

# The international criminal court case study - dominic ongwen and the exclusion of criminal responsibility

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Master's thesis / Diplomski rad

2022

Degree Grantor / Ustanova koja je dodijelila akademski / stručni stupanj: **University of Zagreb, Faculty of Law / Sveučilište u Zagrebu, Pravni fakultet**

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**REPUBLIKA HRVATSKA  
SVEUČILIŠTE U ZAGREBU  
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**THE INTERNATIONAL CRIMINAL COURT CASE  
STUDY - DOMINIC ONGWEN AND THE EXCLUSION  
OF CRIMINAL RESPONSIBILITY**

Kolegij:

**MEĐUNARODNO KAZNENO PRAVO**

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**- Zagreb, studeni 2022. –**

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Iva Glavaš v.r.

## SAŽETAK

*Dominicu Ongwenu sudi se pred Međunarodnim kaznenim sudom za zločine protiv čovječnosti i ratne zločine počinjene na području Sjeverne Ugande u periodu između 1. srpnja 2002. godine i 31. prosinca 2005. godine. U vrijeme počinjenja navedenih kaznenih djela, Dominic Ongwen djelovao je kao zapovijednik Sinia brigade u paramilitarnoj skupini naziva Božja vojska otpora, poznatoj po svojim brutalnim metodama indoktrinacije i korištenju djece kao vojne snage. Ovaj slučaj jedinstven je i razlikuje se od ostalih slučajeva pred Međunarodnim kaznenim sudom obzirom na to da je optuženik ujedno i sam žrtva ratnog zločina novačenja i korištenja djece mlađe od 15 godina kao vojnika. Rimski statut navodi mentalnu nesposobnost i prisilu kao moguće obrane za kaznena djela koja potpadaju pod jurisdikciju Međunarodnog kaznenog suda. Slučaj Dominica Ongwena prvi je pred Međunarodnim kaznenim sudom koji se poziva na prethodno navedene obrane iz Rimskog statuta. Dominic Ongwen nedavno je proglašen krivim za 61 kazneno djelo i osuđen na 25 godina zatvora. Njegova obrana podnijela je žalbu na osuđujuću presudu i na određenu kaznu. Slučaj se trenutno nalazi pred žalbenim vijećem Međunarodnog kaznenog suda, čija odluka se očekuje u narednom periodu.*

*Ključne riječi: Međunarodni kazneni sud, Rimski statut, Dominic Ongwen, djeca vojnici, isključenje kaznene odgovornosti, mentalna nesposobnost, prisila*

## SUMMARY

*Dominic Ongwen is a former child soldier tried before the International Criminal Court for crimes against humanity and war crimes committed on the territory of Northern Uganda between 1 July 2002 and 31 December 2005. At the time of commission of the crimes in question, Dominic Ongwen was a commander of Sinia brigade in the paramilitary group called the Lord's Resistance Army, which was known for its brutal brainwashing methods and children serving as an armed force. This case differs from any other case before the International Criminal Court since the accused is also a victim of a war crime of recruiting and using children under the age of 15 as soldiers. The Rome Statute lays down mental incapacity and duress as possible defenses for crimes within the jurisdiction of the International Criminal Court. Dominic Ongwen's case is the first one dealing with mental incapacity and duress as exclusions of criminal responsibility under the Rome Statute. Recently, he was found guilty of a total of 61 crimes and sentenced to 25 years in prison. Dominic Ongwen's defense team filed an appeal against the conviction and the sentence. The Decision by the Appeals Chamber is to be rendered in due course.*

*Keywords: the International Criminal Court, the Rome Statute, Dominic Ongwen, child soldiers, exclusion of criminal responsibility, mental incapacity, duress*

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# 1. INTRODUCTION

The case of Dominic Ongwen may be one of the most controversial cases tried before one international criminal court. The case is so intriguing because of its factual background but also its legal characterization and impact, imposing a lot of moral dilemmas. On one hand, the accused is a victim of a heinous war crime of recruiting and using children under the age of 15 as soldiers,<sup>1</sup> previously very strongly convicted by the whole international community and the International Criminal Court itself.<sup>2</sup> On the other, that same accused is now standing before that same Court being charged with that same crime, among many others.<sup>3</sup>

Dominic Ongwen is the former child soldier who is accused of crimes against humanity and war crimes committed as a full-grown adult.<sup>4</sup> However, his upbringing was not nearly similar to what is considered a normal childhood. Undisputedly, he was abducted on his way to school and forced to serve as a child soldier in one of the most brutal Ugandan paramilitary groups called the Lord's Resistance Army known for its coercive indoctrination methods.<sup>5</sup> Yet, regardless of the environment, Dominic Ongwen managed to survive and even rise within the ranks to the position of a commander of a brigade.<sup>6</sup> Allegedly, he was very loyal, committed and cruel.<sup>7</sup> Dominic Ongwen surrendered and was put to trial after the confirmation of charges.<sup>8</sup> He was recently sentenced to 25 years of imprisonment with the ongoing appeal phase of the proceedings.<sup>9</sup>

The International Criminal Court is now in delicate and challenging position of achieving what one should call the justice. Nevertheless, can justice ever be served in Dominic Ongwen's case? Is he guilty? Is he responsible? Is he a victim? Who is responsible for what happened to

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<sup>1</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Trial Chamber IX: Sentence, 6 May 2021, ICC-02/04-01/15-1819-Red, para. 82.

<sup>2</sup> The ICC, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dylo, Trial Chamber I: Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842.

<sup>3</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Trial Chamber IX: Public redacted version of "Document containing the Charges", 21 December 2015, ICC-02/04-01/15-375-Conf-AnxA, 25 May 2016, ICC-02/04-01/15, p. 12-34.

<sup>4</sup> *Ibid.*, para 1.

<sup>5</sup> The ICC, Sentence, *Op.cit.*(bilj.1), para. 73.

<sup>6</sup> *Ibid.*, para. 85-86.

<sup>7</sup> Baines, E., Complex political perpetrators: reflections on Dominic Ongwen, *The Journal of Modern African Studies*, Vol. 47, No. 2, pp. 163-191, 2009., p. 174.

<sup>8</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Pre-Trial Chamber II: Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court, 22 January 2015, ICC-02/04-01/05-419, para. 1-3; ICC Pre-Trial Chamber II confirms the charges against Dominic Ongwen and commits him to trial, <https://www.icc-cpi.int/news/icc-pre-trial-chamber-ii-confirms-charges-against-dominic-ongwen-and-commits-him-trial> (29. listopada 2022.)

<sup>9</sup> The ICC, Sentence, *Op.cit.*(bilj.1), para. 396.

him? Is he a “monster”? What about his victims? Who is responsible for the consequences of his acts? Why is his community considering recasting his past?<sup>10</sup> Should that be done?

The purpose of this study is not to give definite answers to the questions above. Clearly, it is the Court’s job. This study presents the case overview, highlights questions alleged by both the Prosecutor and the Defense and demonstrates struggles of the Court in finding the appropriate interpretation of the rules. The emphasis of this study is on the exclusion of criminal responsibility, as the most challenging question in the case at hand.

Dominic Ongwen’s Defense team invoked mental disease or defect and duress as grounds for exclusion of criminal responsibility,<sup>11</sup> which both seem logical in the case dealing with atrocities committed by the former child soldier.

In order to show the challenges, the Court is facing when affirmative defenses of mental disease or defect and duress are invoked, the study is divided into following sections:

- 1) The first section deals with the events in Uganda, which led to Dominic Ongwen’s arrest and accusation. This factual background is crucial for understanding moral and legal dilemmas in this case concerning Dominic Ongwen’s responsibility, exclusion of the same and sentencing. Further, this section presents detailed and thorough overview of every phase of the proceedings with purpose of showing the complexity of the case.
- 2) The second section refers to the grounds of exclusion of criminal responsibility. First, this section will present all legal requirements necessary for mental disease or defect as well as duress to be accepted as a complete defense with respect to crimes under the jurisdiction of the Court developed through international criminal law and the Court. Second, legal requirements presented prior are analyzed through Dominic Ongwen’s defense presenting arguments *pro et contra* with the final ruling of the Court.

Since this case is now in its appeal phase, it is still yet to be answered what is the ultimate standing of the Court concerning the invoked defenses.

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<sup>10</sup> The ICC, Sentence, *Op.cit.*(bilj.1), para. 18.

<sup>11</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Trial Chamber IX: Trial Judgement, 4 February 2021, ICC-02/04-01/15-1762-Red, para 3068.; The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II: Third Public Redacted Version of “Defence Brief for the Confirmation of Charges Hearing”, filed on 18 January 2016 as ICC-02/04-01/15-404-Conf, ICC-02/04-01/15-404-Red3, para 8.

## 2. DOMINIC ONGWEN CASE OVERVIEW

### 2.1. Situation in Uganda

Uganda, as former British colony, was subject to civil wars, military invasions, putsches, dictatorship, contested electoral outcomes that all led to the eighth change of government in a period of 24 years, 5 of which were violent and unconstitutional.<sup>12</sup> One of the later formed paramilitary groups is known as the Lord's Resistance Army (LRA) with its founder and undisputed leader Joseph Kony, which began as a rebellion against the takeover of Uganda by rebel leader Yoweri Museveni and Ugandan government armed forces, Uganda People's Defense Force (UPDF) and local defense units (LDUs).<sup>13</sup>

Joseph Kony and the LRA have perpetrated in various savage acts such as murders, attacks against civilians in Internally Displaced People (IDP) camps established by the government,<sup>14</sup> sexual enslavement, mutilation (such as cutting off ears, lips and noses of civilians), child abductions and many more.<sup>15</sup> According to the Pre-Trial Chamber II (PTC) in the Decision on the confirmation of charges against Dominic Ongwen, "such protracted armed violence, due to its intensity and its broad geographical scope covering the entire northern Uganda, amounted to an armed conflict not of an international character."<sup>16</sup>

The LRA was consisted of four brigades called Sinia, Gilva, Trinkle and Stockree, acting under strict organization, structure and discipline which was assured by lethal sanctions.<sup>17</sup> The high ranking officers of the LRA requested their soldiers to be fully trained, prepared, violent and referred to the LRA as an „army of God“, since the violence was

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<sup>12</sup> Golooba-Mutebi, F., Collapse, War and Reconstruction in Uganda, An Analytical Narrative on State-Making, Working Paper No. 27, Crisis States Working Papers Series NO.2, 2008., <https://www.lse.ac.uk/international-development/Assets/Documents/PDFs/csdc-working-papers-phase-two/wp27.2-collapse-war-and-reconstruction-in-uganda.pdf>, p. 1-2.

<sup>13</sup> Uganda's brutal Lord's Resistance Army, past and present, <https://www.france24.com/en/live-news/20210506-uganda-s-brutal-lord-s-resistance-army-past-and-present> (30. listopada 2022); The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II: Decision on the Confirmation of Charges, 23 March 2016, ICC-02/04-01/15-422-Red, para. 61.

<sup>14</sup> *Ibid.*, para. 62.

<sup>15</sup> Nortje, W., Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court, *International Criminal Law Review*, pp. 1-22, 2016., p. 8.

<sup>16</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 61.

<sup>17</sup> *Ibid.*, para. 56.



considered to be “a sacramental act”.<sup>18</sup> Joseph Kony convinced many of the LRA members that he could read minds, which especially increased fear and obedience among them.<sup>19</sup>

The LRA filled its ranks by abduction of children and forcing them to serve as child soldiers and slaves, or in case of girls, as sex slaves and domestic servants.<sup>20</sup> According to the research conducted in 2008, more than one-third of male youth and one-fifth of female youth in Northern Uganda reported abduction by the LRA.<sup>21</sup> The LRA's attacks decreased 48 percent in 2021, operating remotely in Democratic Republic of the Congo-Central African Republic-South Sudan border areas,<sup>22</sup> which leads to believe that numbers of abducted children have also declined.

From 1 July 2002 to 31 December 2005, the LRA “carried out a widespread attack directed against the civilian population in Pajule IDP camp, Odek IDP camp, Lukodi IDP camp and Abok IDP camp, lasting considerable period of time, involving a large number of acts of violence victimizing a large number of civilians, systematic as it was planned, and the violence followed a discernible pattern.”<sup>23</sup>

## **2.2. Procedural history**

### **2.2.1. The International Criminal Court investigation in Uganda and warrant of arrest**

#### **2.2.1.1. Investigation in Uganda**

Uganda ratified the Rome Statute (the Statute) in June 2002 and thus, the International Criminal Court (ICC) has jurisdiction over crimes laid down in the Statute committed by the Ugandan nationals or committed on the territory of Uganda from 1 July 2002.<sup>24</sup> According to Article 14 of the Statute,

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<sup>18</sup> Nortje, W., Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court, *Op.cit.*(bilj.15), p. 9.; Jackson, P., Politics, Religion and the Lord's Resistance Army in the Northern Uganda, Religions and Development, Working Paper 43, University of Birmingham, 2015., [https://assets.publishing.service.gov.uk/media/57a08b2bed915d3cfd000ba0/Working\\_Paper\\_43.pdf](https://assets.publishing.service.gov.uk/media/57a08b2bed915d3cfd000ba0/Working_Paper_43.pdf)., p. 13.

<sup>19</sup> Fox, K., The Complex Combatant: Constructions of Victimhood and Perpetrator-hood in Gulu District, Northern Uganda, Independent Study Project Collection, 2458, 2016., [Khttps://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=3481&context=isp\\_collection](https://digitalcollections.sit.edu/cgi/viewcontent.cgi?article=3481&context=isp_collection), p. 4.

