



Constructing a Sensory Alternative to the *Ongwen* Judgment

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Abstract

Much ink has been spilt criticising the ICC's *Ongwen* trial judgment for its failure to grasp the cultural context in which the accused Ongwen and the Acholi community were embedded. Some scholars blame this on the poor quality of translation services, others attribute it to the 'binarism' of judgments. We offer another explanation for the *Ongwen* judgment's deficiencies: its purely textual format. The judgment shows that the continued preference for textual judgments in international criminal law sterilises victims' experiences, decontextualises evidence, and muffles objectivity. This ties into the historical preference for text over senses, a colonially engineered decision aimed at suppressing non-Western epistemologies. In this paper, we call for the international criminal law judgment to embrace 'the opportunities of the wider sensory field'. Drawing on the pervasive sensory dimensions of international criminal law, we argue that a sensory reimagination of judgments would better serve international criminal law's affective potential by empowering survivors and achieving a more reparative and reconstructive justice.

Keywords

international criminal justice – judgments – Ongwen – senses and affect – textual medium

1 Introduction

On 4 February 2021, Trial Chamber IX of the International Criminal Court (hereinafter ICC) declared Lord's Resistance Army (hereinafter LRA) Brigade Commander Dominic Ongwen guilty of 61 counts of war crimes and crimes against humanity committed in Uganda from 1 July 2002 to 31 December 2005.¹ The *Ongwen* case implicated thorny questions including the ICC's jurisdiction over minors committing war crimes and duress as a defence to international criminal liability. Scholars and practitioners have since launched multiple critiques of the failure of the judgment to adopt a culturally-sensitive approach in analysing the elements of war crimes and in establishing jurisdiction.² The Court's narrow reading of otherwise elastic terms like 'kadoge'/'kadogi' (Acholi terms typically used to refer to anyone 'younger than oneself') to draw equivalence with the legal bracket of childhood as under the Rome Statute has been a constant subject of this critique.³

Some scholars attribute the Court's failure to the poor quality of translation services.⁴ Others attribute it to the 'binarism' of judgments, as instruments which have no bandwidth for ambiguities or internal contestations.⁵ Judges

1 ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1762-Red, Trial Chamber IX, Judgment, 4 February 2021 (hereinafter Judgment).

2 P. Chifflet and I. Freckelton, 'The Mental Incapacity Defence in International Criminal Law: Ramifications from the *Ongwen* Trial Judgment', 22(4) *International Criminal Law Review* (2022) 751–779; J.I. Bishay, 'Cultural Expertise and International Criminal Law', in L. Holden (ed.), *Cultural Expertise, Law, and Rights* (Routledge, London, 2023), pp. 177–187; A. Nistor, *Ongwen blog symposium: Culture as evidence and the construction of (un)certainly in the Dominic Ongwen trial* (2021), available online at www.armedgroups-international.org/2021/04/15/ongwen-blog-symposium-culture-as-evidence-and-the-construction-of-uncertainty-in-the-dominc-ongwen-trial/ (accessed 10 March 2023).

3 Nistor, *ibid.*

4 L.S. Van-Lin, 'When We Don't Speak the Same Language: The Challenges of Multilingual Justice at the ICC', in E.A. Ankumah (ed.), *The International Criminal Court in Africa: One Decade On* (Intersentia, Cambridge, 2016), pp. 275–298.

5 S. D'hondt, J.-P. Pérez-León-Acevedo, F. Ferraz de Almeida and E. Barrett, 'Trajectories of spirituality: Producing and assessing cultural evidence at the International Criminal Court', *Language in Society* (forthcoming).

are therefore left with no choice but to construct linear narratives by cherry-picking from amongst bundles of testimonies.

In this paper, we offer a different, more fundamental explanation for the *Ongwen* judgment's deficiencies: the *purely* textual format of the judgment. One look at the court records for the *Ongwen* case shows that there are no full public audio/video recordings of the witness testimonies (which formed the basis of the trial judgment). When seen in conjunction with the final judgment (which is purely textual and cites only written material),⁶ the legacy of the case remains purely textual.

We argue that a textual judgment afflicts significant epistemic and material injuries on the victims for whom it is delivered. Our argument rests on two limbs. Firstly, it is based on the deficiencies of the textual medium, such as its proclivity for singular and depersonalised narratives that are isolated from socio-cultural contexts. Secondly and relatedly, we show that despite these deficiencies, text is preferred over sensory and affective mediums because it prevents challenges to the epistemic and social monopoly of law and its community of arbiters. Here, sensory experiences speak to causal results of external stimuli and affective experiences speak to internal, emotional changes.⁷ In this paper, we read affect as the necessary by-product of senses, and consider the value of affect in this attendant form alone. Although engaging with international criminal law remains a predominantly sensory and affective exercise, the tool of the judgment—which is the final and lasting legacy of each case—erases this aspect of the victims' lived experiences by sticking to the textual medium.

This paper joins the long-standing pedigree of socio-legal scholars such as Mulcahy who have lamented lawyers' obsession with text and have asked different questions about how legal phenomenon are experienced, constructed, conditioned, or challenged through senses.⁸ At the same time, it joins scholarship that spotlights the reparative value of senses and affect for international criminal law. As Thorne argues, unlike text, senses and affect are by nature dynamic, emotional, immediate, emancipatory, and hold immense potential for negotiation, challenge, and memory-making.⁹ We spotlight these values and call for the making of a jurisprudence of *senses*. In particular, we

6 Judgment.

7 A. Philippopoulos-Mihalopoulos, 'Atmospheres of law: Senses, Affects, Lawscapes', *7 Emotion, Space and Society* (2013) 35–44.

8 L. Mulcahy, E. Rowden and K. Orr, 'Making Sense of Law: Pungency, Feel and Rhythm', *14(2) Law, Culture and the Humanities* (2018) 199–201.

9 B. Thorne, 'Atrocity archive: Sensory expression of past-present-future', *15(2) Law and Humanities* (2021) 272–278.

turn our attention to the tool of the judgment, which is universally understood as the pinnacle of the case, to attend to the ‘full panoply of sensory dynamics’.¹⁰

Using the *Ongwen* trial judgment as a case study, Section 2 of this paper spotlights multiple instances where text afflicts injustice—epistemic, legal, and procedural. In so doing, it also queries why text is preferred as the medium of the judgment at the expense of senses and affect. In other words, it gives historical and social reasons for international criminal law and particularly judgments’ aversion to senses and affect. The *Ongwen* case, as we explain below, is suited for this study given that it emerges from a conflict seeped in sensory experiences and from mass sexual crimes that rely heavily on sensory subjugations. The trial judgment is especially relevant because of the density of sensory material it considers and the value that the sensory experiences carry for the Acholi community. In fact, one witness in the case even remarked that ‘if the world should know what happened [in Uganda], then this photo would be a very clear message’,¹¹ making a reference to how photographs and videos from the conflict told a much clearer story of the extent of loss suffered by the Acholi community.

With this background, Section 3 launches into a historical examination of international criminal law’s engagement with senses and affect—both inside and outside the courtroom. Upon reflecting on the pervasive presence of senses and affect in international criminal law and the reasons why this presence is systematically censored in the judgment, Section 4 discusses how the stakeholders of international criminal law are better served by activating the sensory and affective potential of judgments, drawing on examples from the *Ongwen* case. This section demonstrates how the current toolboxes of the ICC can be channelled to equip judgments to provide direct outlets for the voices/faces of the unheard local communities and create meaningful relationships with the international criminal justice project’s multiple stakeholders.

2 Limitations of Textual Judgments

As Goodrich notes, the legal tradition—both religious and secular - has been predominantly etched in text.¹² Legal interpretation has been mainly

¹⁰ L. Mulcahy, ‘Eyes of the Law: A Visual Turn in Socio-Legal Studies?’, 44 *Journal of Law and Society* (2017) 111–128.

¹¹ ICC, *Ongwen case: “In the courtroom” programme*, 1 May–17 July 2017, available online at www.youtube.com/watch?v=wJcUeBYbjcU (accessed 20 August 2023).

