of the victim-perpetrator continuum.

In her partly dissenting judgement, Judge Ibáñez Carranza opined Ongwen's personal circumstances as a child solider should be given significant weight as a circumstance in mitigation in sentencing.[134] Judge Ibáñez Carranza stated that Ongwen's abduction and his early traumatic experiences in the coercive environment of the LRA had a long-lasting impact on his personality, brain formation, future opportunities and the development of his moral values. Judge Ibáñez Carranza discussed the legal framework for the protection of children in armed conflicts, the long-lasting effects of being a victim of the crime of conscription and use in hostilities of children below the age of 15 years, and Ongwen's status as a victim-perpetrator.[135] While not explicitly foregrounding agency, Judge Ibáñez Carranza eschewed a rights-based approach by opining that Ongwen's abduction and hardships endured as a result of his conscription into the LRA deprived him of the enjoyment of basic rights as a child,[136] and, as in particular noted by the *amici*,[137] the rights owed to him under the CRC.[138] The findings reached by medical experts,[139] were relevant in determining the impact that Ongwen's abduction as a child and his upbringing in the LRA had on his personality, the development of his

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[131] *Ongwen Sentence Appeal*, above note 11, paras. 195 – 282.
[132] Ibid paras. 283 – 300.
[133] Ibid para. 12.
[134] International Criminal Court *Prosecutor v Ongwen*, Case No ICC-02/04-01/15, Annex to Sentencing Appeal, (Appeals Chamber) 15 December 2022, (Judge Luz del Carmen Ibáñez Carranza) ("Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza").
[135] Ibid para. 91.
[136] Ibid para. 101.
[137] These included Professor Baines, whose work is cited elsewhere in this paper.
[138] Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza, above note 134, para. 109.
[139] Referred to as P-0445 and P-0447.

brain and moral values, and future opportunities.[140] Citing an expert's conclusion in a report that it meant that Ongwen could not be blamed for falling to escape negative influences in his environment,[141] Judge Ibáñez Carranza stated:[142]

> The above shows that Mr Ongwen's early abduction and the traumatic experiences he went through as a result of his conscription into the LRA, violent indoctrination, being forced to carry out and participate in criminal acts as a child and as an adolescent, had damaging and long-lasting consequences. …these experiences negatively affected his personality, brain formation, future opportunities and the development of his moral values. … it is undoubtedly correct to accord significant weight in mitigation to these circumstances.

Judge Ibáñez Carranza noted it was meaningful to acknowledge Ongwen's status as a victim, abducted whilst he was still a defenceless child,[143] and also emphasised that sentencing serves various purposes, including notably retribution and prevention, espousing the benefits of restorative justice.[144] As a separate issue, Judge Ibáñez Carranza found that the sentence was affected by double-counting errors,[145] and was of the view that a new sentence should be imposed – one that is "long enough to acknowledge the gravity of those crimes and to recognise the suffering of the victims while at the same time ensuring fairness and proportionality to Mr Ongwen's culpability and his individual circumstances."[146]

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[140] Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza, above note 134, para. 137.
[141] Ibid para. 139.
[142] Ibid para. 147.
[143] Ibid para. 151.
[144] Ibid para. 192.
[145] Ibid para. 68.
[146] Ibid para. 197.

3.5. The importance of agency

The partly dissenting judgements, of Judge Pangalanan, at sentence, and Judge Ibáñez Carranza, on appeal, respectively, implicitly show how important the issue of Ongwen's agency is to the sentencing exercise. One view is that a harsher sentence could have been meted out. Indeed, as discussed, that is the view of partly dissenting Judge Pangalangan on sentence. However, on appeal, Judge Ibáñez Carranza opined that it was appropriate to reverse the joint sentence of 25 years of imprisonment and remand the matter to the Trial Chamber for it to determine a new sentence, in the name of ensuring fairness and proportionality to Mr Ongwen's culpability and his individual circumstances,[147] as noted above. The question must be asked: did young Ongwen develop a sense of morality, and choose to stay in the LRA anyway? Judge Pangalangan's choice of words was that while his life could have taken a very different path if he had not been abducted, Ongwen "did not initially choose to be part of the LRA."[148] The subtext is that at some point, he might have left. In contrast, Judge Ibáñez Carranza cited medical evidence that stated Ongwen could not be blamed for falling to escape negative influences in his environment.[149] Ongwen's ability to take action prior to turning 18 may have impacted the sentence. If explored by the majority, if could have resulted in a higher sentence, or a lower sentence, as advocated for by Judge Ibáñez Carranza. In the author's view, this was an opportunity missed by the majority.