<sup>20</sup> Asimakopoulus, A., Justice and Accountability: Complex Political Perpetrators Abducted as Children by the LRA in Northern Uganda, Faculty of Humanities Theses (Masters Thesis), August 2010., [https://studenttheses.uu.nl/bitstream/handle/20.500.12932/5272/Justice\\_and\\_Accountability\\_-\\_Complex\\_Political\\_Perpetrators.pdf?sequence=1&isAllowed=y](https://studenttheses.uu.nl/bitstream/handle/20.500.12932/5272/Justice_and_Accountability_-_Complex_Political_Perpetrators.pdf?sequence=1&isAllowed=y), p.7.

<sup>21</sup> Fox, K., The Complex Combatant: Constructions of Victimhood and Perpetrator-hood in Gulu District, Northern Uganda, *Op.cit.*(bilj.19), p. 3.

<sup>22</sup> Uganda's brutal Lord's Resistance Army, past and present, *Op.cit.*(bilj.13).

<sup>23</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), p. 29-39.

<sup>24</sup> Uganda, Situation in Uganda, <https://www.icc-cpi.int/uganda> (28. listopada 2022)

“A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.”<sup>25</sup>

In December 2003, the Ugandan government referred the situation in its territory since 1 July 2002 concerning the LRA to the Prosecutor.<sup>26</sup> The Government of Uganda, its agencies, the United Nations and foreign governmental and non-governmental organizations reported acts of the LRA and their effect on civilians and Uganda’s armed forces.<sup>27</sup>

Pursuant to Article 15(2-4) of the Statute,

“The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. If the Pre-Trial Chamber considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.”<sup>28</sup>

Accordingly, the Prosecutor opened an investigation in July 2004,<sup>29</sup> focusing on the alleged war crimes and crimes against humanity, committed “in the context of an armed conflict” between the LRA and the national authorities since 1 July 2002.<sup>30</sup>

The Prosecutor should have conducted investigation by questioning victims and witnesses, questioning persons under investigation for the purpose of finding evidence of a

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<sup>25</sup> The Rome Statute of the International Criminal Court, the United Nations General Assembly, July 1998, Article 14.

<sup>26</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 4.

<sup>27</sup> The ICC, Situation in Uganda, Pre-Trial Chamber II: Warrant of Arrest for Dominic Ongwen, 8 July 2005, ICC-02/04-01/05-57, para. 6.

<sup>28</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 15(2-4).

<sup>29</sup> The ICC, Situation in Uganda, Presidency: Decision Assigning the Situation in Uganda to the Pre-Trial Chamber II, 5 July 2004, ICC-02/04-1.

<sup>30</sup> Uganda, Situation in Uganda, *Op.cit.*(bilj.24).

suspect's innocence or guilt.<sup>31</sup> The Prosecutor must have investigated incriminating and exonerating circumstances equally.<sup>32</sup>

The investigation identified Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen as suspects.<sup>33</sup>

#### **2.2.1.2. Who is Dominic Ongwen?**

To understand the complexity of and large public interest in this case, it is important to get familiar with facts about Dominic Ongwen. Is he a victim, a perpetrator or both? As stated in Public redacted version of “Document containing the Charges” of the Office of the Prosecutor, Dominic Ongwen is Ugandan national from northern Uganda born in 1975.<sup>34</sup> He was “the first person to be tried for a war crime of which he is also a victim.”<sup>35</sup>

The Convention on the Rights of a child<sup>36</sup> provides,

“States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.”<sup>37</sup>

Similar is set out in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict<sup>38</sup> stating that children must be eighteen before taking direct part in hostilities or being compulsorily recruited into armed forces.<sup>39</sup> Additional

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<sup>31</sup> Situations under investigations, <https://www.icc-cpi.int/situations-under-investigations> (28. listopada 2022)

<sup>32</sup> *Ibid.*

<sup>33</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 4.

<sup>34</sup> The ICC, Public redacted version of “Document containing the Charges”, *Op.cit.*(bilj.3), para. 1.

<sup>35</sup> Fox, K., *The Complex Combatant: Constructions of Victimhood and Perpetrator-hood in Gulu District, Northern Uganda*, *Op.cit.*(bilj.19), p. iv.

<sup>36</sup> Convention on the Rights of the Child, General Assembly resolution 44/25, 20 November 1989.

<sup>37</sup> *Ibid.*, Article 38.

<sup>38</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, General Assembly resolution A/RES/54/263, 25 May 2000.

<sup>39</sup> *Ibid.*, Articles 1, 2.

Protocol I to the Geneva Conventions<sup>40</sup> and Additional Protocol II to the Geneva Conventions<sup>41</sup> provide protection of children in international and non-international armed conflicts. African Charter on the Rights and Welfare of the Child<sup>42</sup> in its Article 22 ensures protection of children in armed conflicts. Lastly, Article 8 (2)(b)(xxvi) of the Statute proclaims conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities a war crime.

Dominic Ongwen was abducted by the LRA in 1987 on his way to school and made a child soldier.<sup>43</sup> He was allegedly “so small he had to be carried by other captives for the first few days.”<sup>44</sup> As a child soldier, he was subject to continuous indoctrination with purpose of him and all the other child soldiers to identify paramilitary group as new home they belong to.<sup>45</sup> He was subject to drug and alcohol abuse and commission of egregious crimes.<sup>46</sup>

Research shows various methods of desensitization carried by the LRA, which ranged from carrying heavy loots to witnessing, or even participating in, murder of their families, exhaustion and intimidation, using tactics such as hard physical labor, long marches, disorientation, frequent beatings and rituals involving cleansings,<sup>47</sup> brainwashing to support the group’s ideologies, resignation and obedience in the face of threat, barriers to escape and brutal killings of those who succeeded as an example to others.<sup>48</sup>

However, there is another side to Dominic Ongwen. According to research, child soldiers in the LRA “were eager to please and happy when their hard work paid off.”<sup>49</sup> Some of them viewed the LRA as a means to success and were contributing to the violence.<sup>50</sup> Dominic Ongwen was one of them, with his natural ability to be a soldier.<sup>51</sup>

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<sup>40</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, 08 June 1977.

<sup>41</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, 08 June 1977.

<sup>42</sup> African Charter on the Rights and Welfare of the Child, Organization of African Unity, 1990.

<sup>43</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 150.

<sup>44</sup> Baines, E., Complex political perpetrators: reflections on Dominic Ongwen, *Op.cit.*(bilj.7), p. 169.

<sup>45</sup> Nortje, W., Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court, *Op.cit.*(bilj.15), p. 6.

<sup>46</sup> *Ibid.*

<sup>47</sup> Baines, E., Complex political perpetrators: reflections on Dominic Ongwen, *Op.cit.*(bilj.7), p. 170.

<sup>48</sup> Fox, K., The Complex Combatant: Constructions of Victimhood and Perpetrator-hood in Gulu District, Northern Uganda, *Op.cit.*(bilj.19), p. 29-37.

<sup>49</sup> *Ibid.*, p. 38.

<sup>50</sup> *Ibid.*, p. 41.

<sup>51</sup> Baines, E., Complex political perpetrators: reflections on Dominic Ongwen, *Op.cit.*(bilj.7), p. 171.

As one of the most atrocious commanders in the LRA,<sup>52</sup> Dominic Ongwen was promoted very quickly within ranks due to his ability to fight and kill, his loyalty, discipline and the fact that he managed to survive and outlive his superiors.<sup>53</sup>

### **2.2.1.3. The Warrant of Arrest**

On 8 July 2005, the PTC issued warrants of arrest against top members of the LRA.<sup>54</sup> Raska Lukwiya and Okot Odhiambo have died and thus, proceedings against them have been terminated.<sup>55</sup> Josph Kony and Vincent Otti remain at large and the warrants against them remain awaiting.<sup>56</sup>

As per the PTC's standpoint, issuing the warrant of arrest for Dominic Ongwen was "necessary based on the facts and circumstances referred to in the Prosecutor's application, namely that the LRA has been in existence for the past 18 years; and that the LRA's commanders are allegedly inclined to launch retaliatory strikes, thus creating a risk for victims and witnesses who have spoken with or provided evidence to the Office of the Prosecutor."<sup>57</sup>

On 16 January 2015, Dominic Ongwen arrived in Bangui, Central African Republic.<sup>58</sup> He was immediately turned over to the Central African Republic's authorities, which confirmed his identity and his intention to voluntarily surrender to the International Criminal Court.<sup>59</sup> On the same day, Dominic Ongwen was handed to the custody of the ICC and on 21 January 2015 was transported to the ICC Detention Centre in the Netherlands.<sup>60</sup>

### **2.2.2. The Confirmation of charges**

The Confirmation of charges hearing was held from 21 January 2016 until 27 January 2016.<sup>61</sup> Pursuant to the Statute,

"[...] within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends

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<sup>52</sup> Nortje, W., Victim or Villain: Exploring the Possible Bases of a Defence in the Ongwen Case at the International Criminal Court, *Op.cit.*(bilj.15), p. 9.

<sup>53</sup> Baines, E., Complex political perpetrators: reflections on Dominic Ongwen, *Op.cit.*(bilj.7), p. 174.

<sup>54</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 4.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*; Uganda, Situation in Uganda, *Op.cit.*(bilj.24).

<sup>57</sup> The ICC, Warrant of Arrest for Dominic Ongwen, *Op.cit.*(bilj.27), para. 32.

<sup>58</sup> The ICC, Report of the Registry on the voluntary surrender of Dominic Ongwen and his transfer to the Court, *Op.cit.*(bilj.8), para. 1.

<sup>59</sup> *Ibid.* paras. 2-3.

<sup>60</sup> *Ibid.*, paras. 3., 17-18.

<sup>61</sup> Ongwen Case, <https://www.icc-cpi.int/uganda/ongwen> (29. listopada 2022)

to seek trial. The hearing shall be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.”<sup>62</sup>

At this phase of the proceedings, it is up to the Prosecutor to show and support each charge with sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.<sup>63</sup>

In the opinion of the Pre-Trial Chamber I in the *Lubanga* case, “[...] the purpose of the confirmation hearing is limited to committing for trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the Defense against wrongful and wholly unfounded charges.”<sup>64</sup>

The same Pre-Trial Chamber defined the concept of “substantial ground to believe” as an obligation of the Prosecutor to “offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations.”<sup>65</sup>

The threshold in the confirmation of the charges phase is higher than the standard for issuance of a warrant of arrest,<sup>66</sup> but lower than the threshold necessary in the trial phase where the Court must be convinced of the guilt of the accused beyond reasonable doubt.<sup>67</sup>

According to Rule 121(3) of the Rules of Procedure and Evidence,<sup>68</sup> “The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of the evidence which he or she intends to present at the hearing.”

In the present case, the Prosecutor filed “Document containing the charges” on 21 December 2015<sup>69</sup> in which she presented statement of facts regarding contextual elements of Article 7 of the Statute, relating to existence of a widespread or systematic attack, directed against civilian population, and Article 8 of the Statute, relating to existence of a non-

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<sup>62</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 61(1).

<sup>63</sup> *Ibid.*, Article 61(7); Schabas, W., A Commentary on the Rome Statute, The International Criminal Court, Oxford Commentaries on International Law, 2010., p. 740.

<sup>64</sup> The ICC, Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Thomas Lubanga Dylo, Pre-Trial Chamber I: Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 38.

<sup>65</sup> *Ibid.*, para. 39.

<sup>66</sup> Schabas, W., A Commentary on the Rome Statute, *Op.cit.*(bilj.63), p. 741.

<sup>67</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 66 (3).

<sup>68</sup> Rules of Procedure and Evidence, PCNICC/2000/1/Add.1, the United Nations, 2000.

<sup>69</sup> The ICC, Public redacted version of “Document containing the Charges”, *Op.cit.*(bilj.3).

international armed conflict<sup>70</sup> as well as legal characterization of those facts. In addition, the Prosecutor presented the list of evidence on which she relied for the purpose of the confirmation of charges hearing.<sup>71</sup>

“At the confirmation of charges hearing, the defendant may object to the charges, challenge the evidence presented by the Prosecutor and present evidence.”<sup>72</sup> “When the defendant chooses to act in accordance with previous provision, he or she shall provide a list of evidence to the Pre-Trial Chamber, but no later than 15 days before the date of the hearing, which shall transmit the list to the Prosecutor without delay.”<sup>73</sup>

Dominic Ongwen’s Defense, in its brief, objected Dominic’s age, referred to Joseph Kony and his spiritual powers, contested the structure of the LRA as an organized armed group stating that the LRA did not have a proper chain of command and that the brigades in the LRA were not brigades as in a conventional army.<sup>74</sup>

Moreover, the Defense objected to cumulative charging which means that the same facts are subsumed under more than one crime.<sup>75</sup> The Defense emphasized that “the Statute does not explicitly provide cumulative charging or convictions” and that “it is inapposite to notions of justice and fairness to conclude that a suspect or an accused can be charged with two crimes for the same action.”<sup>76</sup> Further, it stipulated “cumulative convictions are opposite to the principle of *ne bis in idem* and that they have the same effect as the retrial.”<sup>77</sup> However, the PTC was not persuaded by the Defense submission in this regard stating it is up “to the Trial Chamber to determine the question of concurrence of offences” and when the Prosecutor meets the applicable burden of proof, charges will be confirmed.<sup>78</sup>

Concerning the modes of liability, the Prosecutor charged Dominic Ongwen with the alternative modes of liability that were:

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<sup>70</sup>*Ibid.*, p. 4-5.

<sup>71</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 8.

<sup>72</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 61 (6).

<sup>73</sup> Rules of Procedure and Evidence, *Op.cit.*(bilj.68), Rule 121 (6).

<sup>74</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II: Further Redacted Version of “Defence Brief for the Confirmation of Charges Hearing” filed on 18 January 2016, 3 March 2016, ICC-02/04-01/15, p. 6-14.