¹² P. Goodrich, ‘Traditions of interpretation and the status of the legal text’, 6(1) *Journal of the Society of Legal Scholars* (1986) 53–69.

concerned with finding textually correct meanings of legal words and phrases. This textual correctness has been transported to most parts of the world as a result of the linguisticism that is endemic in domestic and international legal systems.¹³ Some argue that the dominance of text came to be because text was perceived as stable and impervious to quick change.¹⁴ To others, text guaranteed accessibility and clarity.¹⁵

These virtues are valued the most in the tool of the written judgment, which, as Judge Bertram Schmitt observed in his oral pronouncement of the summary of the *Ongwen* judgment, is the ‘only authoritative document’ articulating the Court’s position.¹⁶ The judgment is the lasting legacy of the case, the most decisive pronouncement by the Court of what is right and what is wrong. In international criminal tribunals, more than the substantive outcome, judgments serve as carriers of collective memory of violent conflicts and offer descriptions of historical events.¹⁷ As David Scheffer, the former UN Secretary-General’s special expert on assistance to the Khmer Rouge trials, remarked, the rendering of the judgment against the former Khmer Rouge leaders by the Extraordinary Chambers in the Courts of Cambodia (hereinafter ECCC) was a ‘Nuremberg moment, carrying significant weight for Cambodia, international criminal justice, and the annals of history.’¹⁸ For international institutions, judgments are also ways to firm up their own power and legitimacy as well as that of the international society on whose behalf they consider themselves to be speaking.¹⁹ Text—and its attendant clarity and accessibility—is in service of this objective.

However, the *Ongwen* case usefully illustrates that text, especially within the international criminal law setting, afflicts more harm than one would have imagined. If so, it bears querying why international criminal law prioritises

13 O. Ammann, ‘Language Bias in International Legal Scholarship: Symptoms, Explanations, Implications and Remedies’, 33(3) *European Journal of International Law* (2022) 821–850.

14 F.K. von Savigny, *System des heutigen römischen Rechts* (Bei Veit und Comp, Berlin, 1841), p. 220.

15 O. Ammann, ‘The Interpretative Methods of International Law: What Are They, and Why Use Them?’, in *Domestic Courts and the Interpretation of International Law* (Brill Nijhoff, Leiden, 2020), pp. 191–222.

16 ICC, *Ongwen case: Summary of the verdict*, 4 February 2023, available online at www.youtube.com/watch?v=A858kVSh2oc, minute 1:58 to 2:05 (accessed 20 August 2023).

17 M. Hirsch, ‘The Role of International Tribunals in the Construction of Collective Memories’, 16–43 *Hebrew University of Jerusalem Legal Research Paper* (2016) 1–12, p. 3.

18 ‘Khmer rouge leaders found guilty of genocide in landmark ruling’, *AFP* (16 November 2018).

19 S. Nimage, ‘An International Conscience Collective? A Durkheimian Analysis of International Criminal Law’ 7 *International Criminal Law Review* (2007) 561–619, pp. 605–607.

text over senses and affect. What is in it for international criminal law and those who make and unmake it?

First, a textual judgment has the effect of depersonalising key stakeholders in the international criminal law story. Feminist scholars such as Williams and Minow note how the emancipatory potential of voice cannot be slighted.²⁰ Even if international legal tribunals suffer from problems of Eurocentrism,²¹ enjoying personhood and voice in these institutions is imperative for the communities whose life stories these institutions are adjudicating to be able to claim ownership over them.

As Kalpouzos suggests, the losing of voice at adjudicative tribunals afflicts double victimisation - where communities are first divested of their agency by violent conflicts and then have to go through this loss of voice again when they attempt to seek legal recourse.²² This is what we see in the *Ongwen* case as well, where the text of the judgment reduces victims to mere pseudonyms. Case in point is witness P-0280. P-0280, a former child soldier abducted from the Abok IDP camp in 2016 when he was around 15 years old, testified in his own voice about how he was treated upon abduction and why the LRA chose to abduct younger men.²³ However, his voice found no microphone or audience in the written judgment.

As the psychoanalyst Ferenczi showed, silencing through loss of voice is an inherent characteristic of sexual abuse. In such a case, when a victim does decide to testify in their own voice, treating them as voiceless in a court can have a traumatising effect, mirroring their silencing by the perpetrator.²⁴ In the *Ongwen* case, this is what was done to witness P-0352, a victim of sexual crimes who was assigned to Ongwen's household and forced to marry an LRA soldier, who testified to Ongwen's sexual crimes.²⁵ Her testimony was crucial in establishing the crimes committed by the LRA and the accused Dominic Ongwen. But the judgment only offered judge-renditions of her profound testimony, stripped of her lived experience and bravery.²⁶

20 P. Williams, *The Alchemy of Race and Rights* (Harvard University Press, Cambridge, MA, 1991), p. 153; M. Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, Ithaca, NY, 1991).

21 N. Tzouvala, 'The Specter of Eurocentrism in International Legal History', 31(2) *Yale Journal of Law and the Humanities* (2021) 413-432.

22 I. Kalpouzos, 'International Criminal Law and the Violence against Migrants', 21(3) *German Law Journal* (2020) 571-597. H. Arendt makes a similar argument in *The Origins of Totalitarianism*, New Edition with Added Prefaces (Harcourt Brace, London, 1951/1979).

23 Judgment, paras 501-505; ICC, *supra* note 11 (1:40-2:35).

24 M.R. Khan, 'Between spoken word and written language: Playing', 29 *Etudes Psychotherapiques* (1977) 163-164.

25 Judgment, paras 404-405; ICC, *supra* note 11 (3:01-4:19).

26 Judgment, paras 404-405, 2151-2152, 2184-2186.

In cases like *Ongwen* which are marked by rampant sexual crimes, testimonies lean heavily on sensory details. As van der Kolk notes, ‘the imprints of traumatic experiences are organised not as coherent logical narrative but as fragmented sensory and emotional traces’.²⁷ Several neurobiological and psychological studies have also found testimonies of sexual abuse survivors to be non-linear and consisting of primary sensory information (sights, smells, sounds) linked to physiological fear symptoms.²⁸ There are several examples of this in the *Ongwen* trial itself. P-0396, one of the abducted wives in the LRA household, testified about her experiences with facial blurs.²⁹ She described her husband as ‘as tall and light-skinned, with long hair, and said, notably, that he could not straighten his arms ‘because they were a bit bent’.³⁰ She also spoke of how the abductees were each ‘given a human being to remove the liver, heart and swallow it in order to become strong’.³¹ Another sexual abuse survivor P-0101, when describing the events of her abduction by Ongwen, vividly recalled her school uniform, ‘a pink skirt and white blouse with red stripes on the arms’.³² She also remembered that Ongwen smeared water and shea nut oil on her in ‘order to mark her as his’.³³ While a reading of such details offers possibilities to visualise the perpetrators described, the centrality and gravity of the sensory details contained gets buried in the printed text. In fact, text treats these sensory details as irrelevant and incoherent, rather than crucial evidence of the victims’ trauma. In written form, silences or incoherence or randomness can be incorrectly translated as a lack in the speaker to relate the actual traumatic event.

Mandel recognises that voice—even through acute silences and epistemological gaps—is better equipped to capture the traumatic impact of certain experiences on the speakers’ psyche.³⁴ In this way, voice is able to overcome the limitations of language when trying to convey the horror of trauma.³⁵ That said, although there is reason to believe that voice is better equipped to convey trauma, it could also have retraumatising effects. As

27 B.A. van der Kolk, ‘Trauma and memory’, 52(S1) *Psychiatry and Clinical Neurosciences* (1998) S52–S64.

28 C.R. Brewin, ‘The Nature and Significance of Memory Disturbance in Posttraumatic Stress Disorder’, 7(1) *Annual Review of Clinical Psychology* (2011) 203–227.

29 Judgment, paras 418–427.

30 Judgment, para. 420.

31 Judgment, para. 423.

32 Judgment, para. 2013.

33 *Ibid.*

34 *Ibid.*

35 N. Mandel, *Against the Unspeakable: complicity, the Holocaust and slavery* (University of Virginia Press, Charlottesville, VA, 2006).

studies reveal, even a ‘particular accent or intonation, the pitch of a voice, or the sound of a language can trigger intrusions and flashbacks by which the traumatic event is relived’.³⁶

In the case of the judgment, this trauma would be more accurately conveyed if the judgment were to plug in audio-excerpts from witnesses’ testimonies in their own voice, with the blurs. Notably, ours is not a call to remove the protections offered to witnesses by any means. It is only a call to acknowledge witness identities in the way that they intend, without reducing them to mere written figments. By the Trial Chamber’s own admission, ‘these victims have a right not to be forgotten. They have the right to be mentioned explicitly’.³⁷ As much as we recognise the Court’s duty towards safeguarding the safety of the witnesses, a mere written account of their testimony in a judge’s words is insufficient.