Unsurprisingly, in light of the Court's reasoning, views amongst commentators about Ongwen's sentence are varied. One view is that the ICC's approach in sentencing Ongwen was quite punitive when regard is had to the fact that he was a victim and experienced child soldiering from a young age.[150] Others go so far as to note that while the victim status of child soldiers is emphasised by the ICC, it is apparently not considered relevant when the

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[147] Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza, above note 134, paras. 197 - 198.
[148] Partly Dissenting Opinion of Judge Raul C. Pangalangan, above note 103, para. 10.
[149] Partly Dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza, above note 134, para. 139.
[150] W De Bondt and R Van Erdeghem, above note 22, p. 811.

child is later prosecuted as an adult for crimes committed in adulthood.[151] If this view is correct, then, if the full circumstances of a CSTP's victimhood are taken into consideration in sentencing by the ICC, a greater reduction in sentence could be available to CSTPs. The divergence of opinions about the punishment Ongwen should have received is perhaps, the author speculates, a product of the Court's dissatisfying reasoning.

The author posits that perhaps the limited way in which the ICC addressed Ongwen's unusual story as a CSTP was, at least, partially due to fundamental limitations of ICL. On a broader level, scholars have criticised the ability of ICL to properly address the victim-perpetrator duality, particularly when sentencing defendants in relation to mass atrocities.[152] As has been advanced above, while the ICC relied on various aggravating and mitigating factors, it failed to properly and deeply explore the transition from Ongwen as a formerly abducted child soldier, to Ongwen as a culpable adult defendant.

4. Conclusion

In Ongwen, the ICC was confronted with a novel case: an adult offender who was being sentenced for some of the same crimes he was the victim of two decades earlier in his childhood. As has been explored, the laws that prevent under-18s from being prosecuted are protectionist in nature and depict a "bright line" approach, which paints child soldiers as victims until the date of their eighteenth birthday. The framework does not form a neat template when sentencing CSTPs, who often have complex histories and come of age in conflicts.

In Ongwen, the majority of the Court adopted a "bright line" approach to criminal liability. It used protectionist language in describing Ongwen's activities prior to his abduction, which highlighted his innocence, then shifted to language which portrayed him as a warlord after he turned 18.

[151] Ibid p. 810.
[152] M Drumbl, "Victims who Victimise," above note 6 p. 218. This echoed his thesis, advanced in his 2012 book, "Reimagining", above note 60.

That narrative is silent regarding any agency Ongwen might have possessed during his formative period. The author submits that the Court, therefore, did not fully illuminate Ongwen's individual circumstances in all their complexity. Furthermore, the ICC's Sentencing Court's positive comments about a possible one third reduction in sentence for CSTPs furthered this protectionist agenda towards former child soldiers. However, this discount was not actually applied, so it is difficult to assess how far the ICC might take this in the future. In the author's view, the Court's reasons do not fully grapple with the complexities of sentencing CSTPs, who have suffered victimisation in their childhood. Indeed, they highlight the weak points in ICL, namely, its dichotomous nature which sees only victims or perpetrators, and the inflexibility of its sentencing mandate.

In the Appeals Chamber, the partly dissenting Opinion of Judge Luz de Carmen Ibáñez Carranza prototypically rejected the dichotomic bright-line approach. Unfortunately, this was not taken up by the majority of the court. As has been observed, the Ongwen decision represented an opportunity missed for the Court to explore a CSTP's capacity for moral decision-making during his youth. Instead, the majority of the Court used the language of a passive victim, to describe Ongwen's time in the LRA prior to turning 18.

Reimagining the ICC's task of sentencing Ongwen, with an acknowledgement that child soldiers can possess agency, would help the public understand how CSTPs, who have walked two phases of life, are to be dealt with in sentencing. The rights-based approach in the CRC[153] should be at the forefront of this exercise, as it positions child soldiers as competent survivors with autonomy.[154] Paradoxically, one consequence of this is that CSTPs who are sentenced might receive harsher sentences. While it is not the author's view that Ongwen necessarily deserved a harsher sentence, it is noted that jurists should consider if hefty sentences for CSTPs are appropriate, from a policy perspective.

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[153] See W De Bondt and R Van Erdeghem, above note 22, p. 813, where it is argued the CRC should be at the heart of the debate about sentencing former child soldiers, including the four guiding principles: non-discrimination, the best interests of the child, the right to be heard and the right to life.

[154] J McBride, above note 30, p. xi.

The author suggests perhaps the ICC should prepare sentencing guidelines, to assist in sentencing CSTPs in the future, which could highlight agency as a possible factor in sentencing. In terms of a direction of travel, it will be interesting to observe if the future Court adopts any part of Judge Luz de Carmen Ibáñez Carranza's reasoning, in particular, in relation to the strong emphasis on his individual circumstances as a child solider, as a factor in mitigation, militating against a sentence at the top of the penalty range. As Kan[155] astutely observed, the Ongwen case will have "an insurmountable impact on future proceedings," in setting the scene and guiding the reaction to former child soldiers in both international and in domestic courts. The Ongwen decision issues a clarion call for greater attention to how CSTPs should be dealt with in sentencing.

[155] Gamaliel Kan, "The Prosecution of a Child Victim and a Brutal Warlord: The Competing Narrative of Dominic Ongwen," *SOAS Law Journal* Vol. 5, No. 1, 2018, pp. 70–74, cited in W De Bondt and R Van Erdeghem above note 22, p. 804.