<sup>75</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 29.

<sup>76</sup> The ICC, Further Redacted Version of “Defence Brief for the Confirmation of Charges Hearing”, *Op.cit.*(bilj.74), para. 71.

<sup>77</sup> *Ibid.*, para. 72.

<sup>78</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 30.

- “Charges 1 to 7: Article 25(3)(a) (“indirect co-perpetration”) or 25(3)(c) or 25(3)(d)(i) or (ii) or Article 28(a) of the Statute;
- Charges 8 and 9: Article 25(3)(a) (“indirect co-perpetration”) or 25(3)(b) (ordering) or 25(3)(c) or 25(3)(d)(i) or (ii) or Article 28(a) of the Statute;
- Charges 10 to 23 and 61 to 70: Article 25(3)(a) (“indirect co-perpetration”) or 25(3)(b) (ordering) or 25(3)(d)(i) or (ii) or Article 28(a) of the Statute;
- Charges 24 to 49: Article 25(3)(a) (“indirect perpetration”) or 25(3)(b) (ordering) or 25(3)(d)(i) or (ii) or Article 28(a) of the Statute.”<sup>79</sup>

For Charges 50 to 60 concerning sexual and gender-based crimes (SGBC) perpetrated directly by Dominic Ongwen, the Prosecutor charged him with direct perpetration under Article 25(3)(a) of the Statute.<sup>80</sup>

The Defense raised the question of indirect co-perpetration as a mode of liability before the ICC stating that it is “not a crime which is based on the Statute.”<sup>81</sup> In contrary, the PTC concluded that abovementioned form of liability is provided by the text of the Statute since

“[...] it combines the commission of a crime “jointly with another” (in which every person has the capacity to frustrate the commission of the crime in the way it is realized by not performing his or her coordinated contributive acts within the framework of an agreement among them) with the commission of a crime “through another person” (in which a person commits the crime by subjugating another person’s will, rather than personally and directly executing the objective elements of the crime).”<sup>82</sup>

The PTC concluded Dominic Ongwen was “a commander in position to direct the conduct of the significant operational force subordinate to him”,<sup>83</sup> and as such, he “was aware of the powers he held, and he took and sustained action to assert his commanding position, including by the maintenance of a ruthless disciplinary system, abduction of children to replenish his forces, and the distribution of female abductees to his subordinates as so-called wives.”<sup>84</sup>

Thus, the PTC confirmed the following charges with regard to attacks on Pajule IDP Camp on or about 10 October 2003, to attacks on Odek IDP Camp on or about 29 April 2004, to

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<sup>79</sup> *Ibid.*, para. 36.

<sup>80</sup> The ICC, Public redacted version of “Document containing the Charges”, *Op.cit.*(bilj.3), p. 47-51.

<sup>81</sup> The ICC, Further Redacted Version of “Defence Brief for the Confirmation of Charges Hearing”, *Op.cit.*(bilj.74), para. 84.

<sup>82</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), paras. 39, 41.

<sup>83</sup> *Ibid.*, para. 58.

<sup>84</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 59.



attacks on Lukodi IDP Camp on or about 19 May 2004, and attacks on Abok IDP Camp on or about 8 June 2004:<sup>85</sup>

1) “Crimes against humanity:

- Murder pursuant to Article 7(1)(a) of the Statute;
- Attempted murder pursuant to Article 7(1)(a) of the Statute (concerning Odek, Lukodi and Abok IDP Camp);
- Torture pursuant to Article 7(1)(f) of the Statute;
- Other inhumane acts pursuant to Article 7(1)(k) of the Statute;
- Enslavement pursuant to Article 7(1)(c) of the Statute;
- Persecution on political grounds, of civilians perceived by the LRA as being affiliated with, or supporting the Ugandan government pursuant to Article 7(1)(h) of the Statute.

2) War crimes:

- Attacks against the civilian population as such pursuant to Article 8(2)(e)(i) of the Statute;
- Murder pursuant to Article 8(2)(c)(i) of the Statute;
- Attempted murder pursuant to Article 8(2)(c)(i) of the Statute (concerning Odek, Lukodi and Abok IDP Camps);
- Torture pursuant to Article 8(2)(c)(i) of the Statute;
- Cruel treatment pursuant to Article 8(2)(c)(i) of the Statute;
- Pillaging pursuant to Article 8(2)(e)(v) of the Statute;
- Outrages upon personal dignity pursuant to Article 8(2)(c)(ii) of the Statute (concerning Odek IDP Camp);
- Destruction of property pursuant to Article 8(2)(e)(xii) (concerning Lukodi and Abok IDP Camp).”<sup>86</sup>

Specific list of confirmed charges related to SGBC perpetrated directly and indirectly by Dominic Ongwen which included the following:<sup>87</sup>

1) “SGBC perpetrated directly by Dominic Ongwen:

i) Crimes against humanity:

- Forced Marriage, an inhumane act of a character similar to the acts set out in the Article 7(1)(a)-(j), pursuant to Article 7(1)(k) of the Statute;
- Torture pursuant to Article 7(1)(f) of the Statute;
- Rape pursuant to Article 7(1)(g) of the Statute;
- Sexual Slavery pursuant to Article 7(1)(g) of the Statute;

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<sup>85</sup> The ICC, Public redacted version of “Document containing the Charges”, *Op.cit.*(bilj.3), p. 12-34.

<sup>86</sup> *Ibid.*

<sup>87</sup> The ICC, Public redacted version of “Document containing the Charges”, *Op.cit.*(bilj.3), p. 34-56.

- Enslavement pursuant to 7(1)(c) of the Statute;
  - Forced Pregnancy pursuant to Article 7(1)(g) of the Statute.
  - ii) War crimes:
    - Torture pursuant to Article 8(2)(c)(i) of the Statute;
    - Rape pursuant to Article 8(2)(e)(iv) of the Statute;
    - Sexual Slavery pursuant to Article 8(2)(e)(iv) of the Statute;
    - Forced Pregnancy pursuant to Article 8(2)(e)(iv) of the Statute;
    - Outrages upon personal dignity pursuant to Article 8(2)(c)(ii) of the Statute.
- 2) SGBC perpetrated indirectly by Dominc Ongwen:
- i) Crimes against humanity:
    - Forced Marriage, an inhumane act of a character similar to the acts set out in the Article 7(1)(a)-(j), pursuant to Article 7(1)(k) of the Statute;
    - Torture pursuant to Article 7(1)(f) of the Statute;
    - Rape pursuant to Article 7(1)(g) of the Statute;
    - Sexual Slavery pursuant to Article 7(1)(g) of the Statute;
    - Enslavement pursuant to 7(1)(c) of the Statute.
  - ii) War crimes:
    - Torture pursuant to Article 8(2)(c)(i) of the Statute;
    - Rape pursuant to Article 8(2)(e)(iv) of the Statute;
    - Sexual Slavery pursuant to Article 8(2)(e)(iv) of the Statute.”<sup>88</sup>

Furthermore, charges for conscription and use of child soldiers were confirmed as follows:<sup>89</sup>

- 1) “War crimes:
  - Conscription of children under the age of 15 into an armed group pursuant to Article 8(2)(e)(vii) of the Statute;
  - Use of children under the age of 15 to participate actively in hostilities pursuant to Article 8(2)(e)(vii).”<sup>90</sup>

The PTC confirmed 70 charges in total brought by the Prosecutor against Dominic Ongwen and committed him to trial before a Trial Chamber.<sup>91</sup>

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*, p. 56-59.

<sup>90</sup> *Ibid.*

<sup>91</sup> ICC Pre-Trial Chamber II confirms the charges against Dominic Ongwen and commits him to trial, *Op.cit.*(bilj.8).

### 2.2.2.1. Leave to appeal the Confirmation Decision

On 29 March 2016, the Defense filed the Request, seeking leave to appeal the Confirmation Decision on five different issues:<sup>92</sup>

1) The first issue considers the PTC's decision not to exclude statements and transcripts not translated to Acholi which, in the Defense's opinion, led to violation of Dominic Ongwen's right to equally participate in the proceedings.<sup>93</sup>

2) The second issue refers to the PTC's decision not to take into account evidence on Dominic Ongwen's age.<sup>94</sup>

3) Regarding the third issue, the Defense is of the view that the PTC did not explain the Decision in a clear manner.<sup>95</sup>

4) The fourth issue is raised with reference to the "substantial contribution to the crime" within the meaning of Article 25(3)(c) of the Statute.<sup>96</sup>

5) The fifth issue refers to the PTC's decision that the crime of sexual slavery does not include forced marriage.<sup>97</sup>

As laid down in the Statute<sup>98</sup> and according to established jurisprudence, the PTC stipulated "for leave to appeal to be granted, Article 82(1)(d) of the Statute requires that the "issue" identified by the party would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial."<sup>99</sup> The PTC concluded that the Defense had not identified any issue justifying the appeal, which emerges from the Confirmation Decision and that had an essential impact on the determination by the Chamber that there are substantial grounds to believe that Dominic Ongwen committed the crimes charged.<sup>100</sup>

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<sup>92</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Pre-Trial Chamber II: Decision on the Defence request for leave to appeal the decision on the confirmation of charges, 29 April 2016, ICC-02/04-01/15-428, para. 2.

<sup>93</sup> *Ibid.*, para. 12.

<sup>94</sup> *Ibid.*, para. 16.

<sup>95</sup> *Ibid.*, para. 21.

<sup>96</sup> *Ibid.*, para. 28.

<sup>97</sup> *Ibid.*, para. 33.

<sup>98</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 82 (1) (d).

<sup>99</sup> The ICC, Decision on the Defence request for leave to appeal the decision on the confirmation of charges, *Op.cit.*(bilj.92), para. 8.

<sup>100</sup> *Ibid.*, paras. 14, 40.

### 2.2.3. The Trial

Pursuant to Article 61(11) of the Statute, after the confirmation of charges, the Trial Chamber IX (TC), appointed by the Presidency, opened the trial on 6 December 2016.<sup>101</sup>

One of the preliminary questions that needed to be answered at the trial is the standard of proof when dealing with the grounds for exclusion of criminal responsibility. Namely, “beyond reasonable doubt” is the standard of proof which needs to be reached by the Prosecutor in order for the ICC to issue a conviction.<sup>102</sup> The TC stated

“When a finding of the guilt of the accused also depends on a negative finding with respect to the existence of grounds excluding criminal responsibility under Article 31 of the Statute, the general provisions of Article 66(2) and (3) on the burden and standard of proof equally apply, operating (as is always the case for the determination on the guilt or innocence of the accused) solely with respect to the facts ‘indispensable for entering a conviction’, namely, in this case, the absence of any ground excluding criminal responsibility and, thus, the guilt of the accused.”<sup>103</sup>

However, since the Appeals Chamber (AC) indicated the standard of proof concerning grounds for exclusion of criminal responsibility as a question later in the appeal phase of the proceedings,<sup>104</sup> the abovementioned view of the TC needs to be treated with caution, especially since there is no relevant practice of the ICC confirming this standpoint.

The Defense raised two grounds for exclusion of criminal responsibility: mental disease or defect pursuant to Article 31(1)(a) and duress, pursuant to Article 31(1)(d),<sup>105</sup> which will be addressed under Section 3 of this study.

On 4 February 2021, the TC found Dominic Ongwen guilty for a total of 61 crimes of crimes against humanity and war crimes, committed in Northern Uganda between 1 July 2002 and 31 December 2005<sup>106</sup> as follows:

- 1) “Within the context of the attack carried out by the LRA on the Pajule IDP camp on 10 October 2003, Dominic Ongwen committed, jointly with Vincent Otti, Raska Lukwiya, Okot Odhiambo, and other LRA commanders and through LRA soldiers, within the meaning of Article 25(3)(a) of

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<sup>101</sup> Ongwen case, *Op.cit.*(bilj.61); The Rome Statute, *Op.cit.*(bilj.25), Article 61 (11).

<sup>102</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 66 (2-3).

<sup>103</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 231.

<sup>104</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Appeals Chamber: Directions on the conduct of the hearing, 28 January 2022, ICC-02/04-01/15-1968., para. 13.

<sup>105</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 2448.