However, as we probe the reasons for the preference of text as the chosen medium for judgments, it becomes overtly clear, as scholars like Mulcahy explain, that this preference is neither unique to international criminal law, nor is it new. All forms of law and its many dispensers have traditionally strived to ensure that their epistemic control remains unchallenged.³⁸ This is what has motivated both the preference for text and the systematic erasure of sensory epistemologies—particularly epistemologies of those who are not lawmakers or judges. A historical study reveals that as colonialism became more widespread, the preference for written text was widely enforced to justify the disqualification of colonised peoples from law-making spaces, citing their illiteracy and incompetence.³⁹

A similar imbalance in epistemic authority has been built into international criminal law.⁴⁰ Even now, decades after the formal demise of colonialism in most parts of the world, the Rome Statute and the Rules of Procedure and Evidence retain orthodox and Eurocentric notions of ‘literacy’ to classify those who seek redress from the Court. Rule 102 of the Rules of Procedure and Evidence of the Court allows illiterate persons to submit communications in audio, video, or other electronic forms. The framing of this rule as a type of ‘accommodation’ made by the Court strongly indicates the superiority of status enjoyed by literate persons and the lowly place awarded to those who

36 B. Busch and T. McNamara, ‘Language and Trauma: An Introduction’, 41(3) *Applied Linguistics* (2020) 323–333.

37 ICC, *Ongwen case: summary of the verdict*, 4 February 2021, available online at www.icc-cpi.int/sites/default/files/itemsDocuments/ongwen-verdict/2021.02.03-Ongwen-judgment-Summary.pdf (accessed 15 April 2023), para. 10.

38 Mulcahy *et al.*, *supra* note 8.

39 *Ibid.*

40 Ammann, *supra* note 13.

do not meet such thresholds of literacy. On this basis, those who are not well-versed with textual epistemologies are discredited in their capacity as knowers. In other words, international criminal law also leaves no room for visual, sonic, and oral epistemologies.⁴¹

We argue that the harms of such a hierarchy in literacy are most clearly seen in the written judgment,⁴² which as Judge Schmitt observed in his oral pronouncement of the summary of the *Ongwen* judgment, is the ‘only authoritative document’ articulating the Court’s position.⁴³

The task of arriving at a judgment confers great power and responsibility in the judges. In Sander’s words, ‘judges act as positivist historians, imposing consensus on contrasting and conflicting evidence, by selecting one narrative in preference to others, and ultimately by conferring the mantle of fact on the narratives they construct and validate in their judgments.’⁴⁴ Judges become the sole gatekeepers of the histories and realities encapsulated in the dispute.⁴⁵ Judges—especially in international criminal tribunals - are acutely conscious of this responsibility. Typically, the expectation of judges, as former judge Theodor Meron notes, is their ‘will and ability to overcome their preconceived preferences and consider the case at issue dispassionately, objectively, and fairly.’⁴⁶ However, the truth is that judges are self-interested individuals. The judgment is an instrument for judges to craft their personal legacies, legacies that they prefer to keep immune from tarnish. The first name that comes to mind in conversations about judges creating personal legacies through judgments is Judge Cassese. With every move, from the International Criminal Tribunal for the Former Yugoslavia to the Special Tribunal for Lebanon, Cassese drove

41 A. Craft, *Anishinaabe Nibi Inaakonigewin Report: Reflecting the Water Laws research gathering conducted with Anishinaabe elders at Roseau River*, available online at ssrn.com/abstract=3433235 (accessed 3 August 2023).

42 B. Sander, ‘The Method is the Message: Law, Narrative Authority and Historical Contestation in International Criminal Courts’, 19(1) *Melbourne Journal of International Law* (2018) 299–334.

43 ICC, *supra* note 16 (1:58–2:05).

44 B. Sander, ‘Introduction’, in *Doing Justice to History: Confronting the Past in International Criminal Courts* (Oxford University Press, Oxford, 2021), pp. 1–25; E.H. Reiter, ‘Fact, Narrative, and the Judicial Uses of History: Delgamuukw and Beyond’, 8 *Indigenous Law Journal* (2010) 55–78.

45 V. Nesiiah, ‘The Trials of History: Losing Justice in the Monstrous and the Banal’, in R. Buchanan and P. Zumbansen (eds.), *Law in Transition: Human Rights, Development and Transitional Justice* (Bloomsbury, London, 2014), pp. 289–308. (highlighting how transitional justice institutions operate as ‘official gatekeepers—privileging some histories while obscuring others’).

46 T. Meron, *Standing Up for Justice: The Challenges of Trying Atrocity Crimes* (Oxford University Press, Oxford, 2021), p. 177.

the law forward in ways that were thought to be beyond the remit of judges.⁴⁷ In an interview, Cassese admitted that he ‘was not only a judge, passive and waiting for the prosecution.’⁴⁸ He ‘was acting as a president of an international tribunal. That leadership role called on him to push for action also’. This is not merely a statement of expectation, but also one of aspiration. Text—with its inner attribute of finality—acts as the perfect accomplice for these aspirations of judges. It disguises the self-interest of judges, and still allows judges to weld the directions of international criminal law without being seen as internal cogs in the machine.

Second, the exclusive reliance on text in the written judgment ignores the wider interactional context and may end up distorting what the witnesses intended to say. Illustratively, in their article, D’hondt, Perez-Leon-Acevedo, Ferraz de Almeida and Barrett show how judges selectively quote short pieces of witness testimonies without going so far as to contextualise.⁴⁹ When discussing the belief within the LRA in the spiritual powers of Joseph Kony, the then-leader of the LRA, the Trial Chamber put forward a theory that the young, newly inducted child soldiers tend to believe in Kony’s powers and their belief subsided/disappeared the longer they stayed.⁵⁰ In doing so, the Court referenced testimonies of witness P-0231 by gluing his answers to questions posed by different actors together and made it look like ‘a monological statement by P-0231 delivered in a continuous stretch of talk.’⁵¹ However, when we see the testimony following the excerpt, it becomes clear that P-0231 lost faith in Kony’s powers because of a political rift, which took place after the period during which Ongwen’s charged crimes occurred, revealing that the length of stay had nothing to do with his belief.⁵²

Similarly, Nistor notes how the term ‘kadoge’/‘kadogi’ (meaning ‘child’) was quite elastic in the Acholi language. It could be used to describe anyone younger than oneself. But the Trial Chamber cherry-picked some parts of the witness testimonies to pin down the 13–15 years age bracket for ‘childhood’, without

47 Listen to this excellent podcast series ‘Antonio Cassese: The Stubborn Sparrow’ (episodes 0, 1, and 5 are of particular relevance to our point), available online at antonio-cassese-the-stubborn-sparrow-f3145101.simplecast.com/episodes (accessed 25 April 2023).

48 H.V. Stuart and M. Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese - Interviews and Writings* Paperback (Amsterdam University Press, Amsterdam, 2010). See excerpt available online at press.uchicago.edu/Misc/Chicago/9789085550235.html (accessed 2 May 2023).

49 D’hondt *et al.*, *supra* note 5.

50 Judgment, para. 2645.

51 D’hondt *et al.*, *supra* note 5; Judgment, para. 2646.

52 ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-T-123-Red2-ENG, Trial Chamber IX, Transcript, 2 November 2016, lines 20–23.

giving credit to its flexible, ever-changing meaning in the Acholi vernacular.⁵³ Nistor's example exposes the Court's inability to escape its Western gaze when engaging with different cultural contexts.⁵⁴ The Court's mis-reading of the Acholi terms 'kadoge' and 'kadogi' emerge from its predisposition to Western epistemologies which expect consistency and fixedness in language. This is also visible in the Court's constant use of the qualifier 'so-called' when referring to the wives and husbands in the LRA camps, for instance in its recounting of P-0396's testimony.⁵⁵ Interestingly, the witness herself never used the qualifier, instead choosing to speak of the wives and husbands of the household in a matter-of-fact way.⁵⁶ Similarly, when referring to her statement that she was forced to cut open an abductee and swallow their organs, the Court almost exoticised the experience without offering any consideration for the trauma it afflicted on her. Case in point is this excerpt from the transcript of her testimony:

QUESTIONED BY MR AYENA ODONGO:

Q. [12:38:42] Madam Witness, can you kindly tell Court how big you discovered the human liver to be, the liver of that girl, and then her heart? How big were they?

A. [12:39:08] I cannot know how big. I cannot know the size.

Q. [12:39:15] Were you asked to chew or you just were asked to swallow?

A. [12:39:34] How can you swallow something without chewing?

PRESIDING JUDGE SCHMITT: [12:39:39] May I shortly, just shortly. Madam Witness, was—were these body parts, were they cut into smaller pieces? Or could you explain it to us in a way that we can picture it, that we have also an idea in our heads what has happened?

THE WITNESS: [12:40:02] (Interpretation) It was cut into pieces.

PRESIDING JUDGE SCHMITT: [12:40:06] And who cut it?

THE WITNESS: [12:40:15] (Interpretation) I do not know who cut it.

53 A. Nistor, A. Merrylees and B. Hola, 'Spellbound at the International Criminal Court: The intersection of spirituality & international criminal law', in J. Fraser and B.M.G. Leyh (eds.), *Intersections of Law and Culture at the International Criminal Court* (Edward Elgar, Cheltenham, 2020), pp. 147–168; Nistor, *supra* note 2.

54 U. Obo and D. Ekpe, 'Africa and the international criminal court: A case of imperialism by another name', 3(10) *International Journal of Development and Sustainability* (2014) 2025–2036.

55 Judgment, paras 419, 420, 427.

56 ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-T-126-Red2-ENG, Trial Chamber IX, Transcript, 8 November 2017; ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-T-127-Red2-ENG, Trial Chamber IX, Transcript, 9 November 2017.

As one can see, the judge and the lawyer seem to be constantly questioning the witness about the size of the organs, how she consumed them, and whether they had been cut into pieces.⁵⁷ The witness even expresses her own annoyance at the relevance of these questions and her discomfort in answering them. The hostile and clinical nature of the questioning does not have margin for cultural sensitivity. In fact, in her autobiography, Evelyn Amony, a former LRA abductee, speaks at length about how the eating of goat livers was a celebratory practice in the Acholi community.⁵⁸ The Court, however, did not acknowledge or bring this cultural knowledge onto its record. This is only one of several instances which reveal the Court's Western gaze.

Several scholars have written about how international criminal law's Western gaze has been cultivated through notions of disgust and savagery.⁵⁹ These notions often use *shadows* of senses and affect. As López's remarks, 'given the longstanding characterisation of international crimes as evil, it perpetuates well-documented stereotypes of darker *skin* being associated with wickedness, thereby building on a pernicious narrative of the 'evil Black body'.⁶⁰ Fino writes about how prosecutors bolster rhetorics of perpetrators being immoral and savage using sounds, sights, and smells *described by* eyewitnesses.⁶¹ For instance, during the proceedings of Case 002/02 at the ECCC, Witness Him Huy graphically described how the prisoners detained in the Choeng Ek Genocidal Center would be executed to the sound of bleating generators, so that the screams of the prisoners would be inaudible.⁶² The *Ongwen* case is littered with such examples. For instance, when ascertaining whether Ongwen genuinely had a mental disorder, the Court relied on expert testimonies which claimed that Ongwen's ability to experience the *smell of* blood or gun powder in anticipation of an attack were signs of his mental instability.⁶³ P-0286 also testified about how he 'heard people whistling while others were burning the

⁵⁷ *Ibid.*

⁵⁸ E. Amony, *I Am Evelyn Amony* (2016), available online at www.unwomen.org/en/news/stories/2016/6/i-am-evelyn-amony-a-memoir-of-war-rape-and-survival (accessed 21 August 2023).

⁵⁹ S. Xavier and J. Reynolds, "'The Dark Corners of the World': TWAIL and International Criminal Justice', 14 (4) *Journal of International Criminal Justice* (2016) 959–983.

⁶⁰ R. López, 'Black Guilt, White Guilt at the International Criminal Court', in M. Sirleaf (ed.), *Race and National Security* (Oxford University Press, Oxford, 2023), pp. 211–228.

⁶¹ A. Fino, *The Sound, Smell, and Taste of Atrocity Crimes - Witnesses' and Perpetrators' Perspectives in International Courtrooms*, available online at research.rug.nl/en/publications/the-sound-smell-and-taste-of-atrocity-crimes-witnesses-and-perpet (accessed 25 April 2023).

⁶² ECCC, *Case 002/02*, E1/427.1, Trial Chamber, Transcript of Hearing on the Substance in Case 002/02, 4 May 2016, p. 43.

⁶³ Judgment, para. 2538.

camp'.⁶⁴ In paragraph 1897, the Court extensively relied on witness descriptions of the sounds they heard and savage sights they saw during the LRA attack on the Ibok IDP camp.⁶⁵

Facially, such engagement—with smells, sights, and sounds of atrocity crimes—suggests that international criminal law judgments sometimes embrace senses and affect. When we read about loudspeakers muffling sounds of executions in Cambodia or the smell of burnt belongings in Srebrenica, we momentarily forget that we did not hear the loudspeakers or experience these smells ourselves. We also start to think of judgments as sense-scapes⁶⁶ offering more than judge renditions of atrocity crimes. However, this engagement is merely illusory as in reality, the judgment is fully dressed in text before it is produced to the reader.

This affinity for text is not coincidental. It is the result of a deliberate censorship of senses by the law. As scholars like Ahmed argue, this is because senses and affect are inherently unpredictable and contingent on others' experiences.⁶⁷ Their contingency poses a direct affront to the legal project, which has historically benefited from enforcing and maintaining conditions of inequality.⁶⁸ It is to sustain these unequal structures that law desperately regulates which surfaces we touch, which smells we enjoy and which ones we are disgusted by, which colours we find appealing and which ones we reject.⁶⁹ The law then uses the separation of already existing senses and affect to create *different* classes of people, to create hierarchies between social classes, and to make itself indispensable in preserving these classifications.⁷⁰ Text serves as the tool of choice for the law in this project of differentiation.

Third, the format of the written judgment enforces a singular narrative, showing the door to multiple and even internally conflicting interpretations.⁷¹ In the *Ongwen* judgment of the Trial Chamber, for instance, text is used to present a unified victim experience and a singular understanding of the compassion-less accused Dominic Ongwen, eliciting the empathy of the

64 *Ibid.*

65 Judgment, para. 1897, footnote 5012.

66 F. Ross, 'Sense-scapes: senses and emotion in the making of place', 27(1–2) *Anthropology Southern Africa* (2004) 35–42.

67 S. Ahmed, *The Cultural Politics of Emotion* (Edinburgh University Press, Edinburgh, 2006).

68 P. Virilio, *L'insécurité du territoire* (Editions Galilee, Paris, 1993).

69 G. Deleuze and F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (Bloomsbury, London, 2013).

70 J. Bens, *The Sentimental Court: The Affective Life of International Criminal Justice* (Cambridge University Press, Cambridge, 2022).

71 R.M. Cover, 'Violence and the Word', 95 *Yale Law Journal* (1986) 1601–1630; R.M. Cover, 'Foreword: nomos and narrative', 97(1) *Harvard Law Review* (1983) 4–68.

readers towards the victims while ignoring Ongwen's own victimhood.⁷² For one, the judgment actively uses the 'you' voice.⁷³ Amongst others, in paragraph 1731, the judgment quotes witness P-0410 and notes how he could tell that the civilians were indeed dead. In the judgment's rendition, the witness says 'you keep on moving. You find another corpse. You jump over it and keep moving'.⁷⁴ Now, it is true that the 'you' voice is commonly used in Acholi.⁷⁵ But it performs a particular function in the judgment—which is that of putting the readers in the shoes of the victim(s) alone and arousing their indignation at the perpetrator's actions alone.

Such singularity is difficult to enforce through sensory experiences. Senses and affect are inherently free from reign.⁷⁶ It is impossible to predict how one will register a taste or smell or temperature, based on another's experiences. Given that sense and affect are also relational, their unpredictability is compounded as each emotion creates a ripple of responses amongst people in whose company it is experienced, and this chain carries on.⁷⁷

That is not to say that senses and affect cannot be instrumentalised for political ends. For instance, Tallgren, in her work, cites several examples including the 'Justice Matters' exhibition, a touring exhibition set up inside the ICC premises, in which survivors of sexual violence are shown as ravaged and mutilated, and the officers of the Court are dressed in white and presented as guardians of the virtues of international criminal justice.⁷⁸ Despite this potential to be propagandised, the power of such media lies in the fact that they do not live in isolation. To bring this back to the example proffered by Tallgren, that the exhibition was staged at the glass-walled and fenced premises of the Court reveals much about the Court's own leanings, which allow viewers of the exhibition to contextualise its contents.

72 R.L. Turok-Squire, 'A Judgment like a Spiderweb: Catching Dominic Ongwen in the language of the International Criminal Court', 3 *Journal of International Criminal Law* (2022) 54–93.

73 *Ibid.*, pp. 66–69.