<sup>106</sup> *Ibid.*, para 3116.; Verdict in the Ongwen trial at the ICC, <https://www.icc-cpi.int/sites/default/files/itemsDocuments/ongwen-verdict/qandq-ongwen-verdict-eng.pdf>. (30. listopada 2022)

the Statute, the following crimes: (i) attack against the civilian population as such as a war crime pursuant to Article 8(2)(e)(i) of the Statute; (ii) murder as a crime against humanity, pursuant to Article 7(1)(a) of the Statute; (iii) murder as a war crime, pursuant to Article 8(2)(c)(i) of the Statute; (iv) torture as a crime against humanity, pursuant to Article 7(1)(f) of the Statute; (v) torture as a war crime, pursuant to Article 8(2)(c)(i) of the Statute; (vi) enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute; (vii) pillaging as a war crime, pursuant to Article 8(2)(e)(v) of the Statute; and (viii) persecution as a crime against humanity, pursuant to Article 7(1)(h) of the Statute;”<sup>107</sup>

- 2) “Within the context of the attack carried out by the LRA on the Odek IDP camp on 29 April 2004, Dominic Ongwen committed, jointly with Joseph Kony and other Sinia brigade leaders and through LRA soldiers, within the meaning of Article 25(3)(a) of the Statute, the following crimes: (i) attack against the civilian population as such as a war crime pursuant to Article 8(2)(e)(i) of the Statute; (ii) murder as a crime against humanity, pursuant to Article 7(1)(a) of the Statute; (iii) murder as a war crime, pursuant to Article 8(2)(c)(i) of the Statute; (iv) attempted murder as a crime against humanity, pursuant to Article 7(1)(a) of the Statute, in conjunction with Article 25(3)(f) of the Statute; (v) attempted murder as a war crime, pursuant to Article 8(2)(c)(i) of the Statute, in conjunction with Article 25(3)(f) of the Statute; (vi) torture as a crime against humanity, pursuant to Article 7(1)(f) of the Statute; (vii) torture as a war crime, pursuant to Article 8(2)(c)(i) of the Statute; (viii) enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute; (ix) pillaging as a war crime, pursuant to Article 8(2)(e)(v) of the Statute; (x) outrages upon personal dignity as a war crime, pursuant to Article 8(2)(c)(ii) of the Statute; and (xi) persecution as a crime against humanity, pursuant to Article (1)(h) of the Statute;”<sup>108</sup>
- 3) “Within the context of the attack carried out by the LRA on the Lukodi IDP camp on or about 19 May 2004, Dominic Ongwen committed, through LRA soldiers, within the meaning of Article 25(3)(a) of the Statute, the following crimes: (i) attack against the civilian population as such as a war crime pursuant to Article 8(2)(e)(i) of the Statute; (ii) murder as a crime against humanity, pursuant to Article 7(1)(a) of the Statute; (iii) murder as a war crime, pursuant to Article 8(2)(c)(i) of the Statute; (iv) attempted murder as a crime against humanity, pursuant to Article 7(1)(a) of the Statute, in conjunction with Article 25(3)(f) of the Statute; (v) attempted murder as a war crime, pursuant to Article 8(2)(c)(i) of the Statute, in conjunction with Article 25(3)(f) of the Statute; (vi) torture as a crime against humanity, pursuant to Article 7(1)(f) of the Statute; (vii) torture as a war crime, pursuant to Article 8(2)(c)(i) of the Statute; (viii) enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute; (ix) pillaging as a war crime, pursuant to Article 8(2)(e)(v)

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<sup>107</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 2874.

<sup>108</sup> *Ibid.*, para. 2927.

of the Statute; (x) destruction of property as a war crime, pursuant to Article 8(2)(e)(xii) of the Statute and (xi) persecution as a crime against humanity, pursuant to Article 7(1)(h) of the Statute;”<sup>109</sup>

- 4) “Within the context of the attack carried out by the LRA on the Abok IDP camp on or about 8 June 2004, Dominic Ongwen committed, through LRA soldiers, within the meaning of Article 25(3)(a) of the Statute, the following crimes: (i) attack against the civilian population as such as a war crime pursuant to Article 8(2)(e)(i) of the Statute; (ii) murder as a crime against humanity, pursuant to Article 7(1)(a) of the Statute; (iii) murder as a war crime, pursuant to Article 8(2)(c)(i) of the Statute; (iv) attempted murder as a crime against humanity, pursuant to Article 7(1)(a) of the Statute, in conjunction with Article 25(3)(f) of the Statute; (v) attempted murder as a war crime, pursuant to Article 8(2)(c)(i) of the Statute, in conjunction with Article 25(3)(f) of the Statute; (vi) torture as a crime against humanity, pursuant to Article 7(1)(f) of the Statute; (vii) torture as a war crime, pursuant to Article 8(2)(c)(i) of the Statute; (viii) enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute; (ix) pillaging as a war crime, pursuant to Article 8(2)(e)(v) of the Statute; (x) destruction of property as a war crime, pursuant to Article 8(2)(e)(xii) of the Statute and (xi) persecution as a crime against humanity, pursuant to Article 7(1)(h) of the Statute;”<sup>110</sup>
- 5) “Considering sexual and gender based crimes directly perpetrated by Dominic Ongwen, he committed as an individual, within the meaning of Article 25(3)(a) of the Statute, the crime of outrages upon personal dignity as a war crime, pursuant to Article 8(2)(c)(ii) of the Statute;”<sup>111</sup>
- 6) “Considering sexual and gender based crimes not directly perpetrated by Dominic Ongwen, between 1 July 2002 and 31 December 2005, Dominic Ongwen committed, jointly with Joseph Kony and the Sinia brigade leadership and through LRA soldiers, within the meaning of Article 25(3)(a) of the Statute, the following crimes: (i) forced marriage as an other inhumane act, pursuant to Article 7(1)(k) of the Statute; (ii) torture as a crime against humanity, pursuant to Article 7(1)(f) of the Statute; (iii) torture as a war crime, pursuant to Article 8(2)(c)(i) of the Statute; (iv) rape as a crime against humanity, pursuant to Article 7(1)(g) of the Statute; (v) rape as a war crime, pursuant to Article 8(2)(e)(vi) of the Statute; (vi) sexual slavery as a crime against humanity, pursuant to Article 7(1)(g) of the Statute; (vii) sexual slavery as a war crime, pursuant to Article 8(2)(e)(vi) of the Statute; and (viii) enslavement as a crime against humanity, pursuant to Article 7(1)(c) of the Statute;”<sup>112</sup>
- 7) “Considering conscription and use of children under the age of 15 years and their use in armed hostilities between 1 July 2002 and 31 December 2005, Dominic Ongwen committed, jointly with

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<sup>109</sup> *Ibid.*, para. 2973.

<sup>110</sup> *Ibid.*, para. 3020.

<sup>111</sup> *Ibid.*, para. 3068.

<sup>112</sup> *Ibid.*, para. 3100.

Joseph Kony and the Sinia brigade leadership and through LRA soldiers, within the meaning of Article 25(3)(a) of the Statute, conscription of children and their use in armed hostilities as a war crime, pursuant to Article 8(2)(e)(vii) of the Statute.”<sup>113</sup>

### **2.2.3.1. The Sentence**

The sentence hearing was held on 14 and 15 April 2021 with Dominic Ongwen, the Defense, the Prosecutor and the Victims’ representatives present.<sup>114</sup>

The Prosecutor has taken into account circumstances regarding Dominic Ongwen’s abduction and found that “these circumstances warrant approximately a one-third reduction in the length of the prison sentence to be imposed on Dominic Ongwen.”<sup>115</sup> The Prosecutor recommended that the sentence should be lower than 30 years imprisonment and proposed total joint sentence of at least 20 years imprisonment.<sup>116</sup>

The Defense requested a sentence of time served emphasizing the mitigating and personal circumstances as well as affirming that Dominic Ongwen shall go through the Acholi traditional rituals.<sup>117</sup>

The legal representatives of the participating victims requested life imprisonment as the “only appropriate punishment.”<sup>118</sup> According to the Statute,

“The ICC may impose one of the following penalties on a person convicted of a crime referred to in Article 5 of this Statute:

- (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
- (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.<sup>119</sup> When a person has been convicted of more than one crime, the ICC shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment and this period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment.”<sup>120</sup>

The TC recognized Dominic Ongwen’s abduction and childhood in the LRA as a “specific circumstances bearing a significant relevance in the determination of the sentence,

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<sup>113</sup> *Ibid.*, para. 3115.

<sup>114</sup> The ICC, Sentence, *Op.cit.*(bilj.1), para. 7.

<sup>115</sup> *Ibid.*, para. 9.

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*, para. 10.

<sup>118</sup> *Ibid.*, para. 12.

<sup>119</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 77.

<sup>120</sup> *Ibid.*, Article 78 (3).

which shall be carefully balanced with all other relevant factors and circumstances in order to determine the most appropriate individual sentence for each of the crimes of which Dominic Ongwen was convicted.”<sup>121</sup> The TC accepted the Prosecutor’s recommendation of taking into account Dominic Ongwen’s abduction and childhood which justify a one-third reduction of the sentences, but bearing in mind specifics of each crime.<sup>122</sup>

The TC concluded that seriousness of crimes and aggravating circumstances such as multiplicity of victims,<sup>123</sup> commission of the crime for a motive involving discrimination,<sup>124</sup> the victims being particularly defenseless,<sup>125</sup> including the degree of his culpable conduct, may justify a joint sentence of life imprisonment.<sup>126</sup> However, this is a case of a perpetrator who was also a victim, with the circumstances of his childhood that could not be ignored.<sup>127</sup>

Hence, the TC acknowledged that the Statute “qualifies life imprisonment as an exceptional sentence” justified with “extraordinary circumstances revealing extreme gravity”<sup>128</sup> and, in light of the above, decided not to sentence Dominic Ongwen to such penalty.

The majority of the TC considered a total term of 25 years of imprisonment to be “proportionate to the crimes Dominic Ongwen committed, congruous to his specific individual circumstances arising from his abduction as a child, and suitably conforming to the fundamental purposes of retribution and deterrence underlying sentencing in the system of the Court.”<sup>129</sup>

Furthermore, the time between 4 January 2015 and 6 May 2021 shall be deducted from the total period of imprisonment.<sup>130</sup>

#### **2.2.4. The Appeal**

“The convicted person, or the Prosecutor on that person’s behalf, may make an appeal on any of the following grounds:

- (i) Procedural error,
- (ii) Error of fact,

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<sup>121</sup> The ICC, Sentence, *Op.cit.*(bilj.1), para. 88.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*, para. 270.

<sup>124</sup> *Ibid.*, para. 272.

<sup>125</sup> *Ibid.*, para. 298.

<sup>126</sup> *Ibid.*, paras. 384, 386.

<sup>127</sup> *Ibid.*, para. 388.

<sup>128</sup> *Ibid.*, para. 387.

<sup>129</sup> *Ibid.*, para. 396.

<sup>130</sup> *Ibid.*, p. 138.



(iii) Error of law, or

(iv) Any other ground that affects the fairness or reliability of the proceedings or decision.”<sup>131</sup>

Thus, the Defense filed its appeal against the conviction and sentence in August 2021<sup>132</sup> on six grounds:<sup>133</sup>

- 1) “The Chamber violated Appellant’s Fair Trial Rights under the Rome Statute and International Human Rights Instruments;
- 2) The Chamber erred in law, fact and procedure by rejecting Appellant’s Article 31 affirmative defenses;
- 3) The Chamber erred in respect to its conclusions on culture, Evidentiary Factual and Legal Errors;
- 4) The Chamber erred by failing to individualize Appellant as a victim of the LRA, who was entitled to be protected;
- 5) The Chamber erred in law, fact and procedure in its findings and conclusions about the LRA, Joseph’s Kony’s control over the Appellant and Appellant’s role;
- 6) The Chamber erred in its findings and conclusions of the Appellant’s individual criminal responsibility.”<sup>134</sup>

The AC issued Directions on the conduct of the hearing on 28 January 2022 addressing questions to be discussed during appeals hearing as follows:<sup>135</sup>

- The first question concerns the burden and standard of proof applicable to defenses excluding criminal responsibility. Since the Prosecutor is the one to prove guilt beyond reasonable doubt the question raises when a ground excluding criminal responsibility is alleged, who bears the burden of proof and what standard of proof is applicable?<sup>136</sup>
- The second question concerns mental disease or defect as a ground excluding criminal responsibility. Can forms of diminished mental capacity be compatible with Article 31(1)(a) of the Statute?<sup>137</sup> Nevertheless, since Dominic Ongwen was abducted as a child,

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<sup>131</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 81 (1) (b).

<sup>132</sup> Trying individuals for genocide, war crimes, crimes against humanity, and aggression, [https://www.icc-cpi.int/cases?f%5B0%5D=state\\_of\\_%3A132](https://www.icc-cpi.int/cases?f%5B0%5D=state_of_%3A132) (30.listopada 2022)

<sup>133</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Appeals Chamber: Public Redacted Version of “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”, filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf, 19 October 2021, ICC-02/04-01/15-1866-Red, p. 3.

<sup>134</sup> *Ibid.*

<sup>135</sup> The ICC, Directions on the conduct of the hearing, *Op.cit.*(bilj.104), para 13.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

“could considerations from international human rights law exclude his criminal responsibility?”<sup>138</sup>

- The third question concerns duress as a ground excluding criminal responsibility. “How should the elements set out in article 31(1)(d) of the Statute that result in duress, including the threat of imminent death or of continuing or imminent serious bodily harm, be established?”<sup>139</sup>
- The fourth question refers to indirect perpetration and indirect co-perpetration in light of the LRA structure and the roles of its members.<sup>140</sup> “What elements need to be established, and to what level of specificity, in order to convict an indirect (co-) perpetrator through an organized power apparatus and how can they be established in the present case? What is the understanding of functional control in the context of indirect (co-)perpetration through an organized power apparatus?”<sup>141</sup>
- The fifth question concerns legal elements of SGBC, the interests protected by the crimes of forced marriage, rape, sexual slavery and forced pregnancy, the scope of “other inhumane acts” in the context of Article 7(1)(k) of the Statute.<sup>142</sup>
- The sixth question relates the scope and purpose of cumulative convictions and the general principle of *ne bis in idem*.<sup>143</sup>
- The seventh question concerns sentencing, specifically cumulative convictions and duress as well as diminished mental capacity.<sup>144</sup>

The appeal hearing was held from 14 February until 18 February 2022<sup>145</sup> and the AC decision is expected in due course.<sup>146</sup>

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<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Appeals Chamber: Order scheduling a hearing before the Appeals Chamber, 17 November 2021, ICC-02/04-01/15-1909.

<sup>146</sup> Trying individuals for genocide, war crimes, crimes against humanity, and aggression, *Op.cit.*(bilj.132).