74 Judgment, para. 1731.

75 Turok-Squire, *supra* note 72; L. Swigart, 'Unseen and Unsung: ICC Language Services and their Impact on Institutional Legitimacy', in F. Baetens (ed.), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press, Cambridge, 2019), pp. 272–296.

76 S. Connor, 'Michel Serres' five senses', in D. Howes (ed.), *Empire of the Senses: The Sensual Culture Reader* (Routledge, London, 2004), pp. 318–334.

77 B. Massumi, *Parables for the Virtual: Movement, Affect, Sensation* (Duke University Press, Durham, NC, 2002).

78 I. Tallgren, 'Come and See? The Power of Images and International Criminal Justice', 17(2) *International Criminal Law Review* (2017) 259–280.

On a more pragmatic level, the exclusive reliance on text strains the Court's resources. Importantly, the requirement to translate and transliterate is attached to the Court's obligation to respect the accused's fair trial rights.⁷⁹ For one, accurate interpretations and transliterations are hard to be guaranteed due to the difficulty of capturing the essence of video and oral testimonies in text and the inevitable loss of cultural and emotional nuances during the transliteration process.⁸⁰ Transliteration is also an extremely costly affair. Every day, the ICC spends thousands of dollars on transliterating and printing transcripts from the hearings of the day. In fact, in its proposed programme budget for 2023, the ICC Office of the Prosecutor has asked for 1.8 million dollars to support its language services unit, with a touted 31 new staff members being hired to meet the changing language needs of the Court's docket.⁸¹ In so doing, the Court has become more and more dependent on textual mediums and transliterators. What this ignores is that many dialects are purely oral and there are hardly any people who are trained to capture these dialects in written form. This is exemplified in the *Banda* case, where efforts to transliterate evidentiary material into the little known and unwritten language of Zaghawa, the only language that Abdallah Banda was able to speak and understand, delayed the trial for years and created huge costs.⁸² At its heart, these costs were the result of the Court's refusal to recognise that Zaghawa was a purely oral vernacular.⁸³ This struggle has also been acutely felt in the Court's efforts to transcribe Acholi, a vernacular with limited vocabulary where single words take on different meanings depending on context and pronunciation.⁸⁴

79 Article 67(1)(a) of the Rome Statute of the International Criminal Court (1998).

80 Y. Xu, 'Cultural Image Translation Strategies from the Perspective of Eco-Translatology', 12 *Creative Education* (2021) 1207–1214.

81 International Criminal Court Assembly of States Parties, *Proposed Programme Budget for 2023 of the International Criminal Court* (ICC-ASP/21/INF.2), para. 597.

82 Van-Lin, *supra* note 4.

83 ICC, *Prosecutor v. Adallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-131, Office of the Prosecutor, Prosecutions Response to the Trial Chamber's Request for Written Submissions on issues to be addressed during the Status Conference on 19 April 2011, 14 April 2011, para. 7; I. Compes, *Zaghawa-Wagi: Towards documenting the Sudanese dialectal variant of Zaghawa*. *Endangered Languages Archive*, available online at ifl.phil-fak.uni-koeln.de/en/general-linguistics/projects/current-projects-gl/zaghawa-wagi-towards-documenting-the-sudanese-dialectal-variant-of-zaghawa (accessed 15 April 2023).

84 University of Wisconsin-Madison, 'Acholi: "Literary" Acholi', *University of Wisconsin-Madison Students in African* 671 (University of Wisconsin-Madison, Madison, WI, 2019), available online at wisc.pb.unizin.org/lctresources/chapter/acholi-literary-acholi/ (accessed 20 April 2023).

3 Senses Around International Criminal Law

Despite the law's motives and practices of sensory censorship, the oeuvre of the law has traditionally borne strong sensory and affective dimensions. When one is alive to the ubiquity of what Philippopoulos-Mihalopoulos calls lawscapes,⁸⁵ it becomes clear that the law intrudes even our most private experiences—from the water we use to bathe to our sexualities and sexual relationships to our food and internet connections. These private experiences - perceptibly and invisibly—offer both senses and affect in abundance.⁸⁶

This is heightened in the case of international criminal law, which is born out of war and conflict, which as Cordoba aptly remarks, 'senses were the ammunition for'.⁸⁷ Historians have written about the intersensorial histories of the World War II—an event which defined the course of international criminal law.⁸⁸ Mrozek, for instance, writes about border networks that were created through smells that wafted across the Berlin Wall, communities who were able to smell Soviet armies, and diplomacies that were forged by the sending of Eisenhower food packages.⁸⁹ The *Ongwen* case, similarly, was born out of an alarmingly violent civil war in Uganda that heavily relied on mass sexual crimes and the conscription of child soldiers—both steeped in sensory deprivations. The LRA is also known for its heinous practices of cutting off the lips, ears, and noses of thousands of Ugandan civilians—another tactic directly targeting the sensory abilities of the victims.⁹⁰

When these conflicts become the subjects of court proceedings, then their sensory baggage wafts into the hallowed walls of courts too. Here, it is important to clarify where the ambit of international criminal law itself begins. At the outset, as Philippopoulos-Mihalopoulos argues, our understanding of space has been produced by and is mediated by our understanding of law: '[i]deas

85 A. Philippopoulos-Mihalopoulos, *In the landscape* (Routledge, London, 2007).

86 A. Philippopoulos-Mihalopoulos and S.A. FitzGerald, 'From space immaterial: the invisibility of the landscape', 17 *Griffith Law Review* (2008) 438–454.

87 C. Cordoba, *Sino-Swiss Relations during the Cold War (1949–1989): Between Soft Power & Propaganda* (Routledge, London, 2022).

88 B. Mrozek, *Tagungsbericht: Conflict and the Senses in the Global Cold War: From Propaganda to Sensory Warfare*, available online at www.hsozkult.de/conferencereport/id/fdkn-127425 (accessed 21 April 2023).

89 B. Mrozek, *The scents of others: An olfactory history of the German military division*, available online at www.ifz-muenchen.de/en/research/ea/research/the-scent-of-others-an-olfactory-history-of-german-division?no_cache=1&print=1&type=98&cHash=ca8e51021fd597b32d4cb109e32515c4 (accessed 10 August 2023).

90 Human Rights Watch, 'DR Congo: Lord's Resistance Army Rampage Kills 321', *Human Rights Watch* (2010), available online at www.hrw.org/news/2010/03/28/dr-congo-lords-resistance-army-rampage-kills-321 accessed 21 August 2023).

of space as representation, text, abstraction, system and closure ... all come from a juridical understanding of space.⁹¹ That said, while space is a juridical construction, it is not a component of applied law as such. Like conflicts are spaces which trigger international criminal law rules, courtrooms are spaces which apply international criminal law. Neither activate the remit of the law itself.

In this context, it appears that the spaces in which international criminal law is applied carry many sensory imprints. For instance, the Nuremberg trial discussed how orchestras were played on the platforms of Auschwitz, to soothe the fears of the Jews arriving to their unknown fates.⁹² During the proceedings of Case 002/02 at the ECCC, Witness Him Huy graphically described how the prisoners detained in the Choeung Ek Genocidal Center would be executed when the generators were blaring loudly, so that the screams of the prisoners would be inaudible.⁹³

As the sensory presence in the trials magnifies, trials take on a more affective framing. In their work, Tallgren, Ainley, and Humphreys draw persuasive parallels between international criminal law trials and film.⁹⁴ They remark how international criminal trials toy at the emotions and outrage of victims, audiences, the accused, the legal officers, and the legal fraternity.⁹⁵ The Court is the Holy Grail where heroes are born, narcissists and villains shamed, and victims avenged. One can see how this cinematic affective vocabulary permeates the *Ongwen* trial too. An animated film about the case produced by the ICC's outreach office in 2019 is case in point.⁹⁶ The video (screengrabs in Figure 1)—albeit superficially—teases out the two main narratives that framed the case. One of the helpless, caged former child soldier. The video begins with a short soundbite of a former child soldier, recounting the ordeal of his conscription and the complete stripping of his aspirations. The viewer is made to feel sympathy for the child soldier. This empathy is soon brusquely cut off, by a stark reminder of the ruthless monster that this child soldier turns into. The film ends with a (rather awkward) still of a caged bird being tried by

91 A. Philippopoulos-Mihalopoulos, 'And For Law: Why Space cannot be understood without Law', 17 *Law Culture and the Humanities* (2018) 620–639, p. 627.

92 See T.H. Sachnowitz's comment here: <https://holocaustmusic.ort.org/places/camps/death-camps/auschwitz/camp-orchestras/> (accessed 2 May 2023).

93 ECCC, *supra* note 62.

94 K. Ainley, S. Humphreys and I. Tallgren, 'International criminal justice on/and film', 6(1) *London Review of International Law* (2008) 3–15.

95 G.J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, Princeton, NJ, 2000).

96 ICC, "I want to start my life again" - Using child soldiers is a crime, available online at www.youtube.com/watch?v=wtRx5Pe5eiU (accessed 5 May 2023).

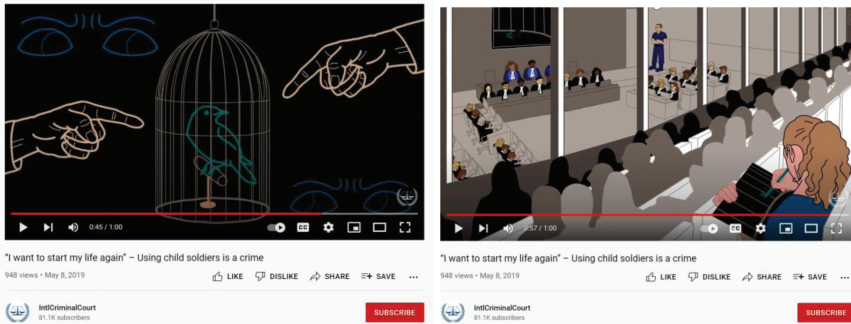


FIGURE 1 Screenshots from www.youtube.com/watch?v=wtRx5Pe5eiU/
COURTESY OF ICC.

the ICC. This film only teases the actual scale of the cinematic narratives that the *Ongwen* case fed off.

To us, it seems that the basis of international criminal law and the spaces where it is applied (the courtroom) are inundated by senses and affect. The question then is, should we allow international criminal law to continue censoring senses and affect?

4 Sensorily Reimagining the *Ongwen* Judgment

As international criminal law comes face to face with its troubled past, the calls for epistemic diversity in the field are becoming louder and louder.⁹⁷ Ours too is one such call, specifically directed at the tool of the written judgment. We argue that as the capstone of the case, the judgment ought not to be confined to text. If the case's lasting legacy is known only through words, that too of the judges, then it afflicts great epistemic injustice and symbolic harm to the many stakeholders in international criminal justice. In response, we suggest that the judgment be reimagined sensorily. How, then, does an affective re-imagination of judgment promote the interests of international criminal law stakeholders?

The first community of stakeholders who benefit from this re-do are victims. We argue, as a rich pedigree of scholars before us have done, that embracing art-based or sensory mediums in judgments can facilitate recognition of

97 B. Fagbayibo, *Ballads of Dissent: Music as a Tool for Rethinking International Law in Africa*, available online at twailr.com/ballads-of-dissent-music-as-a-tool-for-rethinking-international-law-in-africa/ (accessed 17 April 2023).

personhood.⁹⁸ When in place of a written transcript, one can hear a witness's testimony in their voice; where instead of judge's narrations of visuals, the receiver is able to see the wreckage of the perpetrator's crimes through their own eyes, there is an immediate recognition of the personhood of the victim.

This is best illustrated through the Court's treatment of the testimonies of two former LRA abductees: Evelyn Amony and Florence Ayot.

Amony was one of Joseph Kony's wives.⁹⁹ She was abducted by the LRA at the age of 11. Amony testified to the Court about her abduction in 1994, her subsequent escape from the LRA, and participation in the Juba peace talks between Kony and the Ugandan peace delegates. Her testimony also contained several details about how the LRA engaged with *ting tings*, the relationship between wives and LRA husbands, etc (as one can see in the video from 13:03 to 16:56; screenshot in Figure 2).¹⁰⁰ Amony testified without any facial or voice blurs, speaking in her capacity as a survivor as well as an advocate against sexual crimes. Despite having classified her testimony as credible and reliable, the Court only offered a measly written summary of her statement. More importantly, it referred to her via pseudonym D-0049 despite her brave decision to testify with her real name.



FIGURE 2 Screenshot from www.youtube.com/watch?v=nyqLdNoYh-I
COURTESY OF ICC.

98 M.M. Rahman, "Humanising" Statelessness through an Artistic Approach', 2(2) *Statelessness & Citizenship Review* (2020) 272–299.

99 Judgment, para. 433.

100 Judgment, para. 2218.

This treatment was not reserved to Prosecution witnesses alone. Case in point is Defence witness Florence Ayot.¹⁰¹ Ayot was one of Ongwen's wives and made a strong case for why he should be allowed to return to Uganda.¹⁰² She spoke of how difficult Ongwen's incarceration has been for her family. Although the Court engaged more substantively with Ayot's testimony than Amony's, even here the testimony was only made available through text despite Ayot's decision to testify without any facial/voice blurs. A video excerpt (from 16:57 to 22:52 in the above video) more accurately conveys how Ayot herself was battling with her harrowing experience as an LRA abductee even as she lent her voice in Ongwen's support.

Personhood is not relevant for survivors of sexual crimes alone. One of the witnesses Joseph Ywakomoi Oywak (P-0009) testified at length about the LRA's attack on the Pajule IDP camp and the LRA's activities in the region during the period of the charges.¹⁰³ Oywak testified in court without facial blurs. His testimony was considered reliable, but was confined to text.¹⁰⁴ What is ironic is that Oywak's testimony relied heavily on photographs that he had preserved from the Pajule camp. Speaking of one such photograph of Vincent Otti with a young child approximately 10 or 11 years of age wearing a Pajule school uniform, Oywak explicitly said 'we acquired these photographs from some children who returned from the LRA camps, we felt it necessary that if the world should know what happened, then this photo would be a very clear message'.¹⁰⁵

Moreover, our call for a sensory reimagination of judgments threatens to break the epistemic monopoly of judges and instead treats victims as the rightful narrators of their lived experiences. Unlike text, senses and affect are not partitioned by literacy or expertise. Senses are experienced by everyone. As Bermúdez notes, '[e]ach of us experiences our own body in a distinctive way. Part of that distinctiveness is that we each experience our body and our limbs *as our own*'.¹⁰⁶ Of course, this is not to say that senses are immune from social hierarchies.¹⁰⁷ However, they are relatively more egalitarian in their experience than text which is otherwise premised on assumptions of literacy.

¹⁰¹ Judgment, para. 398.

¹⁰² Judgment, para. 2519.

¹⁰³ Judgment, para. 441.

¹⁰⁴ ICC, *Ongwen case: "In the courtroom" programme (in Acholi), 1 May–17 July 2017*, available online at www.youtube.com/watch?v=XHFB6Yp30dc (accessed 2 August 2023).

¹⁰⁵ *Ibid.*

¹⁰⁶ J.L. Bermúdez, 'Ownership and the Space of the Body', in *The Bodily Self: Selected Essays* (MIT Press, Cambridge, MA, 2018), pp. 183–201.

¹⁰⁷ K. Herrity, B.E. Schmidt and J. Warr (eds.), *Sensory Penalties: Exploring the Senses in Spaces of Punishment and Social Control* (Emerald, Bingley, 2021).

With this mind, a sensory judgment—in our view—would create room for plural knowledges to breathe.¹⁰⁸ In a recent talk organised by the Grotius Centre for Legal Studies, McCallum launched a powerful critique of how international criminal justice does not ‘listen’ to indigenous identities and traumas.¹⁰⁹ This deafness is evident in the Western models of evidence-taking, the speaking of colonial vernaculars, and the denial of self-identification as survivors/victims at the Court. A sensory judgment may work to remedy this. A sensory judgment effectively transcends limitations imposed by the official working languages of the Court. In the *Ongwen* case, most of the intercepted evidence concerned tape recordings of people speaking in Acholi or Luo, both of which are not working languages of the court.¹¹⁰ The Chamber readily dismisses most of this evidence citing lack of translation capacity. Sensory evidence, then, allows even for such stakeholders to be heard—if not understood—in their self-determined ways. It allows for non-linear, disorganised, random, and everyday encounters to feature in the international criminal law script.¹¹¹ For instance, sexual abuse survivor P-0101, when describing the events of her abduction by Ongwen, vividly recalled the colours of her school uniform, ‘a pink skirt and white blouse with red stripes on the arms’.¹¹² She also remembered that Ongwen smeared water and shea nut oil on her in ‘order to mark her as his’.¹¹³ While these details facially seem removed from the sexual crime and are likely to be edited out of the judgment for reasons of irrelevance, a sensory excerpt would allow the Court to better appreciate why a victim is more attached to memories of their everyday life before the assault.¹¹⁴ In so doing, the judgment can be repurposed to generate discourse which is relational, reparative, diverse, and porous.