### **3. DOMINIC ONGWEN'S AFFIRMATIVE DEFENSE ANALYSIS**

#### **3.1. Mental disease or defect as a ground for exclusion of criminal responsibly**

##### **3.1.2. Mental disease or defect as a ground for exclusion of criminal responsibly in the international criminal law**

Insanity plea or mental disease may be invoked “when this state of mind entails that the person is deprived of mental capability necessary for deciding whether an act is right or wrong.”<sup>147</sup>

In the so called „*Čelebići*“ case,<sup>148</sup> before the Trial Chamber of International Criminal Tribunal for the Former Yugoslavia (ICTY), one of the defendants, Esad Landžo raised the defense of diminished, or lack of, mental capacity pursuant to sub-Rule 67(A)(ii)(b) of the Rules of Procedure and Evidence.<sup>149</sup> Mentioned Rule sets out that

“ As early as reasonably practicable and in any event prior to the commencement of the trial, the defense shall notify the Prosecutor of its intent to offer any special defense, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defense.”<sup>150</sup>

The same Chamber noted that a party which offers such defense “carries the burden of proving this defense on the balance of probabilities.”<sup>151</sup> The Chamber explained, “in the case of the plea of insanity, the accused is, at the time of commission of the criminal act, unaware of what he is doing or incapable of forming a rational judgement as to whether such an act is right or wrong.”<sup>152</sup> The Chamber is of the view that “the abnormality of mind must be a consequence of arrested or retarded development of the mind, or inherent causes induced by disease or injury”,<sup>153</sup> excluding killings motivated by emotions.<sup>154</sup> Referring to diminished capacity, the Chamber identifies abnormality of mind, which substantially impairs ability to

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<sup>147</sup> Cassese, A., *International Criminal Law*, Second edition, New York, 2008., p. 263.

<sup>148</sup> The ICTY, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, Trial Chamber: Judgement, 16 November 1998, IT-96-21-T.

<sup>149</sup> *Ibid.*, paras. 78, 1156.

<sup>150</sup> Rules of Procedure and Evidence, IT/32, the United Nations, February 1994.

<sup>151</sup> The ICTY, Judgement, *Op.cit.*(bilj.148), para. 78.

<sup>152</sup> *Ibid.*, para. 1156.

<sup>153</sup> *Ibid.*, para. 1166.

<sup>154</sup> *Ibid.*, para. 1166.

control actions as an essential requirement, but the question of the substantiality of impairment stays subjective.<sup>155</sup> The Trial Chamber did not accept diminished capacity defense stating that “although it does appear from the testimony of the experts that Mr. Landžo suffered from a personality disorder, the evidence relating to his inability to control his physical acts on account of abnormality of mind, is not at all satisfactory. Indeed, the Trial Chamber is of the view that, despite his personality disorder, Esad Landžo was quite capable of controlling his actions.”<sup>156</sup> Such plea can only be taken into account concerning mitigation of sentence.<sup>157</sup> Another case dealing with question of diminished mental capacity was ICTY’s *Vasiljević* case that confirmed the view of the Chamber in “*Čelebići*” case.<sup>158</sup>

Although the ICTY dealt only with the diminished capacity, it can be reasonably assumed that the same criteria, or even stricter, would have been applied in the insanity defense.

The ICC provisioned mental disease or defect as a ground for exclusion of criminal responsibility stating,

“A person shall not be criminally responsible if, at the time of that person’s conduct the person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.”<sup>159</sup>

It is stated that the term ‘suffers’ entails long lasting mental defect.<sup>160</sup> What is meant by ‘mental’ applies to the human mind and encompasses emotional and cognitive functions.<sup>161</sup> This includes any severe and permanent mental defect that can disrupt the ability to appreciate or control the conduct.<sup>162</sup> The notion ‘defect’ is not further defined in the Statute. However, a

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<sup>155</sup> *Ibid.*, para. 1169.

<sup>156</sup> *Ibid.*, para. 1186.

<sup>157</sup> The ICTY, *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*, Appeals Chamber: Judgement, 20 February 2001, IT-96-21-A., para. 590.

<sup>158</sup> The ICTY, *The Prosecutor v. Mitar Vasiljevic*, Trial Chamber II: Judgement, 29 November 2002, IT-98-32-T, paras. 282-283.

<sup>159</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 31 (1) (a).

<sup>160</sup> Knoop, G.J., *Defenses in Contemporary International Criminal Law*, Transnational Publishers, Inc., 2010. p. 114.

<sup>161</sup> Triffterer, O., Ambos, K., *Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article* (3rd ed.), München, Germany: Beck/Hart/Nomos, 2016., p. 1139.

<sup>162</sup> Werle, G., *Principles of International Criminal Law* (2nd ed.), The Hague, The Netherlands, 2009., p. 220.

uniform, internationally recognized key for understanding a ‘defect’ is provided by the International Classification of Disease (ICD-10)<sup>163</sup> relied upon by the ICTY.<sup>164</sup>

It can be concluded that, in order to invoke mental disease or defect as an affirmative defense, human mind has to suffer such substantial impairment, which leads to inability of a person to control his or her physical acts and to form a rational judgment at the time of commission of a crime.

### **3.1.3. Mental disease or defect as a possible defense in cases against (former) child soldiers**

Child soldiers are undisputedly victims. Paris Principles on the Involvement of Children in Armed Conflict stipulate that

“a child associated with an armed force or armed group refers to any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes.”<sup>165</sup>

Since the ICC has jurisdiction only over persons who are 18 or more at the time of the alleged commission of a crime,<sup>166</sup> a child soldier cannot stand before the ICC as the accused, but former child soldiers can be prosecuted for the crimes committed as adults.

Studies of child soldiers prove that children who grew up in traumatic environment are “highly unlikely to develop a functional moral compass and determine whether their actions, as children or in the future, are right or wrong.”<sup>167</sup> As the expert witness in *Lubanga* trial emphasized,

“[...] the trauma suffered by child soldiers has intellectual and cognitive consequences in the children’s minds. Children who have suffered trauma have problems with their memory and may have learning difficulties, particularly as regards reading and writing comprehension. [...] this trauma never goes away. [...] although persons with post-traumatic stress disorder may recall events that occurred in

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<sup>163</sup> *Ibid*, note. 446; International Statistical Classification of Diseases and Related Health Problems (ICD), <https://www.who.int/classifications/classification-of-diseases> (31. listopada 2022)

<sup>164</sup> The ICTY, Judgement, *Op.cit.*(bilj.148), para. 1178.

<sup>165</sup> Paris Principles, Principles and Guidelines on Children associated with Armed Forces or Armed Groups, UN Children's Fund (UNICEF), February 2007., 2. Definitions, 2.1.

<sup>166</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 26.

<sup>167</sup> Seyfarth, L.H., Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation, 14 Chi.-Kent J. Int'l and Comp.L. 117, 2013., <http://studentorgs.kentlaw.iit.edu/jicl/wp-content/uploads/sites/5/2014/01/Seyfarth-Article-4.pdf>, p. 16.

the past, their ability to answer and remember these events will depend on the way questions are asked, and if they are asked chronologically.”<sup>168</sup>

An environment in which child soldiers are raised is significant for understanding child soldier's psychological impairments. Using children as soldiers is “carefully crafted strategy of war.”<sup>169</sup> Children have “limited ability to assess risks, feelings of invulnerability and shortsightedness, all of which contribute to child recruitment.”<sup>170</sup> Development of light weaponry contributes to the usage of child soldiers.<sup>171</sup> Child soldiers are growing up in severe violent environment, which leads to development of lasting consequences.<sup>172</sup> Children are usually abducted under circumstances of “extreme coercion, violence and fear and see their families or community members killed.”<sup>173</sup>

In fact, long-lasting childhood trauma “can lead to alteration of immune, neuroendocrine and central nervous system functions but also to physical and mental problems in adulthood.”<sup>174</sup> Children who are continuously exposed to chronic and traumatic stress during developmental age may suffer from mental and related physical impairment, such as post-traumatic stress disorder (PTSD) and severe personality changes.<sup>175</sup> Number of studies have “demonstrated the significant relationship between the number of traumatic-event types experienced and the likelihood of developing PTSD and other disorders of the trauma spectrum: the more exposure to trauma, the more likely the development of psychological disorders.”<sup>176</sup>

Nevertheless, forcible indoctrination or brainwashing is “intensive, usually political or religious, aimed at destroying a person’s basic convictions and attitudes and replacing them with an alternative set of fixed believes.”<sup>177</sup> In fact, brainwashing itself can be categorized as a

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<sup>168</sup> The ICC, Judgment pursuant to Article 74 of the Statute, *Op.cit.*(bilj.2), para. 30.

<sup>169</sup> Honwana, A., *Child Soldiers in Africa*, Chatnam House, Independent Thinking on International Affairs, 2006., <https://www.chathamhouse.org/sites/default/files/public/Research/Africa/030506honwana.pdf>, p.2.

<sup>170</sup> Schauer, E., Elbert, T., *The Psychological impact of child soldiering*, Chapter 14, 2010., <https://www.usip.org/sites/default/files/missing-peace/The%20psychological%20impact%20of%20child%20soldiering%20-%20Schauer.pdf>, p. 311.

<sup>171</sup> *Ibid.*, p. 316.

<sup>172</sup> *Ibid.*, p. 311, 314.

<sup>173</sup> Seyfarth, L.H., *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, *Op.cit.*(bilj.167), p. 7.

<sup>174</sup> *Ibid.*, p. 9.

<sup>175</sup> Schauer, E., Elbert, T., *The Psychological impact of child soldiering*, *Op.cit.*(bilj. 170)., p. 311.

<sup>176</sup> *Ibid.*, p. 327.

<sup>177</sup> American Heritage Dictionary of the English Language, Fifth Edition, <https://ahdictionary.com/word/search.html?q=brainwashing> (31. listopada 2022)

mental defect or disease and it can be argued that defendant cannot distinguish between right and wrong when he or she is committing the act.<sup>178</sup>

It is important to consider significant findings of psychologists that brainwashing has several steps as three distinct stages: a) attack on the person's identity which leads to a complete „identity crisis“; b) introducing the “possibility of salvation”, where the agent attaches a person's feelings of guilt to his old belief system which leads to „psychological rejection of his former identity“; c) reinventing, during which the agent rebuilds the person's believe system and gives him the new identity.<sup>179</sup>

The study conducted within the LRA showed that Joseph Kony used to brainwash his abductees.<sup>180</sup> The first step is spreading the fear of escape by threatening that soldiers would be beaten and killed if attempted to escape, and if they were successful in escaping, the communities that they escape to will kill them.<sup>181</sup> The second is “performing specific rituals to foster a unique identity” so the abductees would lose their sense of home.<sup>182</sup> Next step were lies about spiritual mysticism.<sup>183</sup> The final phase consisted in promises of future political power and wealth.<sup>184</sup>

One of the defense mechanisms in the moment of trauma is dissociation, which “empties one’s mind of one’s own experience, including perceptions, thoughts, feelings and a sense of vulnerability.”<sup>185</sup> When in danger, “the child goes into a trance-like state in which the source of the danger, in this case the abuser, is held in focus intently, but in a depersonalized and de-realized way.”<sup>186</sup> Biological defense mechanisms, involving disengagement from the external world, are activated by a central nervous system, such as depersonalization, derealization and numbing, during which the child may feel like daydreaming.<sup>187</sup> “Mental dissociation refers to

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<sup>178</sup> Dao, J., Mental Health Experts Call Sniper Defendant Brainwashed, The New York Times, 2003., <https://www.nytimes.com/2003/12/11/us/mental-health-experts-call-sniper-defendant-brainwashed.html> (31. listopada 2022)

<sup>179</sup> Layton, J., Hoyt, A., How Brainwashing Works, 2021.,

<http://people.howstuffworks.com/brainwashing.htm/printable> (31. listopada 2022).

<sup>180</sup> Fox, K., The Complex Combatant: Constructions of Victimhood and Perpetrator-hood in Gulu District, Northern Uganda, *Op.cit.* (bilj.19),, p. 30-32.

<sup>181</sup> How Joseph Kony brainwashed child soldiers, <http://invisiblechildren.com/blog/2013/11/04/how-joseph-kony-brainwashes-child-soldiers/> (31. listopada 2022)

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.*

<sup>184</sup> *Ibid.*

<sup>185</sup> Frankel, J., Exploring Ferenczi's Concept of Identification with the Aggressor: Its Role in Trauma, Everyday Life, and Therapeutic Relationship, *Psychanalytic Dialogues*, 12:101-139, 2002., p. 108.

<sup>186</sup> Howell, E., Ferenczi's Concept of Identification with the Aggressor: Understanding Dissociative Structure with Interacting Victim and Abuser Self-States, *The American Journal of Psychoanalysis*, 74, (48–59), 2014., p. 50.

<sup>187</sup> Schauer, E., Elbert, T., The Psychological impact of child soldiering, *Op.cit.*(bilj. 170), p. 334.

disruptions in memory, consciousness, identity and/or perception of an environment, but is also manifested with disturbances of sensation, movement and other bodily functions.”<sup>188</sup>

Consequently, children who grow up in such an environment are “highly unlikely, even when they become adults, to develop a functional moral compass and determine whether their actions are right or wrong.”<sup>189</sup> They are often “fundamentally unable to make moral decisions regarding their behavior and suffer from mental disorders that impair their ability to think rationally.”<sup>190</sup> Moreover, chronic exposure to drugs disrupts the way critical brain structures interact to control and inhibit behaviors related to drug use.<sup>191</sup>

### **3.1.4. Mental disease or defect as an affirmative defense in Dominic Ongwen case**

#### **3.1.4.1. The Trial phase**

The Defense invoked an affirmative defense pursuant to Article 31(1)(a) at the trial phase of the proceedings,<sup>192</sup> and as such being the first case before the ICC to raise that defense.<sup>193</sup>

Reason for invoking this defense lies in the fact that Dominic Ongwen was a victim of a crime. The Judgement of the ICC in *Lubanga* confirmed that conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities, as it is stated in Article 8(e)(vii) is a war crime,<sup>194</sup> and that is what happened to Domic Ongwen. However, Dominic Ongwen's case is unique since he committed atrocities as an adult.

Mental impairment has to be confirmed by medical examination and the Defense experts concluded that Dominic Ongwen suffered from severe depressive illness, PTSD, dissociative disorder (including depersonalization and multiple identity disorder), severe suicidal ideation

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<sup>188</sup> Diseth, T., Dissociation in children and adolescents as reaction to trauma – an overview of conceptual issues and neurobiological factors, *Nordic Journal of Psychiatry*, Volume 59, 2005 - Issue 2, 2005., <https://www.tandfonline.com/doi/abs/10.1080/08039480510022963>, p. 79.

<sup>189</sup> Seyfarth, L.H., *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, *Op.cit.*(bilj.167), p. 15.

<sup>190</sup> *Ibid.*, p. 16.

<sup>191</sup> Volkov, N., *Drugs, Brains, and Behaviour: The Science of Addiction*, National Institute on Drug Abuse, 2020., <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/preface> (31. listopada 2022)

<sup>192</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 3068.

<sup>193</sup> The ICC, Situation in Uganda in the case of the Prosecutor v. Dominic Ongwen, Trial Chamber IX: Public Redacted Version of ‘Corrected Version of “Defence Closing Brief”, filed on 24 February 2020’, 13 March 2020, ICC-02/04-01/15-1722-Corr-Red, para. 535.

<sup>194</sup> The ICC, Judgment pursuant to Article 74 of the Statute, *Op.cit.*(bilj.2), paras. 914, 916, 1358.



and high risk of committing suicide as well as dissociative amnesia and symptoms of obsessive-compulsive disorder.<sup>195</sup> The Defense claimed that such

“mental disease destroyed Dominic Ongwen's capacity to appreciate the unlawfulness or nature of his conduct and capacity to control his conduct to conform to the requirements of law: under circumstances of dissociation and depersonalization, he could not control himself, while in the bush, he did not appreciate that his acts were wrong, his involvement in crimes of the LRA was under the influence of dissociative episodes, including dissociative amnesia and two distinct personalities, (Dominic A and Dominic B) which made it impossible for him to control his actions.”<sup>196</sup>

The Defense experts stated that the violence within the LRA “disrupted his development of any moral values leaving him with no free will.”<sup>197</sup> Dominic Ongwen's mental illnesses came from mass trauma, which had two sources: the Ugandan government and the LRA.<sup>198</sup>

The Defense further submitted that Dominic Ongwen was not able to develop a state of mind necessary to distinguish right or wrong.<sup>199</sup>

Namely, the Defense experts stated that Dominic Ongwen “channelized two personalities one of which carries out the LRA orders and displaces normal personality and because of that duality, it is difficult for him to choose right from wrong under pressing, life-threatening, stressful experience.”<sup>200</sup>

Since the most important question is actually the capacity to appreciate the unlawfulness or nature of a conduct, or capacity to control a conduct to conform to the requirements of law, the Defense emphasized that during the charged period Dominic Ongwen was not aware of events happening around him during the charged period<sup>201</sup> and that “his capacity to control his conduct was destroyed.”<sup>202</sup>

Furthermore, in the context of mental disease, the Defense addressed the lack of Dominic Ongwen's moral development because of the abduction and brainwashing.<sup>203</sup> Even the Prosecutor's expert witness refers to “child-like” development noting that Dominic Ongwen

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<sup>195</sup> The ICC, Public Redacted Version of ‘Corrected Version of “Defence Closing Brief”, *Op.cit.*(bilj.193), para. 536.

<sup>196</sup> *Ibid.*, para. 537.

<sup>197</sup> *Ibid.*, para. 538.

<sup>198</sup> *Ibid.*, para. 539.

<sup>199</sup> *Ibid.*, para. 552.

<sup>200</sup> *Ibid.*, para. 555.

<sup>201</sup> *Ibid.*, paras. 558, 560.

<sup>202</sup> *Ibid.*, para. 564.

<sup>203</sup> *Ibid.*, para. 565-577.

saw himself as a child while looking at the children under his command.<sup>204</sup> Another expert expressed that Dominc Ongwen was “forced to be emotionally dead. A person who is emotionally dead cannot tell right from wrong. Nothing else matters after the experiences.”<sup>205</sup> Experiences like watching his cousin’s sister being brutally killed, the killing of the four boys, order to kill his victim in a savage way, under threats that he himself would be killed in case of refusal.<sup>206</sup> According to the Defense, Dominic Ongwen “was motivated by an instinct for survival and not necessarily a deliberate desire to go into battle.”<sup>207</sup>

The Prosecutor presented the evidence of two psychiatrists and psychologist as expert witnesses.<sup>208</sup> However, Dominc Ongwen was not cooperating with the Prosecution experts.<sup>209</sup> Thus, the Prosecutor’s experts used the documents from the present proceedings, prior expert reports and other evidence relevant to the case in order to write their report.<sup>210</sup> One of the experts pointed out “the presence of [...] severe and incapacitating mental disorders would have been incompatible with Mr Ongwen not only functioning adequately, but actively thriving within the LRA for over twenty years”<sup>211</sup> and added “that PTSD was not ‘generally associated with repeated and persistent aggression and violence.’”<sup>212</sup> Further, the expert found that “if Mr Ongwen had been dissociating, or indeed was affected by any severe mental condition, he would not have been able to recall or to relate the detail of what happened or very much, if any, detail of what happened at the time.”<sup>213</sup> The most important factor in reaching that conclusion were statements of Dominic Ongwen repeating that he knew and know what he did and was doing, that it was wrong and that he felt guilty but held himself irresponsible.<sup>214</sup> Regarding his moral development the Prosecutor’s expert found that Dominic Ongwen “would seem to have matured developmentally against all odds with flexibility of moral reasoning which seem to have been not fully exercised before he becomes top commander.”<sup>215</sup> Final expert stated,

“Even if Mr. Ongwen suffered from some of his experiences, it is highly unlikely that his level of functioning was severely impaired, at least not for a longer period of time. He must have adapted to the

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<sup>204</sup> *Ibid.*, para. 571.

<sup>205</sup> *Ibid.*, para. 573.

<sup>206</sup> *Ibid.*, para. 573.

<sup>207</sup> *Ibid.*, para. 595.

<sup>208</sup> *Ibid.*, para. 535.

<sup>209</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 2471.

<sup>210</sup> *Ibid.*, para. 2471.

<sup>211</sup> *Ibid.*, para. 2473.

<sup>212</sup> *Ibid.*, para. 2472.

<sup>213</sup> *Ibid.*, para. 2473.

<sup>214</sup> *Ibid.*, para. 2474.

<sup>215</sup> *Ibid.*, paras. 2480-2481.

war scenario in order to make the achievements he himself describes and which are not only limited to promotion in the armed force but also include his support of other people and his psychosocial abilities.”<sup>216</sup>

The Court also appointed medical expert who agreed with Defense’s experts on Major Depressive Disorder (MDD), PTSD, and Other Specified Dissociative Disorder as mental illnesses, all of which Dominic Ongwen suffers from simultaneously, noting MDD and PTSD as severe.<sup>217</sup> However, the TC concluded that this report was prepared with the purpose of Dominic Ongwen’s mental health examination during the trial and thus, did not accept it as a base for conclusion on mental disease in context of Article 31(1)(a) of the Statute.<sup>218</sup>

While assessing Article 31(1)(a) as a ground for exclusion of criminal responsibility in the present case, the TC emphasized “that the fact to be determined is the possible presence of a mental disease or defect, and the effect of such mental disease or defect on the relevant mental capacities of the accused, at the time of the relevant conduct.”<sup>219</sup> An assessment of mental health can only be made “on the basis of the facts and evidence relating to the period under examination.”<sup>220</sup>

The TC found the Defense’s experts’ reports unreliable due to a number of reasons.<sup>221</sup>

First, the TC was concerned about the methodology employed by the Defense’s experts and that it affected reliability of the evidence, which were rebutted by the Prosecutor’s experts.<sup>222</sup> Further, the TC accepted the Prosecutor’s standpoint that the Defense’s experts acted in role of treating physicians and forensic experts which led them to an objectivity loss.<sup>223</sup> More importantly, the Defense’s expert reports were full of unexplained contradictions, i.e. suicidal tendencies and survival instinct, possession of uneven cognitive abilities, good long term memory and amnesia,<sup>224</sup> and were based on interviews with four of the closest Dominic Ongwen’s associates’ without examination of the evidence obtained during the trial.<sup>225</sup> Moreover, the Defense’s experts “dismissed malingering as a possible explanation of symptoms

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<sup>216</sup> *Ibid.*, para. 2491.

<sup>217</sup> The ICC, Public Redacted Version of ‘Corrected Version of “Defence Closing Brief”, *Op.cit.*(bilj.193), para. 540.

<sup>218</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 2578.

<sup>219</sup> *Ibid.*, para. 2454.

<sup>220</sup> *Ibid.*, para. 2497.

<sup>221</sup> *Ibid.*, para. 2574.

<sup>222</sup> *Ibid.*, para. 2527.

<sup>223</sup> *Ibid.*, para. 2528.

<sup>224</sup> *Ibid.*, paras. 2536-2544.

<sup>225</sup> *Ibid.*, para. 2551.

of mental disorders which seem apparent from Dominic Ongwen’s self-report.”<sup>226</sup> Finally, the TC concluded the Defense’s experts’ reports to be “very general in analysis and not clearly focused on the relevant time period and circumstances under Dominic Ongwen acted.”<sup>227</sup>

In addition to evaluating experts’ opinions, the TC itself assessed Dominic Ongwen’s behavior based on evidence and concluded they did not provide any credibility to a diagnosis of mental disease or defect.<sup>228</sup> Facts of the case and credible evidence showed the opposite - that Dominic Ongwen was involved in “careful planning of complex operations, which is incompatible with a mental disorder.”<sup>229</sup>

In light of the above, the TC found that Dominic Ongwen “did not suffer from a mental disease or defect at the time of the conduct relevant under the charges.”<sup>230</sup>

Regarding the sentencing, the Defense submitted the argument of substantially diminished mental capacity in support of mitigating circumstances<sup>231</sup> since substantially diminished mental capacity is a mitigating circumstance provided for in Rule 145(2)(a)(i) when circumstances falling short of constituting grounds for exclusion of criminal responsibility.<sup>232</sup>

However, the TC did not accept this argument due to evidence pointing out that Dominic Ongwen “was in full possession of his mental faculties, exercised his role effectively and as such did not suffer from a mental disease or defect.”<sup>233</sup>

#### **3.1.4.2. The Appeal phase**

Currently, the case is in its appeal phase. It is yet to be seen how the ICC will approach several issues the Defense raised before the AC regarding affirmative defense of mental disease or defect. In its appeal, the Defense stressed out that failure to apply Article 66(2) and (3) of the Statute to the affirmative defenses “prejudiced the Appellant and materially affected the Judgment”<sup>234</sup> in a way “erroneous rejection of the evidence of the Defenses experts indicates that had the reasonable doubt standard been applied, it could not have reached such a

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<sup>226</sup> *Ibid.*, para. 2568.

<sup>227</sup> *Ibid.*, para. 2569.

<sup>228</sup> *Ibid.*, para. 2520.

<sup>229</sup> *Ibid.*, para. 2521.

<sup>230</sup> *Ibid.*, para. 2580.

<sup>231</sup> The ICC, Sentence, *Op.cit.*(bilj.1), para. 90.

<sup>232</sup> *Ibid.*, para. 92.

<sup>233</sup> *Ibid.*, para. 100.

<sup>234</sup> The ICC, Public Redacted Version of “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”, *Op.Cit.*(bilj.133), p. 44.

conclusion.”<sup>235</sup> The Defense claimed that “if the Chamber had considered the complete report of its Court-appointed expert, it would have materially affected the Judgment, by leading to a finding that the Prosecution did not disprove each and every element of the affirmative defenses under Article 31(a) and (d) beyond a reasonable doubt.”<sup>236</sup> Further, the Defense expressed that “the Chamber erred in law and fact in its unequivocal rejection of the Defense experts’ evidence”<sup>237</sup> since it did not provide reasoned opinion on disregarding the experts’ methodology<sup>238</sup> and on the “blurring” point of experts in context of expertise *versus* treatment.<sup>239</sup> Moreover, the Defense claimed that Judgement’s conclusions on mental disease were based on “total acceptance of the Prosecution’s experts, but there are no findings that the Prosecutor disproved the elements required in Article 31(1)(a) beyond a reasonable doubt.”<sup>240</sup> To sum up, the Defense sets out that the TC “failed to properly assess and evaluate evidence on the Article 31 affirmative defenses, based on the peculiar individual circumstances of the Appellant immediately before, during and after the charged period.”<sup>241</sup>

## **3.2. Duress as a ground for exclusion of criminal responsibility**

### **3.2.1. Duress as a ground for exclusion of criminal responsibility in the international criminal law**

Duress is believed to be a very controversial defense that “plays a prominent role in international case law.”<sup>242</sup> Such controversy emerges from institute itself. Duress negates the subjective element of the person under coercion since the person does not will the death of another person and the person who threatens is held criminally responsible for the harm caused by the person acting under duress.<sup>243</sup>

One of the most famous trials in the world concerning duress was *Einsatzgruppen trial* which recognized that duress can be a defense even in a case of an unlawful killing.<sup>244</sup> The Court held

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<sup>235</sup> *Ibid.*, para. 213.

<sup>236</sup> *Ibid.*, para. 276.

<sup>237</sup> *Ibid.*, p. 74.

<sup>238</sup> *Ibid.*, para. 327.