Sensory re-imaginings also enrich the *quality* of criminal justice offered to communities. Opening up the judgment to the wider sensory field instantly creates an outlet for the multidimensionality of justice to seep into the fold of international criminal law discourse. Justice is then no longer bound up by the binary outcomes of conviction or acquittal conveyed through a judgment.

108 N. wa Thiong’o, *Moving the Centre: The struggle for cultural freedoms* (James Currey, London, 1993).

109 Leiden University, *Justice through Indigenous Lenses* (2022), available online at www.universiteitleiden.nl/en/events/2022/01/justice-through-indigenous-lenses (accessed 23 March 2023).

110 Judgment, para. 650.

111 D. Redmon, ‘Video Methods, Green Cultural Criminology, and the Anthropocene: SANCTUARY as a Case Study’, 39(4) *Deviant Behavior* (2018) 495–511.

112 Judgment, para. 2013.

113 Judgment, para. 2013.

114 Mandel, *supra* note 35.

In his work on sensory archives, Thorne observes that ‘words can be hard to find, particularly those that seek to describe traumatic and complex social events and relationships’.¹¹⁵ But sensory stimulations are capable of capturing traumatic pasts and generating hope for repair. In his words, the sensory fragments in atrocity legal archives ‘can open up understanding about how justice, peace, and social repair might look, sound and feel like to those who have experienced horrendous suffering.’ The *Ongwen* trial was flooded with sensory fragments of the impact of Ongwen’s crimes—outside the courtroom, the public were exposed to images of the memorial for the 60 people killed in the Lukodi massacre¹¹⁶ to documentaries about the LRA leaders¹¹⁷ to visuals of Ongwen’s family watching his trial.¹¹⁸ Even more powerful were the sensory evidence brought into the courtroom - from photographs of children conscripted when wearing their school uniforms, videos of camps after LRA attacks to videos of several internally displaced children and women.¹¹⁹ Added to this were video excerpts of Ongwen’s statement from the trial which reveals both his culpability and his helplessness and anger towards his own position.¹²⁰ As Mannivannan notes, the act of retelling itself can be reparative.¹²¹ Whether in voice or in image. Perhaps this could translate into responses aimed at reducing vulnerabilities or repairing harm.¹²²

115 Thorne, *supra* note 9.

116 J. Jiwa, *Trial of LRA commander Ongwen still divides Northern Uganda*, www.thenewhumanitarian.org/news-feature/2021/6/30/trial-of-LRA-commander-ongwen-still-divides-northern-uganda (accessed 21 August 2023).

117 Save the Children, *Moving on – Surviving the Lord’s Resistance Army*, available online at resourcecentre.savethechildren.net/3ba158d/ (accessed 15 September 2022).

118 S. Hayden, ‘In Dominic Ongwen’s home village, many see a victim more than a perpetrator’, *Irish Times* (2023), available online at www.irishtimes.com/news/world/africa/in-dominic-ongwen-s-home-village-many-see-a-victim-more-than-a-perpetrator-1.4476487 (accessed 21 August 2023).

119 ICC, *supra* note 11.

120 ICC, *Ongwen case: In the Courtroom programme, January 2021 ACHOLI*, available online at www.youtube.com/watch?v=IHQHYgRpQOU (accessed 20 August 2023); ICC, *Ongwen case: In the Courtroom programme, January 2021 ENGLISH*, available online at www.youtube.com/watch?v=A1fNyicalFA (accessed 20 August 2023); J. Burke, S. Okiror and S. Lundin, ‘Ugandan ex-child soldier guilty of war crimes and crimes against humanity’, *The Guardian* (2021), available online at www.theguardian.com/law/2021/feb/04/uganda-ex-child-soldier-dominic-ongwen-guilty-of-war-crimes-against-humanity (accessed 21 August 2023).

121 Q. Manivannan, *Imagining a Care Curriculum*, available online at www.kcl.ac.uk/imagining-a-care-curriculum (accessed 13 March 2023).

122 A.K. Azad, D. Nadkarni and J.G.F. Bunders-Aelen, ‘Beyond Resistance, Beyond Assimilation: Reimagining Citizenship through Poetry’, 14(3) *Journal of Human Rights Practice* (2022) 986–1004.

The Court and the Office of the Prosecutor also stand to gain from such a re-imagination. Clarke's work on affective justice is a glowing (hypothetical) example of this. The author rearticulates international justice using the vocabulary of emotions, as an assemblage of 'power, history, and contingencies'.¹²³ She focusses on the relationship between African States and the Court and the controversies marring it. Clarke's work shows that the utility of affect cannot be understated. Affect essentially equips international criminal law to transcend the fixed grammars of law.¹²⁴ The politics of international criminal law then does not remain separated from the juridical life of international criminal law. Instead, the two are put in conversation. To borrow an illustration from Clarke's book, the trial of Ruto and Sang embroiled both the Court and the government of Kenya in a match of political mud-slinging, with the government of Kenya investing diplomatic and monetary resources in framing the Court as a 'meddling force that was doing the bidding of Western powers in Africa'.¹²⁵ While the Court struggled to find legal responses, ultimately calling off the case as an instance of a 'mistrial',¹²⁶ the race to find juridical solutions completely invisibilised the heavy affective rifts that the initiation of the case had caused. Ruto and Sang's election victory stood on postcolonial rhetoric. The ICC—having already intervened in Kenya—had been firmly branded as an exogenous, Western intervention.¹²⁷ While much of this is true, the Court's complete lack of engagement with the domestic political rhetoric is what enabled the formation of the Jubilee Alliance (a united front against ICC charges) and ultimately secured Ruto's acquittal and his election victory in Kenya.¹²⁸ In essence, this was a domino effect of the Court's initial dismissal of the case as a 'failure' to award justice, a framing that was regarded as blind to the community's expectations of the Court and their own political leaders. A more reflexive acknowledgment of this affective dimension would have

123 K.M. Clarke, *Affective Justice: The International Criminal Court and the Pan-Africanist Pushback* (Duke University Press, Durham, NC, 2019).

124 H. Lovat, 'Affective Justice: The International Criminal Court and the Pan-Africanist Pushback', 31(4) *European Journal of International Law* (2020) 1603–1610.

125 M. Kersten, 'A Missed Trial or a Mistrial? The End of the ICC Cases against Ruto and Sang', *Justice in Conflict* (2016), available online at justiceinconflict.org/2016/04/07/a-missed-trial-or-a-mistrial-the-end-of-the-icc-cases-against-ruto-and-sang/ (accessed 4 April 2023).

126 ICC, *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-2027-Red-Corr, Trial Chamber V, Decision on Defence Applications for Judgments of Acquittal, 5 April 2016.

127 Clarke, *supra* note 123.

128 Kersten, *supra* note 125.

allowed the Court to be seen as an accessible forum of redress for the victims in Kenya.

This also rings true in the context of the prosecution of Ongwen. Like the Kenyan situation, the *Ongwen* case was triggered by a self-referral from the state of Uganda. As Kersten notes, the self-referral was a strategic tool for the authoritarian Museveni government to prevent the ICC from investigating the crimes of the government forces.¹²⁹ At the same time, by self-referring, Uganda positioned itself as an ally to the ICC. However, this did not stop Museveni from joining forces with other African leaders to complain about the Court's unfair targeting of African defendants and indicting its Western biases.¹³⁰ On the Court's part, the agenda of resolving the conflict between the LRA and the Ugandan government has been of chief priority since the Court's inception. In fact, the ICC was heavily invested in facilitating the Juba peace talks between the two factions from 2006–2008.¹³¹ The peace talks were initiated after the ICC had issued arrest warrants against the LRA's top brass,¹³² in the hopes that the Court's involvement would incentivise both factions to bargain and arrive at an armistice of some sort. It was in this context that the trial of Ongwen took place. The trial therefore presented an opportunity for the Court to play a more instrumental role in the making of the peace process in Uganda. However, the Court chose not to fully consider the history of the Ugandan conflict or the political stakes of the case. Instead, it adopted a more clinical and legalistic approach towards adjudicating the crimes that Ongwen was charged with.

Soon after the start of the trial, the defences of duress and mental disease or defect became the focus of the case. Ongwen's lawyers invoked the defence of duress by arguing that Ongwen was under the control of Joseph Kony (supported by his belief in Kony's spiritual powers) and 'disobeying Kony or leaving the LRA would be punished by death'.¹³³ The defence lawyers also relied

129 M. Kersten, 'Between Disdain and Cooperation—Uganda's Controversial Place in the ICC-Africa Relationship', *Justice in Conflict* (2017), available online at justiceinconflict.org/2017/03/29/between-disdain-and-dependency-ugandas-controversial-place-in-the-icc-africa-relationship/ (accessed 4 August 2023).