<sup>239</sup> *Ibid.*, para. 335.

<sup>240</sup> *Ibid.*, paras. 417,419.

<sup>241</sup> *Ibid.*, para. 512.

<sup>242</sup> Werle, G. Principles of International Criminal Law, *Op.cit.*(bilj.162), para. 557.

<sup>243</sup> Cassese, A., International Criminal Law, *Op.cit.*(bilj.147), p. 281.

<sup>244</sup> The United Nations War Crime Commission, Law Reports of Trials of War Criminals, Digest of Laws and Cases, Volume XV, 1949., p. 156; The ICTY, The Prosecutor v. Drazen Erdemovic, Appeals Chamber: Separate and Dissenting Opinion of Judge Cassese, 7 October 1997., para. 27.

“[i]f one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionately greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse, for example, if a subordinate, under orders, killed a person known to be innocent, because by not obeying it he would himself risk a few days of confinement. Nor if one acts under duress, may he without culpability, commit the illegal act once the duress ceases.”<sup>245</sup>

Other *Einsatzgruppen* cases, *Ohlendorf and others* and *Gustav Alfred Jepsen and others*, support duress as defense even when offence involves killing of the innocents.<sup>246</sup>

Another famous case, mentioned above, appeared before the ICTY. Dražen Erdemović, was a soldier in the Bosnian Serb Army in July 1995.<sup>247</sup> He participated in the executions of hundreds of unarmed Bosnian Muslim men from the Srebrenica enclave.<sup>248</sup> He was the first person to enter a guilty plea at the Tribunal that included existence of duress.<sup>249</sup> In the *Erdemović* case, the Appeals Chamber did not accept duress as a defense stating “duress does not afford a complete defense to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.”<sup>250</sup> Judges McDonald and Vohrah, as a part of the majority, in their Separate opinion, noted that a crime against humanity is a more serious offense than murder and, for that reason, defendants should not be allowed to invoke duress as a defense even when it is possible to plead duress for murder.<sup>251</sup> Moreover, the two stated that there are different criteria for soldiers and people who are not soldiers, namely the higher degree of resistance and bravery, especially when being threatened with their own lives.<sup>252</sup> Members of armed forces are expected to take higher-degree risks and have a “duty to disobey rather than obey.”<sup>253</sup>

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<sup>245</sup> *Ibid.*, p. 158.

<sup>246</sup> Cassese, A., *International Criminal Law, Op.cit.*(bilj.147), p. 287-288.

<sup>247</sup> United Nations, International Residual Mechanism for Criminal Tribunals, Dražen Erdemović, <https://www.icty.org/en/content/dra%C5%BEen-erdemovi%C4%87> (1. studeni 2022)

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*; The ICTY, *The Prosecutor v. Drazen Erdemovic*, Trial Chamber: Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 18.

<sup>250</sup> The ICTY, *The Prosecutor v. Drazen Erdemovic*, Appeals Chamber: Judgement, 7 October 1997, IT-96-22-A p. 17.

<sup>251</sup> The ICTY, *The Prosecutor v. Drazen Erdemovic*, Appeals Chamber: Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997., para 75.; Chiesa, L.E., *Duress, Demanding Heroism and Proportionality: The Erdemovic Case and Beyond*, Pace University, 2008., <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1403&context=lawfaculty>, p. 754.

<sup>252</sup> *Ibid.*, para. 84.

<sup>253</sup> The ICTY, *Sentencing Judgment, Op.cit.*(bilj.249), para. 18.

Often, the duress is raised jointly with superior orders, namely if subordinate refuses to obey the order and the order is reiterated under the threat of life or limb, the duress defense can be invoked.<sup>254</sup> As the majority in *Erdemović* case held, “The rank held by the soldier giving the order and by the one receiving it has also been taken into account in assessing the duress a soldier may be subject to when forced to execute a manifestly illegal order. Although the accused did not challenge the manifestly illegal order he was allegedly given, the Trial Chamber would point out that according to the case-law referred to, in such an instance, the duty was to disobey rather than to obey. This duty to disobey could only recede in the face of the most extreme duress.”<sup>255</sup>

Yet, that decision was not unanimous. Judge Cassese in his Separate and Dissenting opinion stated that under international criminal law duress may be generally urged as a defense, but strict requirements have to be satisfied.<sup>256</sup> Judge Cassese pointed out,

“The relevant case-law is almost unanimous in requiring four strict conditions to be met for duress to be upheld as a defense, namely: (i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb; (ii) there was no adequate means of averting such evil; (iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils; (iv) the situation leading to duress must not have been voluntarily brought about by the person coerced.”<sup>257</sup>

Judge Cassese, as supported by Judge Stephen,<sup>258</sup> held that duress may succeed as a complete defense where it is highly probable that person under duress will not be able to save the life of the innocent.<sup>259</sup>

The International Criminal Tribunal of Rwanda (ICTR) discussed duress in *Ndahimana* case.<sup>260</sup> However, the Trial Chamber did not make any determinative finding on duress but merely stated that *Ndahimana* “might, or may, have been motivated by duress when discussing

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<sup>254</sup> Cassese, A., *International Criminal Law*, *Op.cit.*(bilj.147), p. 284-285.

<sup>255</sup> The ICTY, *Sentencing Judgment*, *Op.cit.*(bilj.249), para. 18.

<sup>256</sup> The ICTY, *Separate and Dissenting Opinion of Judge Cassese*, *Op.cit.*(bilj.239), para. 12.

<sup>257</sup> *Ibid.*, para. 16.

<sup>258</sup> The ICTY, *The Prosecutor v. Drazen Erdemovic*, Appeals Chamber: *Separate and Dissenting Opinion of Judge Stephen*, 7 October 1997., para. 65.

<sup>259</sup> The ICTY, *Separate and Dissenting Opinion of Judge Cassese*, *Op.cit.*(bilj.244), para. 42.

<sup>260</sup> The ICTR, *The Prosecutor v. Gregoire Ndahimana*, Appeals Chamber: *Judgement*, 16 December 2013, ICTR-01-68-A, paras. 174-175.

whether he shared the criminal intent of the members of the joint criminal enterprise and whether his participation resulted from extremism or ethnic hatred.”<sup>261</sup>

Provision defining duress in the Statute “combines necessity and duress into a uniform rule.”<sup>262</sup> In the traditional common law, necessity refers to threats to life and limb originating from objective circumstances, unlike duress, where threat comes from another person.<sup>263</sup> By adopting duress as a complete defense, it can be said that the Statute “explicitly opened up the possibility to the exclusion of the criminal responsibility with regard to killing of the innocent.”<sup>264</sup> According to the Statute duress is

“The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by other circumstances beyond that person's control.”<sup>265</sup>

Duress is a ground for exclusion of criminal responsibility “based on the presence of a threat to life or bodily integrity of the actor or another person.”<sup>266</sup> Duress is said to be “meaningful choice, if there is an absence of threat to life and limb.”<sup>267</sup> The TC in the *Ongwen* case explained the words ‘imminent’ and ‘continuing’ as referring to the nature of the threatened harm, and not the threat itself.<sup>268</sup> “The threatened harm must be either to be killed immediately or to suffer serious bodily harm immediately or in an ongoing manner.”<sup>269</sup> If threat of serious bodily harm “is not going to materialize sufficiently soon”<sup>270</sup> and there is an abstract danger or simply an

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<sup>261</sup> *Ibid.*

<sup>262</sup> Werle, G. Principles of International Criminal Law, *Op.cit.*(bilj.162), para. 556.

<sup>263</sup> *Ibid.*, paras. 554-555.

<sup>264</sup> Triffterer, O., Ambos, K., Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article, *Op.cit.*(bilj.161), p. 1151.

<sup>265</sup> The Rome Statute, *Op.cit.*(bilj.25), Article 31 (1) (d).

<sup>266</sup> Werle, G. Principles of International Criminal Law, *Op.cit.*(bilj.162), para. 559.

<sup>267</sup> Joyce, M., Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse, *Leiden Journal of International Law*, 28, pp. 623–642, 2015., <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/abs/duress-from-nuremberg-to-the-international-criminal-court-finding-the-balance-between-justification-and-excuse/54631E939AAC9E1E4E5AE01B85AAC5B9>, p. 625.

<sup>268</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 2582.

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*



elevated probability that a dangerous situation might occur,”<sup>271</sup> the duress according to the TC is not an applicable defense.<sup>272</sup>

Concerning the necessary and reasonable act, necessity refers to the possibility of immediately eliminating the threat.<sup>273</sup> “The act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect.”<sup>274</sup> Criminal law generally sets the expectations for the ‘reasonable man’ rather than for the ‘reasonable hero’.<sup>275</sup> A standard of reasonable act means that it is “generally appropriate to avert the danger.”<sup>276</sup> The necessary and reasonable criterion must be assessed under the totality of the circumstances in which the person found themselves, including the assessment would others in comparable circumstances be able to necessarily and reasonably avoid the same threat.<sup>277</sup>

Further, the perpetrator has to act to avoid the threat.<sup>278</sup> Judge Li emphasized that “duress can be a complete defense if, among other requirements, the act was done to avoid an immediate danger both serious and irreparable and there was no other adequate means to escape.”<sup>279</sup> The duress is not available if the perpetrator was responsible for provoking or causing the danger.<sup>280</sup> The ICC has to answer will the person be responsible if the person voluntarily exposes themselves to the danger.<sup>281</sup>

Lastly, proportionality criterion with regard to killing of the innocent people, this criterion will be the hardest one to satisfy.<sup>282</sup> It is not explicitly required that the individual in fact causes less harm, but rather that the person intended to cause no greater harm.<sup>283</sup> In the words of judge Cassese,

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<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

<sup>273</sup> Werle, G. Principles of International Criminal Law, *Op.cit.*(bilj.162), para. 561.

<sup>274</sup> Triffterer, O., Ambos, K., Commentary on the Rome Statute of the International Criminal Court: Observers' notes, article by article, *Op.cit.*(bilj.161), p. 1153.

<sup>275</sup> Heim, S.J., (2013), The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians, Cornell International Law Journal, Volume 46, Issue 1, 2013., <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1807&context=cilj>, p. 168.

<sup>276</sup> Werle, G. Principles of International Criminal Law, *Op.cit.*(bilj.162), p. 206.

<sup>277</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 2583.

<sup>278</sup> Werle, G. Principles of International Criminal Law, *Op.cit.*(bilj.162), para. 563.

<sup>279</sup> The ICTY, The Prosecutor v. Drazen Erdemovic, Appeals Chamber: Separate and Dissenting Opinion of Judge Li, 7 October 1997, para. 5.

<sup>280</sup> Werle, G. Principles of International Criminal Law, *Op.cit.*(bilj.162), para. 565.

<sup>281</sup> *Ibid.*, para. 566.

<sup>282</sup> The ICTY, Separate and Dissenting Opinion of Judge Cassese, *Op.cit.*(bilj.244), para. 42.

<sup>283</sup> Brown, B.S., Research Handbook on International Criminal Law, Cheltenham: Elgar, 2011., p. 314.

“It will never be satisfied where the accused is saving his own life at the expense of his victim, since there are enormous, perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others in this way: how can a judge satisfy himself that the death of one person is a lesser evil than the death of another?”<sup>284</sup>

The ICC made the requirement of proportionality subjective, as an element of the perpetrator’s perception and thus, the objective requirement of balancing interest must be reflected in the perpetrator’s mind.<sup>285</sup> “The assessment of whether one intended harm is ‘greater’ than another depends on the character of the harms under comparison.”<sup>286</sup>

One test that can be used to justify the duress is whether a crime would have been committed in any case by a person other than the one acting under duress, in particular where the accused participated in a collective killing, such as execution squads, which would have proceeded regardless of participation of the accused.<sup>287</sup>

Judge Cassese pointed out the following,

“Conversely, however, where it is not a case of a direct choice between the life of the person acting under duress and the life of the victim - in situations, in other words, where there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does - then duress may succeed as a defense. The court may decide, in a given case, that the accused did not do all he could to save the victims before yielding to duress, or that it is too speculative to assert that they would have died in any event.”<sup>288</sup>

This view was also accepted by Judge Stephen stating

„I am at the same time alive to the concerns expressed by other members of this Appeals Chamber of the need to protect innocent life in conflicts such as that in the former Yugoslavia which involve so great a threat to innocent life. However, to my mind, that aim is not achieved by the denial of a just defense to one who is in no position to effect by his own will the protection of innocent life.”<sup>289</sup>

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<sup>284</sup> The ICTY, Separate and Dissenting Opinion of Judge Cassese, *Op.cit.*(bilj.244), para. 42.

<sup>285</sup> Werle, G. Principles of International Criminal Law, *Op.cit.*(bilj.162), para. 564.

<sup>286</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 2584.

<sup>287</sup> Cassese, A., International Criminal Law, *Op.cit.*(bilj.147), p. 289.

<sup>288</sup> The ICTY, Separate and Dissenting Opinion of Judge Cassese, *Op.cit.*(bilj.244), para. 42.

<sup>289</sup> The ICTY, Separate and Dissenting Opinion of Judge Stephen, *Op.cit.*(bilj.258), para. 65.

### 3.2.2. Duress as an affirmative defense in Dominic Ongwen case

#### 3.2.2.1. The Confirmation of charges phase

Duress imposes itself to be logical affirmative defense in a case concerning former child soldier. In its Brief for the Confirmation of Charges Hearing, the Defense invoked the duress defense under Article 31(1)(d).<sup>290</sup> Since duress was invoked in confirmation of charges proceedings, the PTC held that duress may lead to the non-confirmation of charges “when the evidence is so clear that it negates even the low evidentiary standard applicable.”<sup>291</sup>

As stated above, several criteria have to be satisfied in order for duress to be accepted as an applicable defense.