130 B. Momanyi, 'Ugandan Leader Lashes Out at ICC', *IWPR* (2023), available online at iwpr.net/global-voices/ugandan-leader-lashes-out-icc (accessed 4 August 2023).

131 M. Kersten, 'The ICC and the Road to Juba', in *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford University Press, Oxford, 2016), pp. 64–91.

132 ICC, *Prosecutor v. Joseph Kony and Vincent Otti*, ICC-02/04-01/05-57, Pre-Trial Chamber II, Warrant of Arrest for Dominic Ongwen, 9 July 2005.

133 ICC, *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1722-Corr-Red, Defence, Public Redacted Version of 'Corrected Version of "Defence Closing Brief"', filed on 24 February 2020, 13 March 2020.

on medical experts to show that Ongwen suffered from dissociative disorders, depressive illness, and PTSD ('post-traumatic stress disorder').¹³⁴ However, the Court found that this diagnosis of Ongwen's trauma did not meet the conditions for mental defect under the Rome Statute.¹³⁵ Ongwen's lawyers also proposed a cumulative insanity-duress defence, which recognises that certain defendants may have enough lucidity to not qualify for the insanity defence but may still need to be absolved of some liability because of their trauma-induced dysfunctions.¹³⁶ This proposal also fell on the deaf ears of the Court.

In rejecting Ongwen's pleas for recognition of his own victimhood based on his trauma, the Court lost an opportunity to pay heed to the affective foundations of the case.¹³⁷ One may even argue that the Court's framing of the LRA rebels as pathological criminals deters the possibility of the LRA's cooperation with the Court or with the Ugandan government.

We think that a sensory reimagination has the potential to fill these affective gaps. As shown previously, senses and affect always go together. Creating space for senses then automatically makes the Court infrastructure more alive to the affective implications of the justice it dispenses.¹³⁸ This likely facilitates a considered understanding of the Court's goals amongst victim communities and makes it seem less like an exogenous, Western outfit. It is our argument that a sensory/affect friendly judgment would also foster trust-building in the ICC.

Here, it is important to credit the ongoing efforts to foster sensory experiences in the international criminal law narrative. Art and International Justice's 2019 visual and experiential exhibitions surrounding the Marshall Islands judgment of the International Court of Judgment was a commendable effort to centre the conversation about affect and international justice.¹³⁹ Tallgren's work on visuality on international criminal justice also deserves credit.¹⁴⁰ This only goes to show that a sensory judgment is not all that

134 Judgment, paras 2576–2578.

135 Article 31(1)(a) of the Rome Statute of the International Criminal Court (1998); Judgment, para. 2580.

136 ICC, *supra* note 133.

137 L. Hiromoto and L.F. Sparr, 'Ongwen and Mental Health Defenses at the International Criminal Court', 51(1) *Journal of the American Academy of Psychiatry and the Law* (2023) 61–71.

138 Bens, *supra* note 70.

139 Art and International Justice Initiative, 'Workshop: Art and International Justice: Sounds, Design, Visuals', *Art and International Justice Initiative* (2022), available online at artij.org/en/art-and-international-justice-sounds-design-visuals.html (accessed 9 March 2023).

140 Tallgren, *supra* note 78.

illusory or utopian a suggestion. Notably, such retellings have been explored frequently in other fields. Documentary criminology, for instance, employs images, sounds, and textures to reconfigure atmospheres in which criminal encounters take place.¹⁴¹ Documentary criminology ‘calls us to a series of systematic reflections within which we question and clarify that which we intimately live, but which has been lost to our reflective knowledge through habituation and/or institutionalization.’¹⁴² Some such affective retellings have permeated human rights conversations too, albeit only in the fringes. In her stunning piece on music and song in struggles for gender equality, Ghadery notes that departing from text-based doctrine can help us appreciate the multiple non-liberal philosophies which illuminate rights as sites of contestation/recontextualisation.¹⁴³ Ghadery cautions against using sensorily loaded mediums as instruments. Instead, she nudges us to think about music as another rights language, one which can be created and curated collectively.¹⁴⁴ Similarly, the works of Azad,¹⁴⁵ Nadkarni,¹⁴⁶ and Rizwan¹⁴⁷ guide us to see how poetry and literature can forge a genuine plurality of interactions, sans any hierarchies or discriminations.

Of course, the chief roadblock to the execution of this idea is the practical execution. In essence, we envision a sensory reimagination of the judgment to resemble this paper itself, where text is interspersed with other sensory sources. It seems that most criminal tribunals are already equipped with the tools to enable such makeovers. In fact, the ICC has now begun publishing livestreams of oral pronouncements of summary judgments. The *Ongwen* trial judgment, as well, was preceded by a short summary read out by Judge Schmitt.¹⁴⁸ This procedure was presumably introduced to create a space where the immediate affective impact of the judgment can be felt and expressed by stakeholders in the case and beyond. Crushing, however, this opportunity is made available

141 Redmon, *supra* note 111; J. Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press, Durham, NC, 2010).

142 Redmon, *supra* note 111; V. Sobchack, ‘The Active Eye: A Phenomenology of Cinematic Vision’, 12(3) *Quarterly Review of Film and Video* (1990) 21–36.

143 F. Ghadery, ‘Beyond international human rights law – music and song in contextualised struggles for gender equality’, 13(1) *Transnational Legal Theory* (2022) 31–58.

144 *Ibid.* She also cites Mani in support of this point: R. Mani, ‘Women, Art and Post-Conflict Justice’, 11(3) *International Criminal Law Review* (2011) 543–560, p. 543.

145 Azad *et al.*, *supra* note 122.

146 D. Nadkarni, ‘I Understand You, Across the Chasm that Divides Us: Rethinking Community Through Poetry’, 40 *Jaarboek voor Vrouwengeschiedenis* (2021) 137–142.

147 R. Rizwan, ‘Local Flows: The Pleasure-centric Turn in Human Rights Advocacy in South Asia’, 22(1–2) *Tilburg Law Review* (2017) 31–61, p. 48.

148 ICC, *supra* note 16.

in a way where only the judges, court staff, the Prosecutor, and the accused are personified and recognised. Victims are glaringly missing, though it is their story whose end has just been determined by the Court. As of 2008, the ICC began filming all its cases. The YouTube channel of the Court suggests that full-length livestreaming of hearings of cases began in 2013.¹⁴⁹ At the ECCC, statements of apology were filmed and broadcasted as early as 2009.¹⁵⁰ That apart, as a corollary of their investigative mandates, most criminal tribunals already have well-functioning evidence and analysis units that are specialised in preserving the integrity and textures of evidence, in processing sounds, and in offering protections for aural/filmic witness disclosures. A sensory judgment will only require these pre-existing tools to be refashioned for a different purpose. In some ways, this would also reduce the time and monetary costs associated with transliterating into every language spoken and understood by the parties.

5 Conclusion

In this paper, we examine the *Ongwen* trial judgment using the lens of senses and affect and query the limitations of the exclusive reliance on text in the judgment. Our paper starts with the premise that text is incapable of capturing cultural nuances, that it serves to depersonalise victims, and lends weight to problematic singular narratives about perpetratorship and victimhood. We show that the dominance enjoyed by text in international criminal law is not coincidental or innocuous. Instead, international criminal law has deliberately engineered text to censor other sensory or affective experiences in order to preserve the epistemic and social control enjoyed by law and its adjudicators. This desire is only compounded by the contingent, unpredictable, and egalitarian character of sensory and affective experiences. However, we argue that instead of seeing the rupture in control ushered by senses and affect as a threat, international criminal law should open itself up to sensory possibilities. This is what would do justice to the rich sensorial and affective imprints of international criminal law itself. As a solution, we propose the adoption of a sensory alternative model of judgments. We argue that only through a display of multi-dimensional senses and affect can international criminal law become truly reparative and epistemically diverse. Such a rethinking would also

149 ICC, www.youtube.com/@intlcrimincourt/videos (accessed 5 March 2023).

150 ECCC, video archive, available online at www.eccc.gov.kh/en/video/archive?page=2 (accessed 5 March 2023).

incentivise victims and other stakeholders to repose trust in the Court as a guardian of their agency. As the lasting legacy of the case, it is only fitting that this reimagination starts with the tool of the judgment. To quote Redmon, ‘we are sensual before we are verbal’.¹⁵¹ This piece is a reminder to appreciate that.

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¹⁵¹ Redmon, *supra* note 111.