With respect to the criterion of the threat to imminent death and bodily harm, the Defense alleged that Dominic Ongwen spent the majority of his life under duress living in fear of imminent death emphasizing the fear of flight.<sup>292</sup> Additionally, Dominic Ongwen’s stay within the group did not contribute to the dissipation of duress and he held his rank in order to survive.<sup>293</sup> The Defense stressed the impacts of indoctrination on child soldiers stating, “...indoctrination is conducted within a construct that has developed a child soldier within the confines of those norms whereby one could be killed if such norms are not followed. With systematic indoctrination, commanders can over time replace the position of a caretaker/parent and serve as an adult role model, which children will naturally accept.”<sup>294</sup>

However, the PTC held that no evidence on threat of imminent death or continuing or imminent bodily harm at the time of his conduct existed<sup>295</sup> and the threat of later disciplinary measures was not imminent.<sup>296</sup> Further, the PTC emphasized, “Duress is not regulated in the Statute in a way that would provide blanket immunity to members of criminal organizations which have brutal systems of ensuring discipline as soon as they can establish that their membership was not voluntary.”<sup>297</sup>

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<sup>290</sup> The ICC, Third Public Redacted Version of “Defence Brief for the Confirmation of Charges Hearing”, *Op.cit.*(bilj.11), para. 8.

<sup>291</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 151.

<sup>292</sup> The ICC, Third Public Redacted Version of “Defence Brief for the Confirmation of Charges Hearing”, *Op.cit.*(bilj.11), para. 4.

<sup>293</sup> *Ibid.*

<sup>294</sup> *Ibid.*, para. 54.

<sup>295</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 153.

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

Concerning the criterion of threat made by other persons or circumstances beyond that person's control, the Defense stipulated that threats came from Joseph Kony and as such constituted circumstances beyond Dominic Ongwen's control.<sup>298</sup>

The PTC was not convinced by this argument noting, „the circumstances of Dominic Ongwen's stay in the LRA cannot be said to be beyond his control. The evidence demonstrates that escapes from the LRA were not rare.”<sup>299</sup> Furthermore, the PTC pointed out that, according to the evidence, Dominic Ongwen chose to rise in hierarchy and thus, expose himself to higher responsibility.<sup>300</sup>

Regarding the criterion not to intend to cause a greater harm than the one sought to be avoided, the Defense only stated that Dominic Ongwen was simply surviving in his environment<sup>301</sup> without any further elaboration.

The PTC addressed the criterion, which was not alleged by the Defense and related to necessary and reasonable acts to avoid the threat, combined with the conclusion on the third criterion of proportionality.<sup>302</sup> Since the Defense did not offer any argument, but just the statement on the proportionality, the PTC was not convinced how forced marriages, rapes, brutality of sexual abuse, punishments for failure to perform domestic duties, as well as brutality against civilians, would fulfill this criteria.<sup>303</sup>

In the confirmation of charges phase of the proceedings, the PTC was of the view that there was no basis to conclude that criminal responsibility of Dominic Ongwen should be excluded due to duress.<sup>304</sup>

#### **3.2.2.2. The Trial phase**

In its Closing Brief, the Defense addressed duress criteria once more, but this time more thoroughly.

It pointed out that Joseph Kony exercised complete control over Dominic Ongwen through imminent threats to his life and lives of his community, which satisfies criteria of threat pursuant coming from another person or circumstances beyond person's control.<sup>305</sup> According

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<sup>298</sup> The ICC, Third Public Redacted Version of “Defence Brief for the Confirmation of Charges Hearing”, *Op.cit.*(bilj.11), para. 56.

<sup>299</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 154.

<sup>300</sup> *Ibid.*

<sup>301</sup> The ICC, Third Public Redacted Version of “Defence Brief for the Confirmation of Charges Hearing”, *Op.cit.*(bilj.11), para. 56.

<sup>302</sup> The ICC, Decision on the Confirmation of Charges, *Op.cit.*(bilj.13), para. 155.

<sup>303</sup> *Ibid.*

<sup>304</sup> *Ibid.*, para. 156.

<sup>305</sup> The ICC, Public Redacted Version of ‘Corrected Version of “Defence Closing Brief”, *Op.cit.*(bilj.193), p. 182.

to the Defense, Joseph Kony punished those who broke his rules, performing executions regardless of the charged period, failure to obey Kony's orders would result into death, all which resulted in continuing and imminent threat.<sup>306</sup> Imminent threats were constant and real to the families of the abductees.<sup>307</sup>

“The imminence of severe harm or death was guaranteed in the LRA by three factors: 1) forcing abductees to witness or participate in brutality against those who violated rules or commands; 2) the omnipresent surveillance by selected individuals within the LRA, who reported to Kony; and 3) the belief that Kony could predict the future and read LRA abductees' minds.”<sup>308</sup>

Further, the Defense submitted no escape was possible from the LRA voluntarily which was supported by witness testimonies.<sup>309</sup>

When referring to necessary and reasonable criterion, the Defense stressed out that such criterion has to be assessed with regard to Joseph Kony's influence and the LRA's brutal methods of spiritual indoctrination.<sup>310</sup>

Lastly, regarding the proportionality criterion, the Defense claimed the Prosecutor failed to disapprove such criterion for three reasons:

“1) the actual harm for non-homicide crimes was less than the harm of death to Dominic Ongwen or others; 2) the actual harm for homicide crimes, that would have occurred even if Dominic Ongwen had not participated, was less than the harm of death to Dominic Ongwen, his family and community; and 3) regardless of the objective assessment of the harm caused and the harm avoided, Dominc Ongwen did not intend to cause a greater harm.”<sup>311</sup>

Dominic Ongwen was not able to consider which harm is greater because of brutal LRA environment and his mental state.<sup>312</sup>

The TC concluded that the first requirement, existence of threat, was not satisfied and that it was unnecessary to consider other elements<sup>313</sup> due to the following:

When assessing the LRA hierarchy, the TC stipulated that Dominc Ongwen was high-ranked adult, self-confident commander, who was a source of threat to others and who did not always obey to Joseph Kony's orders.<sup>314</sup> The TC concluded that Dominic Ongwen had an effective control over his soldiers and had planned military actions.<sup>315</sup> Further, the evidence

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<sup>306</sup> *Ibid.*, para. 684.

<sup>307</sup> *Ibid.*, para. 690.

<sup>308</sup> *Ibid.*, para. 691.

<sup>309</sup> *Ibid.*, para. 686.

<sup>310</sup> *Ibid.*, para. 724.

<sup>311</sup> *Ibid.*, para. 727.

<sup>312</sup> *Ibid.*, para. 728.

<sup>313</sup> The ICC, Trial Judgement, *Op.cit.*(bilj.11), para. 2585.

<sup>314</sup> *Ibid.*, paras. 2590-2602.

<sup>315</sup> *Ibid.*, para. 2665.

goes to show that killings of senior LRA commanders on the orders of Joseph Kony were not because of refusal to obey the orders, yet they were caused by challenging political power of Joseph Kony as the exclusive leader of the LRA.<sup>316</sup>

Concerning the escapes from the LRA, the TC heard dozens of witnesses on low hierarchical position in the LRA claiming to be under much tighter control than Dominic Ongwen and concluded that “escape was realistic option available to Dominic Ongwen at the time of the conduct relevant for the charges.”<sup>317</sup>

Lastly, direct perpetration of sexual and gender based crimes by Dominic Ongwen cannot be justified by the threat since he could have hide from Joseph Kony the fact that he did not commit them by pretending that girls and wives performed their duties in privacy of his tent.<sup>318</sup>

In conclusion, the TC ruled that duress, as a ground excluding criminal responsibility under Article 31(1)(d) of the Statute, was not applicable in the present case.<sup>319</sup>

However, the TC in its Sentencing stated that “duress could, when falling short of constituting a ground for exclusion of criminal responsibility still be a mitigating circumstance when duress does not satisfy necessity or reasonableness criteria, or where the specific mental element is not met.”<sup>320</sup> Yet, the conduct constituting a crime still has to be caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person.<sup>321</sup>

In the present case, the TC excluded duress, holding that the conduct constituting the crimes had not been caused by such threat, thus not accepting duress as a mitigating circumstance pursuant to Rule 145(2)(a)(i).<sup>322</sup>

### **3.2.2.3. The Appeal phase**

Besides grounds of appeal referred to in the paragraphs of this study dealing with mental disease or defect as grounds for exclusion of criminal responsibility, the Defense raised some issues concerning duress as follows:

In the Defense’s Brief, it is stated that the TC made factual and legal errors saying that “childhood experience in the LRA is not central to the issue”<sup>323</sup> of threat and that the TC had to

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<sup>316</sup> *Ibid.*, para. 2614.

<sup>317</sup> *Ibid.*, para. 2632-2635.

<sup>318</sup> *Ibid.*, paras. 2666-2667.

<sup>319</sup> *Ibid.*, para. 2670.

<sup>320</sup> The ICC, Sentence, *Op.cit.*(bilj.1), para. 108.

<sup>321</sup> *Ibid.*, para. 109.

<sup>322</sup> *Ibid.*, para. 111.

<sup>323</sup> The ICC, Public Redacted Version of “Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021”, *Op.Cit.*(bilj.133), para. 310.

consider the Dominic Ongwen’s childhood experiences under coercion and the status he held while rising in ranks.<sup>324</sup>

The Defense stressed that the TC misinterpreted Article 31(1)(d) since it must be read “as a whole and in proper context”.<sup>325</sup> Further, it emphasizes “The Chamber erroneously made a big and convoluted issue of the interpretation and application of the terms ‘imminent’ and ‘continuing’ in Article 31 of the Statute as referring to “the nature of the threatened harm and not the threat itself. It is not an ‘imminent threat’ of death or a ‘continuing or imminent threat’ of bodily harm’.”<sup>326</sup> According to the Defense, the TC did not take into account the possibility that duress “emanated from the perpetual hostile and violent environment which ruled the life of the Appellant at the time of the charges.”<sup>327</sup> The Defense is of the view that Dominic Ongwen might have been killed by the low rank soldiers after the commission of crimes if he would have disobeyed the orders of Joseph Kony.<sup>328</sup>

The Defense stated that the TC “wrongly assessed and evaluated the gravity of threats”<sup>329</sup> against Dominic Ongwen since he was under constant surveillance that made it harder for him to escape.<sup>330</sup>

The Appeal Judgement should reveal final standpoint of the ICC regarding duress in the present case and will represent the precedent for any other accused before the ICC.

#### **4. CONCLUSION**

A complexity of presented case cannot be denied. A stigmatization of victim perpetrator status will always accompany the name of Dominic Ongwen. However, the struggles of the same construct will always follow the Court since its views shall forever be known to concerned public in its decisions.

Facts of the case show that Dominic Ongwen is a former child soldier, but was an adult while committing the crimes in question. As a child soldier, Dominc Ongwen went through ruthless indoctrination process imposed by the higher leadership of the LRA. Nevertheless, he grew from violence to a position of Sinia brigade commander.

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<sup>324</sup> *Ibid.*, para. 311.

<sup>325</sup> *Ibid.*, paras. 500-501.

<sup>326</sup> *Ibid.*, para. 502.

<sup>327</sup> *Ibid.*, para. 503.

<sup>328</sup> *Ibid.*, para. 507.

<sup>329</sup> *Ibid.*, para. 556.

<sup>330</sup> *Ibid.*

In light of the aforementioned, for the first time, the issue of exclusion of criminal responsibility on the basis of mental disease or defect and duress emerged before the ICC. The overview of presented case shows the problems the Court has encountered while trying to reconcile victimization and perpetration in one person in the context of invoked defenses.

As laid down in the Statute, the mental disease or disorder can serve as a ground for exclusion of criminal responsibility if at the time of the commission of crimes the person suffers from substantial mental impairment that destroyed that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law. Such impairment has to be proven by medical examination and it has to fall within legal requirements of “legally insane”. Considering experiences child soldiers go through, mental incapacity defense may be suitable defense for the crimes under the jurisdiction of the Court committed by former child soldiers.

However, Dominic Ongwen’s case showed that, even though there are mental consequences of growing up in environment of terror confirmed by medical experts, it is very challenging to prove mental incapacity as required by the Rome Statute, especially taking into account nature and duration of charged crimes.

Another defense raised by Dominic Ongwen’s representatives is duress. Relevant case law found duress to be a complete defense, even when dealing with killings of the innocent, when several strict criteria are satisfied. Thus, the Rome Statute adopted similar approach. Accordingly, duress has to be result of a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person made by other persons or constituted by other circumstances beyond that person’s control, the person has to act necessarily and reasonably to avoid this threat and the person does not intend to cause a greater harm than the one sought to be avoided. Before the present case, duress was just “cold fact on paper” for the ICC.

In the case at hand, the ICC dealt with duress requirements presented by the both parties and concluded that the Defense failed to prove Dominic Ongwen was under duress. The ICC records show that the Defense lacked the evidence and it only tried to prove some of the requirements that need to be satisfied in order for duress to present a complete defense, such as threat of imminent death and bodily harm caused by brutal environment and Joseph Kony. For others, such as proportionality criteria, the Defense just provided statements claiming that this criterion was satisfied.



Since duress defense is very disputable, this case has the unique opportunity to answer whether it could indeed represent the complete defense for mass atrocities. When talking about crimes under the jurisdiction of the Court, namely war crimes, crimes against humanity, aggression and genocide, could necessary and reasonable criterion, as well as proportionality, ever be satisfied? In a way, this was confirmed by the ICC when adopting the Statute.

Notwithstanding the aforementioned, the Appeals Chamber should be the one to give the final answers to all the questions raised by this case.

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